BACKGROUNDER

Self-determination & Free, Prior and Informed Consent

Understanding the United Nations Declaration on the Rights of Indigenous Peoples

February 1, 2021

"Indigenous peoples must be part of decision making when our rights and well-being are at stake. Working with us to determine what that looks like is the smart thing to do. It will lead to fewer acrimonious decisions, fewer court battles, more timely decisions, and better outcomes for us all."

– Chief Wilton Littlechild, addressing United Nations Permanent Forum on Indigenous Issues, 2018

Executive Summary

The heart of the matter is the universal right of peoples to self-determination. Indigenous peoples, no less than any other peoples or Nations, have the collective right to make their own decisions through their own institutions and systems of governance and law.

Respect for the right to self-determination is crucial to reconciliation. Self-determination is at the heart of the *UN Declaration on the Rights of Indigenous Peoples* including its provisions on free, prior and informed consent. The Truth and Reconciliation Commission of Canada stated as its first Principle of Reconciliation that the *UN Declaration on the Rights of Indigenous Peoples* "is the framework for reconciliation at all levels and across all sectors of society."

There is no inherent conflict between the human rights framework set out in the *UN Declaration* and Canadian constitutional law. To the contrary, the *Declaration* provides a way to achieve the constitutional imperative of reconciling Canadian law with the pre-existing sovereignty of Indigenous peoples.

The right of Indigenous peoples to make their own decisions includes the right to say "yes", the right to say "no", and the right to "yes with conditions" to proposals brought forward by others.

The term "veto" implies an absolute power, regardless of the circumstances in any given case. Characterizing the right to say no as an absolute veto is confusing, potentially misleading, and often deliberately alarmist. Veto implies a decision that is arbitrary, unilateral, without legal foundation, and taken outside of any legitimate process. None of these things are true of decisions taken by Indigenous peoples in the legitimate exercise of their rights.

Misrepresentations of the *Declaration* must be set aside so that Canada can get on with the necessary and long overdue work of ensuring that the rights of Indigenous peoples are recognized, respected, protected and fulfilled.

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Introduction

To an unfortunate degree, public debate around Canadian implementation of the *United Declaration on the Rights of Indigenous Peoples* has focused on a single word: veto. Tellingly, the word veto is not actually used anywhere in the *UN Declaration*.[1]

The *UN Declaration* recognizes the inherent right of Indigenous peoples (meaning Indigenous Nations) to make their own decisions, according to their own laws, customs, and traditions and through the Indigenous governments and other institutions they have freely chosen for themselves. This includes decisions about meeting the economic and social needs of their communities and about when and how their lands, territories and resources can or should be developed.

Self-determination is a fundamental human right that is at the foundation of all international law.

In other words, Indigenous peoples, no less than any other People or Nation, have the right to self-determination.

Self-determination is a fundamental human right that is at the foundation of all international law. The fact that *all* peoples have the inherent right to self-determination is explicitly highlighted in the *Charter of the United Nations* and set out in the first article of two binding international human rights treaties ratified by Canada almost a half century ago.[2]

All human rights are interdependent and interrelated.[3] This is particularly true of the connection between self-determination, land rights, and the economic, social and cultural rights of Indigenous peoples. Decisions about how lands and natural resources will be conserved or used are some of the most crucial decisions affecting community health and well-being and the vitality of Indigenous peoples' distinct cultures and traditions. The Supreme Court of Canada has concluded that Indigenous land title is a unique form of ownership that necessarily includes the right of Indigenous governments to exercise jurisdiction over how lands and resources are used and developed.[4]

The *UN Declaration* recognizes that self-determination, land rights, and other fundamental rights of Indigenous peoples have been systematically violated throughout history and that this has been the cause of profound harm and ongoing injustice and inequality. The *Declaration* calls on all states and all institutions to recognize and uphold the rights of Indigenous peoples and to work to undo the harms caused by centuries of violations. This includes working in partnership and collaboration with Indigenous governments, ensuring a meaningful role for Indigenous peoples in all decisions potentially impacting their lands and other rights, and committing to act on the basis of mutual agreement – or free, prior and informed consent – especially when there is risk of serious harm.

Free, prior and informed consent (FPIC) describes an agreement reached without coercion, that is based on honest and accurate sharing of information, and that is made early enough in the process for consent to be meaningful. In Canadian law, it is understood that all consent must, by definition, be free, prior and informed. Any agreement entered into under duress, on the basis of inadequate or misleading information, or only after the fact, is not truly consensual.

Free, prior and informed consent may be achieved as the result of a process of meaningful, good faith consultation. However, FPIC is not just another word for consultation. FPIC recognizes that Indigenous peoples are not simply participants in the decision-making process, but decision-makers in their own right.

In other words, FPIC is not just a process to get to yes. The right of Indigenous peoples to make their own decisions includes the right to say "yes," the right to say "no", or the right to "yes with conditions" to proposals brought forward by others. The standard of free, prior and informed consent requires federal, provincial, and territorial governments to respect those decisions or make a clear, compelling, and legally justified case why a different outcome should prevail.

FPIC is a meaningful protection for the rights of Indigenous peoples. However, characterizing the right to say no as a veto is confusing and potentially misleading. The use of the word veto is often deliberately alarmist because of its connotations. The word veto implies a decision that is arbitrary, unilateral, without legal foundation and taken outside of any legitimate process. None of these elements are present, when decisions are made by Indigenous peoples in the legitimate exercise of their rights and governance.

The decision-making powers affirmed in the *Declaration* are exercised on the basis of the inherent or pre-existing rights of Indigenous peoples, including the right to self-determination. Given the long history of discriminatory and racist decisions and policies that have been imposed on Indigenous peoples, and the extreme, lasting harm that has resulted, the *UN Declaration* necessarily sets a high standard to protect the collective rights of Indigenous peoples to determine their own futures. The rights of Indigenous individuals are also affirmed in the *Declaration*.

At the same time, the *Declaration* also explicitly acknowledges that the rights of Indigenous peoples must be reconciled with the rights of others[5] and may be subject to arbitration or other processes when necessary to resolve disputes.[6] In fact, the *Declaration* has some of the most extensive balancing provisions of any international human rights instrument.

Dr. John Borrows has commented that to understand the *Declaration*, "we need to read it contextually and we need to read it as a whole."[7] Reading the *Declaration* as whole, and in its relationship to other international human rights standards, it is clear that the overall emphasis is on mutual respect and partnership. In fact, the preamble to the *Declaration*, which provides guidance on its interpretation, closes by proclaiming the *Declaration* "as a standard of achievement to be pursued in a spirit of partnership and mutual respect."

The word 'veto' describes an extreme exception to democratic norms. The use of the word veto implies that Indigenous peoples are exercising their decision-making authority in a way that is arbitrary, absolute, and without recourse. This is very different from what the *Declaration* intends and the very opposite of what it actually states.

In contrast, a decision by a federal, provincial and territorial government to simply ignore decisions made by Indigenous peoples, or to arbitrarily and unilaterally cast those decisions aside, would be a veto in the true sense of the word. This is how governments in Canada have behaved for decades in respect to Indigenous peoples, but such actions can no longer be reconciled with either domestic or international law.

