PAUL JOFFE

Avocat / Attorney

Membre / member: Québec & Ontario Bars

360 Putney
Saint-Lambert, Québec
Canada J4P 3B6

Tél.: (450) 465-3654
Fax: (450) 465-5730
pjoffe@joffelaw.ca

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Mr. Robert S. McLean
Executive Director
Wildlife Program Policy
Canadian Wildlife Service
Environmental Stewardship Branch
Environment Canada
Place Vincent Massey
351 St. Joseph Blvd., 15th floor
Gatineau, Québec
K1A 0H3

Dear Mr. McLean:

In regard to the Convention on Biological Diversity (CBD), we are writing to you, as head of the Canadian delegation, to express serious concerns about the positions taken by the government of Canada at the 12th session of the Conference of the Parties (COP) in Pyeongchang, Republic of Korea on 6-17 October 2014.

Such positions are inconsistent with Canadian constitutional and international law. The specific issues we raise in this letter include:

1) Use of the term "indigenous peoples and local communities" addressed in a manner prejudicial to Indigenous peoples;
2) COP decision on "peoples" an attack on Indigenous status and self-determination;
3) undermining of the Outcome Document of the World Conference on Indigenous Peoples (WCIP)[1] and the *UN Declaration on the Rights of Indigenous Peoples*; and
4) central importance of "good faith" and international cooperation.

I. Use of term "indigenous peoples and local communities" addressed in a prejudicial manner

At COP 12, Canada opposed use of the term "indigenous peoples and local communities" and insisted on "indigenous and local communities".[2] Canada had also opposed use of the term "indigenous peoples" at COP 11 in October 2012, as well as at the Working Group meeting on

Article 8(j) and Related Provisions in October 2013. The Canadian government has taken such positions **without consulting Indigenous peoples** in Canada[3] and with the knowledge that Indigenous peoples opposed Canada's positions.

In September 2014, a Joint Submission was made to COP 12 by the Grand Council of the Crees (Eeyou Istchee) and others from different regions of the world.[4] The Submission is entitled "Indigenous Peoples are 'Peoples': Draft COP Decision Violates Treaty Interpretation Rules". It concluded that the draft COP decision on use of the term "indigenous peoples and local communities" is "flawed and should not be adopted".[5] In regard to this draft decision, the CBD failed to provide any reasonable analysis in accordance with the rules of the *Vienna Convention on the Law of Treaties*.[6]

When the *Convention on Biological Diversity*[7] was adopted in 1992, it used the term "indigenous and local communities". However, article 22(1) of the *Convention* makes clear that that the *Convention* does not affect States Parties' obligations deriving from "**existing international agreements**".[8] Such agreements clearly include the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which were ratified by Canada in 1976.[9]

Thus, the provisions of the *Convention* do not affect the ongoing affirmative obligation under identical article 1 (3) of the two international human rights Covenants 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." UN treaty bodies have repeatedly affirmed this right in relation to the Indigenous peoples in Canada and other regions of the world.[10]

In addition, Canada is well aware that the description in article 8(j)[11] of the *Convention on Biological Diversity* has been superseded by "**subsequent practice**" since 1992, in accordance with the *Vienna Convention on the Law of Treaties*.[12] This is especially apparent in relation to the use of the term Indigenous "peoples" rather than Indigenous "communities", as evidenced in such consensus international instruments as the *UN Declaration on the Rights of Indigenous Peoples*[13] and the Rio+20 *The future we want*.[14]

By opposing use of the term "Indigenous peoples", Canada is contradicting its own previous actions. The term "indigenous peoples" is also used in the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, which was accepted by Canada on 28 November 2005.[15]

As affirmed in article 31(1) of the *UN Declaration*, Indigenous peoples have the right to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions". Article 31(2) adds: "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights."

In *The future we want*, States recognized in para. 49 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." Sustainable development

and biodiversity are core elements in the *Convention on Biological Diversity* and *Nagoya Protocol*.[16]

In the WCIP Outcome Document, Canada and other States in the General Assembly agreed by consensus in para. 22: "We recognize that the traditional knowledge, innovations and practices of indigenous peoples and local communities make an important contribution to the conservation and sustainable use of biodiversity." No State raised any concern on this issue – not even in Canada's explanation of vote (EOV) after consensus was declared.

