THE *TSILHQOT'IN NATION* DECISION: KEY CONNECTIONS TO INTERNATIONAL LAW

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By Paul Joffe

I. INTRODUCTION

On a global scale, there are over 370 million Indigenous people in over 70 countries.[1] Throughout history, Indigenous peoples have been severely discriminated against, including being largely disqualified from owning or controlling lands, territories, and resources.[2]

Such dispossessions have resulted in impoverishment, discrimination, denial of self-determination and self-government, marginalization, loss of identity, forced assimilation and destruction of culture. All of these issues are rooted in colonial policies, many of which continue today with inter-generational impacts recognized by the Canada's highest court.[3]

In view of this history, Indigenous peoples have sought justice internationally, particularly at the United Nations. Indigenous peoples are both international and domestic actors. They increasingly represent themselves in standard-setting processes. It is a result of the determination of Indigenous representatives from all regions of the world that the *United Nations Declaration on the Rights of Indigenous Peoples*[4] was adopted after more than 20 years of discussion and negotiation.[5]

The *UN Declaration* serves to reinforce the legal status of Indigenous peoples as "subjects of international law".[6] Indigenous peoples are not simply "objects" of international concern but have a recognized status and capacity in the international context.[7]

Today, virtually every major issue relating to Indigenous peoples is addressed in some way at the international level. Such matters include, *inter alia*, human rights, sustainable development, food security, biodiversity, climate change and intellectual property.

The purpose of this paper is to examine the Supreme Court of Canada decision in *Tsilhqot'in Nation* v. *British Columbia*,[8] primarily through the lens of international human rights law. It is important to identify the connections in the decision to international law, which can serve to reinforce Indigenous peoples' rights and related State obligations. It is also important to consider the "underlying constitutional principles" that the Court has identified in previous cases.

From the outset, it is critical to recognize the historic gains in the *Tsilhqot'in Nation* decision relating to Aboriginal title and consent. The Court also included essential criteria to safeguard title lands for future generations. This paper examines how to build upon what was achieved, in the progressive development of the recognition of Indigenous peoples' human rights.

Within the international human rights system, the terms "Aboriginal peoples" and "Indigenous peoples" are used interchangeably. In the *Tsilhqot'in Nation* decision, the Court took the same approach.[9]

II. ROLE OF INTERNATIONAL HUMAN RIGHTS LAW IN CANADA

The Supreme Court has repeatedly affirmed that declarations and other international human rights instruments, as well as customary international law, are "relevant and persuasive sources" for interpreting human rights in Canada.[10] The Federal Court of Canada has also ruled:

> 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 ...[11]

As determined by the Supreme Court: "It is a well-established principle of statutory interpretation that legislation will be presumed to conform to international law. … [A]s a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result."[12] The Court added that "the legislature is presumed to comply with the values and principles of customary and conventional international law. Those values and principles form part of the context in which statutes are enacted, and courts will therefore prefer

a construction that reflects them."[13] This principle of interpretation is relevant to Indigenous peoples in regard to the right of self-determination (addressed later in this paper). Canada has an affirmative obligation in the two international human rights Covenants to "promote the realization of the right of self-determination, and … respect that right, in conformity with the provisions of the Charter of the United Nations."[14]

The "Guiding Principles on Business and Human Rights" provide: "The responsibility of business enterprises to respect human rights refers to internationally recognized human rights".[15] Moreover, "business enterprises may need to consider additional standards. ... In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples".[16] Such "elaboration" includes the *UN Declaration on the Rights of Indigenous Peoples*.

In a speech in Vancouver in 2002, Chief Justice Beverley McLachlin emphasized: "Aboriginal rights from the beginning have been shaped by international concepts. More recently, emerging international norms have guided governments and courts grappling with aboriginal issues. Canada … cannot ignore these new international norms …Whether we like it or not, aboriginal rights are an international matter."[17]

In 2012, Canada indicated to the UN Committee on the Elimination of Racial Discrimination that, in regard to the *UN Declaration*, Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution.[18]

A. INDIGENOUS PEOPLES' COLLECTIVE RIGHTS ARE HUMAN RIGHTS

Based on more than thirty years, there is a well-established practice to address Indigenous peoples' collective rights within international and regional human rights systems.[19] 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" under Item 3 "Promotion and protection of all human rights … including the right to development".[20]

Consistent with international human rights law, the Canadian Human Rights Commission affirmed: "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."[21] Joyce Green underlines the essential need for States to adopt a human rights approach in regard to Indigenous peoples' rights:

> Indigenous human rights exist in law and in principle. They have achieved legitimacy at the United Nations, and the entire international community is now aware of the need to secure these rights on a state-by-state basis. It is time for these rights to be recognized, supported and implemented by the settler states. Only this can lead to the possibility of reconciliation with Indigenous peoples and to decolonization — the mutual imagining of a future that accommodates us all on terms we freely choose.[22]

The Supreme Court of Canada is especially skillful in producing in-depth, qualitative analyses that are relied upon in different countries around the world. In addressing Aboriginal title, the Court should be addressing Indigenous peoples' rights as human rights, especially since the right to property is recognized internationally as a human right.[23]

In *Tsilhqot'in Nation*, the Supreme Court took an important step in acknowledging:

> The Charter forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial.[24]

Yet the Court has yet to expressly refer to the human rights quality of Aboriginal and treaty rights. The *UN Declaration* affirms: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations … and international human rights law."[25]

In Canada's 2013 "Core Document" which forms an integral part of Canada's reports to UN treaty bodies, collective Aboriginal and treaty rights are included under heading III "General Framework for the Promotion and Protection of Human Rights".[26] Similarly, in Canada's

previous "Core Document" in 1998, Canada included such rights under heading III "General Legal Framework Within Which Human Rights Are Protected".[27]

Since its election in 2006, the government of Canada has refused to discuss with Indigenous and human rights organizations the issue of Indigenous peoples' collective rights constituting human rights.

