

**Annotated Commentary by Paul Joffe, Member of Québec and Ontario Bars
on
“Implementing UNDRIP in Canada: Challenges with Bill C-262” by Thomas Isaac
and Arend J.A. Hoekstra¹**

April 2, 2018

Note: I begin this commentary with a General Comment. I then quote portions of the text from the Isaac & Hoekstra article. Each portion is followed by my commentary (indented paragraphs). All bold fonts in quoted texts are added by me, except for headings in Isaac & Hoekstra text quoted in this commentary. All references are included in endnotes – in a separate list for Isaac & Hoekstra and another list for me.

Paul Joffe General Comment:

In their article relating to Bill C-262 and the *United Nations Declaration on the Rights of Indigenous Peoples*² (“UN Declaration” or “UNDRIP”), Isaac and Hoekstra commit a number of errors and omissions. Such shortcomings, considered together, result in an article that should not be relied upon.

There are many examples in their article that demonstrate the need for caution. It is important to carefully look for substance and substantiation for the two authors’ positions. Examples of erroneous and other substandard analysis include the following:

i) **Challenging whether Indigenous peoples’ rights constitute human rights.** As discussed further below, Isaac and Hoekstra erroneously seek to deny that Indigenous peoples’ rights constitute human rights. The rights of Indigenous peoples and individuals have been addressed within the international human rights system for over 35 years.³ The Office of the UN High Commissioner for Human Rights includes the *UN Declaration* in the list of “universal human rights instruments” on its website.⁴

The two authors show a serious lack of understanding of international human rights law and its application in Canada. International human rights instruments are generally drafted in a broad manner in order to take into account a wide range of circumstances – both existing and unforeseen.⁵ Such instruments may be used to interpret Canadian law. To a significant degree, Canadian courts rely on a wide range of international human rights instruments. For example, the *Universal Declaration of Human Rights*⁶ – which was also drafted in broad terms – has been “cited by Canadian courts in literally hundreds of cases”.⁷

ii) **Providing legal interpretations on specific provisions without taking into account other essential provisions in the same instrument.** It is problematic when legal professionals analyze provisions in legal instruments, without taking into account relevant interpretive provisions in the same text. For example, article 46(3)⁸ includes one of the most comprehensive balancing provisions in any international human rights

instrument. It is inexcusable that the authors would seek to describe the *UN Declaration* in extreme terms, yet fail to take into account this essential general provision.

iii) **Discussing reconciliation in the absence of the TRC Calls to Action.** Isaac and Hoekstra purport to be concerned about “reconciliation”. Yet they fail to take into account or even mention the 94 Calls to Action of the Truth and Reconciliation Commission of Canada (TRC). Implementation of the *UN Declaration* is inseparably linked to the TRC Calls to Action. TRC Call to Action 43 calls upon “federal, provincial, territorial, and municipal governments to fully adopt and implement” UNDRIP as “the framework for reconciliation”. By opposing Bill C-262 which explicitly relies upon the TRC Calls to Action, the two authors are discounting the TRC Calls to Action.

iv) **Failing to address colonialism.** Isaac and Hoekstra fail to take into account ongoing colonialism that continues to severely undermine Indigenous peoples and their human rights. This further skews the authors’ overall analysis. In contrast, MP Romeo Saganash has taken an important step in addressing colonialism, providing a legislative framework for implementing the *UN Declaration* and advancing reconciliation through Bill C-262.

v) **Failing to inform the reader that the *UN Declaration* has been reaffirmed by consensus by the UN General Assembly eight times⁹.** On December 16, 2010, the United States was the last State in the world to remove its objection and endorse the *UN Declaration*. Since that date, no State in the world formally objects to the *UN Declaration*. Isaac and Hoekstra fail to disclose or are unaware of such crucial information in their article. The repeated reaffirmations by the General Assembly by consensus serve to strengthen the legal status of the *UN Declaration* and underscore its significance.

vi) **Failing to take into account that the former Conservative federal government endorsed the *UN Declaration* on November 12, 2010.** As described later in this commentary, the authors fail to discuss Canada’s reversal of position and support for this international human rights instrument. At that time, Canada stated: “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.”¹⁰ Perhaps, by omitting Canada’s endorsement, the authors felt they could more easily claim: [the *UN Declaration*] “was not negotiated or drafted to be a comprehensive, implementable, legal regime, and as such, in the Canadian context and the context of Bill C-262, it is inconsistent, deficient, and a potential hindrance to reconciliation.”

vii) **Assuming that Indigenous peoples’ right to give or withhold “consent” originates from the *UN Declaration*.** Throughout their analysis, Isaac and Hoekstra make a significant error in focussing on the *UN Declaration* as if it were the source of “free, prior and informed consent”. In international law, “free, prior and informed consent” is an essential standard that is an integral element of the right of self-determination – a right that the authors fail to even mention.

As underlined by the UN Expert Mechanism on the Rights of Indigenous Peoples, "the right to free, prior and informed consent is embedded in the right to self-determination. ... [FPIC] ... is **an integral element of that right**."¹¹ Self-determining peoples have a "right to choose",¹² which necessarily entails a consensual element. Former Special Rapporteur James Anaya has underscored: "The right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."¹³

As enshrined in the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, Canada has affirmative obligations 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."¹⁴ This right of self-determination in the two *Covenants* has been repeatedly applied to Indigenous peoples globally by the UN Human Rights Committee¹⁵ and the Committee on Economic, Social and Cultural Rights.¹⁶

In 1996, Canada affirmed at the United Nations that Canada is "legally and morally committed" to apply the right of self-determination to Indigenous peoples without discrimination:

[The right of self-determination] ... is fundamental to the international community, and its inclusion in the UN Charter, and in the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* bears witness to the important role that it plays in the protection of human rights of all peoples. ... Canada is therefore **legally and morally committed** to the observance and protection of this right. We recognize that this right applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law.¹⁷

FPIC is also highlighted in *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*: "indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination."¹⁸

The right of Indigenous peoples to **self-determination** is closely associated with **peace and harmonious and cooperative relations**, which are important themes in the *UN Declaration*.¹⁹ UN Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, affirms: "The modern perspective on self-determination focuses on its function as a means to promote peace."²⁰

Erica-Irene Daes, one of the five international experts in the UN Working Group who helped craft the original text of the *UN Declaration*, has underlined the merits of the right of self-determination: "For different peoples to be able to live together peacefully, without exploitation or domination ... they must continually renegotiate the terms of their

relationships. There are too many tragic examples ... where a failure to attain self-determination as part of a living, growing relationship between peoples has resulted in oppression and violence.”²¹

Similarly, Jean-Louis Roy has emphasized that “the right of indigenous peoples to self-determination ... does not represent a threat to peace. It is **a condition of peace**. It amounts to a *sine qua non* of justice for indigenous peoples and of the recognition of their rights.”²² In Canada, Indigenous peoples have entered into treaties of peace and friendship with the Crown. However, these treaties have not been honoured and the principles of cooperation and interdependence have been virtually ignored.

The last preambular paragraph of the *UN Declaration* makes clear that it is proclaimed by the UN General Assembly as “a standard of achievement to be pursued in a spirit of partnership and mutual respect”. A nation-to-nation relationship with Indigenous peoples requires no less.

As described in my Commentary, the opinions expressed by Isaac and Hoekstra are a minority viewpoint and are inconsistent with Canadian and international law. In addition, it is worth noting that in an Open Letter in May 2008, more than 100 legal scholars and experts expressed their support for the *UN Declaration*:

The Declaration provides a **principled framework** that promotes a vision of justice and reconciliation. In our considered opinion, 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.²³

Quotes from Isaac & Hoekstra article

On December 5, 2017, Member of Parliament Romeo Saganash proposed that [Bill C-262](#) be read a second time and referred to a committee. Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is a private members bill, now supported by the Liberal government and the NDP, promoting the full adoption of UNDRIP into Canadian law.

Mechanics of Bill C-262

Bill C-262 is a reaction to the growing chorus of support for the implementation of UNDRIP within Canada. Though the mechanics of Bill C-262 are simple in design, that simplicity is problematic. UNDRIP is a blunt instrument, developed in an international setting, that is not reflective of Canada’s world-leading legal protections for Indigenous rights; Canada is the only nation with an established system for limiting unilateral state action against Indigenous peoples. By simply **adopting** UNDRIP in its entirety into the Canadian context, Bill C-262 misconstrues

Canada's existing and sophisticated Indigenous rights regime and, by adding new uncertainties, risks hindering the pursuit of reconciliation.

Joffe Comment:

It is misleading for Isaac and Hoekstra to state “UNDRIP is a blunt instrument, developed in an international setting, that is not reflective of Canada’s world-leading legal protections for Indigenous rights”. The *UN Declaration* is the longest discussed and negotiated human rights instrument in the history of the United Nations.²⁴ For more than 20 years, Canada was actively involved offering its concerns and revisions to the evolving text.²⁵

Further, Aboriginal rights affirmed in section 35 of the *Constitution Act, 1982* are subject to progressive interpretation.²⁶ This is consistent with the “**living tree**” doctrine²⁷ that applies to Canada’s Constitution. As decided by Canada’s highest Court: “Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”²⁸

The *UN Declaration* constitutes such a “new social, political and historical” reality – a consensus human rights instrument that elaborates on the rights of Indigenous peoples globally. As the Supreme Court indicated in *Reference re Same-Sex Marriage*: “A large and liberal, or progressive, interpretation ensures the *continued relevance and, indeed, legitimacy* of Canada's constituting document.”²⁹

The authors inaccurately declare that “Canada is the **only nation** ... limiting unilateral state action against Indigenous peoples.” While often inadequate, remedies against unilateral state actions can be obtained in domestic courts in other regions of the world.³⁰ I am not aware of any country in the world – including Canada – that adequately safeguards Indigenous peoples from human rights abuses. A few countries, such as Ecuador³¹ and Bolivia³², include international instruments such as the *UN Declaration* and elaborate Indigenous rights protections in their national constitutions.

