Reconciliation and Federal Comprehensive Claims Policy

For meaningful reconciliation to occur, the following elements need to be incorporated in reforming the federal comprehensive claims policy: judicial principles relevant to reconciliation; respect for human rights, including the *UN Declaration on the Rights of Indigenous Peoples*; accommodation of climate change concerns; and cessation by Canada of undermining Indigenous Peoples' rights in international forums. Additional elements include: effective safeguards against unjust federal government actions and fulfillment of its duty to protect; and incorporating international standards developed for business and human rights.

Paul Joffe[1]
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[1] Legal Counsel, Grand Council of the Crees (Eeyou Istchee). I am grateful to Jennifer Preston, Indigenous Rights Coordinator, Canadian Friends Service Committee (Quakers), for her valued insights, comments and revisions on earlier drafts.

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Introduction

At the 4 December 2014 meeting in Gatineau, Québec between members of the Coalition on the UN Declaration on the Rights of Indigenous Peoples and the Ministerial Special Representative Douglas Eyford, an invitation was extended to provide further reflections on reconciliation.

In *Black's Law Dictionary*, 9th ed., "reconciliation" is defined as: "Restoration of harmony between persons or things that had been in conflict". With regard to Indigenous Peoples, such harmony cannot be achieved within a colonial framework.[1] Rather, it must take place in a contemporary context that respects human rights, including the *UN Declaration on the Rights of Indigenous Peoples*.[2]

According to Canada's highest court, the Crown has "not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims … The governing ethos is not one of competing interests but of reconciliation."[3] Reconciliation is about "healing relationships, building trust, and working out differences".[4] It is about redress[5] and respecting the human rights of all. Reconciliation means a genuine commitment to change, to honestly engage in re-conceptualizing relationships to create a future of peace, justice and renewed hope.

Harmonious and cooperative relations between Aboriginal Peoples and the Crown is a crucial element in achieving reconciliation. The *UN Declaration* emphasizes, *inter alia*, the following two aspects that are relevant to federal comprehensive claims policy (CCP):

> … treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States[6]
>
> … the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.[7]

The federal Aboriginal Affairs minister described Canada's endorsement of the *Declaration*: "The November 12, 2010, endorsement of the United Nations Declaration on the Rights of Indigenous Peoples reinforces our government's commitment to reconciliation and strengthening our relationship with Aboriginal peoples in Canada."[8]

Regretfully, the federal government has repeatedly acted to undermine this human rights instrument. The government has generally failed to consult and cooperate with Indigenous Peoples in diverse matters that relate to federal comprehensive claims policy, especially when such issues are addressed in international forums. Such actions are inconsistent with the honour of the Crown and genuine reconciliation.

A reformed federal comprehensive claims policy can only achieve success if the actions of the government – both within and outside such policy – are consistently principled and supportive of Indigenous Peoples' rights and well-being. In regard to the "impeded progress with the treaty negotiation and claims processes", former Special Rapporteur on the rights of indigenous peoples James Anaya concluded: "the Government should take a less adversarial, position-based approach than the one in which it typically seeks the most restrictive interpretation of aboriginal and treaty rights possible."[9]

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."[10]

I. Judicial Principles Relevant to Reconciliation

In regard to the constitutional principle of reconciliation, the Supreme Court of Canada has identified, *inter alia*:

1. **Reconciliation flows from Crown's duty to act honourably.** Reconciliation is "a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples".[11] In Aboriginal law, "the honour of the Crown goes back to the Royal Proclamation of 1763."[12]

2. **Duty to consult and accommodate grounded in honour of the Crown.** The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples.[13] The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems.[14]

3. **Duty to consult and accommodate part of reconciliation process.** The duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.[15]

4. **Aboriginal rights must be recognized and respected.** In reconciling claims protected by s. 35 of the *Constitution Act, 1982*, the honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.[16]

5. **Need to reconcile pre-existing and assumed sovereignties.** The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.[17] Treaties serve to reconcile pre-existing

Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35.[18]

6. Resolution of land claims and rights must reflect their substance. It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter. Only thus can the project of reconciliation this Court spoke of in *Delgamuukw* be achieved.[19] It is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that reconciliation will be achieved.[20]

7. Extinguishment of rights incompatible with Constitution and reconciliation. Section 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982.[21] Prior to 1982, Canada's constitutional framework included the *Royal Proclamation (1763).* The equitable principles in the *Proclamation* have applied throughout Canada since its creation[22] and preclude extinguishment.

8. Limited federal and provincial government powers to diminish Aboriginal or treaty rights. Neither level of government is permitted to legislate in a way that results in a meaningful diminution of an Aboriginal or treaty right, unless such an infringement is justified in the broader public interest and is consistent with the Crown's fiduciary duty owed to the Aboriginal group. The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society.[23]

9. Infringement of Aboriginal rights requires justification. The Supreme Court has ruled that the best way to achieve reconciliation is to demand the justification of any government regulation that infringes upon or denies Aboriginal rights.[24] The Crown must demonstrate that: (1) it complied with its procedural duty to consult with the rights holder and accommodate the right to an appropriate extent at the stage when infringement was contemplated; (2) the infringement is backed by a compelling and substantial legislative objective in the public interest; and (3) the benefit to the public is proportionate to any adverse effect on the Aboriginal interest.[25]

10. Broader public goal must further reconciliation. The process of reconciling Aboriginal interests with the broader interests of society as a whole is the raison d'être of the principle of justification. To constitute a compelling and substantial objective, the broader public goal asserted by the government must further the goal of reconciliation, having regard to both the Aboriginal interest and the broader public objective.[26]

11. Future generations cannot be deprived of benefit of the land. In regard to Aboriginal title, s. 35 of the *Constitution Act, 1982* permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group.[27] Incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land.[28]

12. Crown's fiduciary duty essential re justification and reconciliation. Crown's fiduciary duty infuses an obligation of proportionality into the justification process. Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement that the incursion is necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact).[29]

13. Modern treaties and reconciliation. Modern treaties attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.[30] Treaty making is an important stage in the long process of reconciliation, but it is only a stage.[31]

II. *UN Declaration* as an Instrument of Justice and Reconciliation

The *UN Declaration* can be seen as a blueprint for reconciliation, affirming and elaborating on Indigenous Peoples' inherent rights, which throughout history have not been respected.[32] It does not create new rights.[33] As concluded by former Special Rapporteur on the rights of indigenous peoples, James Anaya: "[The *Declaration*] represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law**."**[34]

Globally, the *UN Declaration* is recognized as an instrument of justice and reconciliation. The Canadian Association of Statutory Human Rights Agencies (CASHRA) has called on "all levels of government across Canada to implement the UN Declaration on the Rights of Indigenous Peoples. … 'Implementing the standards in the Declaration would foster stronger relationships with First Nations, Métis and Inuit peoples and promote Reconciliation across Canada,' says Barbara Hall, Chairperson of CASHRA."[35]

