

Resource development in western Canada: Indigenous peoples' human rights must be respected

Joint Response by BC Assembly of First Nations, First Nations Summit, Union of BC Indian Chiefs, Amnesty International Canada, Canadian Friends Service Committee (Quakers), Chiefs of Ontario, Federation of Saskatchewan Indian Nations, Grand Council of the Crees (Eeyou Istchee), Indigenous Rights Centre, Indigenous World Association, and KAIROS: Canadian Ecumenical Justice Initiatives

March 2014. Aboriginal title and other rights, as well as related Crown obligations, must be addressed in the context of resource development. The rights of Aboriginal peoples that are recognized and affirmed in section 35 of the *Constitution Act, 1982* are much broader than generally assumed – and the Supreme Court of Canada has not yet addressed the full range of such rights.¹

Indigenous peoples' rights are human rights. This mandates a human rights-based approach² to the rights in s. 35. Indigenous rights are holistic in nature and are not simply a listing of rights. As affirmed in international human rights law:

All human rights are **universal, indivisible, interdependent and interrelated**. The international community must treat human rights globally in a fair and equal manner ... it is the duty of States ... to **promote and protect all human rights** and freedoms.³

Consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* and other international human rights law, such rights and related obligations include, *inter alia*, the following:

- Right to **self-determination**, including **consent** and **self-government**, and duty of Crown to promote and respect that right in accordance with the *Charter of the United Nations*⁴
- Right to **lands, territories and resources**⁵
- Right to **redress**, including **restitution**⁶
- Right to **development**, including right to set own priorities for development⁷
- Right to a **safe and healthy environment**⁸
- Duty of Crown to **consult** and **cooperate** with, and **obtain consent** of, Indigenous peoples⁹
- Duty of Crown to **respect** and **protect** Indigenous peoples' human rights, including through Treaties¹⁰
- Duty of Crown to **repudiate continued colonialism** and discriminatory **doctrines of superiority**, including *inter alia* doctrine of discovery and *terra nullius*¹¹
- Right to **equality** and **non-discrimination**¹²
- Right to **culture**¹³
- Right to **health** and **well-being**¹⁴
- Right to **participate in decision-making** in matters that would affect Indigenous peoples' rights¹⁵
- Right to **security**, including *inter alia* environmental security; food security; cultural security; human security and territorial security¹⁶
- Right to **access to justice**¹⁷ and right to an **effective remedy**.¹⁸

The federal government is currently reviewing two reports concerning proposed pipelines and other resource development in western Canada. These are the Report of the Prime Minister's special representative, Douglas Eyford, on west coast energy infrastructure¹⁹ and the *Report of the Joint Review Panel for the Enbridge Northern Gateway Project*.²⁰ Eyford has commented that the Panel does not address Aboriginal concerns²¹ and that Canada should consider "early engagement to address Aboriginal interests" that may not be dealt with in a regulatory process.²²

Both reports acknowledge the need for Indigenous peoples to be meaningfully consulted in all decisions affecting their lands and futures. However, neither report properly addresses the legal framework of Indigenous peoples' human rights. As such, they fail to provide sufficient guidance as the government considers potential approval of the proposed Northern Gateway pipeline and other projects.

In deciding whether or not to approve resource development projects, governments in Canada must respect the human rights protections set out in relevant Canadian and international law. Such law directs that large-scale resource projects must not proceed over the basic objections of affected Indigenous nations.

As described by the Supreme Court of Canada, the high end of the spectrum of consultation requires "full consent of [the] aboriginal nation on very serious issues. This applies as much to unresolved claims as to intrusions on settled claims."²³ The standard of free, prior and informed consent is also affirmed in the *UN Declaration* and has been upheld in the rulings of regional and international human rights bodies.

Failure to respect and protect Indigenous peoples' human rights from the outset generates prolonged conflict and a compounding of the historic injustices inflicted upon them. This is contrary to the fundamental obligation of governments to uphold the human rights of all, without discrimination.