Canada's above-stated position is contradicted by Canada's own laws. Traditional knowledge is tied to Aboriginal "peoples".[17] Further, "community knowledge" is distinguished from "Aboriginal traditional knowledge".[18] The UN Committee on Economic, Social and Cultural Rights has indicated to Canada the need for concrete measures "for the protection and promotion of ancestral rights and traditional knowledge of Aboriginal peoples".[19]

In seeking to deny Indigenous peoples their existing status as "peoples", Canada ignored "subsequent practice" as set out in the *Vienna Convention on the Law of Treaties* and its own domestic laws. In Canada, the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and Treaty rights of the Aboriginal peoples of Canada (s. 35). These "peoples" include Indians (First Nations), Inuit and Métis. Canada's highest court uses the term "Aboriginal peoples" and "Indigenous peoples" interchangeably.[20]

For Canada to ignore such legal and political realities constitutes recurrent violations of the rule of law and bad faith. It is disgraceful that States allowed the CBD's procedural rules to be manipulated so as to accommodate Canada's regressive positions to the detriment of Indigenous peoples globally.

II. COP decision on "peoples" an attack on Indigenous status and self-determination

In regard to the use of the term "indigenous peoples and local communities", COP 12 adopted a decision that includes the following restrictions**:**

> 2 (a) That the use of the terminology "indigenous peoples and local communities" in any future decisions and secondary documents shall not affect in any way the legal meaning of Article 8(j) and related provisions of the Convention;
>
> (b) The use of the terminology "indigenous peoples and local communities" may not be interpreted as implying for any Party a change in rights or obligations under the Convention;
>
> (c) The use of the terminology "indigenous peoples and local communities" in future decisions and secondary documents shall not constitute a context for the purpose of interpretation of the Convention on Biological Diversity as provided for in article 31, paragraph 2, of the Vienna Convention on the Law of Treaties or a subsequent agreement or subsequent practice among Parties to the Convention

> on Biological Diversity as provided for in article 31, paragraph 3 (a) and (b) or special meaning as provided for in article 31, paragraph 4, of the Vienna Convention the Law of Treaties. This is without prejudice to the interpretation or application of the Convention in accordance with Article 31, paragraph 3(c) of the Vienna Convention on the Law of Treaties …[21]

In adopting this decision, COP and the CBD failed to consider State obligations under "existing international agreements", such as the two international human rights Covenants. They also failed to examine "subsequent practice" relating to the term "Indigenous peoples" in accordance with the *Vienna Convention on the Law of Treaties*.

Canada and other Parties within COP have no authority to neutralize the legal effect of use of the term "peoples" within the CBD, in relation to Indigenous peoples. States, such as Canada, that seek to restrict or deny Indigenous peoples' status as "peoples", in order to impair or deny their rights, are violating the *International Convention on the Elimination of All Forms of Racial Discrimination*[22] and the *International Covenant on Civil and Political Rights*.[23] As former Special Rapporteur on the rights of indigenous peoples, James Anaya, affirmed in 2009:

> The right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed.[24]

Under international human rights law, Indigenous peoples constitute "peoples" with the right of self-determination. It is an internal matter of each Indigenous "people" how its communities or institutions exercise rights in this regard.

The current meaning of the term "indigenous and local communities" can only be "indigenous peoples and local communities", in accordance with the *Vienna Convention* and other international law.

To conclude that the term "indigenous and local communities" currently has a different meaning than "indigenous peoples and local communities" would lead to absurd conclusions. It would mean that when one was addressing such issues as "biodiversity", "sustainable development" and "traditional knowledge" under the *Convention on Biological Diversity* and *Nagoya Protocol*, the related status and rights of Indigenous peoples would possibly have one meaning.

Yet when these same issues are considered under subsequent international instruments that use the term "indigenous peoples" – such as the *UN Declaration*, *The future we want*, 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*,[25] 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, and *2005 World Summit Outcome* – the related status and rights of Indigenous peoples would possibly have a different meaning. If so, such a result would be manifestly absurd and unreasonable.[26]

The CBD has put itself in opposition to the General Assembly, Office of the UN High Commissioner for Human Rights, Human Rights Council, UN treaty bodies, special rapporteurs and other independent experts that all use the term "indigenous peoples".

