"Veto" and "Consent" – Significant Differences

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Introduction

This paper offers some analysis on "veto" and "consent" and highlights important differences. It addresses these issues in the context of proposed third party developments in or near Indigenous peoples' lands and territories.

The issue of "consent" or "free, prior and informed consent" (FPIC) often arises in the context of the *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly in 2007.[1] As described below, Indigenous peoples' "consent" is affirmed in, but does not originate with, the *UN Declaration*. Yet too often key legal sources and arguments in favour of consent are not fairly considered, if not fully ignored.[2] A recent example is "Understanding FPIC",[3] a report by Ken Coates and Blaine Favel (see heading 7 of this paper).

The *UN Declaration* is currently a consensus international human rights instrument. No country in the world formally opposes it. The General Assembly reaffirmed the *UN Declaration* by consensus in 2014 and 2015.[4] In particular, the outcome document of the World Conference on Indigenous Peoples not only reaffirmed the *UN Declaration* but also highlighted State commitments to FPIC:

> 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 … in order to *obtain their free and informed consent prior to the approval of any project* affecting their lands or territories and other resources.[5]

In the past, extreme and unfounded statements[6] were made by the government of Canada in relation to the *UN Declaration*, in particular addressing the principle of "free, prior and informed consent". The former government's portrayal of the dangers of FPIC were designed to foster alarm. They ran counter to Canada's endorsement of the *UN Declaration*.[7] Such extreme positions are the antithesis of reconciliation. Unfortunately, such extreme positions have been repeated in the media and have been used by project proponents in courts and regulatory processes in response to Indigenous peoples' assertion of FPIC.

In the context of resource development, the adverse impacts that may affect Indigenous peoples can be severe and far-reaching. Such situations reinforce the need to obtain the "free, prior and informed consent" of Indigenous peoples.[8] Such consent is not the same as a veto. "Veto" implies complete and arbitrary power, with no balancing of rights.

There are various reasons for avoiding use of the term "veto". These include:

i) The Supreme Court of Canada (SCC) has used the term "veto" but has not defined what "veto" means in the context of Indigenous peoples' rights and related Crown obligations;

ii) in *Haida Nation*,[9] the SCC referred to "veto" solely in the context of Aboriginal rights that are asserted but yet unproven. As examined under heading 2 below, even this specific use of the term 'veto' is questionable;[10]

iii) the *UN Declaration* uses the term "free, prior and informed consent".[11] The term "veto" is not used;

iv) To some people, the term "veto" suggests a unilateral and indiscriminate power, i.e. an Indigenous people could block a proposed development regardless of the facts and law in any given case; and

v) "Veto" implies an absolute power, with no balancing of rights. This is neither the intent nor interpretation of "consent" in Canadian and international law. As elaborated below, the *UN Declaration* includes comprehensive balancing provisions.[12]

Human rights instruments, such as the *UN Declaration*, are generally drafted in broad terms so as to accommodate a wide range of circumstances both foreseen and unforeseen. Should any human rights dispute arise, a "contextual analysis" would take place based on the particular facts and law in a specific situation. This is the just approach that is generally accepted in both international[13] and domestic[14] law.

In examining the significance of FPIC and the *UN Declaration*, it is important to underscore that the *Declaration* affirms the inherent[15] human rights of Indigenous peoples. It does not create new rights. The *UN Declaration* is "an interpretative document that explains how the existing human rights are applied to Indigenous peoples and their contexts. It is a restatement of principles for postcolonial self-determination and human rights".[16] Former Special Rapporteur on the rights of Indigenous peoples James Anaya has concluded:

> … the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples**.**[17]

Prior to examining further the issue of consent, it is worth noting that in 2012 Canada highlighted to the UN Committee on the Elimination of Racial Discrimination the relevance of the *UN Declaration*: "While it had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, *including the Constitution*."[18] This interpretive rule is not new.

As former Chief Justice Dickson of the Supreme Court stressed in 1987: "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."[19] This rule applies to human rights in the *Canadian Charter* (Part I). Therefore, the same rule must apply to the human rights of Indigenous peoples in s. 35 (Part II) of the *Constitution Act, 1982*.[20]

Further, Aboriginal rights affirmed in section 35 of the *Constitution Act, 1982* are subject to progressive interpretation.[21] This is consistent with the "living tree" doctrine[22] that applies to Canada's Constitution. As decided by Canada's highest Court: "Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers."[23] The *UN Declaration* constitutes such a "new social, political and historical" reality – a consensus human rights instrument that elaborates on the rights of Indigenous peoples globally.