Greenland achieved significantly enhanced self-government in June 2009.³³ As described by the Inuit Premier of Greenland, “this new development in Greenland and in the relationship between Denmark and Greenland should be seen as a de facto implementation of the [UN] Declaration”.³⁴

Isaac and Hoekstra are also incorrect to conclude that Bill C-262 would “adopt” UNDRIP in its entirety. Section 3 of the Bill affirms the *UN Declaration* as a universal international human rights instrument with application in Canadian law.³⁵ Having “**application**” in federal laws is not the same as “adopting” the *UN Declaration* “in its entirety” in Canadian law.³⁶

The two authors provide no persuasive evidence that their suggestion that applying the *UN Declaration* – a universal human rights instrument applying to over 370 million Indigenous people around the world – would add “new uncertainties” that risk “hindering

pursuit of reconciliation”. Such views run directly counter to TRC Call to Action 43. Furthermore, in February 2018, the Canadian Human Rights Tribunal emphasized that “[o]f particular significance especially in this case is the *United Nations Declaration on the Rights of Indigenous Peoples* ... [which] outlines the individual and collective rights of Indigenous peoples”.³⁷

In 2016, in *Catholic Children's Aid Society of Hamilton v. G.H.*, the Ontario Court of Justice relied on the federal Crown’s statements that “a cornerstone of its commitment to achieving reconciliation ... was the establishment of the ... Truth and Reconciliation Commission” and that Canada endorsed the *UN Declaration* and fully supported it “without qualification”.³⁸ The Court concluded that all such developments “form an **important contextual backdrop** for the analysis of the equality guarantee in section 15 of the [*Canadian*] *Charter*”.³⁹

Isaac & Hoekstra

Uncertain Preamble Language

The preamble to Bill C-262 sets out the overall intention and objectives of the Bill. While the preamble refers repeatedly to UNDRIP, only one reference is made to section 35 of the *Constitution Act, 1982* (s. 35), which is the constitutional source of Canada’s protection of Aboriginal and treaty rights. No explanation is provided in the Bill on how the adoption of UNDRIP in the Canadian context will co-exist, modify, or alter existing Canadian law. The objective of Bill C-262 is similarly unclear, being first phrased as enshrining “the principles” of UNDRIP in Canadian law, and later describing a process of legislative, policy and administrative measures “to achieve the ends” of UNDRIP. There are no expressly stated “principles” within UNDRIP and the “ends” of UNDRIP are also unclear.

Joffe Comment:

Reference to the *Constitution Act, 1982* is in the operative provisions of the Bill and not in the preamble.

It is ludicrous to suggest that Bill C-262 should have explained “how the **adoption** of UNDRIP in the Canadian context will co-exist, modify, or alter existing Canadian law.” First, the Bill “applies” the *UN Declaration* – it does not “adopt” it. Also, any effect on the interpretation of Canada’s Constitution and laws will depend on the facts and law in any given case. Such a contextual⁴⁰ approach is fundamental to the interpretation of Canadian law.

The term “principles” refers to the minimum “standards”, which is the term used in article 43 of the *UN Declaration*. The Minister of Justice and Attorney General of Canada has used both terms synonymously.⁴¹ However, the term “standards” is preferable.

The term “ends” is generally used in article 38 of the *UN Declaration*. According to *Black’s Dictionary*, “end” refers to an “object, goal or purpose”, which fits the meaning in article 38.

Article 38 provides: “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.” This is the **minimum standard** for cooperation between States and Indigenous peoples.

Article 38 includes many strands. It is flexible in that it includes a range of cooperative measures, including legislative measures. Thus, the *UN Declaration* serves to bring the larger human rights understandings, mechanisms and approaches into a domestic setting to make the international and domestic more seamless.

As indicated by the Supreme Court of Canada: “**Cooperation is the animating force.** The federalism principle upon which Canada's constitutional framework rests demands **nothing less.**”⁴² As underlined by the Royal Commission on Aboriginal Peoples: “[Section 35 of the *Constitution Act, 1982*] ... provides the basis for recognizing **Aboriginal governments as constituting one of three orders of government in Canada ...**”⁴³

Isaac & Hoekstra

Extinguishment of Aboriginal and Treaty Rights

Subsection 2(1) of Bill C-262 states that the proposed Act does not “diminish or *extinguish* existing aboriginal or treaty rights” under s. 35. The phrasing is peculiar given that it appears to under-represent the substantial protections granted through s. 35 to Aboriginal and treaty rights in Canada, under which the Crown no longer has the ability to unilaterally extinguish Aboriginal and treaty rights.

Joffe Comment:

The above phrase does not under-represent s. 35. Rather, the provision is a “for greater certainty” clause consistent with what is in article 45 of the *UN Declaration* and international human rights law.⁴⁴ Forms of extinguishment are still occurring in the federal comprehensive land claims process.⁴⁵

Isaac & Hoekstra

Defining “Indigenous”

By referring to Indigenous rights within the context of UNDRIP, and Aboriginal and treaty rights within the context of s. 35, section 2(1) of Bill C-262 creates a larger uncertainty: is UNDRIP intended to apply to peoples other than the “aboriginal peoples of Canada” currently covered by s. 35? As recently noted in our publication in the Supreme Court Law Review,¹ the Supreme

Court of Canada (SCC) suggested in its 2016 decision of *Daniels v Canada*² that the term “Indigenous” may apply to peoples who do not hold s. 35 rights. In this context it is unclear whether UNDRIP is intended to apply to those Indigenous peoples holding s. 35 rights in Canada *and* non-s. 35 rights-bearing Indigenous peoples.

Joffe Comment:

It would be inappropriate for the *UN Declaration* to determine who are “Indigenous” in every State. Since there are over 370 million Indigenous people in more than 70 countries, it is not possible or advisable to have a single definition as to who is “Indigenous” or who is a “people”.⁴⁶

As affirmed in the two international human rights Covenants and by the government of Canada, Indigenous peoples have the right of self-determination. However, it is up to the rights-holders to determine how they wish to organize themselves⁴⁷ and engage in such key issues as decolonization, nation-building, governance, and citizenship/membership.

Isaac & Hoekstra

Discretion and Nuance

Section 3 of Bill C-262 states that UNDRIP is affirmed as an “international human rights instrument with application in Canadian law.” This statement is followed by section 4 which obliges Canada to “take all measures necessary” to ensure its laws are consistent with UNDRIP. The standard of “all measures necessary” is broad and lacks the flexibility to abrogate or derogate from UNDRIP where direct application is impractical, illogical, or otherwise incompatible with Canada’s constitutionally protected Indigenous rights regime.

Joffe Comment:

It is incorrect to suggest that Canada cannot take all measures necessary to ensure its laws are consistent with UNDRIP. In fact, the Trudeau government has established a Working Group of Ministers to “to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration ... and supporting the implementation of the [TRC’s] Calls to Action.”⁴⁸

Further, Isaac and Hoekstra are repeating an error originally found in Isaac’s book *Aboriginal Law*, 5th ed.⁴⁹ This is the failure to interpret specific provisions in the *UN Declaration* in the context of the whole instrument. In article 46(3), the *UN Declaration* includes one of the most comprehensive balancing provisions in any international human rights instrument:

The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

These are core principles in both the Canadian and international legal system. They are also the principles that have been denied Indigenous peoples throughout history. These basic principles in article 46(3) and in the 18th preambular paragraph⁵⁰ of the *UN Declaration* were originally crafted in Geneva by representatives of Indigenous peoples from Canada together with officials of the government of Canada.⁵¹ Other State governments were then lobbied by Canada and Indigenous representatives to support this balanced approach.

In their criticism of Bill C-262 and the *UN Declaration*, Isaac and Hoekstra have failed to apply basic rules of interpretation. Instead of interpreting specific provisions in the context of the *whole Declaration*, the two authors appear to engage in an overall strategy to undermine Bill C-262 and the *UN Declaration* as extreme to its core.⁵²

In view of such strategies, it is instructive to also examine Tom Isaac's analysis in his book *Aboriginal Law*.⁵³ At page 63, Isaac seeks to minimize the significance of the vote on the *UN Declaration* at the General Assembly in September 2007, when the vote was 144 States in favour, 4 against and 11 abstaining:

Of those 88 states with Indigenous peoples 42 (less than half) voted in favour. 11 states abstained and 16 were absent for the vote. Further, many of the states that voted in favour of UNDRIP **placed conditions or caveats on their vote**, similar to what Canada did when it ultimately endorsed UNDRIP. **In 2016, Canada removed its objector status to UNDRIP** and stated it would adhere to UNDRIP in a manner consistent with Canadian law.

However, as indicated in the *Rules of Procedure of the General Assembly*, the phrase “members present and voting” means members casting an affirmative or negative vote.⁵⁴ Members which abstain from voting are considered as not voting.⁵⁵ In other words, votes in the General Assembly are not given significance based on whether Indigenous people are living in each member State that approved a resolution. In addition, those States that abstain are considered as not voting. The vote was 144 in favour and 4 against – and that was a major victory for Indigenous peoples.

Even among States with Indigenous peoples, Isaac failed to correctly add up the numbers. 57 States with Indigenous peoples voted in favour of the *UN Declaration* and only 4 voted against. Contrary to Isaac's calculations, a clear majority voted in favour. Isaac's method of focusing solely on votes among States with Indigenous peoples runs counter to how votes are calculated in the UN General Assembly.

Isaac adds that many of the States voting in favour placed “conditions or caveats” on their vote. This is also inaccurate. None of the affirmative votes can be subject to specific conditions or caveats. Otherwise, the General Assembly would not be able to function – especially if the 193 States all had different variations in their affirmative positions! If States wished to object, they would have had to vote “no”.

It is also **erroneous for Isaac to state in his book that: “In 2016, Canada removed its objector status to UNDRIP”**. Canada endorsed the *UN Declaration* on November 12, 2010. Although Canada had concerns, those were not objections. Moreover, the Conservative government clearly stated at the time: “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.”⁵⁶

It is difficult to comprehend why Isaac would devote space in his book to inaccurately and unjustly seek to diminish the status of the *UN Declaration* with such specious arguments. As indicated on the Thomson-Reuter website, the 5th edition of Isaac’s book was published in mid-October 2016.⁵⁷ Isaac should have known that, prior to the end of December 2015, the *UN Declaration* **had already been reaffirmed three times by consensus** by the General Assembly.

It is a grave injustice to Indigenous peoples and to his readers that Isaac’s book is spreading such false and incomplete information. As illustrated below, the book includes other serious errors.

In *Aboriginal Law*, 5th edition, Isaac includes the following public statement from then Minister of Aboriginal Affairs and Northern Development Chuck Strahl:

In Canada, you are balancing individual rights versus collective rights, and **[UNDRIP] has none of that**. ... By signing on, you default to this document by saying that the **only rights in play here are the rights of First Nations**. And, of course, in Canada, that's inconsistent with our Constitution⁵⁸

Isaac failed to verify this extreme and erroneous statement by a quick search for the term “individual” in the *UN Declaration*. Contrary to the Minister’s statement, seventeen provisions in the *Declaration* address individual rights. These are: preambular paragraphs 4 and 22 and articles 1, 2, 6, 7, 8, 9, 14, 17, 21, 22, 24, 33, 40, 44 and 46.

Isaac & Hoekstra

Uncertain “Objectives”

[In Bill C-262], Section 5 requires that Canada must implement an action plan to achieve the “objectives” of UNDRIP. A search through UNDRIP reveals no description of “objectives.” Instead, UNDRIP provides 24 preambular statements and 46 articles, most of which are broadly phrased and none of which are referred to as “objectives” or “principles” (the word used in the preamble to Bill C-262).

Joffe Comment:

The relevant “objectives” in each case are based on applying the relevant provisions of the *Declaration* – which may well differ depending on the facts and law in each case. Art. 38 refers to the “ends” of the *Declaration*, which is the same or similar to “objectives”.