To date, the government of Canada has taken the position that negotiations with Indigenous peoples on treaties are "interest-based" and not "rights-based".²⁴ This position – which is relevant to resource development – is inconsistent with s. 35 of the *Constitution Act, 1982* and international human rights law. It serves to evade the rulings of the Supreme Court of Canada that uphold Indigenous peoples' rights. It undermines the treaty process in British Columbia. It runs directly counter to the *UN Declaration*, which recognizes the "urgent need to respect and promote the inherent rights of indigenous peoples".

Northern Gateway and other proposed resource development projects

The proposed Northern Gateway project is intended to transport oil sands crude and industrial chemicals between Alberta and the British Columbia coast. Its operations would lead to increased container ship traffic along the coast and promote greater oil sands production on Indigenous peoples' traditional territories in Alberta. The majority of First Nations whose lands would be crossed by the proposed pipeline have opposed the project, as have First Nations whose territories include coastal waters and downstream rivers.

The proposed Northern Gateway Pipeline is among hundreds of large-scale resource extraction and infrastructure projects championed by governments and industry across Canada. The west coast in particular is facing an influx of new proposals, such as the proposed pipeline expansion by Kinder Morgan.²⁵

In December 2013, the report of the Joint Review Panel recommended approval of the Northern Gateway Project, subject to 209 conditions. The federal government had assured the Panel that it would carry out

necessary consultations with First Nations before making a final decision. It is unclear how this can happen, however, given the advance stage of the plans and the federal government's open support of the proposed project.

The federal government's overall approach to consultation is highly questionable. It makes little sense for the National Energy Board to examine the environmental effects on Indigenous peoples' rights, if the government does not **first** consult on what rights are being affected. For example, the real and potential impacts on Aboriginal title²⁶ may differ significantly from those on specific rights.²⁷ Yet such distinctions were not made by either Northern Gateway or the Joint Review Panel, since neither had such a mandate.²⁸

A similar flaw affects the JRP Report's consideration of the "public interest", which is affirmed as being "local, regional, and national in scope" (vol. 1, p. 11). Aboriginal title was not explicitly considered, which includes the "right to exclusive use and occupation of land" and the "right to choose to what uses land can be put".²⁹ The Office of the UN High Commissioner for Human Rights has warned: "changes in the climate threaten to deprive indigenous peoples of their traditional territories and sources of livelihood. Either of these impacts would have implications for the right to self-determination."³⁰ Oil sands expansion in Alberta is linked to the Northern Gateway pipeline,³¹ and this factor is relevant to present and future generations.

Human rights of Indigenous peoples

Canada's *Constitution Act, 1982* recognizes and affirms existing Aboriginal and Treaty rights of Aboriginal peoples. The Supreme Court has called the protection of these rights "an important underlying constitutional value"³² and "a national commitment."³³

Indigenous peoples' rights are also elaborated in international human rights law, including the *United Nations Declaration on the Rights of Indigenous Peoples*. Canadian courts have made clear that international human rights standards are "relevant and persuasive" sources of interpretation of human rights at the domestic level.³⁴ It is presumed that courts will interpret laws in conformity with these standards.³⁵ Canadian courts have already relied upon the *UN Declaration* in interpreting Canadian law.³⁶

The *UN Declaration* is increasingly being used by UN bodies to interpret and apply Indigenous peoples' rights and related State obligations in international treaties. It is crucial to invoke international human rights law, including the *UN Declaration*, in the consultation processes concerning the Northern Gateway and other resource development projects.

Canada treats the jurisprudence of UN and regional human rights bodies as recommendations that can be ignored. The International Court of Justice has ascribed "great weight" to the interpretations adopted by independent bodies established specifically to supervise the application of human rights treaties.³⁷ In relevant Cabinet directives, the federal government acknowledges that the regulation of resource development should comply with international human rights standards. The Cabinet Directive on Regulatory Management, which came into effect April 1, 2012, states, "Departments and agencies are to respect Canada's international obligations in areas such as human rights, health, safety, security, international trade, and the environment. They are also **to implement provisions related to these obligations at all stages of regulatory activity**, including consultation and notification, as applicable."³⁸ Identical provisions were found in the previous 2007 directive.³⁹

A series of Supreme Court of Canada decisions has established the Crown duty to consult with Indigenous peoples whenever considering action that might have an impact on their rights and interests.