As the Supreme Court indicated in *Reference re Same-Sex Marriage*: "A large and liberal, or progressive, interpretation ensures the *continued relevance and, indeed, legitimacy* of Canada's constituting document."[24]

1. "Consent" or FPIC

In contrast to "veto", the standard of "consent" is well-established in domestic and international law.

In Canada, consensual decision-making goes at least as far back as the *Royal Proclamation (1763)*. As explained by Chief Justice Beverley McLachlin in 2009:

> The English in Canada and New Zealand took a different approach [from Spain, France and Australia], acknowledging limited prior entitlement of indigenous peoples, which *required the Crown to treat with them and obtain their consent before their lands could be occupied*. In Canada - indeed for the whole of North America - this doctrine was cast in legal terms by the Royal Proclamation of 1763, which *forbad settlement unless the Crown had first established treaties with the occupants*.[25]

Similarly, the Royal Commission on Aboriginal Peoples elaborated in its 1996 final report: "the Royal Proclamation … initiate[d] an orderly process whereby Indian land could be purchased for settlement or development. … In future, lands could be surrendered only on a nation-to-nation basis, from the Indian nation to the British Crown, in a public process in which the assembled Indian population would be required to consent to the transaction."[26]

In *Tsilhqot'in Nation* v. *British Columbia*,[27] the Supreme Court of Canada highlighted Indigenous peoples' right to "consent" in 9 paragraphs; "right to control" the land in 11 paragraphs; and "right to determine" land uses in 2 paragraphs. The right to control the land conferred by Aboriginal title means that "governments and others seeking to use the land must obtain the consent of the Aboriginal title holders," unless stringent infringement tests are met.[28]

Indigenous peoples' consent is not limited to Indigenous title lands or agreements negotiated with the Crown. In *Haida Nation*, the Court ruled in 2004 that the content of the duty to consult "varied with the circumstances" and required "full consent" on "very serious issues":

> … the content of the duty [to consult] varied 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*.[29]

In 1997, the Court ruled in *Delgamuukw*:

> The nature and scope of the duty of consultation will vary with the circumstances. … In most cases, it will be significantly deeper than mere consultation. *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*.[30]

The term "full consent", as applied by the Supreme Court, has the elements of "free", "prior" and "informed" that is used in the *UN Declaration* and other international human rights law. In Canadian law, "consent" must also be freely given or obtained. There must not be any coercion or misleading information.

In order to ensure meaningful consultations, the Supreme Court has ruled that the Crown must provide "all necessary information in a timely way". This is to ensure that Indigenous concerns are "seriously considered" and "integrated" into a proposed plan of action:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information *in a timely way* so that they have an opportunity to express their interests and concerns, *and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action*.[31]

In *Tsilhqot'in Nation*, the Supreme Court of Canada underlined the far-reaching significance of Indigenous peoples' consent in terms of cancelling projects and rendering legislation inapplicable:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, *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.[32]

The Court added: "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."[33]

In international law, "free, prior and informed consent" (FPIC) is an essential standard that is an integral element of the right of self-determination.[34] Self-determining peoples have a right to choose.[35] In *Tsilhqot'in Nation*, the Supreme Court referred to Indigenous peoples' "right to choose".[36]

The Supreme Court has yet to explicitly consider the *UN Declaration*. However, the Supreme Court has repeatedly affirmed the applicability in Canada of international law as a whole. The Supreme Court has ruled that the legislature is presumed to act in compliance with Canada's international

obligations. Unless there is a clear, contrary legislative intent, domestic laws "will be presumed to conform to international law".[37]

This rule is especially important in regard to the right of Indigenous peoples to self-determination, including self-government, which includes both rights and responsibilities.[38] As affirmed in the *UN Declaration*, "Indigenous peoples are equal to all other peoples"[39] and "nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law".[40]

As affirmed in *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, Canada has affirmative obligations to "promote the realization of the right of self-determination, and … respect that right, in conformity with the provisions of the Charter of the United Nations."[41]

In an August 2018 study by the Expert Mechanism on the Rights of Indigenous Peoples, the significance of the right of Indigenous peoples to self-determination is elaborated as follows: "The concepts of being free, being fully informed, having the right to say yes or no and having control over their own lands and resources as nations or peoples are not … new in international human rights law. These concepts derive from the elements of the right to self-determination, on which the [UN] Declaration bases its provisions on free, prior and informed consent, as a way of operationalizing the right to self-determination, taking into account the particular historical, cultural and social situation of indigenous peoples."[42]

The Expert Mechanism added: "Free, prior and informed consent … constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources. Pursuant to the Declaration, free, prior and informed consent cannot be achieved if one of these components is missing.[43]

To date, the Supreme Court of Canada has failed to address Indigenous peoples' collective rights as human rights.[44] Although the Supreme Court often relies on international human rights law to interpret human rights in the *Canadian Charter of Rights and Freedoms*,[45] it fails to do so in regard to the human rights of Indigenous peoples in section 35 of the *Constitution Act, 1982*. This discriminatory double standard needs urgent redress.