Mutual respect and partnership should be the defining characteristics of any relationships between governments in a cooperative federal state. Dr. Roshan Danesh, who has advised governments and industry on Indigenous rights, notes that "in Canada's constitutional order, no government has absolute power."

> The Crown and Aboriginal groups are different decision-makers acting under different authorities. One does not 'veto' the decision of the other. Neither has the power to reach into the other's jurisdiction and trump the decision of the other. The relationship is one of difference and distinction — not of inferiority and superiority.[8]

Those who characterize Indigenous consent as a veto rarely explain what they mean by the word. Instead, they rely on the word's negative connotations to provoke fear and apprehension about the consequences of implementing the *Declaration*. Characterizing Indigenous decision-making authority as a veto also invokes racist tropes about Indigenous peoples demanding more than they deserve: inherent rights recast as a "handout." An opinion piece in the *Financial Post* set out the following, readily disproven, claims:

> Making all Canadian laws consistent with UNDRIP [the *UN Declaration*] … 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. This would be carrying the Supreme Court's rebalancing of negotiating strength too far.[9]

This brings us to the crux of the matter. Free, prior and informed consent is a collective right of Indigenous peoples that is exercised, not by "small groups of them", but through Indigenous peoples' own structures, institutions, and processes of governance and law. Collectively, "other Canadians" do, in fact, have the same right: it is exercised every day through the federal, provincial, territorial and municipal governments.

The mischaracterization of free, prior and consent as an absolute veto is a rhetorical device that allows opponents of the *Declaration* to avoid obvious questions such as, "Why shouldn't Indigenous peoples be able to make their own decisions?" or, "On what legal or moral basis can federal, provincial and territorial governments continue to impose decisions without regard for the rights, jurisdiction, and decision-making authority of Indigenous peoples?"

Mutual respect and partnership should be the defining characteristics of any relationships between governments in a cooperative federal state.

If we dispense with misleading and confusing rhetoric about veto, we can see free, prior and informed consent, or FPIC, for what it really is: a principled framework to build a better, more just relationship between Canada and Indigenous peoples, consistent with Canada's existing human rights obligations. This is something that the vast majority of Canadians support.[10] The Truth and Reconciliation Commission of Canada, which called the *Declaration* "the framework for reconciliation at all levels and across all sectors of society," explicitly affirmed the importance of free, prior and informed consent in its widely endorsed *Calls for Action*.[11]

Implementing free, prior and informed consent would ensure that Indigenous peoples are able to influence plans and proposals from the outset. Rather than being a barrier to economic development, this would help focus attention and resources on projects that meet the real needs of Indigenous peoples and which have the greatest chance of proceeding to implementation, including those developed by Indigenous peoples themselves.

Respect for the right of free, prior and informed consent would also mean that some projects would be rejected for posing unacceptable risks or violating Indigenous rights and values. This is no more a veto than when any government rejects a flawed project proposal.

The reality is that not all projects *should* go ahead. Early identification of proposals that are unacceptable will head off the kind of lengthy and expensive conflicts that so often result when governments and corporations try to push aside the values, perspectives and legal rights of Indigenous peoples. Reducing conflicts, and the waste of time and energy fighting over bad projects, creates a better climate for mutually beneficial projects to be brought to fruition.

"In many ways, Canada waged war against Indigenous peoples through Law, and many of today's laws reflect that intent."

Some opponents of the *UN Declaration* have made the wild claim that implementation of FPIC could bring resource development to a halt. This ignores the reality that resource development agreements between Indigenous peoples and industry are already commonplace in Canada. A Natural Resources Canada database of mining sector agreements with Indigenous peoples

included 434 active agreements as of July 2020.[12] That number that has grown exponentially since the adoption of the *Declaration*.[13] Around the world, many corporations and industry associations, along with key international lending agencies, have responded to the *Declaration* by promoting the benefits of consent or by adopting formal policies that explicitly require FPIC.[14]

Justice Murray Sinclair, a former Canadian Senator and the Chair of the Truth and Reconciliation Commission, said, "In many ways, Canada waged war against Indigenous peoples through Law, and many of today's laws reflect that intent."[15] Domestic laws shaped by racism and colonialism are not an appropriate lens through which to view an international human rights instrument meant to help the world address and overcome racism and colonialism. No provision in the *Declaration* should be rejected because it is seen in conflict with domestic laws. Instead, domestic laws should be reformed to live up to the agreed minimum standards of the *Declaration*.

That being said, there is no inherent conflict between the *UN Declaration* and Canadian legal tradition, taken as a whole. Implementing the *UN Declaration* is not about making a choice between Canadian constitutional tradition and the requirements of international human rights law. The *UN Declaration* and the constitutional affirmation of Aboriginal and Treaty rights are mutually reinforcing rather than contradictory. In 2008, a group of 100 Canadian experts in constitutional law and human rights published an open letter in support of *Declaration*, stating that the *Declaration* is not only "consistent with the Canadian Constitution and Charter" it is also "profoundly important for fulfilling their promise." The letter went on to state that "claims to the contrary do a grave disservice to the cause of human rights and to the promotion of harmonious and cooperative relations."[16]

Furthermore, consent is already part of how the Supreme Court has interpreted Indigenous title rights. The Supreme Court has also concluded that consent is part of the spectrum of obligations required by the duty to consult and accommodate[17] – a fact that is rarely acknowledged by opponents of the *UN Declaration*.

There is also a deeper legal and political tradition of consent in Canada. The long history of Treaty-making implicitly recognizes the authority of Indigenous peoples to grant or withhold consent and the obligation of the Crown to obtain such consent. The Royal Proclamation of 1763, often referred to as Canada's first constitution, and the subsequent Treaty of Niagara, are generally understood as affirming a requirement of "permission or consent" for European settlement in Indigenous territories.[18] For Indigenous peoples, free, prior and informed consent reflects the underlying principles

of reciprocity and mutual respect that they have always sought, and continue to seek in their relationship with Canada.

This backgrounder sets out in greater detail how consent and veto are separate and distinct concepts and why it is fundamentally wrong to describe the consent provisions in the *Declaration* as an absolute veto. This backgrounder also argues that free, prior and informed consent is a core and indispensable element of the *Declaration,* essential to any meaningful and effective implementation of its provisions. This backgrounder further explains why there is no fundamental contradiction between free, prior and informed consent and the overall direction of how the Supreme Court of Canada has interpreted the Canadian Constitution and the reconciliation of rights. The backgrounder concludes by looking at the example of conflicts around pipelines – the example most often cited by opponents of the *Declaration* – to understand how respect for FPIC should play out in real life.

1. Obligation to fully implement the *UN Declaration on the Rights of Indigenous Peoples*

The *UN Declaration on the Rights of Indigenous Peoples* is the world's most authoritative statement of the rights of Indigenous peoples in international law and the corresponding obligations of all states to respect, protect, fulfill, and promote these rights. All governments in Canada have an obligation to fully implement the *UN Declaration*. Partial implementation, such as by ignoring or minimizing the free, prior and informed consent provisions, violates those obligations and undermines the *Declaration* as a whole.

The *Declaration* is the first international human rights instrument developed through the direct participation of the rights-holders themselves. The provisions of the *Declaration* were drafted and finalized through a process of more than two decades of deliberation and negotiation at the United Nations. In the process of reaching agreement on the final text, each article was extensively scrutinized and debated. No other international human rights standard has been so carefully and thoroughly vetted before adoption.