The government of Norway affirms: "The Declaration contextualizes all existing human rights for Indigenous Peoples and provides therefore the natural frame of reference for work and debate relating to the promotion of indigenous peoples rights".[36]

In achieving enhanced self-government in Greenland in June 2009, the Premier of Greenland declared, "this new development in Greenland and in the relationship between Denmark and Greenland should be seen as a de facto implementation of the Declaration and, in this regard, hopefully an inspiration to others".[37]

In New Zealand, the Court of Appeal relied in part on the *UN Declaration* in determining a case relating to the Indigenous Peoples' customary laws.[38] Also, the Waitangi Tribunal Report 2011 emphasized: "[UN]DRIP represents the most important statement of indigenous rights ever formulated."[39] "The Waitangi Tribunal Report 2014 concluded: "UNDRIP carries significant normative weight affirming basic human rights standards that all States are expected to comply with at the international, regional and national level."[40]

The government of Australia confirmed: "All legislation proposals in Australia are scrutinised by a parliamentary committee to ensure their consistency with human rights, and the Declaration is considered in this context."[41] In 2014, the Aboriginal and Torres Strait Islander Social Justice Commissioner recommended that the government of Australia "engage with the National Implementation Strategy to give effect to the *United Nations Declaration on the Rights of Indigenous Peoples*."[42]

In July 2014, the government of Germany stressed: "Human rights are a guiding principle for German development policy. This is laid down in our binding **human rights strategy** from 2011. Indigenous Peoples' Rights are explicitly integrated with reference to UNDRIP."[43]

In Belize, the Supreme Court of Belize relied on the *UN Declaration* and other aspects of international and domestic law in upholding the land and resource rights of the Maya people.[44]

In Bolivia, the *Declaration* was adopted at the national level as Law No. 3760 of 7 November 2007 and parts were incorporated into the new Constitution promulgated on 7 February 2009. Bolivia emphasized that it "has elevated the obligation to respect the rights of indigenous peoples to constitutional status, thereby becoming the first country in the world to implement this international instrument".[45]

As affirmed in a 2011 report: "In line with its endorsement of the Declaration on the Rights of Indigenous Peoples, the Republic of the Congo has put in place a series of initiatives, the primary one being its new Law No. 5-2011 on the Promotion and protection of the rights of indigenous peoples".[46]

In May 2008, over 100 scholars and legal experts in Canada signed an Open Letter affirming: "The Declaration provides a principled framework that promotes a vision of justice and reconciliation. … it is consistent with the Canadian Constitution and Charter and is profoundly important for fulfilling their promise. Government claims to the contrary do a grave disservice to the cause of human rights and to the promotion of harmonious and cooperative relations."[47]

In the Outcome Document of the 2014 World Conference on Indigenous Peoples, Canada and other States agreed by consensus: "We commit ourselves to taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy and administrative measures, to achieve the ends of the Declaration".[48] In this same Outcome Document, States also committed themselves "to cooperating with indigenous peoples … to develop and implement national action plans, strategies or other measures"[49] in regard to the *Declaration*.

UN Secretary-General Ban Ki-moon underlined in 2008: "The Declaration is a visionary step towards addressing the human rights of indigenous peoples. … The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated.[50]

The High Commissioner for Human Rights emphasized in 2009: "My Office is committed to be a frontline advocate of universal acceptance and implementation of the Declaration ... Indeed, these rights [of indigenous peoples] are, and will remain, a priority area for OHCHR."[51]

In May 2008, the UN Permanent Forum on Indigenous Issues affirmed that the *Declaration* "will be its legal framework" and will therefore ensure that the *Declaration* is integrated in all aspects of its work.[52]

The Inter-Agency Support Group on Indigenous Issues (IASG), representing thirty-one UN specialized agencies,[53] has emphasized that the adoption of the *Declaration* "constitutes a crucial opportunity ... according to Article 42 of the Declaration, to promote respect for and full application of its provisions and follow-up its effectiveness."[54] The IASG pledged "to advance the spirit and letter of the Declaration within our agencies' mandates and to ensure that the Declaration becomes a living document throughout our work."

In the Americas, the Inter-American Court of Human Rights relied in part on the *UN Declaration* in determining unanimously that the Saramaka people have "the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory".[55]

The European Union confirmed in 2012: "The EU has a longstanding engagement towards indigenous peoples which is anchored in the context of the United Nations Declaration on the Rights of Indigenous Peoples. … Indigenous peoples´ rights, as defined in the UN Declaration, form an integral part of all these aspects of the EU´s human rights policy."[56]

Former Special Rapporteur James Anaya has underscored: "even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the [UN] Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity".[57] Anaya added: "the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. The Special Rapporteur reiterates that implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."[58]

In *Brownlie's Principles of Public International Law*, the *UN Declaration* is highlighted as an important "law-making" resolution: "Even when resolutions are framed as general principles, they can provide a basis for the progressive development of the law and, if substantially unanimous, for the speedy consolidation of customary rules. Examples of important 'law-making' resolutions include … the Rio Declaration on Environment and Development; and the UN Declaration on the Rights of Indigenous Peoples".[59]

III. Comprehensive Claims Policy Must Accommodate Climate Change Concerns

In the 2009 *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, it is highlighted: "The United Nations Declaration on the Rights of Indigenous Peoples sets out several rights and principles of relevance to threats posed by climate change."[60] The Report concluded: "International human

rights law complements the United Nations Framework Convention on Climate Change by underlining that international cooperation is not only expedient but also a human rights obligation and that its central objective is the realization of human rights."[61]

Reconciliation is not possible if the CCP fails to effectively consider and accommodate Indigenous concerns relating to climate change.[62] Some climate change impacts are predicted to be irreversible[63] and would significantly affect present and future generations. Foreseeable threats must not be ignored or exacerbated through federal action or inaction. The costs of climate change to the poor or vulnerable have been severely underestimated.[64] As indicated by the UN Development Programme:

> Climate change is a fundamental threat to sustainable development and the fight against poverty. It has the potential to stall and even reverse human development through its impacts on key development sectors and activities, including agriculture and food production, water, ecosystems and other natural resources, disaster risk management and health. Climate change may exacerbate extreme weather events, increasing the risk of high-impact disasters. Communities that are already subjected to impacts from climate change may experience an acceleration and/or intensification of impacts due to Project activities that do not integrate and anticipate climate change risks.[65]

Increased focus is urgently required on mitigation of climate change since "reducing greenhouse gas emissions is vital to reducing the rate and magnitude of climate change".[66] The federal government cannot continue to favour adaptation measures – which are to date inadequate[67] – at the expense of mitigation. Neither the existing CCP nor the "Interim Policy" explicitly address rising adaptation costs.[68] Indigenous Peoples with existing or future treaties could face severe impoverishment. Moreover, Indigenous Peoples may face destruction of culture or intensified assimilation.[69]