The absurdity of Canada's positions and the resulting COP decision on the use of the term Indigenous "peoples" is illustrated in the *Gangwon Declaration on Biodiversity for Sustainable Development* (also adopted on the occasion of COP 12).[27] On the one hand, "indigenous peoples and local communities" is referred to in the context of the Rio+20 *The future we want*:

> *Recalling* the outcome document of the United Nations Conference on Sustainable Development ("Rio+20", Rio de Janeiro, Brazil, 20-22 June 2012), entitled "The future we want" which, inter alia, … (4) recognized that the traditional knowledge, innovations and practices of indigenous peoples and local communities make an important contribution to the conservation and sustainable use of biodiversity, and their wider application can support social well-being and sustainable livelihoods; …[28]

On the other hand, the *Gangwon Declaration* also uses the term "indigenous and local communities" in the same context of biodiversity and traditional knowledge: "*Recognizing* that biodiversity and traditional knowledge are especially important for sustainable livelihoods, particularly for indigenous and local communities as well as poor and vulnerable groups".[29]

III. Undermining of Outcome Document of World Conference and *UN Declaration*

At COP 12, it is reported that:

> CANADA, opposed by BRAZIL, BOLIVIA, EL SALVADOR, ECUADOR, MEXICO and others, favored "noting" over "welcoming" the outcome document of the World Conference on Indigenous Peoples.[30]

According to the UN General Assembly, terms such as "noting" are *per se* "neutral terms that constitute neither approval nor disapproval."[31] Canada's insistence on solely "noting" the WCIP Outcome Document is inconsistent with its object and purpose as a consensus instrument and the many State action-oriented commitments and reaffirmations included therein.

The Outcome Document was adopted by consensus by the General Assembly. Canada chose not to object and was the sole State in the world to request an "explanation of vote" (EOV), after consensus was declared. Canada's EOV does not alter the status of the Outcome Document as a consensus document.

In its EOV, Canada addressed three paragraphs of the Outcome Document. In regard to para. 4, Canada claimed it could not agree "to uphold the principles of the Declaration [on the Rights of Indigenous Peoples]". In relation to paras. 3 and 20, Canada took issue with "free, prior and informed consent". All three paragraphs reflected provisions in the *UN Declaration*. In all three instances, Canada appeared to interpret these paragraphs in the most extreme and absolute manner and then concluded that they were incompatible with Canada's Constitution.

In its EOV, Canada invoked the *Tshilhqot'in Nation*[32] ruling by the Supreme Court of Canada to argue that "the Crown may justify the infringement of an Aboriginal or Treaty right if it meets a stringent test to reconcile Aboriginal rights with a broader public interest". The EOV did not mention that a central part of the Court's decision was to affirm repeatedly the need for the

government to obtain "consent" of the Aboriginal titleholders.[33] The Court's emphasis on the right to give or withhold consent; the "right to control" the land; and the "right to determine" land uses are all consistent with Indigenous peoples' right to development and right to self-determination in international law.

In its EOV, Canada claimed to have "placed on the record its concerns with various provisions of the *Declaration*, including free, prior and informed consent" in its 12 November 2010 endorsement[34] of the *UN Declaration on the Rights of Indigenous Peoples*. It reproduced portions of its endorsement.

However, Canada intentionally omitted the key conclusion in its endorsement that contradicts the reasoning in the EOV: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework." As emphasized in a letter of 23 September 2014 to the Prime Minister of Canada and two of his ministers by Indigenous and human rights organizations: "This constitutes bad faith. Canada has failed to uphold the honour of the Crown. Canada has misled the General Assembly, member States and Indigenous peoples globally."[35] Canada has not responded to the 23 September letter.

The EOV also contradicts previous statements of the government. At the Crown-First Nations Gathering in January 2012, the Prime Minister of Canada declared:

> And, of course, we endorsed the United Nations Declaration on the Rights of Indigenous People. This reaffirms our aspiration and our determination to promote and protect the rights of indigenous people at home and abroad.[36]

In 2012, Canada stated to the UN Committee on the Elimination of Racial Discrimination:

> While [the Declaration] had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution.[37]

In taking its positions in regard to the WCIP Outcome Document, the *UN Declaration* and COP 12, Canada failed to consult Indigenous peoples – despite the commitments to consult and cooperate with Indigenous peoples in the Outcome Document[38] and the *Declaration*.[39] **Since 2006, the federal government has refused to consult Indigenous peoples on the *Declaration* and the adverse positions it repeatedly takes in international forums**.

Within the CBD, there is no legal obligation to require consensus among the Parties. Even if such a duty existed, it could not prevail over the obligations of States to respect the *Charter of the United Nations*, *Convention on Biological Diversity* and international human rights law.

Canada continues to abuse the practice of achieving consensus among the Parties. Thus, it is often the lowest common denominator among their positions that is reflected in the final text. Such a dynamic does not serve to fulfill key objectives of international processes. In the Indigenous context, consensus has led to widespread abuses and unfair results.