FPIC in international law has the same meaning as "consent" in Canadian law. In both cases, if there is duress, there is no valid consent. The same is true if consent is sought *only after* a project is initiated, or if the information provided is inadequate or is misrepresented.

At the international level, the application of FPIC to Indigenous peoples is supported by the UN General Assembly;[46] UN Secretary-General;[47] Office of the High Commissioner for Human Rights;[48] UN treaty bodies;[49] specialized agencies;[50] UN special rapporteurs;[51] Permanent Forum on Indigenous Issues;[52] and Expert Mechanism on the Rights of Indigenous Peoples.[53] None of these entities, bodies and mechanisms describe FPIC as a "veto".[54] The same is true for the Inter-American Court of Human Rights[55] and the African Commission on Human and Peoples' Rights.[56]

Consent "must include the option of withholding consent."[57] This conclusion clearly makes sense. It would be absurd to conclude that Indigenous peoples have the right to say "yes", but not the right to say "no" – even in the most damaging circumstances.

In 2011, the International Finance Corporation announced: “For projects with potential significant adverse impacts on indigenous peoples, IFC has adopted the principle of ‘Free, Prior, and Informed Consent’ informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples.”[58]

The UN Development Programme (UNDP) “will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration”.[59] UNDP added: “FPIC will be ensured on any matters that may affect the rights and interests, lands, resources, territories (whether titled or untitled to the people in question) and traditional livelihoods of the indigenous peoples concerned.”[60]

In March 2016, the UN Committee on Economic, Social and Cultural Rights recommended that Canada “fully recognize the right to free, prior and informed consent of indigenous peoples in its laws and policies and apply it in practice.”[61] In particular, the Committee added that:

> … the State party establish effective mechanisms that enable meaningful participation of indigenous peoples in decision-making in relation to development projects being carried out on, or near, their lands or territories … [and] that the State party effectively engage indigenous peoples in the formulation of legislation that affects them.[62]

In September 2017, the UN Committee on the Elimination of Racial Discrimination indicated to Canada that it was “deeply concerned” that:

> (a) Violations of the land rights of indigenous peoples continue in the State party; in particular, environmentally destructive decisions for resource development which affect their lives and territories continue to be undertaken without the free, prior and informed consent of the indigenous peoples, resulting in breaches of treaty obligations and international human rights law.
>
> (b) Costly, time-consuming and ineffective litigation is often the only remedy, in place of seeking free, prior and informed consent — resulting in the State party continuing to issue permits which allow for damage to lands.[63]

The jurisprudence of UN human rights bodies, including their General Comments, have been ascribed "great weight" by the International Court of Justice (ICJ).[64]

The *Indigenous and Tribal Peoples Convention, 1989* requires Indigenous consent for a broad range of "special measures" by the State:

> 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.[65]

Following his visit to Canada, former Special Rapporteur James 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."[66] Anaya added: "The general rule identified here derives from the character of free, prior and informed consent as *a safeguard for the internationally recognized rights* of indigenous peoples that are typically affected by extractive activities that occur within their territories."[67]

FPIC is also highlighted in *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*: "indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination."[68]

In addition to the right of self-determination, the *UN Declaration* includes a number of provisions that refer to FPIC. No specific provision should be interpreted in isolation, but rather in the context of the whole *Declaration* and other international human rights law. For example, such approach would apply to article 32(2):

> States shall *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, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

In the *Handbook for Parliamentarians* on the *UN Declaration*,[69] the Inter-Parliamentary Union (IPU) emphasizes the importance of Indigenous peoples' "consent":

> When parliamentarians consider draft legislation on matters that directly or indirectly affect indigenous peoples, it is important for them to understand and carry out their duty to obtain indigenous peoples' consent, to ensure that such laws not only reflect the views of the non-indigenous communities concerned, but can also be implemented without detrimentally affecting the rights of indigenous communities.[70]

In 2009, the African Commission on Human and Peoples' Rights relied extensively on the *UN Declaration*[71] and other international law to address the land rights of the Endorois people: "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."[72]

