

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

**ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN
FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN
NATION**

APPELLANT
(RESPONDENT)

AND:

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE
REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY
GENERAL OF CANADA**

RESPONDENTS
(APPELLANTS)

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PART I—OVERVIEW

1. Amnesty International and Canadian Friends Service Committee (the “Coalition”)¹ submits that this appeal presents the Court with a critical opportunity to consider section 35 of the *Constitution Act, 1982* in light of the principles of international human rights law, and to establish a framework for Aboriginal title that respects those principles. Relevant and persuasive sources of international law for the purposes of this appeal include a number of binding treaties, as well as the *U.N. Declaration on the Rights of Indigenous Peoples*, which consolidates and codifies the minimum content of Indigenous peoples’ inherent human rights at a global level.

2. Section 35 can only achieve its basic purpose of genuine reconciliation if the framework for Aboriginal rights (including Aboriginal title) respects the principles of international human rights law. Such a result is in the interest of all Canadians, and not just Indigenous peoples. Accordingly, the Coalition submits that this Court should adopt an approach to s. 35 that advances the goal of genuine reconciliation by taking account of the following:

- (a) Traditional systems of land use, possession and ownership by Indigenous peoples must be respected in determining whether Aboriginal title has been established. Categorically imposing restrictive criteria – including intensive use or site specificity – is inconsistent with international human rights law;
- (b) Aboriginal title is necessary to ensure full enjoyment of other human rights recognized under international human rights law, including the right to self-determination, because Aboriginal title is the species of Aboriginal rights that provides Indigenous peoples with the greatest security and autonomy over the use and control of their lands; and
- (c) Stringent criteria must be met before a limitation on Aboriginal title can be justified under international human rights law.

3. A failure to respect these principles risks leaving Canada behind the rest of the world when it comes to Aboriginal rights.

PART II—QUESTIONS IN ISSUE

4. The Coalition adopts the Appellant’s statement of the questions in issue (as set out at paragraphs 94-96 of the Appellant’s factum), and focuses on the proper test for Aboriginal title.

¹ The Coalition adopts the Statement of Facts of the Appellant, as set out in paragraphs 10-93 of the Appellant’s factum.

PART III— STATEMENT OF ARGUMENT

A. International human rights law must be considered when interpreting s. 35

5. This Court has long recognized international legal principles as a “relevant and persuasive” source of law when interpreting statutes and the *Charter*, and has drawn upon binding treaties, customary international law, declarations, the reports of U.N. Special Rapporteurs, the judicial decisions of other countries, as well as the general comments and concluding observations of various human rights bodies.² In many cases, this Court has intervened and reformulated “judge made” tests or legal interpretations put forward by lower courts to bring them in line with the applicable principles of international law.³

6. International law plays a particularly important role in cases involving human rights. “Respect for human rights” is an underlying principle of the Canadian Constitution, together with federalism, democracy, constitutionalism and the rule of law, and respect for minority rights.⁴ (The “protection of aboriginal and treaty rights” may be included as part of respect for minority rights, or be viewed as a separate principle.⁵) In international law, “human rights, the rule of law and democracy are interlinked and mutually reinforcing.”⁶

7. The land rights and other collective rights of Indigenous peoples are recognized as human rights and are protected as such in international law.⁷ Despite this Court’s general approach to international law in human rights cases and its recognition of underlying constitutional principles, it has yet to fully consider principles of international human rights law when

² *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 (per Dickson CJ, dissenting on other grounds), Coalition Book of Authorities (“Coalition BOA”), **Tab 14** at 348; *United States v Burns and Rafay*, [2001] 1 SCR 283, Coalition BOA, **Tab 5** at paras. 80, 85-89; *Health Services and Support -- Facilities Subsector Bargaining Assn. v British Columbia*, [2007] 2 SCR 391, Coalition BOA, **Tab 5** at paras. 70, 75, 76 and 78; *R v Hape*, [2007] 2 SCR 292, Appellant’s Book of Authorities (“Appellant’s BOA”), Vol. II, **Tab 59** at paras. 35-39, 53-56; *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, Coalition BOA, **Tab 8** at paras. 22-28; *R v Sharpe*, [2001] 1 SCR 45, Coalition BOA, **Tab 11** at paras. 175, 178

³ See, for example, *Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40, Coalition BOA, **Tab 3** at para. 9