In a one-sided[70] 2014 government report, "The Cross-Canada Benefits of the Oil and Gas Industry",[71] there is no mention of "mitigation" or "adaptation". The federal government undermines its credibility when it endorses exaggerated or absurd conclusions such as "the development of the oil and gas industry generates various environmental benefits, including improved air quality, water quality, and reforestation" and the "planet is today much greener because of fossil fuels."[72]

In another 2014 government report, *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation*, it is acknowledged: "entitlements to harvest traditional species to meet food, societal and cultural needs of Aboriginal groups scattered from the Yukon to the eastern Arctic are key elements of modern-day treaties with the Government of Canada".[73] The report cautions: "As climate-induced changes to freshwater and marine ecosystems are likely to alter yields and species composition outside of their historic range …, traditional subsistence fisheries harvested at fixed locations or times would appear to be highly vulnerable, with relatively little adaptive scope to maintain customary harvest in cases where the subject species are severely reduced or eliminated by future climate change."[74] Thus, existing and future treaty rights in modern treaties negotiated under the CCP may be severely jeopardized, despite any constitutional protections.

If "certainty" is a common objective in a revised CCP, Indigenous Peoples must have concrete legal commitments from the federal government to effectively address climate change. These would include redressing Indigenous rights and lands, territories and resources impaired by climate change; engaging in collaborative measures with Indigenous Peoples relating to climate change; fulfilling ongoing obligations to mitigate climate change; and ensuring Indigenous Peoples' right to access to justice and to effective legal remedies.

In August 2014, the Special Rapporteur on the right to food underscored: "Climate change, sustainable resource management and food security are now widely considered among the most complex, interdependent and urgent global policy challenges. … Individuals and communities already in vulnerable situations and at risk of discrimination due to geography, poverty, gender, age, indigenous or minority status and disability are often disproportionately affected."[75]

The UN Permanent Forum on Indigenous Issues recognized in 2008 that "climate change is an urgent and immediate threat to human rights, health, sustainable development, food sovereignty, and peace and security".[76]

IV. Canada Must Cease Undermining Indigenous Peoples' Rights at International Level

The effect of Crown actions on Indigenous Peoples' status and rights is highly relevant to the CCP and the goal of reconciliation, regardless of whether such actions take place domestically or in international forums. In practice, both domestically and internationally, Canada's approach to reconciliation is not informed by legal principles articulated by the courts.

Nothing in *Tsilhqot'in Nation*[77] and other Supreme Court decisions suggest that the Crown's duty to consult and accommodate solely applies within Canada. Increasingly, Indigenous rights and related State obligations are being addressed at the international level. Canada cannot evade its constitutional duties, simply because it is participating in standard-setting or negotiating treaties in international forums. In the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Canada and other States agreed by consensus that:

> … the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that 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.[78]

In its 2013 consensus resolution on *The rule of law at the national and international levels*, the UN General Assembly stressed the "importance of adherence to the rule of law at the national level"[79] and reaffirmed the "imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter of the United Nations".[80] All UN Member States are legally bound to uphold at all times the purposes and principles of the *Charter of the United Nations*,[81] which include "promoting and encouraging respect for human rights … for all without distinction …".[82]

Canada cannot unilaterally take positions that undermine Indigenous Peoples' constitutional status and rights when participating in international forums addressing such issues as biodiversity, food security, sustainable and equitable development and climate change.[83] In international forums, the federal government has refused to consult Indigenous Peoples on their rights, including the *UN Declaration* since 2006. Examples have already been provided in the Coalition's November 2014 Joint Submission to the Ministerial Special Representative.[84]

The government does not generally fund Indigenous Peoples to participate at international meetings.[85] This serves to marginalize or exclude Indigenous Peoples, while Canada prejudices their human rights. In New Zealand, the Waitangi Tribunal has determined:

> In order to meet its Treaty obligations, the Crown needs to be guided by two considerations: first, it should be generous in its support of Māori seeking to sustain an independent voice in international forums where their opinion is sought; and, secondly, that the policies around any funding should be transparent. We recommend that the Crown adopt a set policy, following negotiation with Māori interests, for funding independent Māori engagement in international forums.[86]

The UN General Assembly has repeatedly affirmed by consensus that "human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations."[87] It has also affirmed by consensus that "democracy, development and respect for human rights … are interdependent and mutually reinforcing".[88] Any revised CCP that is geared to reconciliation must provide a principled framework, respecting core principles and values of the Canadian and international legal systems.

In contrast to the Canadian government, the New Zealand government has confirmed that it has a duty to not only consult Indigenous Peoples on international issues but also safeguard their interests. As the Waitangi Tribunal has affirmed: "In exercising its [international] responsibilities, the Crown already accepts that it must consult Māori where necessary and protect their interests."[89] The Tribunal added: "It follows that there is a need for forums to identify those interests and to ensure robust discussions as to what New Zealand's position should be at the international level when they are affected."[90]

The Waitangi Tribunal also emphasized that "there may be occasions where the Māori interest is so great that the Crown should not move without Māori agreement."[91] The Tribunal confirmed, "New Zealand speaks with one voice in international affairs, and that voice is the Crown's. … the Crown's right of kāwanatanga [governance] is qualified by its guarantee of active protection of Māori interests, and of Māori authority (tino rangatiratanga) over their own affairs. These findings do not mean that Māori cannot have an independent voice on the world stage, where their affairs are very much at stake."[92] In regard to Indigenous participation at the international level, the Tribunal added: "… the Crown already accepts that Māori can and should have a voice at this level. There is nothing novel or threatening about it. Various UN bodies and international agencies have long welcomed participation from indigenous peoples, seeking their direct input on matters of relevance to them.[93]"

V. Need for Effective Protections Against Unjust Federal Actions

Indigenous Peoples negotiating treaties in comprehensive claims processes can no longer assume that environmental and other protections that have existed for decades in federal laws will continue. Nor can it be assumed that the federal government will effectively address growing threats arising from climate change. Federal oversight over such matters is being diminished, so as to evade federal responsibilities.

Thus, Indigenous Peoples in treaty negotiations will need to incorporate protections relating to endangered and threatened species; fisheries; biodiversity; ensuring environmental, cultural, food and territorial security;[94] ports and marine areas; and related Indigenous governance and participatory rights as well as ongoing federal obligations.

Repeated use of omnibus bills evades effective consultations with Indigenous Peoples. Harmonious and cooperative Crown-Indigenous relations are being undermined. "Certainty" for present and future generations is severely diminished. Genuine reconciliation is rendered illusory. The broader political and legal framework for any revised CCP is being severely compromised.

Bill C-38,[95] adopted June 2012, included 70 different bills. This "budget" bill, *inter alia*: empowers the government to approve projects, even if they have been refused approval by the National Energy Board; enables the government to significantly limit the time period for environmental assessments; reduces fisheries protection; significantly lowers the number of projects that will be assessed for environmental, social and economic impacts; restricts public participation in environmental assessments; and reduces the number and types of projects that will be subjected to environmental assessment.[96] This was followed by the adoption of Bill C-45,[97] which amended 60 different pieces of existing legislation.