Isaac & Hoekstra
Uncertain Results

Bill C-262 does not state what the actual intended outcome of the **adoption** of UNDRIP will be and how it will compare with those protections already existing under s. 35. Generally, it appears that the Bill is intended to expand the protection of Indigenous rights in Canada, however the specific intended outcomes, and the benchmarks used to determine whether implementation is successful, are not disclosed. As a consequence, Bill C-262 offers a “**wait and see**” **approach** to determining what the actual consequences of the Bill may be. Such an approach appears inconsistent with the basic expectations of government in a democratic society. It also risks creating substantial uncertainty regarding the vast amount of existing law in Canada dealing with Aboriginal and treaty rights.

Joffe Comment:

First, as previously indicated, Bill C-262 does not “adopt” the *UN Declaration*. The Bill affirms UNDRIP’s application to federal law. Second, Isaac and Hoekstra are fabricating a problem that does not exist. Canadian courts, especially the Supreme Court of Canada, will not generally issue rulings without a contextual analysis taking into account the facts and law in each case. It is outrageous to expect to know now the outcome of every situation without any applicable facts and laws. This is certainly not the “basic expectations of government in a democratic society”. Isaac’s statement is clearly inconsistent with the Supreme Court of Canada’s ruling in *Sparrow v. The Queen*, which calls for a contextual approach:

We wish to emphasize the **importance of context and a case-by-case approach** to s. 35(1). Given the generality of the text of the constitutional provision, and especially in light of the complexities of aboriginal history, society and rights, the contours of a justificatory standard **must be defined in the specific factual context of each case.**⁵⁹

Human rights instruments, such as the *UN Declaration*, are generally drafted in broad terms so as to accommodate a wide range of circumstances both foreseen and unforeseen. Should any human rights dispute arise, a “contextual analysis” would take place based on the particular facts and law in a specific situation. This is the just approach that is generally accepted in both international⁶⁰ and domestic⁶¹ law.

Isaac & Hoekstra

The drafting challenges within Bill C-262, noted above, are symptomatic of a larger issue: incorporating a deliberately general document (designed to address realities for Indigenous peoples throughout the world) into the sophisticated Canadian Indigenous rights regime using a broadly drafted and simplistic legislative tool.

Joffe Comment:

It is wholly appropriate to have broadly worded international human rights instrument to apply in diverse countries in different regions of the world. To suggest otherwise is misinformed. The same approach occurs in regard to the application of international human rights instruments to rights and related State obligations in the *Canadian Charter of Rights and Freedoms*.

In *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, the Supreme Court of Canada ruled:

... the *Charter*, as a **living document**, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*.⁶²

Section 35(1) of the *Constitution Act, 1982* is also drafted in general terms: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” This has not prevented courts from interpreting its contents and significance.

Yet the same type of flawed argument used by Isaac in his book *Aboriginal Law* in order to discredit free, prior and informed consent (FPIC), where an absolutist interpretation is erroneously suggested:

The concept of FPIC contained in UNDRIP is also problematic in the Canadian legal context because it **does not refer to any sort of balancing mechanism**, unlike s. 35, to account for the rights of others, possibly suggesting that **Aboriginal rights should always be interpreted to prevail over rights of other affected individual or groups**.⁶³

It appears that **Isaac did not read the whole text** of the *UN Declaration* or else he would have applied article 46(3) – one of the most comprehensive balancing provisions in any international human rights instrument. Isaac is also incorrect in claiming that s. 35 includes a “balancing mechanism” to account for the rights of others.⁶⁴ That role has been assumed by Canadian courts.

In order to discredit FPIC in his book, Isaac committed another serious error. Isaac claims that FPIC in the *UN Declaration* is less “flexible” and “narrower in scope” than what is in article 16 (relocation) of the *Indigenous and Tribal Peoples Convention, 1989*.⁶⁵ However, article 35 of this *Convention* provides that application of its provisions “shall not adversely affect rights and benefits of the peoples concerned pursuant to other ... international instruments”. Such instruments would include the *UN Declaration*.⁶⁶ Thus, in interpreting article 16 of the *Convention* in isolation, Isaac adopted an erroneous approach that falsely inflated its meaning and effect.

Once again, author **Thomas Isaac did not read the whole instrument**. Especially in relation to issues relating to consent, this ILO Convention cannot be interpreted in isolation from the *UN Declaration* and other international instruments. As emphasized by the ILO: “Differences in legal status of UNDRIP and Convention No. 169 should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples ... The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing.”⁶⁷

As affirmed in the 7th preambular paragraph of the *UN Declaration*, the rights in the *UN Declaration* are “inherent” or pre-existing. No new rights are created in this human rights instrument. Moreover, Canada has international obligations relating to “consent”. To cite just one example,⁶⁸ the *Committee on Economic, Social and Cultural Rights* has affirmed:

In relation to Indigenous peoples, the following “**minimum core obligation**” of States Parties is “applicable with immediate effect”:

...

States parties should obtain their **free and informed prior consent** when the preservation of their **cultural resources**, especially those associated with their way of life and cultural expression, are at risk.⁶⁹

Canada ratified this International Covenant in May 1976. Thus, for over forty years, Canada has failed to meet its international obligations relating to consent.

Isaac & Hoekstra

UNDRIP into Canadian Law: The Need for a Nuanced Approach

The creation of UNDRIP, and the embrace of the principles therein, has been a critical international step forward for the recognition and protection of the rights of Indigenous peoples globally. In this context, UNDRIP provides an important benchmark in a world which has too often harmed, mistreated, and exploited Indigenous peoples.

While UNDRIP reflects critical elements of Indigenous rights through a lens of human rights, it was designed as a global benchmark and guide, rather than a specific legal instrument to be directly implemented as law. The fact that UNDRIP is a declaration and not a convention makes this clear. Conventions are binding agreements intended to be a reflection of international law and to be incorporated into national laws. Declarations, in contrast, are statements of generally agreed-upon standards which are not themselves legally binding. UNDRIP was not negotiated or drafted to be a comprehensive, implementable, legal regime, and as such, in the Canadian context and the context of Bill C-262, it is inconsistent, deficient, and a potential hindrance to reconciliation.

Joffe Comment:

Isaac and Hoekstra are inaccurate to suggest that the *UN Declaration* is being “directly implemented as law”. The authors are again confusing wholesale “adoption” of the *UN*

Declaration into Canadian law with “application”. In any event, a contextual analysis would be undertaken by the courts.

It is incorrect for the authors to state that the *UN Declaration* was “not negotiated or drafted to be a comprehensive, implementable, legal regime”. The *UN Declaration* is “the most comprehensive and universal international human rights instrument explicitly addressing the rights of Indigenous peoples. ... It affirms a wide range of political, economic, social, cultural, spiritual and environmental rights.”⁷⁰ In regard to the *UN Declaration*, a system-wide action plan is currently being implemented throughout the United Nations.⁷¹

Also, in February 2012, the former federal government led by Stephen Harper indicated to the UN Committee on the Elimination of Racial Discrimination: “While [the *UN Declaration*] had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, **including the Constitution.**”⁷²

Further, article 38 of the *UN Declaration* explicitly contemplates “legislative measures” by States. Article 42 adds: “States shall promote **respect for and full application** of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

International declarations are not binding in the same manner as treaties, but they do have diverse legal effects.⁷³ As the former Special Rapporteur on the rights of indigenous peoples James Anaya emphasized in his August 2010 report: “... 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 [United Nations] Charter, other treaty commitments and customary international law.** The Declaration ... is grounded in fundamental human rights principles such as **non-discrimination, self-determination and cultural integrity**”⁷⁴

Also, the International Law Association has highlighted: “In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified that “in United Nations practice, a ‘declaration’ is a solemn instrument resorted to only in very rare cases relating to **matters of major and lasting importance where maximum compliance is expected**”. **UNDRIP is such a declaration deserving of utmost respect.**”⁷⁵

Isaac & Hoekstra

Canada’s Indigenous Rights Regime Overview

Indigenous rights are not new in Canada: through s. 35 and the general protections for human rights set out in the *Canadian Charter of Rights and Freedoms*, Canada has developed one of the world’s most sophisticated legal regimes for protecting Aboriginal and treaty rights, including in its constraint of unilateral state action. This has been accomplished in large part through the

effective efforts of Indigenous peoples themselves litigating in Canada's courts. With a focus on reconciliation, the SCC has regularly constrained the exercise of Parliamentary authority for the purpose of protecting Indigenous rights ([as seen in the SCC's 2017 Peel River Watershed decision](#)), while also allowing for necessary and unavoidable infringement of Indigenous interests where such interests conflict with broader, substantial social interests.

Section 35 and Reconciliation

In introducing Bill C-262 to a second reading, Mr. Saganash said that the Bill promises “to at least provide the basis or framework for reconciliation in our country,” suggesting a new approach to Indigenous rights focused on reconciliation. Yet, reconciliation between Canada and its Indigenous peoples has been a constitutional principle in Canada for more than two decades. In 1996, SCC Chief Justice Lamer said s. 35 “provide[s] the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown.”³ Significant progress on the road to reconciliation has been made in Canada in recent decades, and will continue through the pursuit of honest dialogue, transparency of process, and shared expectations.

Joffe Comment:

In *Haida Nation*, the Supreme Court of Canada emphasized: “Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty”.⁷⁶ Yet the SCC has not followed up on such an essential and relevant legal perspective. Indigenous peoples’ sovereignty is not highlighted at all by the two authors.

Isaac and Hoekstra paint an unjustifiably rosy picture of reconciliation. They also fail to take into account or even mention ongoing colonialism.⁷⁷ This further skews their overall analysis. In contrast, MP Romeo Saganash has taken an important step in addressing colonialism, providing a collaborative legislative framework for implementing the *UN Declaration* and advancing reconciliation through Bill C-262.

Former Special Rapporteur James Anaya has emphasized that the “[UN] Declaration is fundamentally a remedial instrument, aimed at overcoming the marginalization and discrimination that indigenous peoples systematically have faced across the world as a result of historical processes of colonization and dispossession.”⁷⁸ The *International Convention on the Elimination of All Forms of Racial Discrimination* affirms that the “United Nations has **condemned colonialism** and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist”.⁷⁹

The impacts of colonialism, displacement, residential schools and other severe human rights abuses have resulted in diverse adverse effects passed on to successive generations. To some extent, the far-reaching and ongoing impacts have been acknowledged by the Supreme Court of Canada:

“Courts have, at times, been hesitant to take judicial notice of the systemic and background factors affecting Aboriginal people in Canadian society ... **To be**

clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples.”⁸⁰

Indigenous peoples and individuals must not have to continue to live in poverty,⁸¹ dispossessed of their lands, territories and resources, and living with inadequate essential services. All of these aspects entail human rights issues in international and Canadian law. It is critical for Canada to reject colonialism⁸² in favour of a contemporary framework solidly based on the *UN Declaration* and other human rights law.