⁴ *R. v. Demers*, [2004] 2 SCR 489 (per LeBel J.), Coalition BOA, **Tab 7** at para. 79; *Reference re Secession of Québec*, [1998] 2 SCR 217, Coalition BOA, **Tab 16** at para. 49

⁵ *Reference re Secession of Québec*, Coalition BOA, **Tab 16** at para. 82

⁶ *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without a vote), Coalition BOA, **Tab 26**, Art. 5

⁷ *U.N. Declaration on the Rights of Indigenous Peoples*, U.N. Doc. A/RES/61/295 (2007), Coalition BOA, **Tab 30**, Article 1; Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1 (18 June 2007) (without a vote), Annex – Agenda and Framework for the Programme of Work, Item 3 - “Promotion and protection of human rights” permanently includes “rights of peoples”: see Coalition BOA, **Tab 35**. Res. 5/1 approved by General Assembly U.N. Doc. A/RES/62/219 (22 December 2007). The Office of the U.N. High Commissioner for Human Rights (OHCHR) lists the *Declaration* as a “Universal Human Rights Instrument”: see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>

analyzing s. 35 of the *Constitution Act, 1982*.⁸ Such an omission is particularly difficult to justify in this case in light of the Court’s “living tree” doctrine of “progressive” constitutional interpretation.⁹ The living tree approach is designed to take account of the “realities of modern life” and, in the context of s. 35, these new realities include the progressive development of international human rights standards relating to Indigenous peoples, particularly the adoption and implementation of the *U.N. Declaration on the Rights of Indigenous Peoples* (the “*UNDRIP*”).

8. Further support for having regard to international legal principles can be found in this Court’s recognition that Indigenous peoples have a special legal and constitutional status; that the Crown must always act honourably in respect to Aboriginal peoples; and that the Aboriginal rights enshrined in s. 35 may evolve over time.¹⁰

9. Ultimately, this appeal presents this Court with a timely, and indeed critical opportunity to consider s. 35 in light of international human rights law principles, and to articulate a contemporary framework for Aboriginal rights that respects those principles. Failure to do so risks leaving Canada behind the rest of the world when it comes to Aboriginal rights. It also risks undermining the prospects for meaningful reconciliation at home.

10. Relevant sources of international human rights law for the purposes of s. 35 include a number of binding treaties to which Canada is a party, including the *International Convention on the Elimination of All Forms of Racial Discrimination* (“*ICERD*”), the *International Covenant on Economic, Social and Cultural Rights* (“*ICESCR*”) and the *International Covenant on Civil and Political Rights* (“*ICCPR*”).¹¹ As this Court has made clear, constructions of domestic law that violate these international obligations should be avoided, unless there is a clear, unequivocal legislative intent to default on them.¹²

⁸ 1982, c. 11 (U.K.), Schedule B

⁹ *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, Coalition BOA, **Tab 15** at paras. 22-23

¹⁰ See *R v Van der Peet*, [1996] 2 SCR 507, Coalition BOA, **Tab 13** at para. 30; *Haida Nation v. British Columbia*, [2004] 3 SCR 511, Coalition BOA, **Tab 4** at para 17; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, Coalition BOA, **Tab 20** at para. 136

¹¹ U.N. General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660 at p. 195, Coalition BOA, **Tab 29**; *International Covenant on Economic, Social and Cultural Rights*, adopted by General Assembly resolution 2200 (XXI) of 16 December 1966, Coalition BOA, **Tab 27**; U.N. General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999 at p. 171, Coalition BOA, **Tab 28**

¹² *Hape*, Appellant’s BOA, Vol. II, **Tab 9** at para. 53

11. Of particular importance given the issues raised on this appeal is the *UNDRIP*. This document, more than twenty years in the making, establishes “a universal framework for indigenous peoples’ rights, social justice and reconciliation.”¹³ Importantly, it is a consensus human rights instrument that no country in the world currently opposes.¹⁴ Canada formally endorsed the *UNDRIP* on November 12, 2010.

12. The *UNDRIP* reflects a number of principles that already form part of customary and conventional international law¹⁵ and is “grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity.”¹⁶ In this way, the *UNDRIP* consolidates and codifies the minimum content of Indigenous peoples’ inherent¹⁷ human rights at a global level – *not* by creating new principles or rights, but by providing “a contextualized elaboration of general human rights principles and rights as they relate to the specific, historical, cultural and social circumstances of indigenous peoples.”¹⁸ The application of these principles in the context of Indigenous peoples has been further explained in the comments, reports and jurisprudence of various U.N. treaty bodies considering the *UNDRIP* and by the U.N. Special Rapporteur on the rights of indigenous peoples.