In *Tsilhqot'in Nation*, the Court confirmed the *sui generis* characterization of Aboriginal title.[28] However, this does not and cannot mean that the human right to property is not universal. In all regions of the world, Indigenous and non-Indigenous peoples, groups and individuals possess property rights that are highly diverse in nature. The General Assembly and States have repeatedly affirmed by consensus:

> All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights ...[29]

In the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Heads of State and Government have reiterated by consensus the "universal nature" of all human rights. They also reaffirmed their commitment to fulfil their obligations in regard to "all" such rights:

> We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all. The universal nature of these rights and freedoms is beyond question.[30]

III. SIGNIFICANCE OF *UN DECLARATION*

The *Declaration* is the most comprehensive, universal international human rights instrument[31] explicitly addressing the rights of Indigenous peoples. It affirms a wide range of political, economic, social, cultural, spiritual and environmental rights. While individual rights are positively affirmed and protected in various ways, the rights in the *Declaration* are predominantly collective in nature. The rights constitute the "minimum standards" for the survival, dignity, security and well-being of indigenous peoples worldwide.[32] The *Declaration* applies existing human rights standards to the specific historical, cultural and social circumstances of Indigenous peoples.[33]

The UN Expert Mechanism on the Rights of Indigenous Peoples has concluded: "The United Nations Declaration on the Rights of Indigenous Peoples constitutes a principled framework for justice, reconciliation, healing and peace."[34] Healing and peace are essential aspects in addressing Indigenous dispossession of lands, territories and resources – including severe impoverishment, loss of identity and culture, and other inter-generational effects.

In *Tsilhqot'in Nation*, the Supreme Court emphasized: "What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society.[35] The *UN Declaration* is well-suited to address these essential requirements. Further, the *Declaration* includes specific provisions relating to Indigenous rights to lands, territories and resources; environmental protection; development; self-determination, including self-government; and free, prior and informed consent (FPIC).

This consensus universal human rights instrument is not merely "aspirational" and has diverse legal effects.[36] The International Law Association has emphasized: "overwhelming support by the UN General Assembly leads to an expectation of maximum compliance".[37] As concluded by Special Rapporteur James Anaya:

> … 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 …[38]

In regard to the outcome document of the UN Conference on Sustainable Development, *The future we want*, States and the General Assembly recognized by consensus: "… the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies."[39] Further, in the outcome document for the 2014 World Conference on Indigenous Peoples, which is to be adopted by Heads of State and Government by consensus on 22 September 2014:

> We reaffirm our solemn commitment to respect, promote and advance and in no way diminish the rights of indigenous peoples and to uphold the principles of the Declaration [on the Rights of Indigenous Peoples].[40]

In light of the significance of international human rights law in Canada, the Supreme Court could have incorporated this important dimension in accordance with constitutional principles. The Court has determined: "our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. … A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document."[41]

Such new "realities" include the adoption and implementation of the *UN Declaration* and international human rights jurisprudence relating to Indigenous peoples. The jurisprudence of UN human rights bodies, including their General Comments, have been ascribed "great weight" by the International Court of Justice (ICJ).[42]

It is important to emphasize that individual provisions of the *UN Declaration* should not be read in isolation. They should be interpreted in the context of the whole *Declaration* and other international law. In this way, international law can be effectively used to reinforce domestic law.

IV. INDIGENOUS TITLE, CONSENT AND SELF-DETERMINATION

In addressing Aboriginal title, the Court repeatedly emphasized the constitutional requirement of obtaining Indigenous peoples' "consent".[43] The right to "control" such title land "means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders."[44] If the Aboriginal group does not consent to the use, "the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*."[45]

In international and Canadian constitutional law, "consent" is not limited to Aboriginal title. Former Special Rapporteur on the rights of indigenous peoples, James Anaya, has concluded: "Indigenous peoples' free, prior and informed consent is required, as a general rule, when extractive activities are carried out within indigenous territories."[46] In his July 2014 report on Canada, Anaya concluded:

> 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. Further, Canada should endeavor to put in place a policy framework for implementing the duty to consult that allows for indigenous peoples' genuine input and involvement at the earliest stages of project development.[47]

In 2007, the African Commission on Human and Peoples' Rights concluded: "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."[48] In 2012, the African Commission adopted a "Resolution on a Human Rights-Based Approach to Natural Resources Governance" calling upon States Parties to: "Establish a clear legal framework for sustainable development as it impacts on natural resources, in particular water, that would make the realization of human rights a prerequisite for sustainability".[49]

The UN Human Rights Committee has urged Colombia to "strengthen special measures in favour of Afro-Colombian and indigenous people in order to guarantee the enjoyment of their rights and, in particular, to ensure that they exercise control over their land and that it is restituted to them, as appropriate. The State party should … adopt the pertinent legislation for holding prior consultations with a view to guaranteeing the free, prior and informed consent of community members."[50] In regard to special measures and consent, the *Indigenous and Tribal Peoples Convention, 1989* provides:

> 1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
>
> 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.[51]

As described by the Supreme Court of Canada, the high end of the spectrum of consultation requires "'full consent of [the] aboriginal nation' on very serious issues. This applies as much to unresolved claims as to intrusions on settled claims."[52] In regard to consent, the Court has yet to fully elaborate as to what "very serious issues" may entail.