Together, the two Bills total about 900 pages. The legislative processes allowed for virtually no amendments, impairing the integrity of Parliament.[98] Many aspects of these omnibus bills have real and potential impacts on Indigenous Peoples' rights and interests. Genuine consultation and accommodation, as well as Crown-Aboriginal cooperation, were absent. Canada's highest court has highlighted that "the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it."[99] Aside from what duty Parliament may have prior to passing legislation, the government has a duty to consult – including consent – when contemplating measures that potentially affect Aboriginal or treaty rights.[100]

On October 23, 2014, the federal government introduced yet another omnibus bill that is over 475 pages in length and amends over 50 laws and regulations. Clearly another "abuse of process".[101] Bill C-43, whose short title is *Economic Action Plan 2014 Act, No. 2*, received royal assent on December 16, 2014.[102] As described by West Coast Environmental Law (WCEL), the Bill included amendments to the *Canada Marine Act*[103] that, "would pose a serious threat to legal protection from and public oversight of environmental threats from activities that occur in ports, like coal storage and LNG facilities."[104]

Former Special Rapporteur James Anaya concluded in his 2014 report on Canada: "New laws, policies and programmes that affect indigenous peoples should be developed in consultation and true partnership with them. The federal and provincial/territorial governments should not push forward with laws, policies or programmes where significant opposition by indigenous governments and leadership still exists."[105]

Historical inequities should not be exacerbated through the adoption of omnibus bills, based on "assumed Crown sovereignty".[106] Rather, "cooperative federalism" inclusive of Indigenous Peoples is consistent with Canada's Constitution.[107] Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, has emphasized: "There are many open accounts worldwide that should be settled —peacefully —through good-faith negotiation with indigenous peoples, whose inalienable rights have not been extinguished through lapse of time or through the racist and factually inapplicable doctrine of discovery".[108]

A revised CCP should ensure that the doctrine of discovery is formally renounced and its consequences considered in treaty negotiations. In 2013, the AANDC minister declared "there is no place in Canada for the Doctrine of Discovery - it plays no part in our relationship with Aboriginal peoples in Canada."[109] Yet the federal government has failed to explain on what legal basis it can claim "assumed Crown sovereignty" over Indigenous peoples' lands, territories and resources. Such "assumed sovereignty" must be reconciled with "pre-existing Aboriginal sovereignty", especially in light of ongoing abuses of power by the Crown.

It is essential that the federal government act consistently with its constitutional and international "**duty to protect**" the rights of Indigenous Peoples. In *Tsilhqot'in Nation*, the Supreme Court of Canada ruled in regard to section 35 of the *Constitution Act, 1982*: "The result is to protect Aboriginal and treaty rights while also allowing the reconciliation of Aboriginal interests with those of the broader society."[110] In *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, the Court clarified: "In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to 'the several Nations or Tribes of Indians, with whom We are connected, and who live under our Protection'".[111] The Court added: "The Constitution is the supreme law of our country, and it demands that courts be empowered to protect its substance and uphold its promises."[112] Such promises include the protection of Aboriginal Peoples' rights in section 35.[113]

In international law, "States have an obligation to protect human rights, including the right to nondiscrimination. This obligation requires the State and all of its bodies to prevent the violation of any individual's or group's rights by any State or non-State actor."[114] As affirmed by the UN Expert Mechanism on the Rights of Indigenous Peoples, "States have a duty to protect against corporate violations of the human rights of indigenous peoples, especially in view of their vulnerability."[115]

As indicated the 2009 *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*: "The State duty to protect against third party abuse is grounded in international human rights law. … [T]reaties commit States parties to refrain from violating the enumerated rights of persons within their territory and/or jurisdiction. … Guidance from international human rights bodies suggests that

the State duty to protect applies to all recognized rights that private parties are capable of impairing, and to all types of business enterprises."[116]

In regard to the right to access to justice and to effective remedies, the *UN Declaration* affirms: "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights."[117] Such other parties would include, *inter alia*, business enterprises.

In assessing Canada's duty to protect the rights of Indigenous Peoples, it is important to emphasize their right of self-determination. Canada has an affirmative 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".[118] Former Special Rapporteur James 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."[119]

As affirmed in the interim report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, "universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights."[120] The Independent Expert added:

> More than an outcome, self-determination should be seen as a process subject to revision and adjustment, and its outcome must correspond to the free and voluntary choice of the peoples concerned, within a framework of human rights protection and non-discrimination. Self-determination cannot be understood as a one-time choice, nor does it extinguish with lapse of time ... Like the rights to life, freedom and identity, it is too fundamental to be waived.[121]

VI. Reconciling Business and Human Rights in the Indigenous Context

The discussion of comprehensive claims and reconciliation must include examination of resource development and the engagement of businesses. Many of the actions taken by the federal government are motivated by its bias in favour of such development. Yet Canada does not live up to international human rights standards relating to business enterprises. A revised CCP should require the federal government to respect, protect and fulfill its own legal obligations and commitments.

In the 2014 "Indigenous Rights Risk Report" issued by First Peoples Worldwide, Inc., it is concluded: "…poor governance is bad for business. Governments that disregard their commitments to UNDRIP (often with the justification that they are obstacles to development) actually propagate volatile business environments that threaten the viability of investments in their countries."[122] The Report adds:

> Although governments maintain that their commitments to UNDRIP are aspirational and nonbinding, Indigenous Peoples are successfully using the document to influence domestic laws and court rulings, and stop unwanted projects from moving forward. Not

> only will this yield more lawsuits against companies that violate FPIC, it also renders them increasingly liable for retroactive damages from past abuses of Indigenous Peoples' rights.[123]

In this context, it is beneficial to underline the following ruling by the Supreme Court of Canada in *Tsilhqot'in Nation*:

> … if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[124]

The "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework"[125] was endorsed by consensus in 2011 by the UN Human Rights Council.[126] Principle 1 of these Guiding Principles provides: "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises."[127] In regard to abuses by private actors, "States may breach their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse."[128]

Principle 11 of the Guiding Principles provides: "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."[129] This responsibility "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."[130]

Principle 12 of the Guiding Principles stipulates: "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights".[131] Depending on circumstances, business enterprises may need to consider additional standards. For example, "United Nations instruments have elaborated further on the rights of indigenous peoples".[132] Such instruments include the *UN Declaration on the Rights of Indigenous Peoples*.