13. The nature, contents and widespread acceptance of the *UNDRIP* clearly demonstrate that it is not just an “aspirational” document, as the Respondent Canada appears to suggest.¹⁹ Indeed,

¹³ Message of Louise Arbour, United Nations High Commissioner for Human Rights and Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (7 August 2007), Coalition BOA, Tab 45. In regard to the universality of all human rights, see the *Vienna Declaration and Programme of Action* (the “*Vienna Declaration*”), adopted by World Conference on Human Rights, 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), Coalition BOA, Tab 48 at para. 5

¹⁴ General Assembly, *Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World’s Indigenous People: Report of the Secretary-General*, U.N. Doc. A/67/273 (8 August 2012), Coalition BOA, Tab 26A at para. 6

¹⁵ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, U.N. Doc. A/HRC/15/37/Add.1 (15 September 2010) (Advance Version), Coalition BOA, Tab 39 at para. 112; P. Joffe, “U.N. Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation” (2010) 26 NJCL 121, Coalition BOA, Tab 52 at 206-207

¹⁶ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, U.N. Doc. A/65/264 (9 August 2010), Coalition BOA, Tab 29B at para. 62

¹⁷ *UNDRIP*, Coalition BOA, Tab 30, preambular para. 7

¹⁸ U.N. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, 11 August 2008, U.N. Doc. A/HRC/9/9, Coalition BOA, Tab 37 at paras. 85, 86

¹⁹ Factum of the Attorney General of Canada at para. 60. *UNDRIP* is being implemented in diverse contexts. For example, see: Rio+20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, U.N. Doc. A/CONF.216/L.1 (19 June 2012), endorsed by General Assembly, U.N. Doc. A/RES/66/288 (27 July 2012) (without a vote) (“Rio+20 Commission”), Coalition BOA, Tab 50 at para. 49; Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Report of the Special

declarations issued by the U.N. General Assembly (such as the *Universal Declaration of Human Rights*) are not designed to be solely “aspirational”. A declaration is a “solemn instrument resorted to only in very rare cases relating to *matters of major and lasting importance where maximum compliance is expected.*”²⁰ The *UNDRIP* is no exception.

14. Certainly, and at the very least, the *UNDRIP* is a relevant and persuasive source of international law that may properly be considered by this Court when determining questions involving Aboriginal rights (including the approach to Aboriginal title under s. 35). This proposition has been recognized by other Canadian courts²¹, by the Canadian government²², and by courts in other commonwealth countries such as New Zealand²³, Australia²⁴ and Belize.²⁵

B. True reconciliation requires a principled framework for Aboriginal title that respects international human rights law

15. This Court has recognized the need for reconciliation of “pre-existing aboriginal sovereignty with assumed Crown sovereignty”²⁶ and has described reconciliation as the “basic purpose” of s. 35.²⁷ This process of reconciliation is taking place “in the shadow of a long history of grievances and misunderstanding.”²⁸ In addition, this Court has taken judicial notice of “such matters as colonialism displacement and residential schools”²⁹, which demonstrate how “assumed” sovereign powers were abused throughout history.

16. Achieving reconciliation against this backdrop should guide this Court’s analysis of an appropriate constitutional framework for Aboriginal rights and title under s. 35. The Coalition

Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, U.N. Doc. A/HRC/17/31 (21 March 2011), Annex, Coalition BOA, Tab 32, Principle 12, commentary

²⁰ Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. I), 18th session, 19 March – 14 April 1962, Coalition BOA, Tab 44 at para. 105 (emphasis added)

²¹ *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2012 FC 445, aff’d 2013 FCA 75, Coalition BOA, Tab 1 at para. 353

²² Committee on the Elimination of Racial Discrimination, 18th session, Summary record of the 2142nd meeting – 19th and 20th periodic reports of Canada, U.N. Doc. CERD/C/SR.2142 (March 2012), Coalition BOA, Tab 43 at para. 39

²³ *Takamore v Clarke*, [2011] NZCA 587 (per Glazebrook and Wild JJ), appeal dismissed [2012] NZSC 116, Coalition BOA, Tab 24 at paras. 252, 254