Indigenous peoples' "consent", as elaborated by the Supreme Court, appears to be virtually the same as "free, prior and informed consent" in international law. "Consent" must always be "free", that is, obtained without duress. It must also be "prior and informed" in that all necessary information must be provided in a timely manner,[53] so that a decision can be made with full knowledge of the risks involved. The Court could have reinforced its positive analysis on "consent" by adding international law perspectives.

In its 2008 "Interim Guidelines for Federal Officials", the government of Canada had indicated: "An 'established' right or title may suggest a requirement for consent from the Aboriginal group(s)."[54] Its 2011 "Updated Guidelines" deleted any reference to Aboriginal "consent".[55]

On crucial issues of "consent", Canada cannot selectively ignore key aspects of the rulings of its highest court, as well as international human rights law,[56] to the detriment of Indigenous peoples. Such actions do not uphold the honour of the Crown. They are inconsistent with the principles of justice, equality, rule of law and respect for human rights.

The *Tsilhqot'in Nation* decision includes numerous references to the duty to consult and accommodate Indigenous peoples.[57] Nothing in this and other Supreme Court decisions suggest that the Crown's duty to consult and accommodate solely applies within Canada. Increasingly, Indigenous rights and related State obligations are being addressed at the international level. Canada cannot ignore or evade its constitutional duties, simply because it is participating in standard-setting or negotiating treaties in international forums.[58] In the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels,* Canada and other States agreed by consensus that:

> … the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.[59]

In its 2013 consensus resolution on *The rule of law at the national and international levels*, the UN General Assembly stressed the "importance of adherence to the rule of law at the national level"[60] and reaffirmed the "imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter of the United Nations".[61] All UN Member States are legally bound to uphold at all times the purposes and principles of the *Charter of the United Nations*,[62] which include "promoting and encouraging respect for human rights … for all without distinction …".[63]

In particular, Canada cannot unilaterally take positions that undermine directly Indigenous peoples' constitutional status and rights when participating in international forums addressing such issues as biodiversity, food security, sustainable and equitable development and climate change.[64] Extraterritorial enforcement of the *Canadian Charter of Rights and Freedoms* may not

be possible in certain circumstances such as competing concerns relating to the jurisdiction of a foreign State.[65] However, such competing concerns are not a factor in the international contexts described in this paragraph. In regard to Canada's positions in international forums, Indigenous peoples' constitutional rights and related Crown duties can be enforced *within Canada* in Canadian courts.

A. INDIGENOUS LEGAL ORDERS IN CANADA'S CONSTITUTION

In *Tsilhqot'in Nation*, the Supreme Court ruled that Aboriginal title confers ownership rights including "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land,"[66] as well as the "right to control" the land.[67]

Such rights go beyond ownership. From an international law perspective, these are essential elements of the collective human right of Indigenous peoples to self-determination,[68] including self-government, and the human right to development.[69] The right of self-determination includes "consent" as an essential element.[70]

In particular, the right to self-determination includes the "right to choose".[71] In *Tsilhqot'in Nation*, the Supreme Court referred to Indigenous peoples' "right to choose",[72] but did not elaborate on governance aspects.

The UN Human Rights Committee emphasized: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."[73] Former Special Rapporteur James Anaya elaborated: "The right of self-determination is a foundational right, without which indigenous peoples' human rights, both collective and individual, cannot be fully enjoyed."[74]

In *Tsilhqot'in Nation*, the Supreme Court explained: "Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use

and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used."[75] In *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, the Court quoted Brian Slattery: "'... when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights.'"[76]

In light of all these considerations, these constitutional rights of Indigenous peoples include inherent self-government powers. While the *Tsilhqot'in Nation* decision focused on Aboriginal title, the *Manitoba Metis Federation Inc.* decision was in a broader context. Such government powers of Indigenous peoples indicate that there are three orders of government in Canada's Constitution. In regard to self-government, Indigenous peoples have the "right to maintain and develop their political, economic and social systems or institutions".[77] They have the "right to determine the structures and to select the membership of their institutions in accordance with their own procedures."[78]

UN human rights bodies have repeatedly applied to Indigenous peoples the right of self-determination in the international human rights Covenants.[79] The Royal Commission on Aboriginal Peoples concluded that s. 35 of the *Constitution Act, 1982* "provides the basis for recognizing Aboriginal governments as constituting one of three orders of government in Canada".[80]

Controlling land use and pro-actively managing the land entail law-making powers. The *Tsilhqot'in* decision referred to Aboriginal laws in several paragraphs,[81] but did not elaborate on self-government. However, Indigenous law-making, including entering into treaties with other Indigenous nations and with European States,[82] is evidence of governmental authority that dates back to Indigenous peoples' early occupation of what is now Canada. Kent McNeil has concluded: "Indigenous peoples …were in occupation because they exercised governmental authority over their territories, in part through the application of their own laws".[83]

As illustrated in *Tsilhqot'in Nation*, the right to determine how title lands are used or developed are important aspects of Indigenous peoples' right to development.[84] The right to development

reinforces the need for a human rights-based approach to development.[85] In *The future we want*, States reaffirmed the "importance of freedom, peace and security, respect for all human rights, including the right to development".[86] Indigenous peoples have the "right to … to be secure in the enjoyment of their own means of subsistence and development" and the "right to determine and develop priorities and strategies for exercising their right to development".[87]

In *Tsilhqot'in Nation*, the Supreme Court cautioned:

> … if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[88]

Article 19 of the *UN Declaration* affirms: "States shall consult and cooperate in good faith with the indigenous peoples concerned … in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Similarly, in the outcome document for the 2014 World Conference on Indigenous Peoples, by Heads of State and Government reaffirm by consensus the importance of "consultation and cooperation" and "consent" in relation to legislative and administrative measures:

> We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples … and our commitments made in this respect to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, in accordance with the applicable principles of the Declaration.[89]

Such limitations on Crown legislative and administrative authority are not limited to Indigenous title lands. These limitations serve to reinforce Indigenous peoples' governance and law-making.