In 2013 the UN Global Compact issued an in-depth *Business Reference Guide* on the *UN Declaration*.[133] This *Guide* "seeks to elaborate on ways business can engage respectfully and positively with indigenous peoples within the context of the UN Declaration, while recognizing that indigenous peoples have a unique and important place in the global community."[134] The *Guide* underscores: "Indigenous peoples are entitled to all human rights established under international law."[135]

The *Business Reference Guide* indicates: "Two fundamental elements of indigenous peoples' rights, on which the ability to exercise and enjoy a number of other rights rest, are the **right to self-determination** … and **free, prior and informed consent** … which, among other things,

require that business fully and meaningfully engage indigenous peoples with the objective to obtain their consent for business activities that will affect them or their rights."[136]

The *Business Reference Guide* affirms: "Indigenous peoples have the right to self-determination (including in relation to development), autonomy, and to maintain their distinct political, legal, economic, social and cultural institutions. ... These rights give indigenous peoples control over their own lives and their futures, and their community's place in the world, free from outside coercion."[137]

In the report of the 2014 General Assembly report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, business enterprises are encouraged: "To clarify that national action plans, or any other measures which a State may initiate, are independent from and cannot reduce the global standard of conduct expected of any business enterprise to respect internationally recognized human rights."[138]

The European Investment Bank's Environmental and Social Principles and Standards provide: "Where the customary rights to land and resources of indigenous peoples are affected by a project, the Bank requires the promoter to prepare an acceptable Indigenous Peoples Development Plan. The plan must reflect the principles of the UN Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent to any relocation."[139]

The UN Development Programme (UNDP) has indicated in its Social and Environmental Standards: "UNDP will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDP will ensure that social and environmental assessments for Projects involving indigenous peoples include an assessment of their substantive rights, as affirmed in Applicable Law.[140]

Conclusions

In order to achieve genuine reconciliation between the Crown and Indigenous Peoples, reforms of the CCP must fully consider and integrate contemporary international human rights standards, including the *UN Declaration on the Rights of Indigenous Peoples*.

Modern treaties that arise from a reformed CCP must remain relevant to, and ensure the well-being of, present and future generations. This would include effective mitigation and adaptation strategies and measures relating to climate change. A commitment to reconciliation is a commitment to a principled and sustained relationship focused on ensuring the security and well-being of Indigenous Peoples, as distinct self-determining peoples.

Reconciliation is an ongoing process that requires effective and ongoing Crown-Indigenous Peoples cooperation. Cooperative federalism must include federal, provincial and Aboriginal governments. Current actions by the federal government to undermine Indigenous Peoples' status and rights in international forums must be terminated. Such adversarial practices are incompatible with Canadian constitutional and international law and are inconsistent with upholding the honour of the Crown, good governance and reconciliation.

Sustainable and equitable development in or affecting Indigenous Peoples' lands, territories and resources can best be attained in close collaboration with the Peoples concerned, respecting the right and principle of free, prior and informed consent. Current federal government approaches to gain unjust advantage over Indigenous Peoples through omnibus bills and other unilateral actions are not working.

Existing and emerging international standards in regard to business and human rights far exceed current practices of the government of Canada. Reconciliation in the context of any future CCP urgently requires significant and fundamental change. The international community has repeatedly reaffirmed that "human rights, the rule of law and democracy are interlinked and mutually reinforcing".[141] It is long overdue that these core principles are fully applied in federal government actions relating to Indigenous Peoples.

Endnotes

[1] See *R. v Ipeelee*, 2012 SCC 13, para. 60, where the Supreme Court took judicial notice of such matters as colonialism and its unjust and impoverishing effects on Indigenous Peoples.
[2] *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. See sixth preambular para.: "indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources".
[3] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 17.
[4] Brian Rice and Anna Snider, "Reconciliation in the Context of a Settler Society: Healing the Legacy of Colonialism in Canada" in Marlene Brant Castellano, Linda Archibald and Mike DeGagné, eds., *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 45 at 45.
[5] "Redress" includes restitution: see *UN Declaration*, arts. 11(2) and 28(1).
[6] *UN Declaration*, preambular para. 15. In regard to treaties, see also preambular paras. 8 and 14 and article 37.
[7] *UN Declaration*, preambular para. 18. See also the last preambular para., where the *Declaration* is proclaimed "as a standard of achievement to be pursued in a spirit of partnership and mutual respect".
[8] Canada, Statement by The Honourable John Duncan on The Occasion of The International Day of the World's Indigenous People, August 9, 2011, http://www.aadnc-aandc.gc.ca/eng/1314712950489.
[9] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex (Conclusions), para. 96.
[10] 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.
[11] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 32. [emphasis added]
[12] *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 66.
[13] *Haida Nation*, para. 16.
[14] *Ibid*., para. 17.
[15] *Haida Nation*, at para. 32.
[16] *Ibid*., para. 25.
[17] *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, para. 42.
[18] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.
[19] *Tsilhqot'in Nation*, para. 23.
[20] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 186.

[21] *Tsilhqot'in Nation*, para. 13.
[22] See *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 200 (reasons of La Forest and L'Heureux-Dubé JJ. were delivered by La Forest): "In essence, the rights set out in the Proclamation … were applied in principle to aboriginal peoples across the country". [emphasis added] See also *Tsilhqot'in Nation*, para. 69: "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* (*1763*)".
[23] *Tsilhqot'in Nation*, para. 139.
[24] *Ibid*., para. 119.
[25] *Ibid*., para. 125.
[26] *Ibid*., para. 82.
[27] *Ibid*., para. 2.
[28] *Ibid*., para. 86.
[29] *Ibid*., para. 87.
[30] *Beckman* v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53, *per* Binnie J. for the majority, para. 10.
[31] *Ibid*. at para. 51 (quoting *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, at para. 54).
[32] *UN Declaration*, seventh preambular para.: "*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources".
[33] 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. 40: "The Declaration does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples."
[34] 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) at para. 85 (Conclusions) [emphasis added].
[35] Canadian Association of Statutory Human Rights Agencies (CASHRA), "Canada's Human Rights Agencies call on all levels of Government to endorse the UN Declaration on the Rights of Indigenous Peoples", July 2012, http://www.cashra.ca/news.html.
[36] Norway, "Statement (Agenda Item 4)" (Delivered to the Expert Mechanism on the Rights of Indigenous Peoples, 2d Sess, Geneva, 12 August 2009) (copy on file with author).
[37] Greenland (Delegation of Denmark), "Statement by Mr. Kuupik Kleist, Premier of Greenland" (Delivered to the Expert Mechanism on the Rights of Indigenous Peoples, 2d Sess., Geneva, 11 August 2009) at 2.
[38] *Takamore* v. *Clarke*, [2011] NZCA 587, *per* Glazebrook and Wild JJ, paras. 250-254 (appeal dismissed [2012] NZSC 116).
[39] Ko Aotearoa Tēnei: *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, Volume 2, WAI 262, Waitangi Tribunal Report 2011, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf, at 672.
[40] Whaiate Mana Motuhake In Pursuit of Mana Motuhake: *Report on the Māori Community Development Act Claim*, Pre-publication Version, WAI 2417, Waitangi Tribunal Report 2014, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_85007148/Maori%20Council%20Pre-pubW.pdf, at 51.
[41] Australia, Statement, Expert Mechanism on the Rights of Indigenous Peoples, Agenda item 6: United Nations Declaration on the Rights of Indigenous Peoples, July 2013, http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH01b0/cbdb4f0e.dir/EM13dea143.pdf. In this regard, see *Human Rights (Parliamentary Scrutiny) Act 2011*, No. 186, 2011 (Australia).
[42] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2014*, Australian Human Rights Commission, http://103.7.165.98/publications/social-justice-and-native-title-report-2014, at 149 (Recommendation 5).
[43] Germany, "United Nations Declaration on the Rights of Indigenous Peoples: Panel discussion on the role of parliaments in the implementation of the Declaration, German Statement", 7th Session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 10 July 2014. [bold in original]