²⁴ *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury*, [2010] QCA 37, Supreme Ct Queensland (Australia), Coalition BOA, Tab 19 at para. 33

²⁵ *Cal et al v Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al v Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 182, Consolidated Claims, Supreme Court of Belize (18 October 2007), Coalition BOA, Tab 20 at paras. 131-132

²⁶ *Haida Nation*, Coalition BOA, Tab 4 at para. 20

²⁷ *Delgamuukw*, Coalition BOA, Tab 2 at para. 186

²⁸ *Misikew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, Coalition BOA, Tab 6 at para. 1

²⁹ *R v Ipeelee*, 2012 SCC 13, Coalition BOA, Tab 10 para. 60

submits that achieving genuine reconciliation requires an approach that is built on a foundation of interlinking and mutually reinforcing principles of justice, good governance, democracy, rule of law, and respect for international human rights.³⁰ These principles, in turn, require a firm commitment from courts to give full legal effect to the human rights of Indigenous peoples, including Aboriginal title, in accordance with international human rights law. In short, courts must not only be prepared to “give content... to the rhetoric of reconciliation”³¹; they must be prepared to do so in a manner that respects and reflects the principles of international law.

17. By contrast, a mischaracterization of reconciliation can lead to a test for Aboriginal title that undermines, rather than advances the basic purpose of s. 35. In justifying its approach to Aboriginal title in this case, the British Columbia Court of Appeal (“BCCA”) explained that it considered “broad territorial claims as *antithetical to the goal of reconciliation*, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown *or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.*”³² With respect, the Coalition submits that this passage reflects a fundamental misunderstanding about the process of reconciliation.

18. Reconciliation cannot be characterized as a trade-off between the rights of Indigenous peoples and the “aspirations of all Canadians”. From the Coalition’s perspective, a principled framework for Aboriginal title that is consistent with international human rights law will benefit *all* Canadians, and not just Indigenous peoples. Ensuring the proper respect for the human rights of all, without discrimination, is in the best interest of all Canadians. So too is achieving genuine reconciliation with Indigenous peoples. Moreover, without a principled framework that respects international human rights law, claims of Aboriginal title are likely to be treated casually (or, at least, unevenly) by governments and the courts, and risk remaining more of a theoretical possibility than an inherent and respected right. By perpetuating a lack of dignity and security³³

³⁰ *UNDRIP, Coalition BOA, Tab 30*, preambular para. 18. See also Office of the High Commissioner for Human Rights, “Good Governance and Human Rights”, *Coalition BOA, Tab 46* at p. 1

³¹ Right Honourable Beverley McLachlin, P.C., “Aboriginal Peoples and Reconciliation” 9 *Canterbury L Rev* 240 (2003), *Coalition BOA, Tab 53* at 245

³² *William v British Columbia*, 2012 BCCA 285 (“Appeal Decision”), *Appeal Record, Vol. III*, Tab 9 at para. 219 (see also para. 239) (emphasis added). In contrast, see the *Montevideo Consensus on Population and Development*, adopted by the 38 countries participating in the first session of the Regional Conference on Population and Development in Latin America and the Caribbean, Montevideo, Paraguay, 15 August 2013, *Coalition BOA, Tab 49* at para. 88 (respect and guarantee the territorial rights of Indigenous peoples)

³³ Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/24/50 (30 July 2013), Annex – Expert

among Indigenous peoples and a deepening sense of mistrust towards the Crown, such a result is fatal to the process of reconciliation.³⁴

C. Principles to be considered in establishing a test for Aboriginal title under s. 35

19. Several international human rights law principles are relevant to the determination of a proper test for Aboriginal title, but the Coalition's submissions will focus on three in particular.

i. Customary land rights must be properly respected in assessing title

20. The principle of racial non-discrimination is a peremptory norm in international law (*jus cogens*), and is also set out in a number of binding treaties, including the *ICERD*.³⁵ The principle of non-discrimination requires that traditional systems of land use, possession and ownership by Indigenous peoples be respected in determining whether Aboriginal title has been established, rather than relied upon to limit claims to Aboriginal title.³⁶ It is a form of discrimination for Indigenous peoples' customary rights to land to be afforded less protection than the property rights of others.³⁷ Evidentiary and legal standards must not be so onerous as to deny effective protection of Indigenous peoples' land rights, or be structured so as to discount traditional modes of land ownership, use and possession by Indigenous peoples.