Isaac & Hoekstra

Reconciliation is not a simple process. According to the SCC, true reconciliation seeks to take into account Indigenous perspectives and the common law perspective, placing equal weight on each.⁴ Under Canada’s existing Indigenous rights regime, the principle of reconciliation is used to constrain and limit government action when Indigenous interests may be impacted. However, the SCC has also used reconciliation as a vehicle for recognizing that at times, broader public interests will justify potential incursions on Indigenous rights. “[Since] distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), *some limitation of those rights will be justifiable* [emphasis added].”⁵

Joffe Comment:

In my respectful view, the authors and the Supreme Court of Canada have not adequately taken “Indigenous perspectives and the common law perspective, placing equal weight on each”. Pre-existing Indigenous sovereignty and governance have not been sufficiently respected and implemented by Canada’s highest court. However, this is not even mentioned by Isaac and Hoekstra.

Yes, some “limitations” are permissible since human rights are generally relative and not absolute.

Special measures are required, in view of the **vulnerabilities** of Indigenous peoples resulting from colonialism and its ongoing effects; residential schools; racial discrimination; widespread dispossession of Indigenous peoples’ lands, territories and resources; impoverishment; and severe violations of their human rights.

Although not considered by Isaac and Hoekstra, the vulnerabilities of Indigenous peoples are an essential factor that must be addressed – especially in the context of proposed developments by third parties. As underlined by the Secretariat of the Permanent Forum on Indigenous Issues; “Indigenous peoples have a profound spiritual, cultural, social,

economic and political relationship with their territories. This is a relationship that defines who they are as peoples. Lands and territories are crucial not only to the well-being of indigenous peoples but to their very existence as distinct peoples.”⁸³ For present and future generations, there is a great deal at stake.

Isaac & Hoekstra

UNDRIP does not use the word “reconciliation” and does not give specific consideration to how Indigenous and non-Indigenous peoples can respectfully coexist. The **omission of any reference to “reconciliation” within UNDRIP appears intentional**: in countries without constitutional constraints on the exercise of power, the protections for Indigenous rights under UNDRIP, even when enacted into law, are subject to governmental discretion. This is different from Canada’s internationally unique legal regime, where the principle of reconciliation means that democratically elected governments are constrained from unjustified interference with Indigenous interests.

Joffe Comment:

Section 35, as well, generally affirms Aboriginal and treaty rights and makes no mention of reconciliation. The Supreme Court of Canada has interpreted s. 35 as including the promise of reconciliation. In analogous manner, the UN Secretary-General and UN mechanisms such as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and the UN Permanent Forum on Indigenous Issues have all highlighted that the *UN Declaration* is an instrument of reconciliation.⁸⁴

For example, EMRIP has concluded: “The United Nations Declaration on the Rights of Indigenous Peoples constitutes a principled framework for **justice, reconciliation, healing and peace**. It affirms that the United Nations, its bodies and specialized agencies, and States have a duty to promote respect for and full application of the provisions of the Declaration and follow up on its effectiveness. Full implementation of the Declaration necessarily entails the protection and promotion of indigenous peoples’ right to access to justice and to effective remedies.”⁸⁵

Isaac and Hoekstra provide no evidence whatsoever for claiming that the “omission of any reference to ‘reconciliation’ within UNDRIP appears intentional: in countries without constitutional constraints on the exercise of power”. This assertion has no basis in fact and is not supported by the evidence. The term “reconciliation” is not found in core international human rights instruments, such as the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights*, and *International Covenant on Economic, Social and Cultural Rights*. In addition, “reconciliation” is not found in the *Canadian Charter of Rights and Freedoms*.

Although the authors emphasize reconciliation, they fail to mention or take into account the Truth and Reconciliation Commission of Canada and its 94 Calls to Action. In particular, it is critical to consider TRC Call to Action 43, which calls upon “federal, provincial, territorial, and municipal governments to fully adopt and implement” the *UN*

Declaration as “the framework for reconciliation”. As a result, the **TRC Calls to Action are inseparably linked to the *UN Declaration***. By opposing Bill C-262 which explicitly relies upon the TRC Calls to Action, Isaac and Hoekstra are severely undermining Canada’s national reconciliation initiative as well as the *UN Declaration*.

Isaac & Hoekstra

Free and Informed Prior Consent

Within the Canadian context, certain elements of UNDRIP appear inconsistent with our highly-tuned concept of reconciliation. The most significant of these elements is the concept of “free and informed prior consent.” **UNDRIP requires governments to obtain “free and informed consent” prior to developing any project affecting (not merely on) lands and territories of Indigenous peoples.**⁶ All lands in Canada, from downtown Toronto, to the remote edges of the Arctic, are the traditional territories of one, and often more than one, Indigenous peoples. UNDRIP also requires that governments seek “free, prior and informed consent” before implementing legislative or administrative measures that may affect Indigenous peoples.⁷

UNDRIP’s focus on free and prior informed consent appears to be generally unworkable in the Canadian context. While negotiation may be effective with a few Indigenous groups, **larger projects such as pipelines may be unworkable where even a single Indigenous group objects.** Similarly, requiring that any general legislation first receive the consent of Indigenous governments risks making Canada’s democratic process unworkable and appears to be inconsistent with the general principles of Canadian federalism. Under the *Constitution Act, 1867*, **governance powers were divided between federal and provincial governments.** While courts have allowed both levels of government to regulate the same area, the SCC has been clear that conflicting regulation will be inoperative against the authorized government’s regulations.⁸ **Allowing Indigenous governments to veto (the effect of requiring the consent of all Indigenous peoples involved) laws and projects** regulated by either the federal or provincial governments creates an overlap of authority unintended and incompatible with the principles of federalism developed over the past 150 years.

Joffe Comment:

Isaac and Hoekstra wrongly assume that FPIC is synonymous with “veto”, which term is not used in the *Declaration*. They fail to provide any definition of “veto” and appear to address **FPIC as an absolute right** – not requiring a balancing of the rights of different parties. Since human rights are generally relative in nature and not absolute, it is disturbing that the two lawyers are providing such erroneous, self-serving analysis to discredit the *UN Declaration*.

At the international level, the application of FPIC to Indigenous peoples is supported by the UN General Assembly;⁸⁶ UN Secretary-General;⁸⁷ Office of the High Commissioner for Human Rights;⁸⁸ UN treaty bodies;⁸⁹ specialized agencies;⁹⁰ UN special rapporteurs;⁹¹ Permanent Forum on Indigenous Issues;⁹² and Expert Mechanism on the Rights of Indigenous Peoples.⁹³ None of these entities, bodies and mechanisms describe FPIC as a

“veto”. The same is true for the Inter-American Court of Human Rights⁹⁴ and the African Commission on Human and Peoples’ Rights.⁹⁵

In its August 2016 report, the UN Working Group on the issue of human rights and transnational corporations and other business enterprises elaborated on the meaning of the terms “free”, “prior” and “informed” consent in the Indigenous context:

The **core elements of free, prior and informed consent** can be summarized as follows:

- “Free” implies that there is no coercion, intimidation or manipulation, and that the communities are consulted through their self-chosen representatives.
- “Prior” implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.
- “Informed” implies that communities have been provided with all the information relating to project plans and activities, and the potential impacts on their rights, and that the information is objective, accurate and presented in a manner and form understandable to them.⁹⁶

These three elements are consistent with the meaning of “consent” in Canadian law. In particular, if there is duress, there is no valid consent. The same is true if consent is sought only after a project is initiated, or if the information provided is inadequate or is misrepresented.

In regard to “consent”, the Working Group concluded: “‘Consent’ must be the objective of consultation, and implies that all affected peoples and communities have the opportunity to decide if they agree to the proposed project or not. This **process must include the option of withholding consent.**”⁹⁷ This conclusion clearly makes sense. It would be absurd to conclude that Indigenous peoples have the right to say “yes”, but not the right to say “no” – even in the most damaging circumstances.

As explained above, there is no basis for the absolutist analysis of Isaac and Hoekstra. Nor can one assume that the federal principle solely includes federal and provincial governments and excludes Indigenous governments. The Royal Commission on Aboriginal Peoples has underlined: “[Section 35 of the *Constitution Act, 1982*] serves to confirm the status of Aboriginal peoples as equal partners in the complex federal arrangements that make up Canada. It provides the basis for recognizing **Aboriginal governments as constituting one of three orders of government in Canada ...**”⁹⁸

K.C. Wheare describes the federal principle as “the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent.”⁹⁹ Jean Leclair adds: “Any definition of Canadian federalism that ignores Québec’s (and aboriginal peoples’) distinctiveness will never be legitimate.”¹⁰⁰

Paul Joffe and Willie Littlechild have also emphasized: “from a Canadian constitutional perspective, it should be made clear that the ‘federal principle’ includes Aboriginal peoples and their governments, as well as federal and provincial governments. For a wide range of purposes, Indigenous participation should be based on both the right of self-determination and the federal principle.”¹⁰¹

The Supreme Court in the *Secession Reference* has indicated that the “principle of federalism remains a central organizational theme of our Constitution ... [C]ertainly of equal importance, federalism is a political and legal response to underlying social and political realities.”¹⁰² These realities include Aboriginal peoples, as highlighted more recently by the entrenchment of s. 35(1) of the *Constitution Act, 1982*.

Further, it is misleading for Isaac and Hoekstra to state: “Under the *Constitution Act, 1867*, governance powers were divided between federal and provincial governments.” As indicated in *Campbell v. British Columbia (Attorney General)*: “A consideration of ... various observations by the Supreme Court of Canada supports the submission that **aboriginal rights, and in particular a right to self-government akin to a legislative power to make laws**, survived as one of the unwritten ‘underlying values’ of the Constitution outside of the powers distributed to Parliament and the legislatures in 1867. The federal-provincial division of powers in 1867 was aimed at a different issue and was a division ‘internal’ to the Crown.”¹⁰³

Isaac & Hoekstra

Interestingly, and suggestive of the global context in which UNDRIP was developed, while UNDRIP provides Indigenous peoples with a general veto power over legislation and economic activity, it provides only one justification for unapproved activities in Indigenous territories: military activities.⁹ **Other than a requirement to undertake consultation, UNDRIP provides no constraint on the conduct of military activities in Indigenous territories.**

Joffe Comment:

It is erroneous for Isaac and Hoekstra to again attribute a “general veto power” to the *UN Declaration* in order to portray it in extremist terms. To suggest that the *UN Declaration* “provides Indigenous peoples with a general veto power over legislation and economic activity” is simply a bad interpretation.

In my view, “veto” implies an absolute power, regardless of the facts and law in any given case. It is unhelpful to select a term such as “veto” that is not used in the *UN Declaration* and which the authors have failed to define. Yet they claim that this is what “free, prior and informed consent” means. Such an approach runs directly counter to article 46(3) of the *UN Declaration*, which affirms in effect that the rights in this human rights instrument are relative and not absolute.¹⁰⁴

In addition, the two authors interpret individual provisions, such as the article relating to the military, in an isolated manner – rather than in the context of the whole declaration

and relevant international human rights law. Article 46(3) applies to every provision in the *UN Declaration*. This would necessarily include article 30 relating to military activities in Indigenous territories.