In various countries, the *UN Declaration* is being used to interpret domestic law.[73] In 2007, in a major land rights case that included the issue of Indigenous "consent'" the Chief Justice of the Supreme Court of Belize relied in part on article 26 of the *UN Declaration* and ruled in favour of the Maya people.[74] Subsequently, the Court of Appeal affirmed Mayan land and resource rights in Southern Belize based on their longstanding use and occupancy.[75] The appeal court emphasized the Chief Justice was "entirely correct" to take into account Belize's international law and treaty obligations, as well as general principles of international law in the *UN Declaration*.[76]

2. Reference to "veto" by Supreme Court

In regard to "veto", the Supreme Court of Canada provided in para. 48 of *Haida Nation*:

> This process [of accommodation] does not give Aboriginal groups a veto over what can be done with land *pending final proof of the claim*. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

It is critical to interpret para. 48 together with the rest of the Supreme Court's ruling. Para. 24 indicated that, at the high end of the scale, the duty to consult requires "the '*full consent* of [the] aboriginal nation' on very serious issues. These words *apply as much to unresolved claims as to intrusions on settled claims*."

The Court added that the process of balancing interests means that both the Crown and Aboriginal peoples may have some limits on their actions "pending claims resolution".

> The Crown, acting honourably, *cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued* in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances ... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. *To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable*.[77]

Where Aboriginal peoples have a "strong prima facie case", the Court indicated that the objective is "aimed at finding a satisfactory *interim* solution". The issue of "veto" was not the focus.

> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. *In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances*, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. *This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases*.[78]

Where a strong prima facie case exists, the Supreme Court again focused on finding interim solutions "pending final resolution". Such solutions may require a process of accommodation that "may best be resolved by consultation and negotiation". Such negotiation raises consensual issues.

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus *the effect of good faith consultation may be to reveal a duty to accommodate*. Where a strong prima facie case exists for the claim ... and the consequences of the government's proposed decision may adversely affect it in a significant way, *addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim*. Accommodation is achieved through consultation, as this Court recognized in R. v. Marshall, [1999] 3 S.C.R. 533, at para. 22: "... *the process of accommodation of the treaty right may best be resolved by consultation and negotiation*".[79]

In the final resolution, the "consent" of an Aboriginal nation on "very serious issues" remains a critical factor.

3. Rights are rarely absolute

In domestic and international law, few rights are absolute. The objective is to respect and uphold the rights of all. Achieving this end may require careful balancing among different rights-holders to resolve potential conflicts. As described below, eliminating such conflicts contributes to reconciliation.

In *Delgamuukw*, the Supreme Court indicated: "The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute."[80] Save for specific exceptions, such as the right not to be subjected to torture or genocide, human rights are relative to the rights of others. As affirmed in international law, Indigenous peoples' rights are human rights.[81]

An essential component of the Truth and Reconciliation Commission's Calls to Action is using the *UN Declaration* as the "framework for reconciliation".[82] The TRC describes "reconciliation" as "coming to terms with events of the past in a manner that *overcomes conflict* and establishes a respectful and healthy relationship among people going forward."[83]

In regard to conflict, former Special Rapporteur Anaya has identified "natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide."[84] In regard to Indigenous consent, Anaya has concluded:

> 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.[85]

Reconciliation is an essential process when addressing Indigenous peoples' Aboriginal and Treaty rights and related injustices. As the Supreme Court has emphasized, reconciliation is "a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*."[86]

This means that such rights are subject to balancing that takes into account a wide range of principles including respect for the rights of others. Indigenous rights may be subject to limitations or lawful infringement, based on strict criteria that can be objectively determined.[87]

The *UN Declaration* includes some of the most comprehensive balancing provisions in any international human rights instrument. Article 46(3) stipulates that all of the provisions set forth in this Declaration "shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith." These are core principles of both the Canadian and international legal systems. These are also the core principles that have been denied Indigenous peoples throughout history.

4. "Valid legislative objectives" or "public purposes" do not preclude Indigenous consent

In *Delgamuukw* v. *British Columbia*, the Supreme Court described the general economic development in B.C. as "valid legislative objectives" that are "subject to accommodation of the aboriginal peoples' interests ... in accordance with the honour and good faith of the Crown":

> ... the *general economic development* of the interior of British Columbia, through agriculture, mining, forestry, and hydroelectric power, as well as the related building of infrastructure ... are valid legislative objectives ... these legislative objectives are *subject to accommodation* of the aboriginal peoples' interests. This accommodation *must always be in accordance with the honour and good faith of the Crown*.[88]

More recently, in *Tsilhqot'in Nation*, the Supreme Court of Canada has elaborated on Crown duties in the context of Indigenous title to lands and territories. Any intrusions must be consistent with the Crown's fiduciary duty to the Aboriginal group.[89] Incursions on Aboriginal title "*cannot be justified if they would substantially deprive future generations of the benefit of the land*".[90] It is not sufficient that government projects be justified on the basis of a "compelling and substantial public interest".[91]

They must also be consistent with the Crown's fiduciary duty to the Aboriginal group. Such obligations are especially crucial when proposed projects contribute to climate change.