Agreement on the provisions of the *Declaration* was reached through a process of consolidating norms and standards already established in international law. It is often said that the *Declaration* does not create any new rights. Every provision can be traced

to standards that were already established either in other instruments previously accepted by the international community or in the body of expert interpretation that has emerged around these instruments.[19]

The *Declaration*'s provisions on free, prior and informed consent are a good example. Fully ten years before the adoption of the *Declaration*, the obligation to obtain the informed consent of Indigenous peoples was set out in a 1997 expert commentary by the independent human rights body established to promote implementation of and compliance with the *UN Convention on the Elimination of Racial Discrimination* (CERD).[20] The CERD committee concluded that FPIC was necessary to fulfill state obligations to combat racial discrimination. CERD is a legally binding human rights treaty that was ratified by Canada in 1970. Other UN Treaty bodies have also affirmed that the free, prior and informed consent of Indigenous peoples is an essential component of state obligations under other international human rights Treaties ratified by Canada including the *International Covenant on Economic, Social and Cultural Rights*.[21]

In international law, there is a distinction between declarations, which are adopted by the UN General Assembly, and conventions or treaties such as CERD that require individual ratification by each state. Treaties are directly binding on ratifying states. In and of themselves, declarations do not have the same direct legal effects as conventions. Nonetheless, declarations are considered to be a crucial expression of the human rights obligations of all states and do have legal effects. There is a clear expectation of implementation and compliance.

More than a half century before the adoption of the *UN Declaration*, the Office of Legal Affairs of the United Nations provided a clarifying comment on the significance of human rights declarations, stating "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."[22] Furthermore, as we have just seen with the example of FPIC, the provisions set out in human rights declarations may incorporate standards that are already part of the legal obligations of states because these standards have already been established through practice or because they are part of previous conventions and how they have been interpreted and applied.

Writing specifically in the context of Indigenous land rights in Canada, Dr. James Anaya, the then UN Special Rapporteur on the rights of Indigenous peoples, characterized the *UN Declaration* as "a strongly authoritative statement" of the human rights of Indigenous peoples "having been the product of over two decades of discussion in which many States, including Canada, and indigenous peoples from around the world actively participated."[23] Dr. Anaya has also written that, "Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."[24]

Declarations are considered to be a crucial expression of the human rights obligations of all states and do have legal effect.

The *Declaration* was adopted by the United Nations General Assembly through a resolution passed on September 13, 2007. At the time of adoption, only four states – Canada, Australia, New Zealand and the United States – voted against the *Declaration*. Louise Arbour, a former Supreme Court of Canada Justice who at the time of the adoption was serving as the United Nations High Commissioner for Human Rights, publicly expressed her "profound disappointment" in Canada's position. She called the Harper government's initial opposition to the *Declaration* a "very surprising position for Canada to take after not only years (but) decades of progressive involvement on that issue…. I found it rather astonishing."[25] Access to information requests subsequently revealed that the decision by the government of Prime Minister Stephen Harper to vote against the *Declaration* was taken against the advice of various federal ministries that had carried out their own legal and policy reviews of the *Declaration* and concluded that there was no reason for Canada to oppose its adoption.[26]

In 2010, the Harper government issued a carefully worded formal statement of support for the *Declaration*. In that statement, the federal government said that it had

> …listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. 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.[27]

It is worth noting the explicit reference to the Harper government having reviewed and reconsidered the *Declaration* in light of the dialogue and research it had undertaken.

Along with Canada, Australia, New Zealand and the United States have all reversed their positions and issued statements of support for the *Declaration*. The *Declaration* is now considered a consensus international instrument, which further adds to its authority and legal effect. Furthermore, the *Declaration* has been reaffirmed by ten consensus resolutions adopted by the UN General Assembly. In 2014, the General Assembly adopted by consensus the outcome document of the World Conference on Indigenous Peoples in which states committed to "develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the Declaration."[28] The outcome document also included two direct and explicit commitments to uphold free, prior and informed consent.[29] In December 2019, the UN General Assembly adopted a consensus resolution, co-sponsored by Canada, that again reaffirmed the *Declaration* and also took note of the fact that the *Declaration* has already had a positive influence on constitutional reform and new laws adopted "at the national and local levels and contributed to the progressive development of international and national legal frameworks and policies."[30]

The imperative of upholding and implementing the *Declaration* is further reinforced by the fact that the Organization of American States has adopted by consensus a human rights instrument for the hemisphere that includes a number of provisions that are virtually identical to the *UN Declaration*, including those concerning free, prior and informed consent.[31]

2. Free, prior and informed consent provisions in the *UN Declaration*

Six articles in the *UN Declaration* explicitly set out state obligations in respect to free, prior and informed consent (article 10 – forced relocation; article 11.1 – cultural, intellectual and spiritual property; article 19 – legislative or administrative measures; article 28 – lands, territories and resources; article 29 – disposal of hazardous materials, and 32 – resource development.) The broadest of these is Article 19:

> States shall 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.

Article 32.2 applies the same standard to decisions and actions affecting Indigenous lands, territories and resources.

Article 28 affirms that there is a duty to provide redress wherever Indigenous lands, territories, and resources have been "confiscated, taken, occupied, used or damaged" without free, prior and informed consent. This article underlines the fact that the requirement of free, prior and informed consent is not optional. While articles 19 and 32.2 explicitly require states to take measures to obtain free, prior and informed consent, article 28 makes it clear that proceeding without such consent is a violation of Indigenous peoples' human rights for which redress must be made.

Critically, no article in the *UN Declaration* should be interpreted in isolation. All the provisions are indivisible, interdependent and interrelated. To understand the implications, each provision needs to be looked at in relation to the *Declaration* as a whole and the larger body of international human rights law of which it is part. This is particularly true of the provisions on free, prior and informed consent.

As demonstrated below, free, prior and informed consent is necessary to respect, protect, and fulfill the right to self-determination. The right to self-determination is at the heart of the *UN Declaration* and is reflected in almost every provision.

3. FPIC and self-determination in the *UN Declaration*

Article 3 of the *UN Declaration* affirms Indigenous peoples' right to self-determination, including the right of Indigenous peoples to "freely pursue" their economic, social and cultural development. Numerous other provisions in the *Declaration* recognize the right of Indigenous peoples to make their own decisions according to their own traditions and values. The terms used most frequently are "determine" and "control."

Article 23 states that Indigenous peoples have the right to "determine and develop priorities and strategies for exercising their right to development." Article 32 states more specifically that Indigenous peoples have the "right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." Article 26.2 recognizes the right of Indigenous peoples to "own, use, develop and control" their lands, territories and resources.

Article 22 recognizes the right of Indigenous peoples "to determine their own identity or membership." Article 12 affirms the right to "use and control" ceremonial objects.

Article 14 sets out the right "to establish and control" educational systems and institutions. Article 31 protects the right of Indigenous peoples to "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions" as well as related intellectual property.