In its 2014 report to the Human Rights Council on access to justice, the Expert Mechanism on the Rights of Indigenous Peoples cautioned that consensus loses its legitimacy if used to undermine Indigenous peoples' human rights, including their right to participate in decision making: "Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples. Where beneficial or necessary, alternative negotiation frameworks should be considered, consistent with States' obligations in the Charter of the United Nations and other international human rights law."[40]

In order to obtain Canada's approval, States invited new compromises on the draft COP decision. As reported in the *Earth Negotiations Bulletin* "COP 12 Highlights" for 10 October 2014:

> BRAZIL suggested "noting with appreciation" as a compromise. COLOMBIA proposed adding a footnote noting reservations by parties. Following discussions, CANADA accepted "welcoming" the document, accompanied by the footnote proposed by Colombia.[41]

As a result, COP adopted a decision where references to the *UN Declaration* included a footnote that for the first time went beyond the usual practice of simply citing the General Assembly resolution that adopted the *Declaration* in 2007. COP's footnote refers to the explanations of vote that were offered at that time:

> Refer to General Assembly resolution 61/295, including reservations put forward by Parties.[42]

In regard to the *UN Declaration*, it is inappropriate for the Parties at COP 12 to have added "reservations" in any COP decision. First, a "reservation" is solely made in regard to treaties[43] and the *Declaration* only included explanations of vote. Second, no reservations may be made to the *Convention on Biological Diversity* or the *Nagoya Protocol*.[44] Such an approach serves to undermine the *UN Declaration* and the WCIP Outcome Document, which extensively addresses the *Declaration*.

Since 2007, the four States that voted against this human rights instrument have all formally reversed their positions. Other States have since endorsed the *Declaration*.[45] It is patently unjust for the CBD to raise explanations of vote made in 2007 from States who have since changed their position. Diverse international instruments have since been approved by consensus that affirmatively address the *Declaration* without explanations of vote.

The Conference of the Parties has no authority to engage in such measures. COP has responsibility to "keep under review the implementation" of the *Convention*[46] and "undertake any additional action that may be required for the achievement of the purposes of this Convention".[47] Such purposes do not include undermining the *UN Declaration on the Rights of Indigenous Peoples* and Indigenous peoples' status and rights.

The actions by COP create a discriminatory double standard. No other peoples are targeted in this harmful manner. For Canada to insist upon such prejudicial measures is inconsistent with Canada's constitutional and international human rights obligations. Such unilateral actions are incompatible with genuine reconciliation.

III. Central importance of "good faith" and international cooperation

In opposing the term "indigenous peoples and local communities", Canada aligned itself with States that have repressive human rights records, such as Indonesia[48] and the Republic of Korea.[49] Canada should have cooperated with the overwhelming majority of States that favour use of the term.

In the context of the *UN Declaration*, the Committee on Economic, Social and Cultural Rights urged Indonesia in 2014 to "expedite the adoption of the draft law on the rights of *Masyarakat Hukum Adat* and "ensure that it … provides for the principle of self-identification, including the possibility to self-identify as indigenous peoples … [and] [d]efine strong mechanisms for ensuring the respect of their free, prior and informed consent on decisions affecting them and their resources".[50]

It is regrettable that Canada is still engaged in such unprincipled strategies. In 2007, Canada worked together with States with abusive human rights records – such as the Russian Federation, Suriname and Colombia – and urged them to not support the adoption of the UN Declaration.[51] Canada also worked at cross-purposes to the African Commission on Human and Peoples' Rights, who had concluded that African States should support the Declaration.[52]

Article 2(2) of the *Charter of the United Nations* stipulates: "All Members ... shall fulfill in good faith the obligations assumed by them in accordance with the present Charter." In order to realize the Purposes and Principles of the *Charter*, Canada and other States must comply with the requirement of good faith.

In accordance with such Purposes and Principles, the UN and member States have a duty to promote "universal respect for, and observance of, human rights … for all without distinction".[53] This requires actions "promoting and encouraging respect" for human rights.[54] This duty is based on "respect for the principle of equal rights and self-determination of peoples", which principle is affirmed in the *Charter of the United Nations* and the *UN Declaration*.[55] Article 46(3) of the *Declaration* requires that Indigenous peoples' rights and related State obligations be interpreted in accordance with the principles of "justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith".