In addition, article 10 of the *UN Declaration* may also apply to the military: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” It would not be in the “public interest” for Canada’s military to forcibly remove Indigenous peoples from their lands or territories.¹⁰⁵

Isaac & Hoekstra

Indigenous Rights and Human Rights

In introducing Bill C-262, Mr. Saganash discussed how the fundamental rights of Indigenous peoples are human rights. “This is the main objective of Bill C-262, to recognize that on one hand they [Indigenous rights] are human rights.”¹⁰

In the Canadian context, describing Indigenous rights as human rights may not be helpful. Human rights, including those protected by the *Canadian Charter of Rights and Freedoms*, are the creation of, and may be derogated through, the democratic process enshrined in our Parliamentary system. Aboriginal rights are of a different kind, resulting not from our Parliamentary system but rather from the fact that “when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries [emphasis in original].”¹¹ **By failing to reflect the important distinction between Indigenous rights and human rights generally, UNDRIP appears, once again, to be a unsophisticated tool in comparison to the highly tuned Canadian Indigenous rights regime** which has evolved over 25 years and through more than 70 decisions by the SCC.

Joffe Comment:

It is unfortunate that the authors advance their own speculation as they move along, with no apparent knowledge of international human rights law. They are wildly out of step with the international human rights system, as well as key jurists from Canada and around the world.

For over 35 years, Indigenous peoples’ rights have been addressed within the UN human rights system. International human rights are inherent or pre-existing. In its Agenda and Framework for the programme of work, the UN Human Rights Council has permanently included the “Rights of peoples, and specific groups and individuals” under the heading “Promotion and protection of all human rights”.¹⁰⁶

The Office of the High Commissioner for Human Rights includes in its list of “universal human rights instruments” in international law both the *UN Declaration on the Rights of Indigenous Peoples* and the *Indigenous and Tribal Peoples Convention, 1989*.¹⁰⁷

Similarly, the International Law Association also concludes:

... the Committee on the Rights of Indigenous Peoples of the International Law Association expresses the **following conclusions and recommendations**:

1. Indigenous peoples are holders of collective human rights aimed at ensuring the preservation and transmission to future generations of their cultural identity and distinctiveness. Members of indigenous peoples are entitled to the enjoyment of all internationally recognized human rights – including those specific to their indigenous identity – in a condition of full equality with all other human beings.¹⁰⁸

The UN Permanent Forum on Indigenous Issues has also underlined: “the adoption of the United Nations Declaration on the Rights of Indigenous Peoples in 2007 was a milestone in the recognition of the human rights of indigenous peoples.”¹⁰⁹

The UN Global Compact’s *Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* highlights:

The Declaration illustrates the interdependent and indivisible nature of international human rights norms and standards. Indigenous peoples’ rights are, by definition, collective rights. While also including rights of individuals, the extent to which collective rights are recognized in the Declaration indicates that the international community affirms that **indigenous peoples require recognition of their collective rights as peoples to enable them to enjoy human rights.**¹¹⁰

In addition, the UN Development Programme has made clear that it “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).”¹¹¹

In challenging Indigenous peoples’ human rights, Isaac and Hoekstra are out-of-step with the position of the international community, including Canada. As highlighted on Canada’s website:

Human rights are central to the achievement of sustainable development, peace and security.

Promoting respect for human rights, **as set out in international law**, is a **priority** for Canada. ...

...

Human rights defenders sometimes focus on specific categories of rights or the rights of specific persons. These may include women’s rights; children’s rights; ... **the rights of Indigenous peoples; rights related to land, natural resource management and the environment** ...¹¹²

Canada's position is accurate – the “2030 Agenda is unequivocally anchored in human rights.”¹¹³ As highlighted in *Transforming Our World: The 2030 Agenda for Sustainable Development*:

We resolve, between now and 2030, to **end poverty** and hunger everywhere; ... to **protect human rights** and **promote gender equality** and the empowerment of women and girls; and to **ensure the lasting protection of the planet and its natural resources**.¹¹⁴

... we pledge that **no one will be left behind**. ... we wish to see the Goals and targets met **for all nations and peoples** and for all segments of society. And we will endeavour to **reach the furthest behind first**.¹¹⁵

It is important to underline that the *2030 Agenda* has been reaffirmed to date at least nine times by the General Assembly by consensus.¹¹⁶ In addition, the General Assembly has stressed “the need to ensure that **no one is left behind, including indigenous peoples**, who will benefit from and participate in the implementation of the 2030 Agenda”.¹¹⁷

Thus, sustainable development is inextricably linked to eliminating the impoverishment of Indigenous peoples and individuals, as well as safeguarding their human rights. In January 2008, the Canadian Human Rights Commission emphasized the human rights quality of Indigenous peoples' collective and individual rights:

... human rights have a dual nature. **Both collective and individual human rights must be protected**; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of rights without diminishing either.¹¹⁸

See also the Government of Canada's *A Canada for All: Canada's Action Plan Against Racism*:

Canada is also an active participant in negotiations to finalize a UN Declaration on the Rights of Indigenous Peoples. Canada's objective is to achieve a strong and effective statement **addressing the human rights and fundamental freedoms of indigenous peoples and individuals**.¹¹⁹

Further, Canada's Core Document forming part of all of its reports to human rights bodies in the United Nations includes “Aboriginal and treaty rights” in section 35 of the *Constitution Act, 1982* under the headings for “promotion and protection of human rights”:

III General framework for the promotion and protection of human rights

...

B. Legal framework for protecting human rights at the domestic level

...

Constitutional and legal rights of Aboriginal peoples

...

Article 35 of the Constitution Act, 1982 recognizes and affirms, that is to say protects, two kinds of special rights. These rights, which are collective in nature, are called Aboriginal and treaty rights. All levels of government—federal, provincial, territorial, municipal and Aboriginal—are obliged to respect Aboriginal and treaty rights.¹²⁰

In relation to Indigenous peoples, Isaac and Hoekstra repeatedly demonstrate their profound lack of understanding as to how human rights are applied internationally and in Canada – and how the two are interrelated. Instead, the two authors recklessly fabricate their own theories relating to Indigenous peoples’ human rights and the *UN Declaration*. Such actions are highly prejudicial to Indigenous peoples and demonstrate no respect for their inherent human rights.

As affirmed by consensus in the 2012 *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*: “**human rights, the rule of law and democracy are interlinked and mutually reinforcing** and ... they belong to the universal and indivisible core values and principles of the United Nations.”¹²¹ By undermining Indigenous peoples’ human rights, the rule of law and democracy as they relate to Indigenous peoples would also be significantly affected.

In 2016, the General Assembly reaffirmed by consensus the “fundamental link between democratic governance, **peace, development** and the promotion and protection of **all human rights** ... which are interdependent and mutually reinforcing”.¹²² Thus, the promotion and protection of Indigenous peoples’ human rights are also crucial for democratic governance, peace and development.

Isaac & Hoekstra

Variety and Substance of Rights

Not all Indigenous rights, and impacts to rights, are equal. Within the Canadian context there exists Aboriginal rights (including Aboriginal title) and treaty rights. Oftentimes these rights will overlap, with multiple Indigenous peoples holding Aboriginal and treaty rights over a single area of land. The Canadian Indigenous rights regime has developed processes for prioritizing these rights as against government activity. This process ensures that appropriate protections are provided for Indigenous rights and that those most impacted are the greatest beneficiaries of any resulting accommodation measures.

UNDRIP does not contemplate overlapping rights, a variety of rights, or the degree such rights may be impacted by government action. This causes several challenges when contemplating the adoption of UNDRIP into Canadian law. First, UNDRIP provides veto powers unrelated to Indigenous rights: Indigenous consent is required whether or not a traditional right is impacted.

This may require governments to provide the same degree of deference and accommodation to Indigenous governments with substantially different interests in a region, and may, as a consequence, inhibit Indigenous peoples from advancing their own economic interests on their traditional territories. Second, by disassociating the power to constrain government actions from the actual harm incurred, accommodation or other benefits obtained by Indigenous groups in exchange for the solicited consent are likely to be measured in relation to the benefits received by non-Indigenous persons, potentially undermining reconciliation by creating long-term ongoing conflict between the interests of Indigenous and non-Indigenous peoples.

Joffe Comment: Again, it appears that Isaac and Hoekstra are oblivious or ignorant of arts. 46(2) and (3) of the *UN Declaration*. Indigenous consent is again erroneously interpreted as an absolute veto, and adding that such veto powers are “unrelated to Indigenous rights”. This is pure fiction. Therefore, the ensuing analysis is also deeply flawed.

The two authors speak generally of “government actions” and impacts, but fail to even mention the environment – a matter of far-reaching concern and significance to Indigenous peoples. As the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John Knox, has emphasized: “For indigenous peoples, forest-dwellers, fisherfolk and others who rely directly on the products of forests, rivers, lakes and oceans for their food, fuel and medicine, environmental harm can and often does have disastrous consequences.”¹²³

The Special Rapporteur adds that “the loss of ecosystem services and biodiversity threatens a broad spectrum of rights, including the rights to life, health, food, water, culture and non-discrimination. States therefore have a general obligation to safeguard biodiversity in order to protect those rights from infringement. That obligation includes a duty to protect against environmental harm from private actors, and businesses have a responsibility to respect the rights relating to biodiversity as well”.¹²⁴

As stressed by the Special Rapporteur, “States have heightened duties with respect to those who are particularly **vulnerable to environmental harm** ... [I]ndigenous peoples and others who closely depend on nature for their material and cultural needs are especially vulnerable to actions that adversely affect ecosystems. States should ensure that such actions, whether carried out by Governments or private actors, do not prevent the enjoyment of their human rights”.¹²⁵ In this whole context, the Special Rapporteur makes explicit reference to the *UN Declaration* and “free, prior and informed consent”.¹²⁶

Isaac & Hoekstra Concerns with UNDRIP

Indigenous rights are a fundamental element of Canada’s legal system. They have evolved to reflect First Nations, Inuit, and Métis, the history of this nation, and the reality of Crown sovereignty. In 1982 Canada enshrined the protection of Aboriginal and treaty rights within its

Constitution, and in the years following, courts have, through many hundreds of judicial decisions, developed a legal regime intended to justly and effectively protect the rights of Indigenous peoples in a manner consistent with the principles of a free and democratic society.

UNDRIP should be embraced as a benchmark for enhancing global protections for Indigenous peoples. Within Canada, governments should consider the concepts of UNDRIP and the importance of Indigenous rights. However, by mandating the imposition of UNDRIP into the highly tuned Canadian Indigenous rights regime, Bill C-262, *as it is currently drafted*, risks introducing substantial uncertainty and further rhetoric into the Canadian Indigenous rights regime in the pursuit of opaque objectives.