The *Declaration*'s specific articles on free, prior and informed consent must be understood as a counterpart or corollary to the much larger number of provisions affirming the right of Indigenous peoples to determine and control all aspects of the protection and enjoyment of their rights. The right to self-determination can only be meaningfully protected and upheld if there is are corresponding obligations for states to work collaboratively with Indigenous decision-makers and respect and uphold the decisions that they make.

4. Self-determination in international law

The UN Expert Mechanism on the Rights of Indigenous Peoples has called free, prior and informed consent "an integral element" of the right to self-determination.[32] The UN Deputy High Commissioner for Human Rights has said that free, prior and informed consent is not merely a matter of information or consultation.

> Free, Prior and Informed Consent is not about ticking a box or some other pro-forma method by which only to pay lip service to indigenous peoples' rights.
>
> No! What it is, is a process by which to ensure meaningful engagement with indigenous peoples so that they can truly, authentically, actually affect the outcome. In other words, Free, Prior and Informed Consent is a manifestation of the right to self-determination, which has been called the "heart and soul" of the *UN Declaration on the Rights of Indigenous Peoples*.[33]

The right to self-determination is foundational in international law, including international human rights. The 1945 *Charter of the United Nations* includes in its objectives, promotion of peaceful and friendly relations through "respect for the principle of equal rights and self-determination of peoples." In international law, a 'people' is a nation distinguished by characteristics including its unique laws and political structure, culture, history, language and relationship to specific territories.

The two central pillars of the international human rights system, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, both begin with the same first provision:

> ***Article 1***
>
> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

There is no possible legitimate reason to deny to Indigenous peoples a right recognized as the right of "all peoples." Such a denial would violate the principle of equal rights and self-determination of peoples in the *Charter of the United Nations*, as well as the prohibition of racial discrimination in international and Canadian law.

Prior to colonization, Indigenous peoples exercised sovereignty over their own lands and territories. In the exercise of this sovereignty, Indigenous Nations made decisions according to their own laws and protocols. Dr. Sarah Morales has written of Indigenous peoples in Canada:

There is no possible legitimate reason to deny to Indigenous peoples a right recognized as the right of "all peoples."

> Living in independent communities and nations across the land, [Indigenous peoples]…developed norms and practices to govern their societal relations, manage territories, regulate trade, resolve disputes and govern the

> relationships between different nations. Over time the diverse norms and practices progressed into highly developed legal traditions that guided these people for centuries in the governance of community, the environment and relations between people.[34]

The Supreme Court of Canada has recognized that there is a fundamental legal imperative to come to terms with the fact that Canada was forged through the suppression of the Indigenous governments and legal orders that were already here. As stated by the Supreme Court in the 2004 *Haida Nation* decision, reconciliation means reconciling "*assumed* Crown sovereignty" with "*pre-existing* Aboriginal sovereignty."[35]

The Truth and Reconciliation Commission concluded that Canada's colonial laws and policies were intended to destroy First Nations, Inuit and the Métis Nation as Nations and societies. The TRC concluded that this was a form of "cultural genocide"[36] and, in some instances, potentially "genocide."[37] The instruments of cultural destruction included arbitrarily denying Indigenous title over lands and territories and criminalizing Indigenous institutions of self-government. These actions were shaped and justified by racist assumptions about the superiority of European culture and institutions and by now clearly repudiated religious and legal doctrines such as Terra Nullius and the Doctrine of Discovery.

Canada's 2008 Statement of Apology to Former Students of Indian Residential Schools stated, "There is no place in Canada for the attitudes that inspired the Indian Residential Schools system to ever prevail again."[38] The rejection of racist and colonialist doctrines, attitudes and policies – which is necessary and long overdue – has significant implications. A status quo based on ignoring and denying the rights and jurisdictions of self-determining Indigenous Nations cannot stand. Canadian society as a whole must recognize and respect the right of Indigenous peoples to make decisions for themselves. The *UN Declaration*, including its provisions on free, prior and informed consent, provides the framework for achieving these goals.

5. FPIC, self-determination, and Indigenous governance

Self-determination is a collective right of peoples or Nations, rather than individuals. Indigenous peoples' right to self-determination is expressed through the governments, institutions and legal orders freely chosen by Indigenous peoples.

Article 5 of the *UN Declaration* states that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions…" Article 18 states that "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

The *Declaration*'s provisions on free, prior and informed consent explicitly state that free, prior and informed consent can only be granted by Indigenous peoples' "own representative institutions" (Articles 19 and 32.2).

For many Indigenous peoples, contemporary decision-making processes are clearly defined and well-developed. For some, colonial laws and policies have created divisions over who has the right to speak for the Nation when it comes to issues such as land title and resource development. These divisions are not of Indigenous peoples' making. It is crucial that Indigenous peoples have the time and opportunity to rebuild and revitalize their systems of law and governance without external pressure or manipulation. In the meantime, states and corporations must not exploit or exacerbate conflicts and divisions for their own benefit.

6. FPIC and due diligence

Free, prior and informed consent has an additional dimension in international law. In addition to being a manifestation of the right to self-determination, and related rights such as Indigenous land title, the requirement to obtain free, prior and informed consent is also a precautionary measure necessary to prevent further violation of the human rights of Indigenous peoples.

International human rights law requires all governments, institutions and members of society take every reasonable precaution to safeguard against violating the rights of others. The requirements of due diligence are necessarily higher in respect to any group or peoples who have already been subjected to widespread and grave human rights violations and who are in a situation of heightened vulnerability as a result.

The late Professor Rodolfo Stavenhagen, the first person to carry out the role of UN Special Rapporteur on the rights of Indigenous peoples, stated that when large-scale economic activities are carried out on Indigenous peoples lands, "it is likely that their communities will undergo profound social and economic changes."[39] Critically,

Professor Stavenhagen found that such impacts "are frequently not well understood, much less foreseen, by the authorities in charge of promoting them.*"*[40] Free, prior and informed consent helps uphold the due diligence requirement by ensuring that the decision-making process cannot ignore the perspectives, experience and expertise of the individuals and communities who will bear the burden of any harm.

Professor James Anaya, who succeeded Professor Stavenhagen as Special Rapporteur on the rights of Indigenous peoples has underlined that a "precautionary approach" should guide decisions "about any measure that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples."[41] Professor Anaya has said that free, prior and informed consent is a presumptive requirement whenever Indigenous peoples' land rights are at stake.

> It is generally understood that indigenous peoples' rights over lands and resources in accordance with customary tenure are necessary to their survival. Accordingly, Indigenous consent is presumptively a requirement for those aspects of any extractive project taking place within the officially recognized or customary land use areas of indigenous peoples, or that otherwise affect resources that are important to their survival.[42]

free, prior and informed consent is a presumptive requirement whenever the land rights of Indigenous peoples are at stake.

For the corporate world, due diligence is associated with risk management, legal liability and financial prudence. In this context, FPIC has been increasingly recognized as a sound business practice.[43] For example, almost a decade ago, IPIECA, an international association for the oil and gas industry, concluded that "good faith negotiation and decision-making with the objective of achieving agreements, seeking consent or broad community support" was an "emerging good practice."[44] IPIECA noted

> Indigenous Peoples are distinct social groups that warrant special consideration....Indigenous Peoples typically have cultures and ways of life that are distinct from the wider societies in which they live: they are often reliant on the land and its natural resources for their livelihoods; they may also have strong cultural, spiritual and economic ties to their land; and in

> some parts of the world, Indigenous Peoples have suffered from a history of discrimination and exclusion that has left them on the margins of the larger societies in which they live. These characteristics can expose Indigenous Peoples to different types of development challenges and impacts as oil and gas projects are developed in their territories, as compared to other social communities.[45]

Additionally, it must be recognized that when governments or corporations try to proceed with projects over the objections of Indigenous peoples, they are increasing the risk of further harm to individuals and communities that have already been marginalized, disadvantaged and impoverished as the result of a long history of decisions being imposed on them.