[44] *Cal v. Attorney General of Belize and Minister of Natural Resources and Environment; Coy v. Attorney General of Belize and Minister of Natural Resources and Environment* (18 October 2007) Claims No. 171 & 172 (Consolidated), (Supreme Court of Belize), paras. 118-135.
[45] Permanent Forum on Indigenous Issues, *Information received from Governments: Bolivia*, E/CN.19/2009/4/Add.2 (24 February 2009), para. 57.
[46] Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya; Addendum: The situation of indigenous peoples in the Republic of the Congo, UN Doc. A/HRC/18/35/Add.5 (11 July 2011), para. 40.
[47] "*UN Declaration on the Rights of Indigenous Peoples*: Canada Needs to Implement This New Human Rights Instrument", Open Letter, May 1, 2008 (signed by more than 100 legal scholars and experts), available at http://cfsc.quaker.ca/pages/documents/UNDecl-Expertsign-onstatementMay1.pdf.
[48] 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) (adopted without a vote), para. 7. After the Outcome Document was adopted by consensus at the World Conference, Canada requested an explanation of vote (EOV). Such EOV has no effect on the status of the Outcome Document as a consensus instrument.
[49] *Ibid*., para. 8.
[50] Secretary-General (Ban Ki-moon), "Protect, Promote, Endangered Languages, Secretary-General Urges in Message for International Day of World's Indigenous People", SG/SM/11715, HR/4957, OBV/711 (23 July 2008).
[51] United Nations High Commissioner for Human Rights, "Opening Remarks Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights to the 2nd session of the Expert Mechanism on the Rights of Indigenous Peoples", United Nations, Geneva (10 August 2009), http://www.unhchr.ch/huricane/huricane.nsf/view01/0A1A8D39C55CE3F9C125760E00304246?opendocument. OHCHR is the Office of the United Nations High Commissioner for Human Rights.
[52] Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April - 2 May 2008)*, UN ESCOR, 2008, Supp. No. 23, UN Doc. E/2008/43, E/C.19/2008/13 at para.132. The seven substantive mandated areas of the Permanent Forum are "economic and social development, environment, health, education, culture, human rights and the implementation of Declaration".
[53] As of 2008, the IASG includes 31 members. These are: UN Department of Economic and Social Affairs (DESA); UN Department of Public Information (DPI); Secretariat for the Convention on Biological Diversity (SCBD); Food and Agriculture Organisation of the United Nations (FAO); International Fund for Agricultural Development (IFAD); International Labour Organisation (ILO); International Organization for Migration (IOM); United Nations Office of the Coordination of Humanitarian Affairs (OCHA); Office of the United Nations High Commissioner for Human Rights (OHCHR); United Nations Programme on HIV/AIDS (UNAIDS); United Nations Conference on Trade and Development (UNCTAD); United Nations Development Program (UNDP, including Regional Initiative on Indigenous Peoples' Rights and Development in the Asia Pacific); United Nations Environment Programme (UNEP); United Nations Educational Scientific and Cultural Organisation (UNESCO); United Nations Framework Convention on Climate Change (UNFCCC); United Nations Population Fund (UNFPA); United Nations Human Settlements Programme (UN-HABITAT, including Indigenous Peoples' Right to Adequate Housing: A Global Overview); United Nations Children's Fund (UNICEF); United Nations Development Fund for Women (UNIFEM); United Nations Industrial Development Organisation (UNIDO); United Nations Institute for Training and Research (UNITAR); World Intellectual Property Organization (WIPO); World Health Organization (WHO); World Bank; Inter-American Development Bank (IADB); European Union; Fondo Indígena; Economic Commission for Latin America and the Caribbean (ECLAC); Commonwealth Secretariat; United Nations University, Institute of Advanced Studies; United Nations Non-Governmental Liaison Service (NGLS).
[54] Inter-Agency Support Group on Indigenous Issues, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, adopted at its Annual Meeting in September 2007.
[55] *Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R., (Judgment) 28 November 2007, Series C No. 172, para. 131 (reference to *UN Declaration*) and para. 214 (8).
[56] European Union, "Statement on behalf of the European Union", Expert Mechanism on the Rights of Indigenous Peoples Fifth Session (Geneva, 9 – 13 July 2012), 11 July 2012.
[57] 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, UN Doc. A/65/264 (9 August 2010), at para. 62. [emphasis added]