Joffe Comment:

As repeatedly elaborated above, the authors appear to exhibit an ignorant and racially discriminatory approach to Bill C-262 and the *UN Declaration*. Yet the authors are silent as to the fact that TRC Call to Action calls upon federal, provincial, territorial and municipal governments to **adopt the *Declaration* as “the framework” for reconciliation**. The authors appear oblivious as well that Call to Action 44 calls for the Canadian government to develop a “national action plan ... to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.” Clearly, such Calls to Action allow for consideration of the rights of all.

It is worth reflecting on the words of Senator and former Justice Murray Sinclair in his message of support for Bill C-262:

For there to be true reconciliation, there must be institutional change as well. Much of what has been enacted since Confederation as the laws of this country have been tainted by rationales, terminology and intent that have been fundamentally racist. In many ways, Canada waged war against Indigenous peoples through Law, and many of today’s laws reflect that intent. The Indian Act is the leading example, but it is not alone. Other laws and policies need to be scrutinized with an eye to reconciliation and where found lacking, will need to be changed.

The **full adoption and implementation of the UN Declaration on the rights of Indigenous Peoples** will not undo the War of Law, but it will begin to address that war’s legacies.¹²⁷

Isaac & Hoekstra

The suggestion that Bill C-262 offers an avenue for reconciliation must be examined critically. “Reconciliation” has become *le mot de jour* for all Indigenous rights efforts. Reconciliation is more than creating goodwill or the implementation of government through consensus. Reconciliation requires truth, clarity, forthrightness, and predictability for Indigenous and non-Indigenous peoples alike. Reconciliation must help Indigenous and non-Indigenous peoples move forward, in confidence and with certainty, **together towards a sustainable future**. As

presently drafted, Bill C-262 appears incapable of advancing the objectives it sets out to achieve. All peoples in Canada, Indigenous and non-Indigenous, should insist upon clear, precise, and nuanced approaches to legislation addressing such important and foundational matters to our country as reconciliation and the respect for Aboriginal and treaty rights.

Joffe Comment:

In this final paragraph of their paper, Isaac and Hoekstra indicate: “Reconciliation must help Indigenous and non-Indigenous peoples move forward, in confidence and with certainty, together towards **a sustainable future.**” Yet, as illustrated in my commentary, the authors have clearly moved in the opposite direction.

Although unsuccessful, Isaac and Hoekstra have made a deliberate attempt to seriously undermine the *UN Declaration on the Rights of Indigenous Peoples*; discredit Bill C-262; and devalue the rights of Indigenous peoples. The repeated commitments by Canada and other States to “protect human rights” in the context of sustainable development were never considered.

In particular, “free, prior and informed consent” (FPIC) was a prime target for their determined opposition. Inexplicably, the authors ignored or were unaware of the core right of self-determination – a key source of “consent” in the two international human rights Covenants.¹²⁸ Thus, Isaac and Hoekstra never took into account Canada’s affirmative obligations to respect and promote the right of Indigenous peoples to self-determination.

Inexplicably, Isaac and Hoekstra opted to wholly ignore the Truth and Reconciliation Commission’s Calls to Action – while at the same time claiming to seek reconciliation based on “truth, clarity, forthrightness”. They also chose to ignore colonialism and the ongoing subjugation of Indigenous peoples and dispossession of their lands, territories and resources. Despite such profound and ongoing adverse impacts, the authors failed to take into account or even mention the vulnerability of Indigenous peoples. The two authors’ lack of knowledge and understanding of international human rights law further compromised their overall analysis, especially regarding the *UN Declaration*.

In light of all of the concerns addressed in this Commentary, the analysis by Isaac and Hoekstra should be **treated with caution and not relied upon in this forum.**

Looking forward, it is important to recall the conclusion of the Truth and Reconciliation Commission of Canada: “We remain convinced that the *United Nations Declaration* provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada.”¹²⁹ Bill C-262 provides a legislative and collaborative framework to achieve this national objective.

Endnotes (Isaac & Hoekstra)

¹ Thomas Isaac and Arend Hoekstra, “Identity and Federalism: Understanding the Implications of *Daniels v. Canada*” (2017) 81 Sup Ct L Rev 27 [Identity and Federalism] at 35-36.

² *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] SCJ No 12.

³ *R v. Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 31 [*Vander de Peet*].

⁴ *Ibid* at para 50.

⁵ *R v. Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 at para 73.

⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 107th plenary meeting (13 September 2007) [UNDRIP] at art 32.

⁷ *Ibid*, art 18.

⁸ *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para 4.

⁹ UNDRIP, *supra* note 6 at art 30.

¹⁰ *House of Commons Debates*, 42nd Parl, 1st Sess, No 245 (5 December 2017) (Romeo Saganash).

¹¹ *Van der Peet*, *supra* note 3 at para 30.

Endnotes (Joffe)

¹ Thomas Isaac & Arend J.A. Hoekstra, “Implementing UNDRIP in Canada: Challenges with Bill C-262”, published January 8, 2018, http://www.casselsbrock.com/CBNewsletter/Implementing_UNDRIP_in_Canada_Challenges_with_Bill_C_262 (no page numbering).

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.

³ In addition, in its Agenda and Framework for the programme of work, the UN Human Rights Council has permanently included the “rights of peoples, and specific groups and individuals” under Item 3 “Promotion and protection of all human rights ...”: see Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex. Approved by UN General Assembly, Res. 62/219, 22 December 2007.

⁴ In regard to universal human rights instruments, see <http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>, where the OHCHR also cites the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), International Labour Organization, adopted Geneva, 76th ILC session 27 June 1989 (entered into force 5 September 1991).

⁵ See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1093: “the phrase ‘existing aboriginal rights’ must be interpreted flexibly so as to **permit their evolution over time**. ... Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate ‘frozen rights’ must be rejected.”

⁶ *Universal Declaration of Human Rights*, UNGA Res. 217 A (III), UN Doc. A/810, at 71 (1948). Adopted by the UN General Assembly on December 10, 1948.

⁷ William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed. (Toronto: Carswell, 2007), at 138-149.

⁸ *UN Declaration*, art. 46(3): “The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.”

⁹ The eight consensus resolutions to date are: General Assembly, *Rights of the child*, UN Doc. A/RES/72/245 (24 December 2017) (vote 162-0-1 abstention (Palau)), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/72/155 (19 December 2017) (adopted without vote), preamble; General Assembly, *Enhancing the Participation of Indigenous Peoples' Representatives and Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them*, UN Doc. A/RES/71/321 (8 September 2017) (adopted without vote), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/71/178 (19 December 2016) (without a vote), preamble; General Assembly, *Rights of the child*, UN Doc. A/RES/71/177 (19 December 2016) (without a vote), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/69/159 (18 December 2014) (without a

vote), preamble; 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. 3.

¹⁰ Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010. [emphasis added]

¹¹ 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. 20. [emphasis added] Similarly, see Permanent Forum on Indigenous Issues, Report on the tenth session (16 – 27 May 2011), Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 36.

¹² Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 118: "It has been clear from the outset that self-determination was not tied only to independence. The peoples of an independent territory have always had the **right to choose** the form of their political and economic future." [emphasis added] See also Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group, 1996), vol. 2(1), at 175: "Self-determination refers to the collective power of choice; self-government is one possible result of that choice."

Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations, UN Doc. E/CN.4/Sub.2/1986/7, Add. 4 (J. Cobo, Special Rapporteur), at paras. 579 & 580: "Self-determination, in its many forms, must be recognized as the basic precondition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future. It ... constitutes the exercise of **free choice** by indigenous peoples". [emphasis added]

¹³ 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.

¹⁴ International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47 (1966), adopted by the UN General Assembly on December 16, 1966 and entered into force March 23, 1976, accession by Canada 1976 and International Covenant on Economic, Social and Cultural Rights, Can. T.S. 1976 No. 46, adopted by the UN General Assembly on December 16, 1966 and entered into force 3 January 1976, accession by Canada 1976, identical article 1(3).

¹⁵ See, e.g., *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; *Concluding observations of the Human Rights Committee: Chile*, U.N. Doc. CCPR/C/CHL/CO/5 (18 May 2007) at para. 19; *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37.

¹⁶ See, e.g., *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, UN Doc. E/C.12/NZL/CO/3 (31 May 2012), para. 11; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Argentina*, UN Doc. E/C.12/ARG/CO/3 (14 December 2011), para. 9; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka*, UN Doc. E/C.12/1/LKA/CO/2-4 (9 December 2010), para. 11; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc. E/C.12/COL/CO/5 (7 June 2010), paras. 9-10; *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; *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.

¹⁷ *Statements of the Canadian Delegation*, Commission on Human Rights, 53rd Sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 2nd Sess., Geneva, 21 October - 1 November 1996, cited in *Consultations Between Canadian Aboriginal Organizations and DFAIT in Preparation for the 53rd Session of the U.N. Commission on Human Rights, February 4, 1997* (statement on art. 3, right to self-determination, on October 31, 1996) [emphasis added].

¹⁸ Asia Pacific Forum of National Human Rights Institutions and Office of the United Nations High Commissioner for Human Rights, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions* (APF and OHCHR, 2013), <http://www.ohchr.org/Documents/Issues/IPeoples/UNDRIPManualForNHRIs.pdf>, at 20.

¹⁹ *UN Declaration*, 18th preambular para.: “*Convinced* that 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”.

²⁰ 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), para. 85.

²¹ Erica-Irene Daes, “Striving for Self-Determination of Indigenous Peoples” in Y.N. Kly & D. Kly, eds., *In Pursuit of the Right of Self-Determination: Collected Papers and Proceedings of the First International Conference on the Right of Self-Determination, Geneva 2000* (Atlanta, Georgia: Clarity Press, 2001) 50, at 58.

²² Jean-Louis Roy (ICHRDD President), “Preface” in International Centre for Human Rights and Democratic Development, *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: ICHRDD, 2002) 1 at 2 [emphasis added].

²³ “*UN Declaration on the Rights of Indigenous Peoples: Canada Needs to Implement This New Human Rights Instrument*”, Open Letter, May 1, 2008, available at <http://quakerservice.ca/wp-content/uploads/2011/05/UNDecl-Experts-sign-on-statement-May-1-1.pdf>.

²⁴ S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (Oxford/New York: Oxford University Press, 2004), at 63 (UN Working Group on Indigenous Populations began its work to draft a declaration on the rights of indigenous peoples in 1985).

²⁵ *Ibid.*, at 64: “Canada ... took a leading role.”

²⁶ Peter Hogg, *Constitutional Law of Canada*, Loose-leaf Edition (Toronto: Thompson Carswell, 1997), vol. 2 at 33-17: “It is never seriously doubted that progressive interpretation is necessary and desirable in order to adapt the Constitution to facts that did not exist and could not have been foreseen at the time when it was written.”

²⁷ *Edwards v. A.-G. Canada*, [1930] A.C. 124 at 136: “The [*Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits.”