The intent of this consultation must be to “substantially” address Indigenous peoples’ concerns.⁴⁰ If such accommodation is not seriously considered, then the consultation process is “meaningless”⁴¹ and fails to meet the government’s legal obligations. The government must be willing to consider all alternatives such as significantly altering or delaying a project or rejecting a project outright when warranted. Otherwise, there is no genuine consultation.⁴²

As noted above, the high end of the spectrum of consultation set out by Canadian courts includes an obligation to obtain the consent of Indigenous peoples. The Eyford Report echoes the current government of Canada in confusing the right to give or withhold “consent”, which the Supreme has affirmed, with the power of “veto”, which the Supreme has said cannot be exercised by Aboriginal peoples in the context of unresolved title claims. The term “veto” may imply an absolute right to block a proposed development regardless of the facts and law in any given case. In contrast, the concept of Indigenous consent in Canadian and international law is neither arbitrary nor absolute, but responds to the rights at stake and the potential for harm.

Where there is a strong *prima facie* case for Aboriginal rights, but these rights have not yet been proven or otherwise resolved, the Supreme Court has indicated that the objective must be to find “a satisfactory **interim** solution”.⁴³ Any interim solution must support Indigenous peoples’ rights, including their right to self-determination and their right to determine their own priorities for development.

It is also important to note that, regardless of whether States recognize Indigenous peoples’ title or other rights, UN Special Rapporteur Anaya concluded in 2013:

Indigenous peoples’ **free, prior and informed consent is required, as a general rule**, when extractive activities are carried out within indigenous territories. Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending on the nature of the activities and their potential impact on the exercise of indigenous peoples’ rights.⁴⁴

In his Statement upon conclusion of the visit to Canada, Anaya underlined:

The goal of reconciliation that has been cited by the Government and indigenous peoples alike **requires a more generous and flexible approach** that seeks to identify and create common ground. Further, as a general rule, resource extraction should not occur on lands subject to aboriginal claims without **adequate consultations** with and the **free, prior and informed consent** of the aboriginal peoples concerned.⁴⁵

Federal actions undermine consultations

Since 2012 – partly in response to public opposition to the proposed Northern Gateway Pipeline – the federal government has taken steps to weaken environmental safeguards so as to favour resource development. Such actions were carried out through omnibus bills C-38 and C-45,⁴⁶ preventing careful parliamentary scrutiny and oversight. Little or no prior consultation was undertaken with Indigenous peoples, despite the effects on their rights.

In regard to the proposed Northern Gateway Pipeline, the government has sought to discredit Indigenous peoples and civil society organizations opposing the project.⁴⁷ The government is reported to be selectively reviewing the charitable status of organizations that have opposed the project “as a threat to encourage silence”.⁴⁸

In his Fall 2013 Report, the Commissioner of the Environment and Sustainable Development highlighted “a wide gap between the government’s commitments and the results achieved”.⁴⁹ In order to “break the pattern of unfulfilled commitments and responsibilities ... reported on over the years, the government needs to do things differently”.⁵⁰ Four key areas identified were: collaborative approaches, reliable information, sound management practices, and transparency and engagement. All four of these elements are crucial to Indigenous peoples – especially in the context of resource development and the Crown’s duty to consult and uphold the honour of the Crown.

The various adverse actions by the federal government indicate that, in regard to proposed western pipelines, genuine consultations on Indigenous peoples’ rights have already been undermined. The government continues to promote and favour Northern Gateway and other projects through legislation and other initiatives, rather than first listen to and address Indigenous concerns – as the Supreme Court stressed – “with an open mind”.⁵¹

Additional concerns

Douglas Eyford’s Report raises some useful elements in the current climate of resource development in British Columbia. However, his Report is also lacking in critical areas.