The reference to Indigenous peoples' "own representative institutions" would clearly include their own governments.

In 2013, the United Nations Global Compact published a detailed "Business Reference Guide" on the *UN Declaration*.[90] The Guide encourages business enterprises to obtain FPIC in situations that are not limited to Indigenous peoples' title to lands, territories and resources and that respect their rights to self-determination:

> The concept of free, prior and informed consent ("FPIC") is fundamental to the UN Declaration as a measure to ensure that indigenous peoples' rights are protected. (p. 25)
>
> FPIC should be obtained whenever there is an impact on indigenous peoples' substantive rights (including rights to land, territories and resources, and rights to cultural, economic and political self-determination). (p. 26)

As George Kell, executive director of the UN Global Compact, underscores: "There is … a growing interdependency between business and society. Business is expected to do more in areas that used to be the exclusive domain of the public sector – from health and education, to community investment and environmental stewardship."[91]

V. INDIGENOUS TITLE – PRESENT AND FUTURE GENERATIONS

In *Tsilhqot'in Nation*, the Supreme Court indicated that incursions on title lands are permitted only with the consent of the Indigenous nation or group, or if they are justified by a compelling and substantial public purpose. "Valid legislative purposes" for general economic development are not necessarily "compelling and substantial", which will depend on the facts "on a case-by-case basis".[92]

Aboriginal title inheres in present and future generations.[93] Any intrusions must be consistent with the Crown's fiduciary duty to the Aboriginal group.[94] Incursions on Aboriginal title "cannot be justified if they would substantially deprive future generations of the benefit of the land".[95]

Further, the incursion must be "necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact)."[96]

Such limiting criteria by the Court should be interpreted strictly in order to ensure essential safeguards for Indigenous peoples. Article 46(2) of the *UN Declaration* stipulates: "The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are ... in accordance with international human rights obligations … and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

The Supreme Court's ruling that incursions on Aboriginal title "cannot be justified if they would substantially deprive future generations of the benefit of the land" has diverse support in international law. This safeguard can provide significant security to present and future generations. For example, article 7(2) of the *UN Declaration* affirms: "Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples". When read together with other provisions of the *Declaration*, "security" can include human, territorial, food, environmental and economic, social and cultural dimensions.[97]

Article 13(1) of the *UN Declaration* affirms: "Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies …" All of these aspects have a strong cultural component that is often linked to Indigenous peoples' lands, territories and resources. Article 25 affirms: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

In *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court of Human Rights emphasized: "Among indigenous peoples there is a communitarian tradition

regarding a communal form of collective property of the land **…** the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. … relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."[98]

In the 1992 *Rio Declaration on Environment and Development*: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[99] The *Tsilhqot'in Nation* decision contributes to this principle.[100] Also, in the *Convention on Biological Diversity*, the preamble expresses that the Parties are: "Determined to conserve and sustainably use biological diversity for the benefit of present and future generations".[101]

In *The future we want*, States agreed by consensus to diverse commitments relating to "present and future generations". These included:

> … to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, and to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment …[102]

All countries expressed deep concern that they "are vulnerable to the adverse impacts of climate change, and are already experiencing increased impacts, including persistent drought and extreme weather events, sea-level rise, coastal erosion and ocean acidification, further threatening food security and efforts to eradicate poverty and achieve sustainable development."[103] In regard to North America, the Intergovernmental Committee on Climate Change cautioned: "Among the most vulnerable are indigenous peoples due to their complex relationship with their ancestral lands and higher reliance on subsistence economies".[104] It is likely that some of the climate change impacts will be irreversible.

Climate change issues have been raised by First Nations in British Columbia and other regions of Canada. Too often their concerns are not being addressed by federal and provincial governments. Thus, such governments may find it exceedingly difficult to satisfy the "minimal impairment" and other criteria required of them, as fiduciaries. In *Tsilhqot'in Nation*, the Supreme Court generally indicated:

> Implicit in the Crown's fiduciary duty to the Aboriginal group is the requirement … that the government go no further than necessary to achieve [it's goal] (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact) …[105]

The above considerations relating to sustainable and equitable development, as influenced by *Tsilhqot'in*, are likely to be relevant in upcoming resource development debates. In this whole context, the *UN Declaration* and diverse international environmental instruments could prove highly relevant.