21. In other words, "distinctiveness should not be an excuse for not giving Aboriginal rights the same generous treatment as other constitutional rights."³⁸ Nor should difference among cultures "[be] made the basis for a denial of basic human rights."³⁹ In fact, because of the history

Mechanism Advice No. 5 (2013), Coalition BOA, **Tab 34** at para. 2 (in regard to UNDRIP, art. 7(2), "security includes, *inter alia*, cultural, environmental and territorial aspects")

³⁴ See Joffe, Coalition BOA, **Tab 52** at 136

³⁵ Ian Brownlie, *Principles of Public International Law*, 8th ed. (Oxford: Clarendon Press, 2012), Coalition BOA, **Tab 51** at pp. 595, 644-646; *ICERD*, Coalition BOA, **Tab 29**

³⁶ Inter-American Commission on Human Rights ("IACHR"), Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States)*, December 27, 2002, Coalition BOA, **Tab 22** at paras. 127-130; IACHR, *Maya Indigenous Communities of the Toledo District*, Belize, Case No. 12.053, Report No. 96/03, 24 October 2003, Coalition BOA, **Tab 21** at para. 166; *UNESCO Universal Declaration on Cultural Diversity*, Resolution 25 adopted by the General Conference at its 31st session, (2001), Coalition BOA, **Tab 47**, Art. 4; Committee on the Elimination of Racial Discrimination, General Recommendation No. 23, Coalition BOA, **Tab 42**

³⁷ *Xákmok Kásek Indigenous Community v. Paraguay (Merits, Reparations and Costs)*, Inter-American Court of Human Rights ("IACtHR"), Ser C No. 214 (Judgment) 24 August 2010, Coalition BOA, **Tab 25** at para. 273

³⁸ Kent Roach, *Constitutional Remedies in Canada* (Toronto, Ontario: Thomson Reuters Canada Ltd, 2013), Coalition BOA, **Tab 54** at para. 15.170

³⁹ Human Rights Council, *Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind*, U.N. Doc. A/HRC/22/71 (6 December 2012), Coalition BOA, **Tab 40** at para. 37 (quoting the American Anthropological Association, "Declaration on Anthropology and Human Rights"); Rio+20 Commission, Coalition BOA, **Tab 50** at para. 9 (must be no distinction based on race or property)

of colonialism and its continuing effects on Indigenous peoples, the *UNDRIP* requires that states take “special measures” to protect the human rights of Indigenous peoples set out therein.⁴⁰

22. Accordingly, under international law, Indigenous land rights do not depend on conditions such as continuous occupation, evidence of intensive land use, an intent to use the land only in accordance with the practices of the past, or other imposed criteria. Article 26 of the *UNDRIP* affirms Indigenous peoples have rights (including title), based on their having “traditionally owned, occupied or otherwise used or acquired” these lands, territories and resources. This language reflects the principle of non-discrimination and “effectively rejects a strict requirement of continuous occupation or cultural connection from the time of European contact in order for indigenous peoples to maintain interests in lands.”⁴¹ Other courts have focused on the traditional possession and land use of the claimants in deciding Aboriginal title cases.⁴²

23. A rigid test for Aboriginal title, which imposes the requirements of “intensive use” of land at “specific sites” in all cases, fails to adequately account for traditional forms of land use and ownership by Indigenous peoples, is inconsistent with the principle of non-discrimination and runs against the provisions of the *UNDRIP*.

24. Finally, the “principle of discovery” cannot be relied upon in formulating an approach to Aboriginal title, and must be firmly rejected.⁴³ The principle of discovery is a “continuation of colonialism” that amounts to a “violation of the Charter of the United Nations ... and the principles of international law.”⁴⁴

ii. Aboriginal title is critical to the fulfillment of a wide range of human rights

25. The BCCA adopted the view that Aboriginal rights short of Aboriginal title are sufficient to protect the traditional cultures and lifestyles of Indigenous peoples and achieve the objectives

⁴⁰ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, U.N. Doc. A/HRC/9/9 (11 August 2008), *Coalition BOA*, **Tab 37** at para. 47

⁴¹ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya: *Addendum: Situation of indigenous peoples in Australia*, U.N. Doc. A/HRC/15/37/Add.4 (1 June 2010), *Coalition BOA*, **Tab 39A** at para. 29

⁴² IACtHR, *Sawhoyamaya Indigenous Community v. Paraguay*, judgement of 29 March 2006, *Coalition BOA*, **Tab 23** at para. 128