The principle of good faith is also emphasized to be of central importance in the *Vienna Convention on the Law of Treaties*. Article 26 provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 31 (1) of the *Vienna Convention* adds: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

The International Court of Justice in *Nuclear Tests (Australia v. France)* has emphasized the far-reaching significance of good faith, indicating that trust and confidence are "inherent" in international cooperation:

> One of the basic principles governing the creation and the performance of legal obligations, whatever their source, is the principle of good

> faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming essential.[56]

Conclusions

In international law, good faith prohibits any abuse of procedure. Canada abused the process at the World Conference on Indigenous Peoples (WCIP), by issuing an explanation of vote based on misleading arguments. This included a distorted interpretation of the Supreme Court of Canada's ruling in *Tshilhqot'in Nation* v. *British Columbia*, in order to oppose reference to "free, prior and informed consent". Canada failed to acknowledge that Indigenous peoples' "consent" was a key constitutional requirement in this historic decision by Canada's highest court.

Since 2006, the federal government has refused to consult Indigenous peoples in relation to their rights and related State obligations addressed in international forums. Federal officials have not been allowed to even discuss the nature of Canada's obligations in this regard.

Within the CBD, Canada exploits weak procedural rules, whenever Indigenous peoples' status and rights are involved. Canada's insistence on continuing to use the term "indigenous and local communities" is inconsistent with contemporary domestic and international law.

Canada's aggressive opposition to use of "indigenous peoples" and "free, prior and informed consent", as well as the continued undermining of the *UN Declaration of the Rights of Indigenous Peoples*, constitute an attack on Indigenous peoples' status as "peoples" and their right of self-determination under international and Canadian constitutional law.

In the 2012 *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, it is recognized by consensus that the rule of law applies to <u>all States and international organizations</u>. In order to attain legitimacy, all actions must respect and promote the rule of law and justice:

> We [Heads of State and Government ...] recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that <u>respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions</u>.[57]

As reaffirmed in this 2012 *Declaration*, States cannot use international organizations, such as the CBD, to evade their commitments in the *Charter of the United Nations* and to undermine Indigenous peoples' human rights:

> We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice ... (para. 1)
>
> We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, <u>all human</u>

> rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond question. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect human rights ... for all, without distinction of any kind. (para. 6)

We are requesting electronic copies of all statements and positions that Canada made or took at the COP 12 meeting, in relation to the issues and concerns raised in this letter. In the past, our requests for timely copies of statements at such international forums have been virtually ignored.

We also request a prompt and substantive written response to the following questions, consistent with Canadian constitutional and international law:

Draft COP 12 decision. Did the government of Canada carry out an in-depth examination of the flawed draft COP 12 decision relating to the use of the term "indigenous peoples and local communities" and the related analysis of the CBD Executive Secretary, prior to taking positions to neutralize the legal effect of use of the term "indigenous peoples" within the CBD? If so, please share with us the government's own analysis.

Failure to consult on "indigenous peoples". Since the government of Canada was well aware of Indigenous peoples' concerns over the failure of the CBD to use the term "indigenous peoples" for at least a few years, why did the government fail to consult Indigenous peoples and accommodate their concerns?

Joint Submissions ignored. Why has this government of Canada virtually ignored since 2006 the in-depth and substantive Joint Submissions prepared by the Grand Council of the Crees (Eeyou Istchee) and its partners, in relation to the CBD, Permanent Forum on Indigenous Issues, Expert Mechanism on the Rights of Indigenous Peoples, Food and Agriculture Organization (FAO) and other international forums?

Consultation, accommodation and consent. In regard to international forums, such as the CBD, does the government of Canada have a duty to consult and accommodate Indigenous peoples in a timely manner, when the government contemplates taking positions or actions that may potentially affect Indigenous peoples' status and human rights? Does the government take the position that it can undermine such status and rights, in the absence of consultation and consent?

Respect for the rule of law. In regard to such forums, does the government of Canada believe it must respect Canada's Constitution and laws, as well as Indigenous peoples' rights and related State obligations in international human rights law?

Duty to provide information. In regard to such forums, does the government have a duty to provide information in a timely manner, so as to enable Indigenous peoples to democratically engage in full and effective participation and respond to Canada's positions and actions?

Canada's opposition to Indigenous "consent'. Is the government of Canada opposing the principle of "free, prior and informed consent" (FPIC) relating to Indigenous peoples and the *UN Declaration* in a wide range of international forums? Would the government provide detailed and timely information in regard to Canada's positions and actions in all such forums where Canada is opposing FPIC? In particular, did the government oppose FPIC at the meeting of the FAO Committee on World Food Security (CFS) in Rome (13-18 October 2014) in the context of "Principles for Responsible Investment in Agriculture and Food Systems"?