VI. UNDERLYING CONSTITUTIONAL PRINCIPLES

In *Tsilhqot'in Nation*, the Supreme Court made some reference to the federalism principle:

> … it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both. (para. 105)

> "[C]onstitutional doctrine must facilitate, not undermine what this Court has called 'co-operative federalism'" and as such "a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government" … (para. 149, quoting *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at paras. 24 and 37)[106]

The Supreme Court underlined the importance of "cooperative federalism", but it appears to be solely in the context of federal and provincial governments. In 2001, the Court has ruled that cooperation is the "animating force" and the federalism principle "demands nothing less".[107]

In international law, such cooperation must also include Indigenous peoples and their governments. In achieving the ends of the *UN Declaration*, States are required generally as a minimum standard to take appropriate measures "in consultation and cooperation with indigenous peoples".[108]

In the *Indigenous and Tribal Peoples Convention, 1989*: "Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."[109] Cooperation with Indigenous peoples is also required for the planning, co-ordination, execution and evaluation of the measures provided for in this *Convention* (art. 33(2)) and, more specifically, in regard to education and health (arts. 7(2); 25(2); 27(1)); and to protect and preserve Indigenous territories (art. 7(4)).

In *Reference re Secession of Québec*, the Supreme Court identified four underlying constitutional principles:

> … four foundational constitutional principles … are … federalism, democracy, … rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other. [110]

The Court added that "protection of existing aboriginal and treaty rights" could be looked at in its own right or as part of the underlying constitutional principle of "respect for minorities".[111] In *R.* v. *Van der Peet*, the majority opinion affirmed that Aboriginal peoples are distinct from all other minority groups and have a "special legal, and now constitutional status".[112]

Thus, "protection of existing aboriginal and treaty rights" is more accurately described as an underlying constitutional principle in its own right rather than a part of "respect for minority rights". Minorities, *per se*, do not have a right of self-determination. A similar view has been expressed by others.[113]

The underlying constitutional principle of democracy is also an essential consideration. As the Supreme Court concluded: "democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government."[114] In 2004, Mr. Justice LeBel of the Supreme Court concluded that "respect for human rights and freedoms" is also an underlying constitutional principle.[115]

The far-reaching significance of the underlying constitutional principles should not be underestimated. They are highly significant for Indigenous peoples and Canada's Constitution as a whole. As elaborated by the Supreme Court in *Reference re Secession of Québec*:

> Our Constitution has an internal architecture … The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. …certain underlying principles infuse our Constitution and breathe life into it**.** (para. 50)
>
> The [underlying] principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood**.** (para. 51)[116]

The Supreme Court has indicated that the underlying constitutional principles are "not an invitation to dispense with the written text of the Constitution", but can be used by the courts "in the filling of gaps in the express terms of the constitutional text".[117] The Court added that these principles are "invested with a powerful normative force, and are binding upon both courts and governments."[118]

In the *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, Heads of State and Government reaffirmed: "human rights,

the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations."[119] This interrelationship has been repeatedly reaffirmed in international law.

Thus, both Canadian constitutional law and international law adopt a similar approach in regard to these core principles. Such principles must be applied to the underlying constitutional principle of "protection of existing aboriginal and treaty rights".

VII. CONCLUSIONS AND RECOMMENDATIONS

Tsilhqot'in Nation v. *British Columbia* is a landmark decision on Aboriginal title. The right to determine the uses of Indigenous peoples' title lands and resources and fully benefit from them – as well as the many references to Indigenous peoples' consent and to control of the land – are highly significant. Such elements are consistent with Indigenous peoples' right to self-determination; free, prior and informed consent; and right to development under international human rights law.

Of particular significance is the Supreme Court's safeguarding of Indigenous title lands and resources for present and future generations. This intergenerational approach has diverse support in international human rights and environmental law. It is especially crucial in addressing such urgent issues as climate change.

At the same time, it is important to build on this judicial precedent. Canada's highest court has still not adopted a human rights-based approach in relation to Indigenous peoples' rights, including treaty rights. International human rights law is a most relevant and persuasive source for interpreting the rights of Indigenous peoples as self-determining peoples.

The *UN Declaration on the Rights of Indigenous Peoples* constitutes a principled framework and context for achieving reconciliation, justice, healing and peace. The *Declaration* and other international human rights law can significantly reinforce Canadian constitutional law and ensure

a principled approach that fully takes into account Indigenous peoples as both international and domestic actors.

A crucial opportunity currently exists to reframe the Indigenous-Crown relationship not only for Aboriginal title holders, but for all Indigenous peoples. Focus should be on ensuring harmonious and cooperative relations – not on infringement of Indigenous land and resource rights and jurisdiction.

The Court has identified the "protection of existing aboriginal and treaty rights" as an underlying constitutional principle. Yet the Court has not yet defined it together with other key constitutional principles, such as federalism, democracy and respect for human rights.

"Protection of existing aboriginal and treaty rights" cannot be defined in isolation. Other underlying constitutional principles – such as federalism, democracy, and respect for human rights – must be applied so as to reinforce Indigenous peoples' rights.

Indigenous legal orders must be respected in Canada's Constitution. This is a central and compelling conclusion, when the *Tsilhqot'in Nation* decision, international human rights law and the underlying constitutional principles identified by the Supreme Court are all fully considered. The constitutional jurisdiction of Indigenous peoples must not be limited to Aboriginal title lands.

It is important to use the *UN Declaration* wherever possible. Key uses would include: Indigenous constitutions and governance; negotiations with governments and corporations; litigation in Canadian courts; and in international forums.

Human rights education relating to Indigenous peoples' status and rights should be an ongoing focus for governments, lawyers, judges, students and others, with a view to ensuring justice and reconciliation.

In order to permanently move from a paradigm of colonialism to one based on contemporary human rights, it would appear critical for Indigenous plaintiffs to effectively invoke in litigation the *UN Declaration* and other international human rights law. In addition, the underlying constitutional principles identified by the Supreme Court should be used effectively from an Indigenous perspective.