In both the *Constitution Act, 1982* and international law, “peoples” is used in referring to the distinct status of Indigenous nations. Apart from direct quotations, Eyford’s report refers only once to the term “Aboriginal peoples” (excluding quotes and titles), while “Aboriginal communities” is used 109 times. In a report meant to find a basis of reconciliation around resource development, not using “peoples” shows an avoidance of the language of rights and obligations. Such choices are harmful to the cause of reconciliation.

Three of the four paragraphs in Eyford’s mandate assume Aboriginal participation in west coast energy development. The Eyford Report does not provide a reasonable description of the extent of opposition expressed by Indigenous peoples and others before the Joint Review Panel (JRP) on the Enbridge Northern Gateway Project.

- **Need to reconcile Crown-Aboriginal “sovereignties”.** The Eyford Report twice quotes the Supreme Court of Canada as calling for “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown” (pp. 9, 22). It is important to note that in the *Haida Nation* decision, the Court called for reconciliation of “pre-existing aboriginal sovereignty with assumed Crown sovereignty” (para. 20). This significant point is not acknowledged in the Eyford Report.

Federal and provincial governments have never explained how they could ignore the pre-existing sovereignty of Indigenous peoples and legitimately acquire sovereignty over such peoples and their lands, territories and resources. Colonial doctrines, such as “discovery” and *terra nullius*, that were relied upon to make such claims have been repudiated as “racist, scientifically false, legally invalid, morally condemnable and socially unjust”.⁵² As affirmed by the UN General Assembly, “continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations ... and the principles of international law”.⁵³

- **Right of self-determination.** Eyford makes no mention of Indigenous peoples’ right of self-determination. This right has been repeatedly applied by UN human rights bodies to Indigenous peoples in Canada⁵⁴ and elsewhere. Canada has an affirmative international obligation to “promote the realization

of the right of self-determination, and ... respect that right, in conformity with the provisions of the Charter of the United Nations”.⁵⁵

This core right is of central relevance in interpreting the nature and scope of Indigenous peoples’ rights in section 35 of the *Constitution Act, 1982*. As Special Rapporteur Anaya has underlined: “The right of self-determination is a foundational right, without which indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”⁵⁶

- **Root causes affecting trust and reconciliation not addressed.** The Eyford Report highlights three main themes: building trust, fostering inclusion and advancing reconciliation. However, the root causes affecting these themes are not identified. The government continues to undermine Indigenous peoples’ rights and devalues the *UN Declaration*. Federal and provincial governments oppose Aboriginal rights to lands and resources in virtually every court case. As exemplified in *William v. British Columbia*, the governments of Canada, British Columbia, Alberta and Saskatchewan have vigorously opposed assertions of Aboriginal title except for, perhaps, small spots. The Report does correctly describe the regulatory process for Northern Gateway Pipeline as “adversarial proceedings damaging relations between the Crown and industry on one hand, and Aboriginal communities on the other”.⁵⁷

- **UN Declaration devalued.** The Report presents the positions of the Canadian government on the *Declaration*, without providing a balanced analysis. For example: “UNDRIP is an aspirational document ... Canada has stated that UNDRIP does not change Canadian law or represent customary international law.” Such characterization of the *Declaration* is erroneous and the positions are contradicted by other government statements.⁵⁸ To conclude that the *Declaration* is merely aspirational is a political position and is inconsistent with Canadian and international law.⁵⁹

- **Importance of international standards on business and human rights.** Save for devaluing the *UN Declaration*, the Eyford Report makes no reference to international standards. The “Guiding Principles on Business and Human Rights” have been endorsed by consensus by the UN Human Rights Council.⁶⁰ Principle 12 of these Guiding Principles makes clear: “The responsibility of business enterprises to respect human rights refers to **internationally recognized human rights**”. In the Indigenous context, this includes the *UN Declaration*.