7. FPIC and the reconciliation of rights

The *UN Declaration* is intended to provide a very high standard of protection for Indigenous peoples' rights, consistent with the crucial importance of these rights to the "survival, dignity and well-being of Indigenous peoples" (Article 43) and profound and pervasive rights violations faced by Indigenous peoples around the world.

That being said, almost all human rights are relative rather than absolute, meaning that they can be subject to limitations where there is an objective and compelling need to do so in order to respect and uphold the rights of others. The provisions of the *UN Declaration* are not an exception. In fact, the *Declaration* contains some of the most explicit and extensive balancing provisions of any international human rights instrument. There is no excuse for commentators who seek to claim that its provisions are absolute.

Article 46.2 of the *UN Declaration* explicitly states that "the exercise of rights enunciated in the present Declaration" may be subject to "limitations." The article goes on to state that such limitations must be "determined by law", "in accordance with international human rights obligations", "non-discriminatory" 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 balancing provisions in the *UN Declaration* are consistent with well-established international human standards. For example, a 2005 judgement by the Inter-American

Court of Human Rights concluded that any limitation on human rights must be based in law, be strictly necessary, serve "a legitimate goal in a democratic society," and be proportionate to that goal. The Court said this requires an assessment, "on a case by case basis, of the consequences that would result from recognizing one right over the other."[46]

As discussed in the two following sections, there is no fundamental incompatibility between the approach to the reconciliation of rights in international law and Canadian constitutional law. In fact, the requirements set out in *UN Declaration* Article 46 and in other international human rights standards are remarkably similar to the justification test set out by the Supreme Court of Canada in landmark decisions such as the *Tsilhqot'in* decision which is discussed in section 9 below.

8. The *UN Declaration* and Canadian constitutional law

Opponents of the *UN Declaration* usually claim to support the rights of Indigenous peoples. The problem with the *Declaration*, they argue, is that it would undermine the positive developments already achieved through court interpretation of the *Canadian Constitution* and the *Canadian Charter of Rights and Freedoms*.[47]

Like many arguments against the *Declaration*, this claim doesn't hold up to scrutiny. The *Declaration* itself explicitly constitutes the "minimum standards" for realizing the rights of Indigenous peoples (Article 43) rather than the maximum. Furthermore, the *Declaration* states "nothing in the Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future." (Article 45)

The *UN Declaration* can and should be used to help ensure existing federal, provincial, territorial laws are fairly interpreted and applied, as well as to guide the reform of those laws that are out of step with Canada's human rights obligations. Using the *Declaration* in this way is well within Canadian legal tradition.

The *Canadian Constitution* is understood to be a living, evolving instrument. This is known as the "living tree" doctrine.[48] The Supreme Court has said that the Constitution must " be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[49] The progressive development of international human rights law, and Canada's engagement

with this development, is part of a new social, political and historical reality to which constitutional interpretation must be responsive.

It is already an established principle that Canadian courts can and should use international human rights laws and standards to help interpret domestic law.[50] The use of the *Declaration* to inform such a "contextual approach to statutory interpretation" is already established in Canadian jurisprudence.[51] In addition, Canadian courts make the presumption that domestic laws are written with the intention of honouring Canada's legal commitments under the conventions it has ratified[52] as well as the global norms have become accepted as unwritten international customary law.[53] More broadly, as the Canadian Human Rights Tribunal stated in the First Nations Child and Family Caring Society case, "Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric."[54]

Much more can and must be done to bring domestic law into line with Canada's obligations toward Indigenous peoples, including those obligations affirmed in the Constitution, expressed in Treaties, and set out in international human rights standards including the *UN Declaration*. The TRC, for example, called for all lawyers to receive "appropriate cultural competency training, which includes the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, and Aboriginal-Crown relations (Call to Action 27)." The TRC also called on federal, provincial, territorial and municipal governments to fully implement the Declaration "as the framework for reconciliation (Call to Action 43)." All of this only underlines the fact that international human rights standards and the evolution of Canadian law are not wholly separate or distinct, but instead intertwined and interconnected. Former Supreme Court Chief Justice McLachlin has stated:

"Canada's statements and commitments, whether expressed on the international scene or at the national level, should not be allowed to remain empty rhetoric."

> 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, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past. Whether we like it or not, aboriginal rights are an international matter.[55]

9. Consent and "veto" in Canadian jurisprudence: *Delgamuukw*, *Haida Nation* and *Tsilhqot'in*

In three landmark land rights decisions discussed below – *Delgamuukw*[56], *Haida Nation*[57] and *Tsilhqot'in*[58] – the Supreme Court of Canada clearly established that Indigenous consent is already part of Canadian constitutional law. The Court affirmed that consent is a key component of Indigenous title and rights and part of the spectrum of state obligations necessary to ensure federal, provincial and territorial governments don't "run roughshod"[59] over Indigenous peoples' rights pending resolution of outstanding land and title disputes. Opponents of the *Declaration* almost invariably ignore what the court has actually said about consent, and instead focus on a single passage from the same *Haida Nation* decision that refers to a veto. However, as set out below, because the *Haida Nation* decision both affirmed consent and rejected a veto, it is actually a helpful example of the fact that consent and veto are distinct concepts. What the *Haida Nation* decision demonstrates, alongside *Delgamuukw* and *Tsilhqot'in*, is that fearmongering about veto misleadingly creates a barrier to upholding and implementing the *UN Declaration* in Canada.

In the 1997 *Delgamuukw* case, the Supreme Court made a distinction between the rights associated with land title and rights related to land use, such as fishing rights. The Supreme Court stated that "aboriginal title encompasses within it a right to choose to what ends a piece of land can be put."[60] In other words, title includes the right to grant or withhold consent. The Court went on to state that there are other instances where Canada's constitutional "duty to consult" will also require respect for the right of Indigenous peoples to grant or withhold consent, including where there is potential for impacts on rights to use land for activities like hunting and fishing. The Court gave provincial "hunting and fishing regulations" as an example of when the Crown's fiduciary duty "may even require the full consent of an aboriginal nation."[61]

The inclusion of consent within the spectrum of the duty to consult and accommodate was explicitly and repeated affirmed in the Supreme Court's 2004 *Haida Nation*

decision. Quoting the *Delgamuukw* case, the court states that Crown obligations "vary with the circumstances":

> from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. [62]

In the same paragraph, the decision states that "These words [referring to the entire passage] apply as much to unresolved claims as to intrusions on settled claims." [63]

In another paragraph of the *Haida Nation* decision, the Court again states that the spectrum of possible Crown responsibilities "includes a requirement of Aboriginal consent."[64] In a third paragraph, the Court quotes the *Delgamuukw* decision at length, including the phrase, "Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[65]

In the 2014, *Tsilhqot'in* decision, the Supreme Court of Canada affirmed that Indigenous land title includes "the right to control how the land is used."[66] As a consequence, the Supreme Court stated, "governments and others seeking to use the land must obtain the consent of the Aboriginal title holders."[67]

While the *Tsilhqot'in* decision deals at length with Indigenous consent, the decision never uses the word veto. The *Tsilhqot'in* decision also makes it clear that the requirement to obtain the consent of Indigenous title holders is not absolute. Instead, the court lays out a nuanced approach to the reconciliation of rights that a) affirms the decision-making authority and jurisdiction of Indigenous title holders; b) recognizes that some intrusion or limitation on this authority may permissible on a case-by-case basis; but c) requires a high threshold for justification of such intrusions or limitations.