As described in this letter, the government of Canada's unilateral actions have far-reaching adverse implications for Indigenous peoples and their status and rights on a wide range of constitutional and international matters. These include, *inter alia*, the Crown's duty to uphold the honour of the Crown; duty to consult and accommodate; good governance; justice and reconciliation; Indigenous peoples' self-determination, including self-government; biodiversity; climate change; Indigenous cultural, environmental and food security; land and resource rights, including those of future generations; federal comprehensive claims policies; and proposed resource developments.[58]

We are requesting that you share our letter with the Minister of Environment and relevant colleagues, so that those issues relating to Environment Canada may be fully addressed. We look forward to receiving a timely and detailed response. In regard to the issues raised in this letter, we appreciate that the federal government's strategies and actions transcend those in any one department. Therefore, we are copying federal officials from other departments.

Respectfully,

Paul Joffe, Legal Counsel
Grand Council of the Crees (Eeyou Istchee)

cc. Jenni Byrne, Deputy Chief of Staff, Prime Minister's Office
Kim Gertel, Senior Policy Advisor, Foreign Affairs, Trade and Development Canada
Anne Daniel, General Counsel, Justice Canada
Thomas Mulcair, Leader of the Opposition, New Democratic Party
Jean Crowder, NDP Critic on Aboriginal Affairs
Paul Dewar, NDP Critic on Foreign Affairs
Justin Trudeau, Leader, Liberal Party of Canada
Carolyn Bennett, Liberal Critic on Aboriginal Affairs
Marc Garneau, Liberal Critic on Foreign Affairs
Elizabeth May, Leader, Green Party of Canada
Ghislain Picard, Interim National Chief, Assembly of First Nations
Terry Audla, President, Inuit Tapiriit Kanatami
Duane Smith, President, ICC Canada
Michèle Audette, Native Women's Association of Canada
Grand Chief Matthew Coon Come, Grand Council of the Crees (Eeyou Istchee)

Grand Chief Stewart Philip, Union of British Columbia Indian Chiefs
Grand Chief Ed John, First Nations Summit
Chief Perry Bellegarde, Federation of Saskatchewan Indian Nations
Grand Chief Stan Beardy, Chiefs of Ontario
Clement Chartier, President, Métis National Council
Chief Wilton Littlechild, International Chief for Treaties 6, 7 and 8

Endnotes

[1] General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (without a vote).

[2] See, *e.g.*, the report in *Earth Negotiations Bulletin*, International Institute for Sustainable Development, Vol. 9, No. 636, 7 October 2014, at 2.

[3] The Canadian government may finance representatives from the various national Aboriginal organizations to be a part of the Canadian delegation. However, each such representative must first sign a "security" document agreeing that they will not disclose to anyone, including their own organization, anything discussed within the delegation.

[4] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Indigenous Peoples are 'Peoples': Draft COP Decision Violates Treaty Interpretation Rules", Joint Submission of Indigenous and civil society organizations, Convention on Biological Diversity, Conference of the Parties, 12th sess., Pyeongchang, Republic of Korea on 6-17 October 2014, (9 September 2014), http://quakerservice.ca/wp-content/uploads/2014/09/COP-12-IPs-are-Peoples-Draft-COP-Decision-Violates-Intl-Rules-GCCEI-Joint-Submission-FINAL-Sep-9-14.pdf.

[5] *Ibid.*, para. 106.

[6] *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) (entered into force 27 January 1980).

[7] *Convention on Biological Diversity*, concluded at Rio de Janeiro (5 June 1992) (entered into force 29 December 1993).

[8] *Convention*, Art. 22(1): "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity." [emphasis added]

[9] *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on December 16, 1966 and entered into force March 23, 1976; and *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46. Adopted by the U.N. General Assembly on December 16, 1966 and entered into force 3 January 1976, accession by Canada 19 May 1976.

[10] See, *e.g.*, Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December

2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

[11] *Convention*, art. 8(j): "Each Contracting Party shall, as far as possible and as appropriate: … (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices ..."

Article 15(2) of the *Convention* requires States to adopt national legislation in a positive direction: "Each Contracting Party shall endeavour ... not to impose restrictions that run counter to the objectives of this Convention."