Some climate change impacts are predicted to be irreversible[92] and would significantly affect present and future generations. In view of their inadequate responses,[93] federal and provincial governments may find it exceedingly difficult to satisfy the "minimal impairment"[94] and other criteria required of them as fiduciaries.

An increasingly urgent public purpose is addressing effectively climate change. In regard to this crucial issue, the Office of the UN High Commissioner for Human Rights emphasized in 2015: "indigenous peoples' rights should be fully reflected in line with the United Nations Declaration on

the Rights of Indigenous Peoples and actions likely to impact their rights should not be taken without their free, prior and informed consent."[95] In 2014, 27 UN special rapporteurs and independent experts declared in an Open Letter:

> Respecting human rights in the formulation and implementation of climate policy requires … that the State Parties meet their duties to provide access to information and facilitate informed public participation in decision making, especially the participation of those most affected by climate change … The *principle of free, prior and informed consent of indigenous peoples must be respected. Particular care must be taken to anticipate, prevent and remedy negative effects on vulnerable groups …*[96]

In 2013, former Special Rapporteur Anaya concluded: "Within established doctrine of international human rights law, and in accordance with explicit provisions of international human rights treaties, States may impose limitations on the exercise of certain human rights, such as the rights to property".[97] Anaya added:

> In order to be valid, however, the limitations must comply with certain *standards of necessity and proportionality* with regard to a valid public purpose, defined within an *overall framework of respect for human rights*.[98]

Article 46(2) of the *UN Declaration* calls for a human rights-based approach: "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected." It then sets out allowable limitations on the exercise of the rights of Indigenous peoples and individuals:

> The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and *in accordance with international human rights obligations*. Any such limitations shall be *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*.[99]

5. Business, human rights and FPIC

In regard to resource development, the "Guiding Principles on Business and Human Rights" affirm that business enterprises have a responsibility to respect "internationally recognized human rights".[100] This would include Indigenous peoples' rights affirmed in the *UN Declaration*.[101]

To fulfill this responsibility, companies should "[e]xercise due diligence so as to avoid becoming complicit in human rights violations committed by host governments".[102] As emphasized by Special Rapporteur Anaya, the corporate responsibility to exercise due diligence includes "ensuring that corporate behaviour does not infringe or contribute to the infringement of the rights of indigenous peoples ... regardless of the reach of domestic laws."[103]

Corporations that commit or contribute to violations of the rights of Indigenous peoples can and should be held accountable by States. The UN Guiding Principles also confirm that: "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to *prevent, investigate, punish and redress* such abuse through effective policies, *legislation*, regulations and adjudication."[104]

In *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, the authors described in 2010 the benefits of obtaining FPIC from a business perspective:

> … given the recent momentum regarding FPIC on the international stage, gaining consent through a formal and documented process may provide a stronger license to operate than a typical engagement process. … The process may better assure that, despite changes in government and political trends, the company will not become a target due to local opposition to its project.[105]

In 2012, the International Finance Corporation (IFC) adopted "Performance Standard 7: Indigenous Peoples". This Standard requires FPIC to be obtained in regard to lands that are traditionally owned or under customary use by Indigenous peoples; relocations; significant unavoidable impacts on their critical cultural heritage; and where cultural heritage including their knowledge, innovations, or practices are used for commercial purposes.[106]

In 2013, the United Nations Global Compact published a detailed "Business Reference Guide" on the *UN Declaration*.[107] The Guide highlights: "The concept of free, prior and informed consent … is fundamental to the UN Declaration as a measure to ensure that indigenous peoples' rights are protected."[108] The Guide adds:

> The concept of a State's FPIC obligation is well enshrined in international law.[109]
>
> The independent corporate responsibility to respect indigenous peoples' rights gives rise to opportunities for business to partner with governments and indigenous peoples to advance FPIC practices.[110]
>
> 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).[111]

In 2013, the International Council on Mining and Metals (ICMM) issued a new position on "Indigenous Peoples and Mining":

> In ICMM's view, FPIC comprises a process, and an outcome. … The outcome is that Indigenous Peoples can give or withhold their consent to a project, through a process that strives to be consistent with their traditional decision-making processes while respecting internationally recognized human rights and is based on good faith negotiation.[112]

The Boreal Leadership Council emphasized in 2015 the need for a consensual approach to resource developments in Canada:

> The trend towards the need and expectation of establishing effective and lasting agreements with affected Indigenous communities as part of major project development is clear. From recognition through international law, to national court decisions, and the increasing number of voluntary industry codes and policies, the *role of FPIC-related processes is a growing part of the landscape*.[113]

Some governments in Canada may raise resource development as a basis for opposing FPIC. Yet the business sector includes a growing number of enterprises and industry associations that are supportive of FPIC and other internationally recognized rights of Indigenous peoples.