The court wrote, "If the Aboriginal group does not consent… the [federal, provincial or territorial] government's only recourse is to establish that the proposed incursion on the land is justified." The justification test set out in the *Tsilhqot'in* decision is multi-part. Consistent with the court's 1990 decision on the *Sparrow* case[68], the *Tsilhqot'in* decision stated that in order to establish justification, federal, provincial, or territorial governments must do more than simply consult: they must demonstrate that their actions are "consistent with the Crown's fiduciary obligation" and "backed by a compelling and substantial objective." [69] Furthermore, the court found that the

intrusion must be objectively necessary to achieve that compelling and substantial objective, must not go any further than necessary to achieve that objective, and "that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest."[70]

The court also concluded that in order to establish justification, all these factors have to be considered from the perspective of the affected Indigenous peoples, and not just from the point of view of the federal, provincial and territorial governments. [71] Finally, the court found that Canada's fiduciary duty requires that limitations on Indigenous decision-making authority are only permissible if they do not undermine the collective, intergenerational character of Indigenous land title itself: "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."[72]

Indigenous nations continue to assert their unceded title to the traditional lands.

The *Tsilhqot'in* decision remains the only Canadian court decision to restore traditional lands to the jurisdiction of Indigenous title holders, which in itself is an indication of a profound problem with access to justice for Indigenous nations.[73] Across Canada, however, Indigenous nations continue to assert their unceded title to the traditional lands. These demands will continue until justice is achieved. In the *Tsilhqot'in* case, then Supreme Court Chief Justice Beverley McLachlin specifically cautioned government or industry from assuming that consent can be ignored where title has not yet been recognized. The Chief Justice wrote, "I add this. Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group."[74]

Despite this direct and pointed message, the *Tsilhqot'in* decision is routinely ignored by politicians and pundits claiming that the *Declaration*'s FPIC provisions are contrary to Canadian constitutional tradition. Instead, they cite the following passage from the Supreme Court's 2004 *Haida Nation* decision:

"This process [of accommodating Aboriginal and Treaty rights] does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim."[75]

These critics misunderstand the Court. First, is that it is clear even from the sentence itself that the Court did not mean to comment on all assertions of Indigenous rights but only on the specific circumstance of "what can be done with the land pending final proof of the claim." Second, the *Haida Nation* decision does not even call consent a veto. In fact, as shown above, the decision actually affirms consent in three other paragraphs. Third, while the decision does not offer a definition of veto, it does go on to contrast a "veto" with the objectives of "balancing interests, of give and take"[76] and "seeking compromise in an attempt to harmonize conflicting interests"[77]. In other words, consent requirements that include the balancing and harmonizing of conflicting interests, such as in the *Tsilhqot'in* decision and which is the case for the *UN Declaration*, should not be considered a veto. Taken as a whole, the *Haida Nation* decision actually helps clarify that consent and veto are not the same.

10. The pipeline question

Public debate around FPIC often focuses on the drive to build new oil and gas pipelines to the Atlantic or Pacific coasts. Pipelines are controversial for the Canadian public as a whole. For different Indigenous Nations, any particular project can represent widely varying opportunities and risks, depending on the pipeline route, the circumstances of each Nation, and the traditions and customs that they practice. It's not unusual for some Indigenous Nations to enter into agreements with project proponents while others withhold their consent. Opponents of the *UN Declaration* often argue that it is unacceptable for some Indigenous peoples to withhold consent when others have agreed.

Understanding how FPIC may apply in any particular case requires careful consideration of the facts and law, including the rights at stake and the potential for harm to those rights. However, several more points need to be made.

First, no Nation can grant consent on behalf of another Nation. Every Indigenous Nation must be free to make its own decisions based on its own governance, laws, rights, interests, traditions, values and procedures. Otherwise, the right of self-determination may well become meaningless and Indigenous peoples will be denied an essential safeguard against further harm to their cultures, traditions, institutions and well-being.

Second, decisions to withhold consent are not taken lightly – particularly given the incentives that project proponents offer Indigenous peoples – and the decisions made

by Indigenous governments and governing authorities should not be casually dismissed. Federal, provincial and territorial governments have an obligation to take careful consideration of whether any decision to withhold consent reflects a fundamental incompatibility between the project as proposed and important public values, including environmental protection, respect for human rights, and advancing reconciliation.

Third, withholding consent is not a veto. However, consistent with the balancing provisions set out in the *Declaration* and the standards of justification required by Canadian jurisprudence such as the *Tsilhqot'in* decision (see section 9 above), the onus falls on federal, provincial and territorial governments to demonstrate justification, including that the project serves a "compelling and substantial" public objective, that this specific route is actually necessary, that benefits to all affected Indigenous peoples exceed any harmful effects, and that the land rights of future generations will not be compromised.

Implementation of an effective FPIC system consistent with Canada's domestic and international obligations will not be simple. The pipeline question is a good example of the complexities that in some instances will need to be worked out on a case-by-case basis. That being said, implementation of Canada's legal obligations to obtain Indigenous consent will create much more clarity and consistency than currently exists. One needs only look at the many long and fractious legal battles over resource development – including cases that have overturned federal approval for pipelines – to know that maintaining the current status quo is not a viable alternative.

Conclusion: Implementing the *UN Declaration on the Rights of Indigenous Peoples*

Canada has an obligation to uphold and implement the *UN Declaration on the Rights of Indigenous Peoples*. Free, prior and informed consent is an essential part of the *Declaration* and the protections it provides for the rights of Indigenous peoples. As explained in this backgrounder, there is no fundamental conflict between the *Declaration* and Canadian constitutional tradition. On the contrary, the detailed, carefully crafted provisions of the *Declaration* are a vital tool to provide clarity and consistency to the application of domestic law and to guide its continued progressive evolution. That's why Canadian courts and tribunals are already using the *Declaration*

to help interpret and apply domestic law. As the Truth and Reconciliation Commission highlighted, the *Declaration* is "the framework for reconciliation."

In 2016, Romeo Saganash, then an NDP Member of Parliament representing the northern Quebec riding of Abitibi–Baie-James–Nunavik–Eeyou, introduced a private Member's Bill to implement the *UN Declaration*. Bill C-262 was debated in Parliament and passed by a majority vote in 2018. Unfortunately, passage into law was stalled by a filibuster by a small number of Senators. Prime Minister Trudeau committed to bringing forward government legislation based closely on C-262. Similar legislation has also been passed at the provincial level in British Columbia.