VIII. ENDNOTES

[1] Office of the High Commissioner for Human Rights, "Combating Discrimination against Indigenous Peoples", http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_indigenous.aspx: "The world's indigenous population has been estimated at 370 million individuals living in more than 70 countries and made up of more than 5.000 distinct peoples."

[2] In regard to British Columbia, see Grand Chief Edward John, "Survival, Dignity and Well-Being: Implementing the Declaration in British Columbia" in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 47.

[3] *R. v. Ipeelee*, 2012 SCC 13, para. 60: "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."

[4] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (13 September 2007), Annex.

[5] Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action*, *supra*; and Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009), http://www.iwgia.org/iwgia_files_publications_files/making_the_declaration_work.pdf.

[6] Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples", (2009) 58 ICLQ 957, at 957: "The Declaration represents the culmination of an extraordinary process which has gradually transformed indigenous peoples from 'victims' to 'actors' of international law."

[7] Romeo Saganash and Paul Joffe, "The Significance of the UN Declaration to a Treaty Nation: A James Bay Cree Perspective" in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 135, at 140-141.

[8] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44.

[9] *Ibid.*, para. 4. At paras. 4, 6 and 24, the Supreme Court refers to "indigenous groups". This term is synonymous with "Aboriginal groups" used by the Court in other parts of the decision.

[10] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting on other grounds). See also *United States of America* v. *Burns*, [2001] 1 S.C.R. 283, para.80.

[11] See also *Simon* v. *Attorney General of Canada*, 2013 FC 1117, para. 121: "the Applicants invoke [the *UN Declaration*] to inform the contextual approach to statutory interpretation as per Baker cited above, at paras 69-71. Indeed, while this instrument does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values." The *Declaration* does not "create" new rights, precisely because Indigenous peoples' rights are "inherent": see its preambular para. 7.

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

[13] *Ibid.* [emphasis added]

[14] *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on December 16, 1966 and entered into force March 23, 1976 and *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46. Adopted by the U.N. General Assembly on December 16, 1966 and entered into force 3 January 1976, identical art. 1(3).

[15] "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, endorsed by Human Rights Council, *Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/17/4/ (16 June 2011) (adopted without vote).

[16] *Ibid.*, Principle 12, *Commentary*.

[17] Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Aboriginal Rights: International Perspectives", Order of Canada Luncheon, Canadian Club, Vancouver, British Columbia, February 8, 2002.

[18] Committee on the Elimination of Racial Discrimination [CERD], "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. This document was issued by CERD after Canada's appearance before the Committee.

Generally, in regard to its international positions on Indigenous peoples' rights, Canada does not engage in prior consultation with Indigenous rights-holders. Canada also refuses to provide representatives of Indigenous peoples with a copy of its public statements or positions on Indigenous peoples' rights at international forums. Thus, Indigenous representatives are denied the ability to review such documents in a timely manner so as to provide an effective response at such forums.

[19] Regional systems include the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

[20] See Annex in Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007 (adopted without vote), approved in General Assembly, *Report of the Human Rights Council*, UN Doc. A/RES/62/219 (22 December 2007).

[21] 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.

[22] Joyce Green, "Honoured in Their Absence: Indigenous Human Rights" in Joyce Green, ed., *Indivisible: Indigenous Human Rights* (Winnipeg, Manitoba: Fernwood Publishing, 2014) (forthcoming) 1 at 13.

[23] *Universal Declaration on Human Rights*, UNGA Res. 217 A (III), UN Doc. A/810, at 71 (1948). Adopted by the U.N. General Assembly on December 10, 1948, art. 17 (1); *International Convention on the Elimination of All*

Forms of Racial Discrimination, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352. *Adopted by* U.N. General Assembly on 21 December 1965, opened for signature on 7 March 1966, and *entered into force* on 4 January 1969, art. 5(d)(v); *American Convention on Human Rights*, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 144 *entered into force* 18 July 1978, art. 21; *American Declaration on the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), art. XXIII; *African Charter of Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 October 1986, art. 14.

[24] *Tsilhqot'in Nation* v. *British Columbia*, *supra* note 8, para. 142 [emphasis added]

[25] *UN Declaration*, article 1. See also *Indigenous and Tribal Peoples Convention, 1989* (No. 169), International Labour Organization, adopted 27 June 1989 (entered into force 5 September 1991), article 3(1): "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." Canada has not ratified this *Convention*, but can still be used to interpret domestic law.

[26] 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: "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."

[27] Canada, *Core Document Forming Part of the Reports of States Parties: Canada*, UN Doc. HRI/CORE/1/Add.91 (12 January 1998), III, C, para. 124.

[28] *Tsilhqot'in Nation* v. *British Columbia*, *supra* note 8, paras. 14 and 72

[29] *Vienna Declaration and Programme of Action*, adopted by consensus at World Conference on Human Rights, 25 June 1993, UN Doc. A/CONF.157/24 (Part I) at 20 (1993), reprinted in (1993) 32 I.L.M. 1661, para. 5. [emphasis added] Endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993) (adopted without a vote).

[30] *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without vote), para. 6.

[31] For a list of "universal human rights instruments" in international law, including the *UN Declaration*, see online: OCHCR http://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx

[32] *UN Declaration*, arts. 7 and 43.

[33] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, UN Doc. A/HRC/9/9 (11 August 2008), para. 86 (Conclusions).

[34] Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex – Expert Mechanism Advice No. 6 (2014): Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, para. 1.