The Human Rights Council has emphasized: “transnational corporations and other business enterprises have a responsibility to respect human rights, irrespective of where they conduct their business”.⁶¹ In the UN Global Compact’s “Business Guide” on the *UN Declaration*,⁶² it is provided that free, prior and informed consent should be obtained “whenever there is an impact on indigenous peoples’ substantive rights”.

- **State duty to protect Indigenous rights.** In the context of resource development, the “State duty to protect against third party abuse is grounded in international human rights law”.⁶³ This duty “applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises.”⁶⁴ The Eyford Report makes no reference to this duty.

- **Principled framework vital to consultation process.** The Crown’s duty to consult can only be fulfilled if there is a principled framework that is consistent with s. 35 and the honour of the Crown that in turn requires “due diligence”.⁶⁵ Such a framework must include full and fair consideration of Indigenous peoples’ human rights that may be affected by the proposed Project. The Eyford Report only recommends “principled and informed dialogue about resource development”. (p. 42)

• **Environmental sustainability essential.** As affirmed in the Eyford Report, Indigenous representatives emphasized: “environmental sustainability and prevention of significant environmental harm are necessary conditions for their support” (p. 3). Yet the Report only recommends: “Where federal jurisdiction is engaged, Canada should ... encourage sustainable development” (p. 51). “Encourage” falls well below current domestic and international standards.

In the *Federal Sustainable Development Act*: “The Government of Canada ... acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government.”⁶⁶ In *The future we want*, Canada and other Heads of State recognized the “importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies.”⁶⁷

• **Environmental information must be fair – not misleading.** In order to ensure meaningful consultations with Aboriginal peoples, the Crown must provide “all necessary information in a timely way”.⁶⁸ In regard to the draft 2013–2016 Federal Sustainable Development Strategies, the Commissioner of the Environment and Sustainable Development has cautioned the federal government against “misleading the reader” and avoiding “distortions of information” in its progress reports.⁶⁹ It was recommended: “Environment Canada should ensure that future progress reports are fair and balanced, presenting progress to date **and the remaining challenges**”.⁷⁰ The Eyford Report emphasized the importance of trust and environmental sustainability in the Indigenous context of resource development. However, it failed to mention that such key elements are undermined if federal information on sustainable development strategies is misleading or inaccurate.

Conclusion: Reconciliation and Indigenous peoples’ human rights

Indigenous peoples’ rights are not a barrier to economic development. The rights of Indigenous peoples as protected in domestic and international law provide a principled, unbiased framework to ensure that development which does take place will be carried out sustainably and will benefit Indigenous peoples, rather than compounding the injustices they have experienced.

Governments in Canada must engage with and uphold the rights of Indigenous peoples, or violate the rule of law. Upholding these rights will mean that some projects promoted by powerful interests will be rejected. In regard to Aboriginal peoples, the Eyford Report urges Canada to “take decisive steps to build trust ..., to foster their inclusion into the economy and to advance the reconciliation of Aboriginal and non-Aboriginal people in Canadian society.” We already know from Canada’s history that trust, inclusion, and reconciliation are not advanced by denying or minimizing the status and rights of Indigenous peoples. What is required instead is the fullest possible recognition and realization of the human rights of all.