[12] *Vienna Convention on the Law of Treaties*, *supra* note 6, article 31(3)(b): "There shall be taken into account, together with the context: … (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation …"

[13] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

[14] 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), http://sustainabledevelopment.un.org/futurewewant.html, endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote).

[15] Adopted at the General Conference of UNESCO, 33rd sess., Paris, 20 October 2005. The preamble recognizes the "importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion".

[16] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010.

[17] *Species at Risk Act*, S.C. 2002, c. 29, preamble: "Recognizing that … the traditional knowledge of the aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures". *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, s. 60.1: "In exercising its powers, a board shall consider (a) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the Constitution Act, 1982 applies and who use an area of the Mackenzie Valley; and (b) any traditional knowledge and scientific information that is made available to it."

[18] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, section 52 (enactment), at s. 19(3): "The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge." See also *Species at Risk Act*, art. 15(2): "COSEWIC [Committee on the Status of Endangered Wildlife in Canada] must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge."

[19] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc. E/C.12/CAN/CO/5/CRP.1 (19 May 2006), para. 34.

[20] *E.g.*, *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 4.

[21] Conference of the Parties to the Convention on Biological Diversity, *Terminology "indigenous peoples and local communities": Draft decision submitted by the Chair of Working Group II*, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UNEP/CBD/COP/12/L.26 (16 October 2014), para. 2. A copy of the COP decision on this matter has not yet been made available by the Secretariat of the CBD.

[22] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, 5 I.L.M. 352 (entered into force 4 January 1969), article 1.

[23] In regard to this Covenant, see Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at para. 7:

> ... the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [emphasis added]

[24] 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.

[25] Adopted at the General Conference of UNESCO, 32nd sess., Paris, 17 October 2003, *entered into force* on 20 April 2006. The objectives include protecting and ensuring respect for intangible cultural heritage of Indigenous peoples. Such heritage includes "knowledge and practices concerning nature and the universe" (art. 2(2)(d)).

[26] Even if the words of a treaty in question were clear, "if applying them would lead to a result that would be manifestly absurd or unreasonable …, the parties must seek another interpretation": Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed. (New York: Cambridge University Press, 2013) at 215.

[27] *Gangwon Declaration on Biodiversity for Sustainable Development*, adopted on the occasion of the twelfth meeting of the Conference of the Parties to the Convention on Biological Diversity, in Pyeongchang, Gangwon Province, Republic of Korea, 16 October 2014, http://www.cbd.int/hls-cop/gangwon-declaration-hls-cop12-en.pdf.

[28] *Ibid.*, preamble.

[29] *Ibid.* See also para. 6: "Recognize the crucial role of indigenous and local communities in the conservation of biodiversity and its sustainable use".

[30] *Earth Negotiations Bulletin*, International Institute for Sustainable Development, Vol. 9, No. 640, CBD COP 12 Highlights, 10 October 2014, http://www.iisd.ca/biodiv/cop12/, at 1.

[31] Annex to General Assembly Decision 55/488 of 7 September 2001 provides: "The General Assembly ... reiterates that the terms 'takes note of' and 'notes' are neutral terms that constitute neither approval nor disapproval."

"Noting" is used in the preamble of the *Nagoya Protocol*, in regard to the *UN Declaration on the Rights of Indigenous Peoples*. However, the next preambular paragraph affirms that "nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities". The *Declaration* is widely used both internationally and domestically to reinforce Indigenous peoples' rights. Therefore, the reference to the *Declaration* in the *Nagoya Protocol* cannot be construed as having no significant meaning. See the WCIP Outcome Document, *supra* note 1, para. 4, where States in the UN General Assembly reaffirmed their "solemn commitment to … uphold the principles of the Declaration". See also General Assembly, *Implementation of the Convention on Biological Diversity and its contribution to sustainable development*, UN Doc. A/RES/68/214 (20 December 2013) (adopted without a vote), preamble, where the *UN Declaration* is linked to this resolution on implementing the *Convention*.

[32] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44. Canada's EOV referred to a recent Supreme Court of Canada decision, but did not identify the name of the case.

[33] "Consent" is not limited to Aboriginal titleholders and it extends to other Aboriginal rights holders. At the high end of the duty to consult, the Supreme Court of Canada ruled the nature and scope of the Crown's duty to consult would require the "full consent of [the] aboriginal nation . . . on very serious issues": see *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24. See also *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 168; and Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of Indonesia*, *infra* note 50.

[34] Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010, http://www.aadnc-aandc.gc.ca/eng/1309374239861.