[35] *Tsilhqot'in Nation*, *supra* note 8, para. 23. [emphasis added]

[36] Alexandra Xanthaki, "Indigenous Rights in International Law Over the Last 10 Years and Future Developments", (2009) 10 Melbourne J. Int'l L. 27 at 36; and Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Not Merely 'Aspirational'", 22 June 2013, http://quakerservice.ca/wp-content/uploads/2012/09/UN-Decl-Not-merely-aspirational-.pdf.

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

[38] 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.

[39] Rio+20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), para. 8. Endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote), para. 49.

[40] *Outcome document of the high-level meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/69/L.1 (15 September 2014) (draft to be adopted 22 September 2014), para. 4.

[41] *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, paras. 22 and 23.

[42] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639 at 663, para. 66.

[43] In regard to "consent", see *Tsilhqot'in Nation*, *supra*, paras. 2, 5, 76, 88, 90-92, 97 and 124; and *UN Declaration*, article 32(2).

[44] *Ibid.*, para. 76. In regard to "control", see also paras. 2, 15, 18, 31, 36, 38, 47, 48, 50, 75 and 119; and *UN Declaration*, article 26(2).

[45] *Ibid.*, para. 76.

[46] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, UN Doc. A/ HRC/24/41 (1 July 2013), para. 84. Anaya adds: "Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending on the nature of the activities and their potential impact on the exercise of indigenous peoples' rights." [emphasis added]

[47] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex (Conclusions), at para. 98. [emphasis added]

[48] 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. For a similar ruling, see *Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R., Judgment of November 28, 2007, Series C No. 172, para. 134.

[49] African Commission on Human and Peoples' Rights, "Resolution on a Human Rights-Based Approach to Natural Resources Governance", ACHPR/Res.224(LI)2012, done in Banjul, The Gambia, 2 May 2012, http://www.achpr.org/sessions/51st/resolutions/224/, para. 1. [emphasis added]

[50] Human Rights Committee, *Concluding observations of the Human Rights Committee: Colombia*, UN Doc. CCPR/C/COL/CO/6 (4 August 2010), para. 25. [emphasis added]

[51] *Indigenous and Tribal Peoples Convention, 1989*, *supra* note 25, article 4.

[52] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24 (where Supreme Court quotes *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 168). In the case of "strong *prima facie* rights" that are asserted but yet unproven, a key issue appears to be establishing reasonable interim measures relating to a propose development pending resolution of such rights (*Haida Nation*, paras. 44 and 47). The project cannot proceed in the interim (para. 27).

See also Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, *supra* note 47, 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." [emphasis added]

[53] Such full and timely information must be provided by the Crown in carrying out its duty to consult: see, *e.g.*, *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C.C.A.), at para. 160, cited with approval in *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 64.

[54] Government of Canada, *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult* (February 2008) at 53.

[55] Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675.

[56] *Vienna Declaration and Programme of Action*, *supra* note 29, Part I, para. 32: "The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues." [emphasis added]

[57] See, *e.g.*, *Tsilhqot'in Nation*, *supra* note 8, paras. 2, 17, 77-80, 88, 90-97, 113, 125 and 153.

[58] See *supra* note 18.

[59] *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, *supra* note 30, para. 2. [emphasis added] And at para. 37: "We reaffirm that States shall abide by all their obligations under international law".

[60] General Assembly, *The rule of law at the national and international levels*, UN Doc. A/RES/68/116 (16 December 2013) (without vote), para. 6.

[61] *Ibid.*, para. 4.

[62] *Charter of the United Nations*, art. 2, para. 2.

[63] *Ibid.*, art. 1, para. 3.

[64] See Paul Joffe, "Undermining Indigenous Peoples' Security and Human Rights: Strategies of the Canadian Government" in Joyce Green, ed., *Indivisible: Indigenous Human Rights*, *supra* note 22 at 217: "The federal government often takes positions that adversely affect Indigenous peoples' rights. At the international level, the government appears to proceed on the assumption that it has no obligation to consult and accommodate Indigenous peoples on their concerns."

[65] See, *e.g.*, *R.* v. *Hape*, [2007] 2 S.C.R. 292, at paras. 60-90.

[66] *Tsilhqot'in Nation*, *supra* note 8, para. 73. [emphasis added] See also paras. 94 and 121.

[67] *Ibid.*, paras. 2, 18, 75 and 76.

[68] *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical art. 1. In regard to the right of self-determination, see also *UN Declaration*, preambular paras.16, 17 and arts. 1-4.

[69] *UN Declaration*, arts. 20, 23, 26(2) and 32(1); and *Declaration on the Right to Development*, GA Res. 41/128, 41 UN GAOR, Supp. (No. 53) UN Doc. A/41/925 (1986), http://www.un.org/documents/ga/res/41/a41r128.htm. The right to development, as included in this 1986 *Declaration*, was affirmed in *Vienna Declaration and Programme of Action*, *supra* note 29, which in turn was endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993) (adopted without vote).

[70] 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." [emphasis added]

[71] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 119: "Self-determination has never simply meant independence. It has meant the free choice of peoples."; and Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at 175: "Self-government ... is one natural outcome of the exercise of self-determination and refers to the right of peoples to exercise political autonomy. Self-determination refers to the collective power of choice; self-government is one possible result of that choice." [emphasis added]

[72] *Tsilhqot'in Nation*, *supra*,note 8, paras. 67 and 75.

[73] Human Rights Committee, *General Comment No. 12, Article 1*, 21st sess., A/39/40 (1984), para. 1.

[74] 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.