Endnotes

- ¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 136: "... the constitutionalization of common law aboriginal rights by s. 35(1) does not mean that those rights exhaust the content of s. 35(1).... The existence of an aboriginal right at common law is ... sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1)."
- ² *UN Declaration on the Rights of Indigenous Peoples* ["UN Declaration"], art. 1 and 42. See also United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", February 2008, www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf, at 24 ("human rights-based and culturally sensitive approach when addressing the specific situation of indigenous peoples").
- ³ *Vienna Declaration and Programme of Action*, adopted by World Conference on Human Rights, 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993) (without a vote).
- ⁴ *UN Charter*, arts. 1(2) and (3); 2(2); 55(c) and 56; *International Covenant on Civil and Political Rights* (ICCPR) and *International Covenant on Economic, Social and Cultural Rights* (ICESCR), identical art. 1; *UN Declaration*, preambular paras. (PPs) 1, 16, 17 and arts. 1-4, 38, 42 and 46(3).
- ⁵ *UN Declaration*, arts. 25 – 28, 30-32. ICCPR and ICESCR, identical art. 1.
- ⁶ *UN Declaration*, arts. 11 and 28. Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted on 18 August 1997), para. 5. *Case of Sawhoyamaya v. Paraguay*, Inter-Am. Ct. H.R. Ser. C. No. 146 (Judgment) 29 March 2006, para. 128.
- ⁷ *UN Declaration*, PPs 6, 10 and arts. 3, 20, 23; and *Indigenous and Tribal Peoples Convention, 1989*, art. 7(1). See also *Declaration on the Right to Development*, adopted by General Assembly resolution 41/128, 4 December 1986, and right to development in this Declaration reaffirmed by consensus in 1993 *Vienna Declaration and Programme of Action*, endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993).
- ⁸ *UN Declaration*, PP 11 and art. 29; *Indigenous and Tribal Peoples Convention, 1989*, arts. 4(1) &(2), 7(3) & (4) and 15; *Rio Declaration on Environment and Development* (1992), Principle 1; and *Stockholm Declaration of the United Nations Conference on the Human Environment* (1972), Principle 1. See also *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, para. 1.
- ⁹ *UN Declaration*, PPs 18-19, 24 and arts. 19, 32, 38. *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, paras. 32, 49, 57, 82 ("protection of aboriginal and treaty rights" cannot be defined in isolation from other underlying constitutional principles, such as federalism.) Federalism principle requires cooperation: see *Reference re Securities Act*, [2011] 3 S.C.R. 837, para. 133.
- ¹⁰ *UN Declaration*, PP 7, 15 and arts. 37, 38, 40, 42; *Constitution Act, 1982*, s.35. See generally ICCPR, ICESCR and ICERD.
- ¹¹ *UN Declaration*, PPs 4, 6 and arts. 1, 2; *International Convention on the Elimination of Racial Discrimination* (ICERD), preamble and art. 1.
- ¹² *UN Declaration*, PP 2 and arts. 1-2; 46(2) and (3). In regard to racial discrimination, see, e.g., ICERD, arts. 1, 2 and 5.
- ¹³ *UN Declaration*, arts. 11-16, and 31; ICCPR, art. 27; and ICESCR, art. 15(1)(a).
- ¹⁴ *UN Declaration*, PP 13 (child), 22 (collective rights indispensable for well-being) and art. 43. See, e.g., ICESCR, arts. 9-13.
- ¹⁵ *UN Declaration*, arts. 18 and 46(3). ICCPR and ICESCR, identical art. 1 (self-determination).
- ¹⁶ *UN Declaration*, arts. 7 read together with arts. 29; 20, 23; 11-16, 31; 24; 25-28, and 31-32; and *Declaration on Security in the Americas*, adopted at 3rd plenary session of Special Conference on Security, Mexico City, OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1 (28 October 2003), para. 4i (security includes political, economic, social, health, and environmental aspects).
- ¹⁷ *ICJ Declaration on Access to Justice and Right to a Remedy in International Human Rights Systems*, Geneva, Switzerland, adopted by International Commission of Jurists, 12 December 2012, para. 1. See also *B.C.G.E.U. v. British Columbia (A.G.)*, [1988] 2 S.C.R. 214, Dickson C.J. for the majority, para. 25: "There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."
- ¹⁸ *Universal Declaration of Human Rights*, (1948). Art. 8; ICCPR, art. 2, para. 3; ICERD, art. 6. *UN Declaration*, art. 40. "The standards affirmed in the Declaration share an essentially remedial character": Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, UN Doc. A/HRC/9/9 (11 August 2008), para. 86 (Conclusions).
- ¹⁹ Douglas R. Eyford, *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development* (Government of Canada (Natural Resources), 2013) ["Eyford Report"], <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/publications/ForgePart-Online-e.pdf>. For a list of west coast infrastructure projects, see Appendix B.
- ²⁰ Canada (National Energy Board), *Report of the Joint Review Panel for the Enbridge Northern Gateway Project*, 2013 ["JRP Report"]. "Connections", vol. 1 and "Considerations", vol. 2 are both available at: <http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprt-eng.html>.
- ²¹ Chris Plecash, "Northern Gateway Joint Review Panel doesn't address aboriginal concerns, says federal adviser", *Hill Times*, December 20, 2013.
- ²² Eyford Report, at 37 and 53. The Crown must engage early in its duty to consult: *Haida Nation*, *supra*, para. 35.