⁴³ Appeal Decision, *Appeal Record*, Vol. III, Tab 9 at para. 166

⁴⁴ General Assembly, *Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 2621 (XXV), October 12, 1970, *Coalition BOA*, **Tab 29A** at para. 1; *ICERD*, *Coalition BOA*, **Tab 29**, preamble (“the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist”)

of s. 35.⁴⁵ Even beyond ignoring the right of Indigenous peoples to lands traditionally owned, occupied or used (set out in Article 26 of the *UNDRIP*), this position is inconsistent with Canada's binding obligations under the *ICESCR* and *ICCPR* to "promote" and "respect" a wide range of human rights, including, *inter alia*, the right to self-determination, development⁴⁶, culture, health and livelihood.⁴⁷

26. Self-determination has been described as a "foundational right" without which Indigenous peoples' "human rights, both collective and individual cannot be fully enjoyed."⁴⁸ This Court has concluded that the right to self-determination "is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law."⁴⁹ The right to self-determination includes a people's right to "freely dispose of their natural wealth and resources", "not to be deprived of their own means of subsistence" and to "freely pursue their economic, social and cultural development."⁵⁰ The *UNDRIP* references international law on the right to self-determination, and affirms that Indigenous peoples enjoy this same right, including the right to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions".⁵¹

27. Recognition of Aboriginal title is an integral part of the right of self-determination because Aboriginal title is the species of Aboriginal rights that provides Indigenous peoples with the greatest and most secure safeguard for the ability to use and control their lands and resources according to their own values, customs and needs. Moreover, Aboriginal title has an "inescapable economic aspect"⁵² that is uniquely critical for ensuring the self-sufficiency of Indigenous peoples for both current and future generations.

⁴⁵ Appeal Decision, Appeal Record, Vol. III, Tab 9 at paras. 234-239

⁴⁶ *UNDRIP*, Coalition BOA, Tab 30, Articles 20, 23. This right was affirmed as a "universal and inalienable right and an integral part of fundamental human rights" in the *Vienna Declaration and Programme of Action*, endorsed by the General Assembly, *World Conference on Human Rights*, U.N. Doc. A/RES/48/121 (20 December 1993), Coalition BOA, Tab 48

⁴⁷ *ICCPR*, Coalition BOA, Tab 28, Articles 1, 27; *ICESCR*, Coalition BOA, Tab 27, Articles 1, 11, 12; *UNDRIP*, Coalition BOA, Tab 30, Arts. 11-16; 20, 24. General Assembly, *The right to development*, U.N. Doc. A/RES/67/171 (20 December 2012), Coalition BOA, Tab 26B, preambular paras. 1-7; Human Rights Council, *Report of the Special Rapporteur on the right to food, Addendum: Mission to Canada*, U.N. Doc. A/HRC/22/50/Add.1 (24 December 2012), Coalition BOA, Tab 36 at pp. 19-21

⁴⁸ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, U.N. Doc. A/HRC/12/34 (15 July 2009), Coalition BOA, Tab 38 at para. 41

⁴⁹ *Reference re Secession of Quebec*, Coalition BOA, Tab 16 at para. 114

⁵⁰ *ICCPR*, Coalition BOA, Tab 28, Article 1; *ICESCR*, Coalition BOA, Tab 27, Article 1; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, U.N. Doc. CCPR/C/79/Add.105 (7 April 1999), Coalition BOA, Tab 33 at para. 8; *UNDRIP*, Coalition BOA, Tab 30, Articles 20, 23 and 25-32.

⁵¹ *UNDRIP*, Coalition BOA, Tab 30, preambular paragraph 16, Articles 3, 4, 5

⁵² *Delgamuukw*, Coalition BOA, Tab 2 at para. 169

iii. Any limitations on Aboriginal title must be strictly necessary

28. Like most human rights, the right to Aboriginal title is not absolute. However, international human rights law imposes stringent criteria before a limitation on Aboriginal title can be justified (without prior, informed and free consent).⁵³ Article 46(2) of the *UNDRIP* states: “[t]he exercise of the rights set forth in this Declaration shall be subject only to such limitations as are ... in accordance with international human rights obligations ... and *strictly necessary* solely for the purpose of securing due recognition and respect *for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.*”⁵⁴ This means that any limitation must be “*motivated by concern for human rights of others.*”⁵⁵

29. These requirements are appropriately robust given the importance of Aboriginal title and its direct impact on the human rights of Indigenous peoples. A test for Aboriginal title that categorically rules out “broad territorial claims”⁵⁶ effectively amounts to imposing a sweeping limitation on Aboriginal title without meeting the strict criteria set out in Article 46(2). Such a test precludes a contextual approach⁵⁷, and is inconsistent with international human rights law.