In its 2016 Discussion Paper on the *UN Declaration*, the Canadian Association of Petroleum Producers (CAPP) endorses the *Declaration* "as a framework for reconciliation in Canada".[114] CAPP supports the "implementation of its principles in a manner consistent with the Canadian Constitution and law".[115] Further, FPIC is said to have "its genesis in the right of self-determination".[116]

In addition, Pacific Future Energy emphasizes: "We know that we must gain free, prior and informed consent from First Nations who hold both rights and title to the land affected by this project. … PFEC is in full agreement with the UN Declaration on the Rights of Indigenous Peoples."[117] The company adds: "We recognize and respect First Nations' title and rights. We respect the governance processes of the different First Nations … We will proceed with our project only if we are welcomed and supported by affected First Nations."[118]

Such positions from the business sector will require further careful scrutiny.[119] Indigenous peoples continue to express environmental, cultural and other concerns relating to proposed developments. They underline both their rights and responsibilities in regard to present and future generations.

In 2015, the Truth and Reconciliation Commission called upon the corporate sector in Canada "to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources."[120] This would include, *inter alia*, the following Call to Action:

> Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.[121]

Sixteen of the TRC Calls to Action relate to the *UN Declaration*. Thus, corporations or governments in Canada that choose to undermine or reject this global human rights instrument are also adversely affecting the national reconciliation initiative of the TRC.

Canada can also learn from the Council of Europe, which has called for "Additional protection of indigenous peoples" that relate to the *UN Declaration*.[122] In March 2016, its Committee of Ministers adopted a Recommendation that Member States "require that business enterprises respect the rights of indigenous peoples, *in accordance with international standards*".[123] This would also apply, as appropriate, to operations abroad by businesses domiciled within a State.[124]

States should reinforce efforts to "meet their commitments with regard to business and the rights of indigenous peoples" under the *UN Declaration* … and "any other international instrument that protects the rights and culture of indigenous peoples".[125] It was also recommended that "*legislative and other measures* as may be necessary to encourage or, where appropriate, require business enterprises domiciled within their jurisdiction to "respect the rights and interests of indigenous peoples".[126] Such businesses should:

> consult and co-operate in good faith in order to *obtain their free and informed consent prior to the approval of any project* affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources.[127]

6. Canada's misleading and unfounded opposition to FPIC

A "top priority" of the current government of Canada is to implement the *UN Declaration*, in consultation and cooperation with Indigenous peoples.[128] However, it is instructive to examine briefly a few of the positions taken by the previous federal government relating to FPIC.

In 2014, Canada declared that it opposed "free, prior and informed consent" when it could be interpreted as a "veto".[129] Yet the federal government at that time never explained its position as to what constituted "consent" and what constituted a "veto". Was "veto" synonymous with "consent"?[130] Was "veto" absolute?[131] In *Tsilhqot'in Nation*, there are many references to "consent" and no mention of "veto".

In the 2008 "Interim Guidelines for Federal Officials", the government of Canada indicated: "An 'established' right or title may suggest a requirement for consent from the Aboriginal group(s)."[132] The 2011 "Updated Guidelines" deleted any reference to Aboriginal "consent".[133]

In October 2014, at the Committee on World Food Security in Rome, Canada would not accept a reference to FPIC without inserting a formal explanation of position in the consensus Report: "Canada interprets FPIC as calling for a process of meaningful *consultation* with indigenous peoples on issues of concern to them".[134] Such a view contradicts the Supreme Court's rulings that explicitly refer to "consent".