²³ *Haida Nation*, *supra*, para. 24 (where Supreme Court quotes *Delgamuukw*, para. 168).

²⁴ See, e.g., Jorge Barrera, "Aboriginal Affairs 'unable' to do job, faces 'high risk' of deteriorating relationship with FN: Documents", *APTN National News* (4 March 2014), <http://aptn.ca/news/2014/03/04/aboriginal-affairs-unable-job-faces-high-risk-deteriorating-relationship-fn-documents/>; and Martin Lukacs, "Aboriginal rights a threat to Canada's resource agenda, documents reveal", *The Guardian*, UK, (4 March 2014), <http://www.theguardian.com/environment/true-north/2014/mar/04/aboriginal-rights-canada-resource-agenda>.

²⁵ Dene Moore, "Kinder Morgan Application Filed With National Energy Board", *Huffington Post* (16 December 2013) (updated 16 January 2014), http://www.huffingtonpost.ca/2013/12/16/kinder-morgan-application_n_4454857.html. A proposed second pipeline would serve to "triple the flow of oil in its Trans Mountain pipeline from Edmonton to the BC coast" and "could result in a seven-fold increase in tanker traffic in the waters that surround Vancouver".

²⁶ See, e.g., JRP Report, vol. 2, at 37, where Aboriginal groups criticized Northern Gateway for not addressing their concerns that dealt with Aboriginal title, jurisdiction, consent, and governance.

²⁷ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 117: "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures". See also para. 166.

²⁸ JRP Report, vol. 2, at 47: "In keeping with its mandate, the Panel has not made any determinations regarding Aboriginal rights, including Métis rights, treaty rights, or the strength of an Aboriginal group's claim respecting Aboriginal rights."

²⁹ *Delgamuukw*, *supra*, para. 166.

³⁰ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61 (15 January 2009), para. 40.

³¹ Pembina Institute, "Opening the Door for Oil Sands Expansion," Fact Sheet, December 2009, <http://bc.pembina.org/pub/1940> at 1.

³² *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 82.

³³ *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533, para. 45.

³⁴ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348.

³⁵ *R. v. Hape* [2007] 2 S.C.R. 292, para 53.

³⁶ *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445, paras. 351-354. *Simon v. Attorney General of Canada*, 2013 FC 1117, para. 121.

³⁷ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 at 663-664, where the importance of "General Comments" by independent bodies is also emphasized.

³⁸ Treasury Board of Canada, "Cabinet Directive on Regulatory Management", 1 April 2012, <http://www.tbs-sct.gc.ca/rtrap-parfa/cdrm-dcgr/cdrm-dcgr01-eng.asp>, para. 30. [emphasis added]

³⁹ Treasury Board of Canada, "Cabinet Directive on Streamlining Regulation" (CDSR), 1 April 2007.

⁴⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168.

⁴¹ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, para 54.

⁴² *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247, para. 149. Leave to appeal to SCC refused, [2011] S.C.C.A. No. 399.

⁴³ *Haida Nation*, *supra*, para. 44.