PART IV—SUBMISSIONS ON COSTS

30. The Coalition does not seek costs, and requests that no costs order be made against it.

PART V—ORDER SOUGHT

31. The Coalition requests permission to make oral submissions of no more than 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of September, 2013

Justin Safayeni
Stockwoods LLP
Lawyers for the Coalition

⁵³ African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, Coalition BOA, **Tab 18** at paras. 213-215

⁵⁴ Article 46(2) (emphasis added); *Takamore v. Clarke*, Coalition BOA, **Tab 24** at paras. 250, 259 and 309

⁵⁵ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, U.N. Doc. A/HRC/24/41 (1 July 2013), Coalition BOA, **Tab 41** at para. 34-35 (emphasis added)

⁵⁶ Appeal Decision, Appeal Record, Vol. III, Tab 9

⁵⁷ *R v Sparrow*, [1990] 1 SCR 1075, Coalition BOA, **Tab 12** at 1111

PART VI—TABLE OF AUTHORITIES

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1.	<i>Canada (Human Rights Commission) v Canada (Attorney General)</i> , 2012 FC 445	14
2.	<i>Delgamuukw v. British Columbia</i> , [1997] 3 S.C.R. 1010	15, 27
3.	<i>Ezokola v Canada (Citizenship and Immigration)</i> , 2013 SCC 40	5
4.	<i>Haida Nation v. British Columbia (Minister of Forests)</i> , [2004] 3 S.C.R. 511	8, 15
5.	<i>Health Services and Support -- Facilities Subsector Bargaining Assn. v British Columbia</i> , [2007] 2 SCR 391	5
6.	<i>Misikew Cree First Nation v Canada (Minister of Canadian Heritage)</i> , [2005] 3 SCR 388	15
7.	<i>R v Demers</i> , [2004] 2 S.C.R. 489	6
8.	<i>R v Divito</i> , 2013 SCC 47	5
9.	<i>R v Hape</i> , [2007] 2 SCR 292	10
10.	<i>R v Ipeelee</i> , 2012 SCC 13	15
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14.	<i>Reference re Public Service Employee Relations Act (Alberta)</i> , [1987] 1 SCR 313	5
15.	<i>Reference re Same-Sex Marriage</i> , [2004] 3 SCR 698	7
16.	<i>Reference re Secession of Québec</i> , [1998] 2 S.C.R. 217	6, 26
17.	<i>United States v Burns and Rafay</i> , [2001] 1 SCR 283	5

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19.	<i>Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury</i> , [2010] QCA 37, Supreme Ct Queensland, Australia.	14
20.	<i>Cal et al v Attorney General of Belize and Minister of Natural Resources and Environment</i> , Claim No. 171, and <i>Coy et al v Attorney General of Belize and Minister of Natural Resources and Environment</i> , Claim No. 172, Consolidated Claims, Supreme Court of Belize (18 October 2007)	14
21.	IACHR, <i>Maya Indigenous Communities of the Toledo District (Belize)</i> , Case 12.053, Report No. 96/03, 24 October 2003	20
22.	IACHR, <i>Mary and Carrie Dann (United States)</i> , Case 11.140, Report No. 75/02, 27 December 2002	20
23.	IACtHR, <i>Sawhoyamaxa Indigenous Community v. Paraguay</i> , judgement of 29 March 2006	22
24.	<i>Takamore v Clarke</i> , [2011] NZCA 587	14, 28
25.	<i>Xákmok Kásek Indigenous Community v. Paraguay (Merits, Reparations and Costs)</i> , I/A Court H.R., Ser C No. 214 (Judgment) 24 August 2010.	20
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26.	<i>Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels</i> , GA Res. 67/1	6
A.	<i>Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General</i> , U.N. Doc. A/67/273 (8 August 2012)	11
B	<i>Declaration of the right to development</i> , U.N. Doc. A/RES/67/171 (20 December 2012)	25
27.	<i>International Covenant on Economic, Social and Cultural Rights</i> , UNTS, vol. 993, p. 3, CTS 1976/46	10, 25, 26
28.	<i>International Covenant on Civil and Political Rights</i> , 999 UNTS 171, Can TS 1976 No 47	10, 25, 26
29.	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i> , 660 UNTS 195, (1966) 5 ILM 352	10, 20, 24