[58] General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (14 August 2013) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), http://unsr.jamesanaya.org/docs/annual/2013-ga-annual-report-en.pdf, para. 67. [emphasis added]
[59] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), at 42. [emphasis added]
[60] 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. 53 and accompanying note 79: "Key provisions include the right to effective mechanisms for prevention of, and redress for, actions which have the aim or effect of dispossessing them of their lands, territories or resources (art. 8); the principle of free, prior and informed consent (art. 19), the right to the conservation and protection of the environment and indigenous lands and territories (art. 29), the right to maintain, control, protect and develop their cultural heritage and traditional knowledge and cultural expressions (art. 31)."
See also para. 39, which highlights the right to self-determination include the right of a people not to be deprived of its own means of subsistence and the obligation of a State party to promote the realization of the right to self-determination.
[61] *Ibid*., para. 99 (Conclusions).
[62] See, *e.g.*, Erin Flanagan and Clare Demerse, *Climate Implications of the Proposed Energy East Pipeline: A Preliminary Assessment*, The Pembina Institute, 2014, http://www.pembina.org/reports/energy-east-climate-implications.pdf, at 23 : "there is an important connection between the construction of new oilsands transportation infrastructure and the rate of growth of future oilsands production. … Expanded oilsands production carries a number of environmental consequences."
[63] Matthew Collins *et al*., "2013: Long-term Climate Change: Projections, Commitments and Irreversibility", ch. 12 in T.F. Stocker *et al*., eds.., *Climate Change 2013: The Physical Science Basis*, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter12_FINAL.pdf, at 1033: "A large fraction of climate change is largely irreversible on human time scales, unless net anthropogenic CO2 emissions were strongly negative over a sustained period." [bold in original, underline added]
See also General Assembly, *Protection of global climate for present and future generations of humankind*, Doc. A/RES/68/212 (20 December 2013) (adopted without vote), para. 15: "*Notes* the recognition by the Conference of the Parties to the Convention that climate change represents an urgent and potentially irreversible threat to human societies and the planet and thus requires to be urgently addressed by all parties". [emphasis added] The Convention referred to is the *Framework Convention on Climate Change*, opened for signature 4 June 1992, S. Treaty Doc. 102-38 (1992), 31 I.L.M. 849 (1992) (entered into force 21 March 1994).
[64] Karl Ritter, "UN report: costs of climate change to poor much bigger than previously estimated", *Canadian Business*, December 5, 2014 http://www.canadianbusiness.com/business-news/un-report-costs-of-climate-change-to-poor-much-bigger-than-previously-estimated/.
[65] United Nations Development Programme, *UNDP Social and Environmental Standards*, 14 July 2014, http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP%20Social%20and%20Environmental%20Standards-14%20July%202014.pdf, at Standard 2: Climate Change Mitigation and Adaptation, para. 1. [emphasis added]
[66] F.J. Warren and D.S. Lemmen, eds., *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation* (Ottawa: Government of Canada, 2014), http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/earthsciences/pdf/assess/2014/pdf/Full-Report_Eng.pdf, at 21.
[67] *Ibid*., at 76: "… adaptation should be considered as essential to sustainable forest management. For example, the criteria and indicators of sustainable forest management adopted by the CCFM (2006) may prove to be difficult, if not impossible, to achieve because they do not factor in the impacts of a changing climate." [emphasis added]
CCFM is the Canadian Council of Forest Ministers.
At 74: "trees killed by the mountain pine beetle in western Canada will have released nearly one billion tonnes of carbon dioxide into the atmosphere, roughly equivalent to five years of emissions from Canada's transportation sector."
[68] Aboriginal Affairs and Northern Development Canada, "Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights", September 2014 ["Interim Policy"], http://www.aadnc-aandc.gc.ca/eng/1408631807053/1408631881247.

[69] For additional concerns relating to climate change, see Amnesty International Canada *et al.*, "Renewing the Federal Comprehensive Land Claims Policy", Joint Submission of 12 Indigenous and human rights organizations to Ministerial Special Representative Douglas Eyford, *supra*, at 24.
[70] See also 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. 8.73 Recommendation: **"**Environment Canada should ensure that future progress reports are fair and balanced, presenting progress to date and the remaining challenges. To achieve this, Environment Canada should explore options for having the progress report verified by a third party or by an independent multi-stakeholder review panel before publication." [emphasis added]
[71] House of Commons, "The Cross-Canada Benefits of the Oil and Gas Industry", Report of the Standing Committee on Natural Resources, 41st Parl., 2nd sess., June 2014, http://www.parl.gc.ca/content/hoc/Committee/412/RNNR/Reports/RP6644319/rnnrrp07/rnnrrp07-e.pdf. The report includes the dissenting opinions of New Democratic Party and Liberal Party of Canada.
[72] *Ibid.*, at 3 (Executive Summary) and 11. In contrast, see, *e.g.*, Sustainable Development Solutions Network (SDSN) & Institute for Sustainable Development and International Relations (IDDRI), *Pathways to Deep Decarbonization*, Interim 2014 Report, July 2014, http://unsdsn.org/wp-content/uploads/2014/07/DDPP_interim_2014_report.pdf, at 61: "To contribute to a path that limits the global increase in temperature to less than 2°C, Canada would need to dramatically reduce CO2 emissions from energy- and industrial process-related activities. Emissions would need to be transformed from 20.616 tonnes of carbon dioxide equivalent per capita (tCO2e/cap) in 2010 to less than 2 tCO2e/cap in 2050. This represents a nearly 90% reduction in emissions from 2010 levels by 2050."
[73] F.J. Warren and D.S. Lemmen, eds., *Canada in a Changing Climate: Sector Perspectives on Impacts and Adaptation* (Ottawa: Government of Canada, 2014), http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/earthsciences/pdf/assess/2014/pdf/Full-Report_Eng.pdf, at 126.
[74] *Ibid.* [emphasis added]
[75] General Assembly, *Right to food: Note by the Secretary-General*, interim report of the Special Rapporteur on the right to food, Hilal Elver, UN Doc. A/69/275 (7 August 2014), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/498/25/PDF/N1449825.pdf?OpenElement, para. 42. [emphasis added]
[76] Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April - 2 May 2008)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2008/43, E/C.19/2008/13, para. 23.
[77] See, *e.g.*, *Tsilhqot'in Nation*, paras. 2, 17, 77-80, 88, 90-97, 113, 125 and 153.
[78] *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)*, *http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/67/1*, para. 2. [emphasis added] And at para. 37: "We reaffirm that States shall abide by all their obligations under international law".
[79] General Assembly, *The rule of law at the national and international levels*, UN Doc. A/RES/68/116 (16 December 2013) (without vote), para. 6.
[80] *Ibid.*, para. 4.
[81] *Charter of the United Nations*, art. 2, para. 2.
[82] *Ibid.*, art. 1, para. 3.
[83] See 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 at 217: "The federal government often takes positions that adversely affect Indigenous peoples' rights. At the international level, the government appears to proceed on the assumption that it has no obligation to consult and accommodate Indigenous peoples on their concerns."
[84] Amnesty International Canada *et al.*, "Renewing the Federal Comprehensive Land Claims Policy", Joint Submission of 12 Indigenous and human rights organizations to Ministerial Special Representative Douglas Eyford, *supra*, at 20.
[85] The Canadian government may finance a representative from one or more of the 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.
[86] Ko Aotearoa Tēnei: *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, Volume 2, WAI 262, Waitangi Tribunal Report 2011,

https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf, at 687. [emphasis added]

[87] See, *e.g.*, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, *supra*, para. 5.

[88] General Assembly, *The universal, indivisible, interrelated, interdependent and mutually reinforcing nature of all human rights and fundamental freedoms*, UN Doc. A/RES/66/151 (19 December 2011) (adopted without a vote), para. 3. See also *Vienna Declaration and Programme of Action*, adopted by consensus at World Conference on Human Rights, 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), para. 8. The Vienna Declaration was endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993) (without a vote).

[89] Ko Aotearoa Tēnei: *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, Volume 2, WAI 262, *supra*, at 685.

[90] *Ibid*.

[91] *Ibid*., at 686.

[92] Ko Aotearoa Tēnei: *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, Volume 2, WAI 262, *supra*, at 686-687. [emphasis added]

[93] *Ibid*., at 687.

[94] In regard to the diverse security dimensions relating to Indigenous Peoples, see 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 149-151.

[95] *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. Its short title is: "*Jobs, Growth and Long-term Prosperity Act*".