As described in this paper, the right of Indigenous peoples to self-determination in international law includes the right to give or withhold consent as a core element. In regard to self-determination, the two human rights Covenants provide: "In no case may a people be deprived of its own means of subsistence."[135] The *UN Declaration* affirms: "Indigenous peoples have the right … to be secure in the enjoyment of their own means of subsistence and development".[136]

In 2009, the Committee on Economic, Social and Cultural Rights elaborated on the "right of everyone to take part in cultural life".[137] In Indigenous and other contexts, the Committee stressed that "States parties have the following *minimum core obligations* applicable with immediate effect":[138]

> To eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture … without discrimination and without consideration for frontiers of any kind;[139]
>
> *States parties should obtain their free and informed prior consent* when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.[140]

The UN Special Rapporteur on the right to food had emphasized in 2012 to Canada the importance of FPIC and called for concerted measures "with the goal towards strengthening indigenous peoples' own self-determination and decision-making over their affairs at all levels."[141]

On crucial issues of "consent", Canada cannot selectively[142] ignore key aspects of the rulings of its highest court, as well as international human rights law, to the detriment of Indigenous peoples. Such actions are inconsistent with the principles of justice, equality, rule of law and respect for human rights.

7. "Understanding FPIC" – a flawed analysis

Defective and exaggerated interpretations of the *UN Declaration* continue to be published by a few think tanks, academics and media pundits. An April 2016 Macdonald-Laurier Institute paper titled "Understanding FPIC", co-authored by Ken Coates and Blaine Favel, is a clear example of such missteps.[143]

The paper claims it "seeks to provide dispassionate analysis", examine the "meaning" of the *UN Declaration* and explore "how it interacts with current Canadian law and practice".[144] The co-authors reproduce a range of comments from others, but provide little or no critical analysis as to their validity. Overall, the paper lacks a contextual legal analysis of FPIC that is required in both Canadian and international law.[145]

The Executive Summary concludes: "There is not a strong case that FPIC currently applies to resource development in Canada".[146] Such conclusion is inconsistent with the authors' own statement: "On lands with proven Aboriginal title, such as those identified through the *Tsilhqot'in* case in British Columbia, the need for Indigenous consent is clearly and explicitly laid out by the Court".[147] The co-authors do not examine what the elements of "free", "prior" and "informed" signify in international law. Nor do they document that these same elements exist in the Canadian law notion of "consent".[148]

Although the 2004 *Haida Nation* case is referred to in their paper, the authors make no mention that – at the high end of the spectrum – the constitutional duty to consult requires "the '*full consent* of [the] aboriginal nation' on very serious issues".[149] While the paper makes a passing reference to the Truth and Reconciliation Commission (TRC), it omits any relevant Calls to Action.

TRC Call to Action 43 calls upon federal and other governments to "fully adopt and implement the *United Nations Declaration* … as the framework for reconciliation". TRC Call to Action 44 calls

upon the government of Canada to "develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration*".

TRC Call to Action 92 calls upon the corporate sector to adopt the *UN Declaration* "as a reconciliation framework" and apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources".[150] This would include "obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects".[151]

In contrast, the "Understanding FPIC" paper is seeking to convince the Canadian government to solely "reflect the *spirit* of UNDRIP in Canada's resource development framework".[152] The paper fails to assess the impacts of such a diminished objective on the TRC's national reconciliation initiative, as well as on Indigenous peoples' human rights.

Coates and Favel include in their bibliography, the 2014 report of former Special Rapporteur on the rights of indigenous peoples James Anaya regarding his visit to Canada. However, the paper does not mention or assess Anaya's conclusion that "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."[153] Nor does the paper examine Anaya's criticism of Canada's statement that there is no customary international law reflected in the *UN Declaration*.[154]

The *UN Declaration* in itself is not binding in the same manner as international treaties, but it still has diverse legal effects.[155] It reflects rights in existing human rights treaties. It also includes customary international law,[156] which is legally binding on States unless contradicted by domestic law.[157]

The co-authors claim that while Canada ultimately accepted the *UN Declaration* and its articles, "it was precisely because the government articulated that it had no legal or political implications in and of itself that it was prepared to shift its position."[158] The authors add: "With respect to the question about UNDRIP's legal standing, the Harper government was of the view that the declaration had no binding legal ramifications in and of itself. Its only legal standing was the extent to which it became codified in Canadian law or policy."[159] As illustrated above, such commentary is inaccurate.

The previous Conservative government sought to devalue the *UN Declaration* by undermining its status and denying its legal effects. However in 2012, the government indicated that Canadian courts could consult international law sources, such as the *UN Declaration*, "when interpreting Canadian laws, *including the Constitution*".[160] Moreover, the "living tree" doctrine can be applied so as to include the *Declaration* in interpreting Canada's Constitution.[161]

The paper fails to consider the significance of international human rights law in interpreting Canadian law – or Canada's confirmed commitments in this regard. Global Affairs Canada (GAC) emphasizes on its website: "The UN Charter and customary international law impose on all countries the *responsibility to promote and protect human rights*. This is not merely a question of values, but a mutual obligation of all members of the international community".[162]