²⁸ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

²⁹ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 23. [emphasis added]

³⁰ See, e.g., *Cal et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, (2007) 71 WIR 110 (SC, Belize). At para. 136(d), the ruling concluded:

... order that the defendants cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent and in compliance with the safeguards of the Belize Constitution. [emphasis in original]

³¹ See, e.g., *Constitution of the Republic of Ecuador*, 2008, as revised, article 57: “Indigenous communes, communities, peoples and nations are recognized and guaranteed, in conformity with the Constitution and human rights agreements, conventions, **declarations** and other international instruments, the following collective rights: ...

4. To keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible. These lands shall be exempt from paying fees or taxes.

5. To keep ownership of ancestral lands and territories and to obtain free awarding of these lands.

In regard to “**self-determination**”, see articles 21, 96 and 351.

³² See, e.g., *Bolivia (Plurinational State of)'s Constitution of 2009*, article 218: “**I.** The Public Defender (Defensor del Pueblo) shall oversee the enforcement, promotion, dissemination of and **compliance with human rights, both individual and collective**, that are established in the Constitution, laws and **international instruments**. See also article 30 for a broad range of protections for Indigenous peoples’ rights, including the right of **self-determination**.”

³³ See *Act on Greenland Self-Government*,

<http://naalakkersuisut.gl/~media/Nanoq/Files/Attached%20Files/Engelske-tekster/Act%20on%20Greenland.pdf>.

This new Act recognizes Greenlanders as a people under international law (preamble) and Greenlandic as the official language (s. 20). The Act also provides for Greenland’s ownership and control of all natural resources (ss. 2-4 and 7).

³⁴ 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.

³⁵ See, e.g., Global Affairs Canada, “Canada’s International Human Rights Policy”,

<http://www.international.gc.ca/rights-droits/policy-politique.aspx?view=d&lang=eng>: “The UN Charter and

customary international law impose on all countries the responsibility to promote and protect human rights. This is not merely a question of values, but a mutual obligation of all members of the international community”.

³⁶ See, e.g., *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J., dissenting), where it is indicated that **declarations** and other international human rights instruments, as well as customary norms, are “relevant and persuasive sources” for interpretation of domestic human rights law. This same passage has been cited with approval by the Supreme Court of Canada in *United States of America v. Burns*, [2001] 1 S.C.R. 283, para. 80. [emphasis added]

First Nations Child and Family Caring Society of Canada v. Canada (Attorney General), 2012 FC 445, para. 353, aff’d 2013 FCA 75: “International instruments such as the [UN Declaration on the Rights of Indigenous Peoples] and the *Convention on the Rights of the Child* may also **inform the contextual approach** to statutory interpretation”. [emphasis added]

³⁷ *First Nations Child and Family Caring Society of Canada v. Canada (Minister of Indian Affairs and Northern Development)*, 2011 CHRT 4, para. 273.

³⁸ *Catholic Children’s Aid Society of Hamilton v. G.H.*, 2016 ONSC 6287, para. 72.

³⁹ *Ibid.*, para. 73 [emphasis added]. See also *R. v. Sayers*, 2017 ONCJ 77, paras. 51 and 52.

⁴⁰ See, e.g., *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 50.

⁴¹ Minister of Justice and Attorney General of Canada (Hon. Jody Wilson-Raybould), “Special Statement at the Opening Ceremonies of the United Nations Permanent Forum on Indigenous Issues, 15th Session”, UN General Assembly, New York, May 9, 2016: “by embracing the principles or minimum standards articulated in the United Nations Declaration”.

⁴² *Reference re Securities Act*, [2011] 3 S.C.R. 837, para. 133 [emphasis added].

⁴³ Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Canada Communication Group, 1996), vol. 2(1), para. 168.

⁴⁴ See, e.g., *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 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, section 5(1): “Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.”

⁴⁵ Minister of Crown-Indigenous Relations and Northern Affairs Carolyn Bennett, Speech at the Assembly of First Nations Special Chiefs Assembly, Shaw Centre, Ottawa, Ontario, December 6, 2017: “Concepts such as extinguishment and surrender have no place in the modern treaty process. ... Federal policies have, in the past, looked to find ways for Indigenous peoples to permanently give up certain rights in exchange for money or land. ... Communities were being asked to extinguish or surrender rights. ... Our government doesn’t believe anyone should have to choose between their community’s well-being – and their rights. ... So we are taking extinguishment and surrender off the table for good.”

⁴⁶ Antonio Cassese, *Self-Determination of Peoples: A Legal Appraisal* (Cambridge: Cambridge University Press, 1995), at 326-327: “To provide a legal definition [of ‘peoples’] in this volatile area would simply lead to bad legal draftsmanship.”

⁴⁷ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at p. 182: “Aboriginal peoples are entitled to identify their own national units for purposes of exercising their right of self-determination. ... [A]ny self-identification initiative must necessarily come from the people actually concerned.”

⁴⁸ “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples”, February 22, 2017, <http://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>.

⁴⁹ Thomas Isaac, *Aboriginal Law*, 5th ed. (Toronto, Ontario: Thomson Reuters, 2016).

⁵⁰ *UN Declaration*, para. 18 provides: “*Convinced* that 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.”

⁵¹ I can confirm this based on my own active involvement in drafting such texts during the negotiations on the *UN Declaration*.

⁵² The same flaw of not reading the whole text of the *UN Declaration* has been made by others. See, e.g., Harry Swain & Jim Baillie, “The Trudeau government signs on to give Aboriginals veto rights nobody else has”, *Financial Post* (26 January 2018): “Making all Canadian laws consistent with UNDRIP, as C-262 demands, would not just

give Aboriginal Canadians rights not enjoyed by other Canadians, it would concede to small groups of them an absolute veto on many issues of resource development.”

⁵³ Thomas Isaac, *Aboriginal Law*, 5th ed. (Toronto, Ontario: Thomson Reuters, 2016).

⁵⁴ United Nations, *Rules of Procedure of the General Assembly* (New York, 2008), Rule 85.

⁵⁵ *Ibid.* Rule 86.

⁵⁶ Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010. [emphasis added]

⁵⁷ See <http://store.thomsonreuters.ca/product-detail/aboriginal-law-fifth-edition-hardcover/>.

⁵⁸ Canwest News Service. "Native rights declaration inconsistent with legal tradition: Strahl". Sept. 13, 2007.

<http://www.canada.com/nationalpost/news/story.html?id=23df9769-3423-4f43-b828-a755725c2719&k=23677>.

Cited in Thomas Isaac, *Aboriginal Law*, 5th ed., at 62.

⁵⁹ *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075, at 1111. [emphasis added]

⁶⁰ Robert McCorquodale, "Self-Determination: A Human Rights Approach", (1994) 43 Int'l & Comp. L.Q. 857, at pp. 884-885: "the human rights approach ... does provide a framework to enable every situation to be considered and all the relevant rights and interests to be taken into account, balanced and analysed. This balance means that the geopolitical context of the right being claimed – the particular historical circumstances – and the present constitutional order of the State and of international society, is acknowledged and addressed."

⁶¹ See, e.g., *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 54: "the contextual approach to s. 15 [of the *Canadian Charter of Rights and Freedoms*] requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history."

See also *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, at para. 50: "*The collision between rights must be approached on the contextual facts of actual conflicts*. The first question is whether the rights alleged to conflict can be reconciled: ... Where the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will ... go on to balance the interests at stake" [emphasis added]

⁶² See, e.g., *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, at para. 78. [emphasis added]

⁶³ Thomas Isaac, *Aboriginal Law*, 5th ed., *supra*, at 61. [emphasis added]

⁶⁴ However, section 35(4) of the *Constitution Act, 1982* stipulates that Aboriginal and treaty rights referred to in s. 35(1) are "guaranteed equally to male and female persons".

⁶⁵ Thomas Isaac, *Aboriginal Law: Commentary and Analysis*, *supra* at 61. See also *Indigenous and Tribal Peoples Convention, 1989* (No. 169), International Labour Organization, adopted Geneva, 76th ILC session 27 June 1989 (entered into force 5 September 1991).

⁶⁶ For a similar conclusion, see Luis Rodríguez-Piñero Royo, "'Where Appropriate': Monitoring/Implementing of Indigenous Peoples' Rights Under the Declaration" in Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) 314 at 323. The author adds: "The adoption of the [UN] Declaration now naturally calls for a consistent reading of the Declaration and of the [ILO] Convention".

⁶⁷ International Labour Organization, "ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners", http://www.ilo.org/indigenous/Resources/Publications/WCMS_100792/lang--en/index.htm, at 2.

⁶⁸ For other examples, see generally Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London and New York: Routledge, 2015). See also Paul Joffe, "'Veto' and 'Consent' – Significant Differences", 3 October 2017, <http://quakerservice.ca/wp-content/uploads/2017/12/Veto-and-Consent-Significant-differences-Joffe-2017.pdf>.

⁶⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 55(e). [emphasis added]

⁷⁰ 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 123-124.

⁷¹ Permanent Forum on Indigenous Issues, "System-wide action plan for ensuring a coherent approach to achieving the ends of the United Nations Declaration on the Rights of Indigenous Peoples", UN Doc. E/C.19/2016/5 (19 February 2016), http://www.un.org/en/ga/search/view_doc.asp?symbol=E/C.19/2016/5, para. 4: "the plan focuses on the following action areas: (a) raise awareness on the United Nations Declaration on the Rights of Indigenous

Peoples and indigenous issues; (b) support the implementation of the Declaration, particularly at the country level; (c) support the attainment of indigenous peoples' rights in the implementation and review of the 2030 Agenda for Sustainable Development”.

⁷² 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.

⁷³ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting): “The various sources of international human rights law - **declarations**, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms - must, in my opinion, be **relevant and persuasive sources for interpretation** of the Charter's provisions.” [emphasis added] This quote was cited with approval in *United States of America v. Burns*, [2001] 1 S.C.R. 283, para. 80.

⁷⁴ 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), para. 62.

⁷⁵ International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), at 5 [quoting Economic and Social Council, Report of the Commission on Human Rights (E/3616/Rev. 1), para. 105, 18th session, 19 March – 14 April 1962]. [emphasis added]

See also Eckhart Klein & Stefanie Schmahl, “Functions and Powers: Article 10” in Bruno Simma *et al.*, eds., *The Charter of the United Nations: A Commentary*, 3rd ed. (New York: Oxford University Press, 2012) 461 at 478-479: “The term ‘**declaration**’ ... is used by the GA for resolutions which claim to express **political or legal principles of particular importance** ... Examples of the **most important declarations** which have attained a **quasi-legislative function** are: the Universal Declaration of Human Rights of 10 December 1948 ... and the **United Nations Declaration on the Rights of Indigenous Peoples** of 13 September 2007”.

⁷⁶ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20.