[96] For a brief analysis of environmental concerns relating to Bill C-38, see, for example, Suzuki Foundation, "Bill C-38: What you need to know", http://www.davidsuzuki.org/publications/downloads/2012/C-38%20factsheet.pdf; and West Coast Environmental Law, "Six Questions for your MP about Bill C-38", 27 June 2012, http://wcel.org/resources/environmental-law-alert/six-questions-your-mp-about-bill-c-38?utm_source=twt.

[97] *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. Its short title is "*Jobs and Growth Act*".

[98] See, *e.g.*, Andrew Coyne, "Illegitimate use of omnibus bills renders Parliament a lame duck", *The Gazette* (1 May 2012), A15, http://www.montrealgazette.com/news/Illegitimate+omnibus+bills+renders+Parliament+lame+duck/6544558/story.html.

[99] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 116.

[100] *UN Declaration*, arts. 19, 38 and 42. See also *Tsuu T'ina Nation* v. *Alberta (Minister of Environment)*, 2010 ABCA 137, para. 55: "the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions."

[101] "The year in review: Has Harper gone from leader to liability?", *Globe and Mail*, editorial (26 December 2014), http://www.theglobeandmail.com/globe-debate/editorials/the-year-in-review-has-harper-gone-from-leader-to-liability/article22212088/: "Omnibus bills are designed to defeat Parliament's oversight role. The thick bills allow majority governments to push through major policy changes with little debate by combining multiple unrelated issues into one over-sized turkey. They are an abuse of process; the Conservatives have tabled four since 2010, and the most recent was the second largest."

[102] *A second Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*, S.C. 2014, c. 39.

[103] *Canada Marine Act*, S.C. 1998, c. 10. Amendments to this Act were proposed in Division 16 of Bill C-43.

[104] West Coast Environmental Law, "LEGAL BACKGROUNDER – BILL C-43: A threat to environmental safety and democracy", http://wcel.org/resources/publication/legal-backgrounder-%E2%80%93-bill-c-43-threat-environmental-safety-and-democracy. In assessing the proposed amendments, WCEL concluded such changes to the *Canada Marine Act* "would significantly increase the powers of port authorities, allow the federal government to offload its responsibility over shipping in federal ports, broaden the Governor-in-Council (Cabinet's) powers to reduce federal oversight and the transparency of shipping activities in Canada, and limit the application of federal environmental laws on port lands."[104] While it remains to be seen what actions will be taken by the federal government, "proposed changes of this nature and scope should be subject to rigorous public consultation in advance, not rammed through in an omnibus bill."

[105] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex (Conclusions).
[106] Reconciliation of "pre-existing aboriginal sovereignty with assumed Crown sovereignty" is discussed in Amnesty International Canada *et al.*, "Renewing the Federal Comprehensive Land Claims Policy", Joint Submission, *supra*, at 28.
[107] *Ibid.*, at 14.
[108] General Assembly, *Promotion of a democratic and equitable international order: Note by the Secretary-General*, interim report of the Independent Expert Alfred-Maurice de Zayas, UN Doc. A/69/272 (7 August 2014), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/497/95/PDF/N1449795.pdf?OpenElement, para. 58.
[109] Aboriginal Affairs and Northern Development Canada, "'Creating Canada: From the Royal Proclamation of 1763 to Modern Treaties' Symposium", Speaking Notes for Minister Bernard Valcourt, Museum of Civilization, Gatineau, Québec, October 7, 2013, http://www.aadnc-aandc.gc.ca/eng/1381156885861/1381156990723.
[110] *Tsilhqot'in Nation*, para. 139. [emphasis added]
[111] *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 66. See also *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 42.
[112] *Ibid.* para. 153. [emphasis added]
[113] *R.* v. *Powley*, [2003] 2 S.C.R. 207, paras. 13 and 38; and *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20 ("promise of rights recognition").
[114] Office of the High Commissioner for Human Rights, *Developing National Action Plans Against Racial Discrimination: A Practical Guide* (New York/Geneva: OHCHR, 2014), at 32. [emphasis added]
[115] Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex – Expert Mechanism Advice No. 6 (2014): Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, para. 15.
[116] 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.
[117] *UN Declaration*, art. 40. [emphasis added]
[118] Identical article 1(3) of the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*. In regard to the right of self-determination, see also Amnesty International Canada *et al.*, "Renewing the Federal Comprehensive Land Claims Policy", Joint Submission, *supra*, at 21.
[119] 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.
[120] General Assembly, *Promotion of a democratic and equitable international order: Note by the Secretary-General*, interim report of the Independent Expert Alfred-Maurice de Zayas, *supra*, para. 2.
[121] *Ibid.*, para. 3. [emphasis added]
[122] Rebecca Adamson & Nick Pelosi, "Indigenous Rights Risk Report", First Peoples Worldwide, Inc., 2014, http://www.firstpeoples.org/images/uploads/Indigenous%20Rights%20Risk%20Report%281%29.pdf, at 33.
[123] *Ibid.*, at 34.
[124] *Tsilhqot'in Nation*, para. 92. [emphasis added]
[125] "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[126] "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).
[127] "Guiding Principles", *supra*, I. State Duty to Protect Human Rights, A. Foundational Principles, Principle 1.
[128] *Ibid.*, Commentary on Principle 1.
[129] "Guiding Principles", *supra*, II. The Corporate Responsibility to Respect Human Rights, A. Foundational Principles, Principle 11.
[130] *Ibid.*, Commentary on Principle 11. [emphasis added]
[131] "Guiding Principles", *supra*, II. The Corporate Responsibility to Respect Human Rights, A. Foundational Principles, Principle 12.

[132] *Ibid*., Commentary on Principle 12.
[133] 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. UN Global Compact is the largest corporate responsibility initiative in the world with over 10,000 signatories based in 140 countries. 8,000 of those signatories are corporate.
[134] *Ibid*., at 4. [emphasis added]
[135] *Ibid*., at 5.
[136] *Ibid*., at 11 [bold in original].
[137] *Ibid*., at 37. [emphasis added]
[138] General Assembly, *Human rights and transnational corporations and other business enterprises: Note by the Secretary-General*, report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/69/263 (5 August 2014), para. 94(c) (Conclusions and recommendations). [emphasis added]
[139] European Investment Bank, *EIB Statement of Environmental and Social Principles and Standards (2009)*, http://www.eib.org/attachments/strategies/eib_statement_esps_en.pdf, para. 53. [emphasis added]
[140] United Nations Development Programme, *UNDP Social and Environmental Standards*, 14 July 2014, http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP%20Social%20and%20Environmental%20Standards-14%20July%202014.pdf, at Standard 6: Indigenous Peoples, para. 4 (Respect for domestic and international law). In regard to "Applicable Law", see the Overarching Policy and Principles at p. 5, para. 9: "UNDP will not support activities that do not comply with national law and obligations under international law, whichever is the higher standard (hereinafter "Applicable Law")."
[141] *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. 5.