Implementation legislation will not enshrine the *Declaration* in domestic law. Bill C-262 was intended to set up a collaborative process through which the federal government would work with Indigenous peoples to identify those federal laws that need to be reformed to fulfill the requirements of the *Declaration*. Any such reforms would have to come back to Parliament for debate and adoption before becoming law.

In December 2020, the federal government tabled new legislation, Bill C-15, that builds on C-262 as the floor. The new bill explicitly states that it is intended to provide a "framework" for the implementation of the *Declaration*.

If passed by Parliament, this legislation will provide an opportunity to address Indigenous rights in a much more coherent, cohesive and coordinated way than continuing to rely on case-by-case litigation before the counts. Such an approach would help build a common understanding of how FPIC is best applied in various contexts. Passage of implementation legislation would also help break the cycle of needless obstruction and misrepresentation of the *Declaration* that has preventing public policy from advancing even while court cases proceed. As Professor Mary Ellen Turpel-Lafond has stated,

> "At this point, the issue is not about whether the Declaration will be implemented but how. For far too long, governments in Canada have relied on the courts to interpret the rights of Indigenous peoples. This approach inevitably leads to conflict and long and costly litigation. Implementation legislation is a better way forward, offering greater certainty to Indigenous and non-Indigenous peoples alike."[78]

Endnotes

[1] For a more in-depth, technical explanation of the legal issues, see, Paul Joffe, "'Veto' and 'Consent' – Significant Differences," 30 August 2018, as well as other references included in the resource list at end of this paper. Short factsheets on the issue are also available at declarationcoalition.ca.

[2] *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights.*

[3] It is often said that all rights are universal, indivisible, interdependent and interrelated. This means that failure to uphold one right inevitably erodes and undermines the enjoyment of a wide range of other rights.

[4] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256.

[5] See Article 46 of the *UN Declaration*.

[6] See Articles 27 and 40 of the *UN Declaration*.

[7] John Borrows, Canada Research Chair in Indigenous Law, University of Victoria, Presentation to the Standing Senate Committee on Aboriginal Peoples, 29 May 2019. https://sencanada.ca/en/content/sen/Committee/421/appa/54831-e

[8] Roshan P. Danesh, "Understanding the relationship between veto and consent," *Vancouver Sun*, 25 December 2016. https://vancouversun.com/opinion/opinion-understanding-the-relationship-between-consent-and-veto

[9] The headline stated that implementing the *Declaration* would "give Aboriginals veto rights nobody else has" and that implementation would "dismantle our courts' carefully constructed approach to reconciliation." The *Financial Post* also set the following in large, bold type in the middle of the article: "Making all laws consistent with UNDRIP would give Aboriginals rights not enjoyed by other Canadians." Harry Swain and Jim Baillie.,"The Trudeau government signs on to give Aboriginals veto rights nobody else has," *Financial Post*, 26 January 2018. https://financialpost.com/opinion/the-trudeau-government-signs-on-to-give-aboriginals-veto-rights-nobody-else-has

[10] In a NANOS research poll conducted for the Assembly of First Nations in April 2020, in the midst of the COVID-19 pandemic, 80 percent of Canadians said that Indigenous issues should be an important priority for the Government of Canada. In the same poll, two-thirds of Canadians expressed support for adoption of federal implementation legislation. https://www.afn.ca/wp-content/uploads/2020/09/2020-1579-AFN-Populated-Report-with-Tabs.pdf

[11] The TRC's Call to Action 43 calls on federal, provincial, territorial and municipal governments to "fully" implement the *UN Declaration* while Call to Action 44 calls for a "national action plan, strategies and other concrete measures to achieve the goals" of the *Declaration*. Call to Action 92 called for corporations to apply the *Declaration's* "principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources," including a commitment to "meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects."

[12] Natural Resources Canada, "Indigenous Mining Agreements," retrieved September 30, 2020 from http://atlas.gc.ca/imaema/en

[13] According to a Library of Canada review, as few as 23 impact benefit agreements were signed between 2001 and 2006. Norah Kielland, *Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements*, Library of Parliament, Legal and Social Affairs Division, 5 May 2015. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201529E

[14] The UN Global Compact, which describes itself as the world's largest corporate sustainability initiative, has stated that "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)." UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples*, 2013, p. 26. https://www.unglobalcompact.org/library/541 As of October 2020, 125 Canadian corporations had signed onto the Global Compact. In a 2016 discussion paper supportive of implementing the *UN Declaration*, the Canadian Association of Petroleum Producers (CAPP) stated: "In practice, CAPP member companies regularly seek to and achieve FPIC with Indigenous communities… through meaningful discussions that can lead to the mitigation of project-related impacts." Canadian Association of Petroleum Producers, "Discussion Paper on Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada," May 2016. https://www.capp.ca/wp-content/uploads/2020/01/CAPP-Discussion-Paper-on-Implementing-the-United-Declaration-on-the-Rights-of-Indigenous-Peoples-in-Canada_354411.pdf The

International Council on Mining and Metals has similarly called on its members to "work to obtain the consent of Indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts." *Indigenous Peoples and Mining Position Statement*, Commitment 4, May 2013. https://www.icmm.com/position-statements/indigenous-peoples See also: International Finance Corporation, *Performance Standards on Environmental and Social Sustainability*, *Performance Standard 7: Indigenous Peoples*, January 1, 2012. https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/publications/publications_handbook_pps Boreal Leadership Council, *Free, Prior, and Informed Consent in Canada: A summary of key issues, lessons and case studies towards practical guidance for developers and Aboriginal communities*, September 2012. https://beta.fpic.info/en/resources/free-prior-and-informed-consent-canada-summary-key/
Oxfam, *Community Consent Index*, 2015. https://www.oxfam.org/en/research/community-consent-index-2015

[15] 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," 21 April 2016.

[16] "Open Letter on the UN Declaration on the Rights of Indigenous Peoples – Canada Needs to Implement This New Human Rights Instrument." *Nation Talk*, 3 May 2008.
https://nationtalk.ca/story/open-letter-un-declaration-on-the-rights-of-indigenous-peoples-canada-needs-to-implement-this-new-human-rights-instrument

[17] For consent as an element of title rights, see *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256. For the duty to consult, see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168 and *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, paras. 24, 30, 40, 65. These precedents are discussed in greater detail in Section 9.

[18] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in Michael Asch (ed.), *Aboriginal and Treaty Rights in Canada,* Vancouver: UBC Press. https://www.sfu.ca/~palys/Borrows-WampumAtNiagara.pdf Also, Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, "Aboriginal Peoples and Reconciliation", (2003) 9 *Canterbury Law Review* 240.

[19] Walter R. Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples*, Golden, Colorado: Fulcrum Publishing, 2013, p. 39: "The standards in the *Declaration* do not create new or special rights for indigenous peoples. … [O]ne purpose of the *Declaration* is to connect the human rights of indigenous peoples to the larger body of international human rights law and make that body more accountable to the needs and circumstances of indigenous peoples."

[20] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII on the Rights of Indigenous Peoples*, U.N. Doc. A/52/18. 1997. "The Committee calls in particular upon States Parties to (…) ensure that indigenous peoples can participate effectively in public life and that decisions affecting their rights are made with their informed consent."