[75] *Tsilhqot'in Nation*, *supra* note 8, para. 75.

[76] *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 67 (quoting Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at 436). See also *Haida Nation*, *supra* note 52, para. 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty and assumed Crown sovereignty".

[77] *UN Declaration*, articles 3, 4 and 20.

[78] *Ibid.*, article 33.

[79] See, *e.g.*, Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

[80] Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Canada Communication Group, 1996), vol. 2(1), at 168.

[81] *Tsilhqot'in Nation*, *supra* note 8, paras. 35, 41 and 49. Similarly, see *Delgamuukw*, *supra* note 52, para. 157.

[82] See, *e.g.*, *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, at 1053, para. 69: "Indian nations were regarded in their relations with the European nations which occupied North America as independent nations." See also *UN Declaration*, 14th preambular para.: "rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character".

[83] Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?", (2012) 91 Can. Bar Rev. 745 at 751. See also pp. 749 and 752.

[84] *Tsilhqot'in Nation*, *supra* note 8, paras. 70, 72, 73, 75, 90, 94 and 121.

[85] Human Rights Council, *Consolidated report of the Secretary-General and the United Nations High Commissioner for Human Rights on the right to development*, UN Doc. A/HRC/27/27 (18 June 2014), para. 8.

[86] Rio+20 United Nations Commission on Sustainable Development, *The future we want*, *supra* note 39, para. 8. And at para. 9: "We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction".

[87] *UN Declaration*, articles 20 and 23.

[88] *Tsilhqot'in Nation*, *supra* note 8, para. 92. [emphasis added]

[89] *Outcome document of the high-level meeting of the General Assembly known as the World Conference on Indigenous Peoples*, *supra* note 40, para. 3.

[90] UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (New York: UN Global Compact, 2013), http://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf. The UN Global Compact describes itself as the largest corporate responsibility initiative in the world, with 8,000 business signatories from 140 countries.

[91] George Kell, "Building a Sustainable Future – The Compact Between Business and Society", *Inter Press Service* (27 August 2014), http://www.ipsnews.net/2014/08/opinion-building-a-sustainable-future-the-compact-between-business-and-society/

[92] *Tsilhqot'in Nation*, *supra* note 8, para. 83.

[93] *Ibid.*, para. 86.

[94] *Ibid.*, paras. 2 and 88.

[95] *Ibid.*, para. 86.

[96] *Ibid.*, para. 87.

[97] Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121 at 149-151.

[98] *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R., Ser. C No. 79 (Judgment) 31 August 2001, para. 149. [emphasis added]

[99] *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1(13 June 1992) endorsed by General Assembly, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/RES/47/190 (22 December 1992) (adopted without vote), Principle 3. [emphasis added] See also *UN Declaration*, preambular para. 11 ("sustainable and equitable development").

See also *Federal Sustainable Development Act*, S.C. 2008, c. 33, s. 5, where the government of Canada "accepts the basic principle that sustainable development is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government."

[100] In regard to safeguarding present and future generations, see *Tsilhqot'in Nation*, *supra*, paras. 15, 74, 86, 88, 94 and 121.

See also *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Vice-President Weeramantry, [1997] I.C.J. Rep. 88 at 110: "…far-reaching principles as the principle of trusteeship of earth resources, the principle of intergenerational rights, and the principle that development and environmental conservation must go hand in hand. Land is to be respected as having a vitality of its own and being integrally linked to the welfare of the community."

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

[102] Rio+20 United Nations Commission on Sustainable Development, *The future we want*, *supra* note 39, para. 158. [emphasis added]

[103] *Ibid.*, para. 190 [emphasis added] Similarly, see General Assembly, *Protection of global climate for present and future generations of humankind*, Doc. A/RES/67/210 (21 December 2012) (adopted without vote), para. 2.

[104] Intergovernmental Panel on Climate Change, Working Group II Fifth Assessment Report, *Climate Change 2014: Impacts, Adaptation, and Vulnerability*, vol. II "Regional Aspects", c. 26 "North America", 28 October 2013, http://ipcc-wg2.gov/AR5/images/uploads/WGIIAR5-Chap26_FGDall.pdf, at 5.

[105] *Tsilhqot'in Nation*, *supra* note 8, para. 87 [emphasis added].

[106] *Tsilhqot'in Nation*, *supra* note 8. [emphasis added]

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

[108] *UN Declaration*, articles 38 and 43.

[109] *Indigenous and Tribal Peoples Convention, 1989*, *supra* note 25, art. 2(1). [emphasis added]

[110] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 49.

[111] *Ibid.*, para. 82. The "protection of existing aboriginal and treaty rights" was also characterized by the Court as a "constitutional value".

[112] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, *per* Lamer C.J. for the majority, para. 30.

[113] See, *e.g.*, Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dalhousie L.J. 5, at 12, n. 15, where in regard to the "protection of existing aboriginal and treaty rights", it is said: "The [Supreme] Court indicated that protection of aboriginal interests might be an element of the broader respect for minority rights or it might constitute its own principle. … the preferable approach is to recognize it as an independent principle to acknowledge that First Nations are not in the same position as other so-called "minorities." [emphasis added]

[114] *Reference re Secession of Québec*, *supra* note 110, para. 64.

[115] *R.* v. *Demers*, (2004) 2 S.C.R. 489, para. 79.

[116] *Reference re Secession of Québec*, *supra* note 110. [emphasis added]

[117] *Ibid.*, para. 53.

[118] *Ibid.*, para. 54.

[119] *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, *supra* note 30, para. 5 [emphasis added]