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B	<i>Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General</i> , Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, U.N. Doc. A/65/264 (9 August 2010)	12
30.	<i>UN Declaration on the Rights of Indigenous Peoples</i> , U.N. Doc. A/RES/61/295 (2007)	7, 12, 16, 25, 26
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33.	Human Rights Committee, <i>Concluding observations of the Human Rights Committee: Canada</i> , U.N. Doc. CCPR/C/79/Add.105 (7 April 1999)	26
34.	Human Rights Council (EMRIP), <i>Access to justice in the promotion and protection of the rights of indigenous peoples</i> , U.N. Doc. A/HRC/24/50 (30 July 2013), Annex – Expert Mechanism Advice No. 5 (2013)	18
35.	Human Rights Council, <i>Institution-building of the United Nations Human Rights Council</i> , Res. 5/1 (18 June 2007) (without a vote), Annex – Agenda and Framework for the Programme of Work, "Promotion and protection of human rights" permanently includes "rights of peoples". Res. 5/1 approved by General Assembly U.N. Doc. A/RES/62/219 (22 December 2007)	7
36.	Human Rights Council, <i>Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to Canada</i> , UN Doc. A/HRC/22/50/Add.1 (24 December 2012)	25
37.	Human Rights Council, <i>Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people</i> , S. James Anaya, U.N. Doc. A/HRC/9/9 11 August 2008)	12, 21
38.	Human Rights Council, <i>Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people</i> , James Anaya, U.N. Doc. A/HRC/12/34 (15 July 2009)	26
39.	Human Rights Council, <i>Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)</i> , U.N. Doc. A/HRC/15/37/Add.1 (15 September 2010) (Advance Version)	12

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42.	Committee on the Elimination of Racial Discrimination, <i>General Recommendation No. 23: Indigenous Peoples</i> , 18 August 1997	20
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45.	Message of Louise Arbour, United Nations High Commissioner for Human Rights and Rodolfo Stavenhagen, Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, 7 August 2007	11
46.	Office of the High Commissioner for Human Rights, “Good Governance and Human Rights”	16
47.	UNESCO, <i>Universal Declaration on Cultural Diversity</i> , Resolution 25 adopted by the General Conference at its 31 st session, (2001)	20
48.	<i>Vienna Declaration and Programme of Action</i> , adopted by World Conference on Human Rights, 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993)	11, 25
	Other international documents	
49.	<i>Montevideo Consensus on Population and Development</i> , adopted by the 38 countries participating in the first session of the Regional Conference on Population and Development in Latin America and the Caribbean, Montevideo, Paraguay, 15 August 2013	17
50.	Rio+20 United Nations Commission on Sustainable Development, <i>The future we want</i> , Rio de Janeiro, Brazil, 20-22 June 2012, U.N. Doc. A/CONF.216/L.1 (19 June 2012)	13, 21
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51.	Brownlie, Ian, <i>Principles of Public International Law</i> , 8 th ed. (Oxford: Clarendon Press, 2012)	20
52.	Joffe, Paul, <i>UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation</i> , (2010) 26 NJCL 121	12, 18
53.	McLachlin, Beverley, "Aboriginal Peoples and Reconciliation," (2003) 9 Canterbury L. Rev. 240	16
54.	Roach, Kent, <i>Constitutional Remedies in Canada</i> (Toronto, Ontario: Thomson Reuters Canada Ltd, 2013)	21

PART VII—STATUTORY PROVISIONS

Section 35 of the *Constitution Act, 1982*

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.

35. (1) Les droits existants — ancestraux ou issus de traités — des peuples autochtones du Canada sont reconnus et confirmés.

(2) Dans la présente loi, « peuples autochtones du Canada » s'entend notamment des Indiens, des Inuit et des Métis du Canada.

(3) Il est entendu que sont compris parmi les droits issus de traités, dont il est fait mention au paragraphe (1), les droits existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

(4) Indépendamment de toute autre disposition de la présente loi, les droits — ancestraux ou issus de traités — visés au paragraphe (1) sont garantis également aux personnes des deux sexes.