⁷⁷ See also Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), “Special Statement at the Opening Ceremonies of the United Nations Permanent Forum on Indigenous Issues, 15th Session”, UN General Assembly, New York, May 9, 2016: “**we seek to deconstruct our colonial legacy**. Important to this work will be implementing the Calls to Action set out in the recent report of the Truth and Reconciliation Commission”. [emphasis added]

Minister of Indigenous and Northern Affairs (Carolyn Bennett), “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10”, May 10, 2016: “What is needed is fundamental and foundational change. It's about righting historical wrongs. **It's about shedding our colonial past**. It's about writing the next chapter together as partners. I firmly believe that once you know the truth, you cannot unknow the truth. We now know the truth.” [emphasis added]

⁷⁸ "Statement by James Anaya, Special Rapporteur on the rights of indigenous peoples", 6th session of the Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council, Geneva, Switzerland, Panel on the Declaration on the Rights of Indigenous Peoples, 11 July 2013.

⁷⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, adopted by U.N. General Assembly on 21 December 1965, and entered into force on 4 January 1969 (ratified by Canada on 14 October 1970), preamble. [emphasis added]

⁸⁰ See, e.g., *R. v. Ipeelee*, 2012 SCC 13, para. 60.

⁸¹ UNICEF, *Poverty Reduction Begins with Children*, New York, March 2000, at 39 (Summary): “Poverty is a denial of human rights and human dignity.”

⁸² World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Declaration and Programme of Action*, adopted in Durban, South Africa (8 September 2001), para. 14: “colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that ... **indigenous peoples were victims of colonialism and continue to be victims of its consequences**. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its recurrence prevented.” [emphasis added]

⁸³ Permanent Forum on Indigenous Issues, *International expert group meeting on the theme “Sustainable Development in the Territories of Indigenous Peoples”*: Note by the Secretariat, UN Doc. E/C.19/2018/7 (21 February 2018), para. 1.

⁸⁴ E.g., UN 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): “The Declaration is a **visionary step** towards addressing the human rights of indigenous peoples. It sets out a framework on which States can **build or rebuild their relationships** with indigenous peoples. ... [I]t provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote **reconciliation** and ensure that the **past is not repeated.**” [emphasis added]

⁸⁵ 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), para. 1.

See also Permanent Forum on Indigenous Issues, *Report on the fourteenth session (April 20 – 1 May 2015)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2015/43-E/C.19/2015/10, para. 33: “The Permanent Forum reminds States that the implementation of the United Nations Declaration provides a **common framework for reconciliation, justice, healing and peace**. Each **State has a prime responsibility and duty to protect, promote and implement all human rights**, consistent with the Charter of the United Nations and international human rights law. Furthermore, all forms of discrimination must be avoided.”

⁸⁶ General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/72/155 (19 December 2017) (adopted without vote), preamble: “*Recognizing the importance of free, prior and informed consent*, as outlined in the United Nations Declaration on the Rights of Indigenous Peoples”.

⁸⁷ Ban Ki-Moon, “Use All Media to Create World that Celebrates Diversity, Says Secretary-General, in Remarks for International Day of World’s Indigenous Peoples”, 9 August 2012: “sustainable development is about people — all people. There can be no development for indigenous peoples without their free, prior and informed consent and without them being involved in every step. These fundamental principles are enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.”

⁸⁸ OHCHR, *Understanding Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change*, 26 November 2015, at 4: “indigenous peoples’ rights should be fully reflected in line with the United Nations Declaration on the Rights of Indigenous Peoples and actions likely to impact their rights should not be taken without their free, prior and informed consent.”

⁸⁹ See, e.g., Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-first to twenty-third periodic reports of Canada*, UN Doc. CERD/C/CAN/CO/21-23 (13 September 2017), para. 20 “(c) end the substitution of costly legal challenges as post facto recourse in place of obtaining meaningful free prior and informed consent of Indigenous Peoples” and “(d) Incorporate the free, prior and informed consent principle in the Canadian regulatory system”; Committee on Economic, Social and Cultural Rights, *Concluding observations of the sixth periodic report of Canada*, UN Doc. E/C.12/CAN/CO/6 (23 March 2016), para. 13: “the right to free, prior and informed consent of indigenous peoples to any change to their lands and territories is not adequately incorporated in domestic legislation and not consistently applied by the State party”; Human Rights Committee, *Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela*, UN Doc. CCPR/C/VEN/CO/4 (14 August 2015), para. 21(a): “obtain their free, prior and informed consent before any measure is adopted or implemented that may substantively compromise [Indigenous peoples’] way of life and culture, in particular in relation to projects that may have an impact on their lands and territories and other resources”.

⁹⁰ E.g., Food and Agriculture Organization, “FAO Policy on Indigenous and Tribal Peoples” (Rome: FAO, 2010), at 5: “The principle and right of ‘free, prior and informed consent’ demands that states and organizations of all kinds and at all levels obtain indigenous peoples’ authorization before adopting and implementing projects, programmes or legislative and administrative measures that may affect them.”

⁹¹ E.g., 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, para. 98 (Conclusions): “In accordance with the Canadian constitution and relevant international human rights standards, **as a general rule** resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned.” And at para. 99: “Resource development projects, where they occur, should be fully consistent with aboriginal and treaty rights, and **should in no case be prejudicial to unsettled claims**. The federal and provincial governments should strive to maximize the control of indigenous peoples themselves over extractive operations within their lands and the development of benefits derived therefrom.”

See also Office of the High Commissioner for Human Rights, “A New Climate Change Agreement Must Include Human Rights Protections For All”, An Open Letter from **27 Special Procedures mandate-holders** of the Human

Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014), 17 October 2014, http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf: “**The principle of free, prior and informed consent of indigenous peoples must be respected.** Particular care must be taken to anticipate, prevent and remedy negative effects on **vulnerable groups**, which may include indigenous peoples, minorities, persons living in poverty, migrants and displaced persons, older persons, persons with disabilities, and children, as well as to empower and protect the rights of women.” (p. 3)

⁹² Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 36: “As a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is ... relevant to a wide range of circumstances ... Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law”.

⁹³ 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. 20: “the right to free, prior and informed consent is embedded in the right to self-determination. ... [T]he right of free, prior and informed consent needs to be understood in the context of indigenous peoples’ right to self-determination because it is an integral element of that right.”

⁹⁴ *Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 28 November 2007. Series C No. 172, para. 137: “in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory **must be understood to additionally require the free, prior, and informed consent of the Saramakas**, in accordance with their traditions and customs.” [emphasis added]

⁹⁵ African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, at para. 291: “any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”

⁹⁶ 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/71/291 (4 August 2016), para. 71.

⁹⁷ *Ibid.*

⁹⁸ Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Canada Communication Group, 1996), vol. 2(1), para. 168. [emphasis added] See also John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), at 198-200 (principle of federalism can support Indigenous peoples' institutions and laws).

⁹⁹ K.C. Wheare, *Federal Government*, 4th ed. (1963), at 10.

¹⁰⁰ Jean Leclair, “The Attorney General’s Vision” in David Schneiderman, ed., *The Québec Decision: Perspectives on the Supreme Court Ruling on Secession* (Toronto: James Lorimer & Company Ltd., 1999) 72, at 76.

¹⁰¹ Paul Joffe & Willie Littlechild, “Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms” in Commission on First Nations and Métis Peoples and Justice Reform, *Submissions to the Commission*, Final Report, vol. 2 (Saskatchewan: 2004), Section 12, at p. 12-26.

¹⁰² *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 57.

¹⁰³ *Campbell v. British Columbia (Attorney General)*, (2000) 189 D.L.R. (4th) 333 (B.C.S.C.), para. 81.

¹⁰⁴ The only exception is in art. 7(2) of the *UN Declaration*. The right not to be subjected to genocide is an absolute right in international law.

¹⁰⁵ See also *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40: “We do not, however, see the public interest and the duty to consult as operating in conflict. ... A project authorization that breaches the constitutionally protected rights of Indigenous peoples cannot serve the public interest”.

¹⁰⁶ Human Rights Council, *Institution-building of the United Nations Human Rights Council*, UN Doc. A/HRC/RES/5/1 (18 June 2007) (adopted without a vote), Annex (Framework for the programme of work, Item 3) .

Approved in General Assembly, *Report of the Human Rights Council*, UN Doc. A/RES/62/219 (22 December 2007).

¹⁰⁷ See online: OCHCR

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>

¹⁰⁸ International Law Association, "Rights of Indigenous Peoples", Final report, Sofia Conference (2012), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>, at 29-30 (Conclusions and Recommendations). [emphasis added]

¹⁰⁹ Permanent Forum on Indigenous Issues, *Report on the eleventh session (7 – 18 May 2012)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2012/43-E/C.19/2012/13, para. 68.

¹¹⁰ UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (New York: UN Global Compact, 2013), at 5. [emphasis added] The UN Global Compact is the largest corporate responsibility initiative in the world, with the participation of over 9,500 companies from over 160 countries, <https://www.unglobalcompact.org/what-is-gc>

¹¹¹ 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).

¹¹² Government of Canada, "Voices at risk: Canada's guidelines on supporting human rights defenders", http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng

¹¹³ Human Rights Council, *Question of the realization in all countries of economic, social and cultural rights: Report of the Secretary-General*, UN Doc. A/HRC/34/25 (14 December 2016), para. 4.

¹¹⁴ General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (25 September 2015) (adopted without a vote), at 3 (Declaration), para. 3.

¹¹⁵ *Ibid.* para. 4.

¹¹⁶ *E.g.*, General Assembly, *Global health and foreign policy: addressing the health of the most vulnerable for an inclusive society*, UN Doc. A/RES/72/139 (12 December 2017) (without vote); General Assembly, *Implementation of the Convention on Biological Diversity and its contribution to sustainable development*, UN Doc. A/RES/72/221 (20 December 2017) (without a vote); General Assembly, *International trade and development*, UN Doc. A/RES/71/214 (21 Dec 2016) (without a vote); General Assembly, *Culture and sustainable development*, UN Doc. A/RES/70/214 (22 December 2015) (without a vote).

¹¹⁷ General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble.

¹¹⁸ Canadian Human Rights Commission, "Still A Matter of Rights", A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the *Canadian Human Rights Act*, January 2008, at 8.

¹¹⁹ Government of Canada, *A Canada for All: Canada's Action Plan Against Racism* (Ottawa: Department of Canadian Heritage, 2005), at 37. [emphasis added]

¹²⁰ Canada, *Core Document Forming Part of the Reports of States Parties: Canada*, UN Doc. HRI/CORE/CAN/2013 (30 May 2013), III, B, para. 109 [underline added]

¹²¹ *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without a vote), para. 5.

¹²² General Assembly, *Education for democracy*, UN Doc. A/RES/71/8 (16 November 2016) (adopted without a vote), para. 2.

¹²³ Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretariat*, UN Doc. A/HRC/31/52 (1 February 2016), para. 22.

¹²⁴ *Ibid.*, para. 33.

¹²⁵ *Ibid.*, para. 50.

¹²⁶ *Ibid.*, para. 51.

¹²⁷ Senator Murray Sinclair, "Statement of the Honourable Murray Sinclair, Senator, concerning the introduction of a Bill [C-262] in the House of Commons requiring the Government of Canada to adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples", April 21, 2016. [emphasis added]

¹²⁸ *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical article 1.

¹²⁹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, May 31, 2015, at 20.