[35] Assembly of First Nations *et al.*, Joint Letter to Prime Minister Stephen Harper, Foreign Affairs Minister John Baird and Aboriginal Affairs Minister Bernard Valcourt regarding Canada's positions at World Conference on Indigenous Peoples, http://quakerservice.ca/wp-content/uploads/2014/09/WCIP-joint-letter-to-Canadian-government-September-23-2014.pdf. See also Grand Chief Matthew Coon Come, "Canada fails at WCIP", editorial, *the Nation*, 3 October 2014, at 3, http://www.nationnews.ca/wp-content/uploads/2014/10/21-24-Nation.pdf.

[36] Government of Canada, "Statement by the Prime Minister of Canada at the Crown-First Nations Gathering", Ottawa, Ontario, 24 January 2012, http://pm.gc.ca/eng/media.asp?category=3&featureId=6&pageId=26&id=4597.

[37] Committee on the Elimination of Racial Discrimination, "Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (*continued*): *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.

[38] In the WCIP Outcome Document, State "cooperation" or some other form of collaboration with Indigenous peoples is included in paras. 1, 3, 5, 7, 8, 9, 16, 17, 18, 20, 21, 23, 25, 27 and 31.

[39] In achieving the ends of the *UN Declaration*, States are required generally as a minimum standard to take appropriate measures "in consultation and cooperation with indigenous peoples": see *UN Declaration*, arts. 38 and 43.

[40] Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 27. [emphasis added]

[41] *Earth Negotiations Bulletin*, *supra* note 30 at 1.

[42] Conference of the Parties to the Convention on Biological Diversity, *Draft decision submitted by the Chair of Working Group II*, Twelfth meeting, Pyeongchang, Republic of Korea, 6-17 October 2014, UNEP/CBD/COP/12/L.7 (13 October 2014), identical footnotes 2 and 3.

[43] *Vienna Convention on the Law of Treaties*, *supra* note 6, article 2(1)(d). The *Rules of Procedure of the General Assembly* (1985) include no express provisions relating to reservations.

[44] *Convention on Biological Diversity*, article 37; and *Nagoya Protocol*, article 34. COP does not have the authority to amend the *Convention* or *Protocol* except in accordance with articles 29 and 30 of the *Convention*.

[45] Colombia, Samoa and Ukraine had abstained in the 2007 vote in the General Assembly and subsequently endorsed the *UN Declaration*.

[46] *Convention on Biological Diversity*, art. 23(4).

[47] *Ibid.*, art. 23(4)(i).

[48] See, *e.g.*, Committee against Torture, *Concluding observations of the Committee against Torture: Indonesia*, UN Doc. CAT/C/IDN/CO/2 (2 July 2008), para. 11 ("numerous, ongoing credible and consistent allegations, corroborated by the report of the Special Rapporteur on torture and other sources, of the routine and disproportionate use of force and widespread torture and other cruel, inhuman and degrading treatment or punishment by members of the security and police forces").

[49] Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Republic of Korea*, UN Doc. CAT/C/KOR/CO/2 (25 July 2006), para. 8: "In view of the number of reported allegations of torture and/or other acts of cruel and inhuman or degrading treatment, and of complaints of human rights violations in general, the Committee is concerned about the relatively low rate of indictments, convictions and disciplinary measures imposed on law-enforcement officials."

[50] Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of Indonesia*, UN Doc. E/C.12/IDN/CO/1 (19 June 2014), para. 38.

[51] Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121, at 172-174. See especially p. 174, note 288, where the following human rights violations are documented: Russian Federation (numerous, ongoing and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel); Suriname (crimes against humanity); and Colombia (murders, forced disappearances, kidnappings, sexual violence or torture and arbitrary detentions, most of them at the hands of State agents).

[52] *Ibid.*, at 218-219. See also pp. 172-173.

[53] *Charter of the United Nations*, arts. 55 c and 56.

[54] *Ibid.*, art. 1(3).

[55] *Ibid.* The *UN Charter*'s purposes and principles are also highlighted in the *UN Declaration*, preambular para. 1. The principle of equal rights of peoples is affirmed in the *UN Declaration*, preambular para. 2 and art. 2. The right of self-determination is affirmed in Art. 3.

[56] *Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253 at 267.

[57] *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 vote), para. 2.

[58] See generally Paul Joffe, "Undermining Indigenous Peoples' Security and Human Rights: Strategies of the Canadian Government" in Joyce Green, ed., *Indivisible: Indigenous Human Rights* (Winnipeg, Manitoba: Fernwood Publishing, 2014) 217.