[21] See, for example, *UN Committee on Economic, Social and Cultural Rights, General Comment No. 21: Right of everyone to take part in cultural life*, U.N. Doc. E/C.12/GC/21, 21 December 2009, para. 37.

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

[23] Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya – Addendum Cases examined by the Special Rapporteur (June 2009 – July 2010), U.N. Doc.* A/HRC/15/37/Add.1, 15 September 2010.

[24] James Anaya, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Expert Mechanism on the Rights of Indigenous Peoples*, 15 July 2010.

[25] David Ljunggren, "Canada's commitment slipping, U.N. rights boss says," Reuters, 22 October 2007.
https://www.reuters.com/article/us-rights-canada/canadas-commitment-slipping-u-n-rights-boss-says-idUSN2246283620071022

[26] See, *e.g.* 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 177: "In concluding that the Declaration is "inconsistent with the National Defence Act", the government was contradicting its own Department of National Defence. A freedom of information request revealed that the Department recommended that the government support the Declaration with a statement of understanding.

Footnote 308: Gloria Galloway, "Back UN on native rights, Ottawa urged" Globe and Mail (8 June 2007) at A1. http://quakerservice.ca/wp-content/uploads/2011/05/NJCLPJArticleUNDeclaration2010.pdf

[27] https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142

[28] UN General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, U.N. Doc. A/RES/69/2, 25 September 2014, para. 8.

[29] *Ibid*, para. 3: "We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, 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." Also para 20: "We recognize commitments made by States, with regard to the United Nations Declaration on the Rights of Indigenous Peoples, to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources."

[30] UN General Assembly, "Rights of Indigenous Peoples," U.N. Doc. A/74/396, 18 December 2019.

[31] See, Organization of American States, *American Declaration on the Rights of Indigenous Peoples*, AG/RES.2888 (XLVI-O/16). Adopted at the third plenary session, held on June 15, 2016.

[32] 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*, Annex: "Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision making", U.N. Doc. A/HRC/18/42, August 17, 2011, para. 20.

[33] Officer of the UN High Commissioner of Human Rights, "Statement by United Nations Deputy High Commissioner for Human Rights Kate Gilmore," 11th session of the Expert Mechanism on the Rights of Indigenous Peoples, 9 July 2018. https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23417&LangID=E

[34] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult," in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, Special Report, 2017, p. 75.

[35] *Haida Nation v. British Columbia (Minister of Forests*), [2004] 3 S.C.R. 511, 2004 SCC 73, para. 20. *Emphasis added*.

[36] Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, Volume 1, June 2015, p. 3.

[37] The difference between the terms "cultural genocide" and "genocide" is a much-debated legal distinction. The term "cultural genocide" was excluded from the drafting of the primary international legal instrument, the International Convention against Genocide. The TRC nonetheless noted that certain harms inflicted on Indigenous peoples, including forcible removal of children with the intent to destroy Indigenous cultures, are clearly within the scope of actions explicitly prohibited under the Convention. Truth and Reconciliation Commission of Canada, *The Final Report of the Truth and Reconciliation Commission of Canada*, Volume 1, June 2015, Volume 5, pp. 124-5.

[38] Prime Minister Stephen Harper on behalf of the Government of Canada, *Statement of Apology to Former Students of Indian Residential Schools,* 11 June 2008.

[39] UN Economic and Social Council, *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, U.N. Doc. E/CN.4/2003/90, 21 January 2003.

[40] *Ibid*.

[41] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, U.N. Doc. A/HRC/21/47, 6 July 2012, para. 52.

[42] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of indigenous peoples in the United States of America,* U.N. Doc. A/HRC/21/47/Add.1, 30 August 2012, para. 85.

[43] See UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples*, *supra*, at endnote 13.

[44] IPIECA, *Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice,* 2012. https://www.ipieca.org/resources/good-practice/indigenous-peoples-and-the-oil-and-gas-industry-context-issues-and-emerging-good-practice/

[45] *Ibid.*

[46] IACtHR, *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision,* Judgment of June 17, 2005, paras. 144, 146.

[47] For example, Dwight Newman and Ken Coates, "Bill on Implementing UNDRIP Overly Simplistic," *The Hill Times*, 4 January 2017. https://www.macdonaldlaurier.ca/bill-on-implementing-undrip-overly-simplistic-newman-and-coates-in-the-hill-times/ Nigel Banks sets out an opposing analysis in, "Implementing UNDRIP: some reflections on Bill C-262," *ABlawg*, 27 November 2018. https://ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/

[48] *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."

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

[50] In a 1987 Supreme Court case, Chief Justice Dickson stated in a view that dissented on other matters, "A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. 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." *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J., dissenting). This reasoning has been affirmed in subsequent court decisions including the Supreme Court of Canada in *United States of America v. Burns*, [2001] 1 S.C.R. 283, para. 80.

[51] *First Nations Child and Family Caring Society of Canada v. Canada* (Attorney General), 2012 FC 445, para. 353. This decision was affirmed by the Federal Court of Appeal in 2013 FCA 75. See also, *Simon v. Attorney General of Canada*, [2013] FC 1117, para. 121 (ruling reversed on other grounds in A.-G. Canada v. Simon, 2015 FCA 18); *R. v. Sayers*, [2017] ONCJ 77, para. 53(2); *Pastion v. Dene Tha' First Nation*, 2018 FC 648 [2018] 4 FCR 467, para. 10.

[52] *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, paras. 54-6.

[53] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, para. 95.

[54] See also, *First Nations Child & Family Caring Society of Canada et al. v. Attorney General of Canada*, 2020 CHRT 20, paras 156-7.

[55] Beverley McLachlin, Chief Justice of Supreme Court of Canada, "Aboriginal Rights: International Perspectives", Order of Canada Luncheon, Speech, Canadian Club of Vancouver, Vancouver, BC, 8 February 2002.

[56] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

[57] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73.

[58] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256.

[59] *Haida Nation, supra* at endnote 55, para. 27.

[60] *Delgamuukw*, *supra* at endnote 54, para. 168.

[61] *Ibid*.

[62] *Haida Nation, supra* at endnote 55, para. 24.

[63] *Ibid*, para. 24.

[64] *Ibid*, para. 30.

[65] *Ibid*, para. 40.

[66] *Tsilhqot'in Nation, supra* at endnote 56, para. 75.

[67] Ibid., para. 76.

[68] R. v. Sparrow, [1990] 1 S.C.R. 1075

[69] *Tsilhqot'in Nation, supra* at endnote 56, para. 77.

[70] *Ibid*, para. 87.

[71] *Ibid*, para. 81.

[72] *Ibid*, para. 86.

[73] Inter-American Commission on Human Rights (IACHR). *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada*. October 30, 2009. Para. 37.

[74] *Tsilhqot'in Nation, supra* at endnote 56, para. 97.

[75] *Haida Nation, supra* at endnote 55, para. 48.

[76] *Ibid*.

[77] *Ibid*., para. 49.

[78] Coalition for the Human Rights of Indigenous Peoples, "Adoption of Federal Implementation Legislation Must Not Be Delayed," Public Statement, 17 August 2020. https://tinyurl.com/y2q35pkj

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- *Understanding Bill C-15*
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