⁴⁴ Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, UN Doc. A/ HRC/24/41 (1 July 2013), para. 84. See also para. 27: "Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices."

⁴⁵ Office of the UN High Commissioner for Human Rights, "Statement upon conclusion of the visit to Canada by the United Nations Special Rapporteur on the rights of indigenous peoples, James Anaya", 15 October 2013, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13868&LangID=E>.

⁴⁶ See *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures* (Bill C-38), S.C. 2012, c. 19 [Short title: "*Jobs, Growth and Long-term Prosperity Act*"]; and *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*" (Bill C-45), S.C. 2012, c. 31 [Short title: "*Jobs and Growth Act*"].

⁴⁷ "Pipeline rhetoric is a radical attack on due process", *Globe and Mail*, editorial (11 January 2012), <http://www.theglobeandmail.com/news/opinions/editorials/pipeline-rhetoric-is-a-radical-attack-on-due-process/article2297894/>: "There are legitimate concerns about oil tankers and the possibility of a spill. The government should respect the process enough not to heap scorn on the participants."

⁴⁸ Eva Sajoo, "Tories squash public dissent", *Winnipeg Free Press* (14 November 2012), A11, www.winnipegfreepress.com/opinion/westview/tories-squash-public-dissent-179242121.html.

⁴⁹ Office of the Auditor General, *Report of the Commissioner of the Environment and Sustainable Development – Fall 2013*

(Ottawa: Minister of Public Works and Government Services, 2013), "The Commissioner's Perspective", at 3.

⁵⁰ *Ibid.*, at 4.

⁵¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 46 (referring to New Zealand Ministry of Justice's Guide for Consultation with Maori).

⁵² *UN Declaration*, preambular para. 4; see also *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble.

⁵³ 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, para. 1.

⁵⁴ See, e.g., Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8.

⁵⁵ *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical article 1(3). See also *UN Declaration*, arts. 3 and 38.

⁵⁶ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 41.

⁵⁷ Eyford Report, para. 25. See also Chris Plecash, "Northern Gateway Joint Review Panel doesn't address aboriginal concerns, says federal adviser", *Hill Times*, December 20, 2013.

⁵⁸ See, e.g., Committee on the Elimination of Racial Discrimination, "Nineteenth and twentieth periodic reports of Canada (continued)", Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39: "While [UN Declaration] had no direct legal effect in Canada, **Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution.**"

⁵⁹ See, generally, Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples: Not Merely 'Aspirational'*", 22 June 2013, <http://quakerservice.ca/wp-content/uploads/2012/09/UN-Decl-Not-merely-aspirational-.pdf>.

⁶⁰ "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", endorsed by Human Rights Council, *Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/17/4/ (16 June 2011) (without a vote), para. 1.

⁶¹ Human Rights Council, *Contribution of the United Nations system as a whole to the advancement of the business and human rights agenda and the dissemination and implementation of the Guiding Principles on Business and Human Rights*, UN Doc. A/HRC/21/L.14/Rev.1 (27 September 2012) (adopted without vote), preamble.

⁶² UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (New York: UN Global Compact, 2013), http://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf at 26.

⁶³ Human Rights Council, *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/11/13 (22 April 2009), para. 13.

⁶⁴ *Ibid.*

⁶⁵ *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, paras. 75-83.

⁶⁶ *Federal Sustainable Development Act*, S.C. 2008, c. 33, s. 5.

⁶⁷ Rio+20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), adopted by General Assembly, *The future we want*, UN Doc. A/RES/66/288 (27 July 2012) (without a vote), para. 49.

⁶⁸ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C.C.A.), at para. 160. This paragraph was cited with approval in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 64.

⁶⁹ Office of the Auditor General, *Report of the Commissioner of the Environment and Sustainable Development – Fall 2013* (Ottawa: Minister of Public Works and Government Services, 2013), c. 8, "Federal and Departmental Sustainable Development Strategies", para. 8.70.

⁷⁰ *Ibid.*, para. 8.73.