GAC underlines: "Canada *takes its international human rights obligations seriously* and is committed to maintaining a constructive dialogue with the United Nations human rights treaty

bodies".[163] GAC adds: "These international mechanisms provide an independent perspective on the state of human rights in Canada, and allow the Canadian government to *review laws or policies which may be in conflict with international obligations*."[164]

While the co-authors make reference to the right of self-determination, they fail to examine Canada's affirmative international obligations in this regard.[165] In particular, there is no mention whatsoever that self-determination necessarily includes the right to choose – the right to give or withhold consent.[166]

Coates and Favel indicate: "The Supreme Court, in the *Tsilhqot'in* decision in 2014, made it clear that the government could claim an overriding interest in a project but that it had to make the criteria used for doing so clear."[167] This is not an accurate reflection of the Court's ruling, which added a new significant criterion. Consistent with the Crown's fiduciary duty, incursions on Aboriginal title "*cannot be justified* if they would substantially deprive future generations of the benefit of the land".[168]

The co-authors concede: "Consent may not legally bestow a veto".[169] Yet they still suggest that "Canada should not be constrained by the concept of FPIC, but rather should seek a made-in Canada, Indigenous-centric system of ensuring Indigenous people enter into discussions with resource companies with assurances of fairness and appropriate outcomes."[170] However, Canadian law already includes rules for relying upon international human rights law, including the *UN Declaration*.

The co-authors' "made-in-Canada" approach would entail Indigenous peoples eschewing the human rights-based approach reflected in the *UN Declaration* and instead focusing on its "spirit and intent". For the reasons already described, this would not be a just and equitable approach. It would also run counter to Canada's commitments relating to international human rights and sustainable development.

In the Rio + 20 outcome document *The future we want*, States recognized "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.[171]

In *Transforming Our World: The 2030 Agenda for Sustainable Development*, the United Nations by consensus resolved to "*protect human rights* … and to ensure the lasting protection of the planet and its natural resources".[172] Further, it is affirmed that no individuals, nations or peoples "will be left behind".[173]

In May 2017, the Minister of Indigenous and Northern Affairs declared at the UN Permanent Forum in New York: "By adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as *a full box of rights* for Indigenous peoples in Canada. Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including 'free, prior and informed consent'."[174]

Collaborative processes can often enhance understanding and trust. They can prove very helpful in moving away from the unilateral actions of previous governments in Canada. However, such processes cannot replace the crucial need to adopt a principled legislative framework to fully implement the *UN Declaration on the Rights of Indigenous Peoples*.[175]

In June 2015, the *Globe and Mail* reported: "Prof. Coates … said [the *Declaration*] may not effectively respond to the needs and challenges of the 21st century."[176] Clearly what meets Indigenous needs and challenges in this century is a matter for Indigenous peoples to decide, consistent with their human right to self-determination.

Conclusions

In the Indigenous context, there are significant differences between "veto" and "consent". In contrast to "veto", the term "consent" has been extensively elaborated upon in Canadian constitutional and international human rights law. Yet these essential legal sources and arguments have not been fairly considered. Indigenous peoples' right of self-determination has not been applied at all.

In the landmark 2014 *Tsilhqot'in Nation* decision that addressed in detail Indigenous peoples' consent, the term "veto" was not raised by the Supreme Court of Canada. The term "veto" is not used in the *UN Declaration on the Rights of Indigenous Peoples*. "Veto" implies an absolute power, with no balancing of rights. This is neither the intent nor interpretation of the *UN Declaration*, which includes some of the most comprehensive balancing provisions in any international human rights instrument.

The *UN Declaration* is a consensus international human rights instrument, which has been reaffirmed by consensus by the UN General Assembly. At the same time, the principle of free, prior and informed consent (FPIC) has also been explicitly reaffirmed.

In regard to federal, provincial and territorial governments, a most effective approach to implement the *UN Declaration*, including FPIC, is in conjunction with First Nations, Inuit and Métis peoples.[177] Such an approach would foster stronger relationships with Indigenous peoples, safeguard their human rights and promote reconciliation across Canada.[178] In its final Report and Calls to Action, the Truth and Reconciliation Commission of Canada requires no less.

Currently, an essential step would be to enact Bill C-262[179] as federal law to ensure a legislative framework for the implementation of the *UN Declaration* – with Indigenous peoples as full partners. In the context of reconciliation, the TRC credits global adoption of the *UN Declaration* as advancing Indigenous self-determination and FPIC:

> Around the globe, the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* has resulted in the growing recognition that Indigenous peoples have the right to be self-determining peoples ... The *Declaration* also establishes that actions by the state that affect Indigenous peoples require their free, prior, and informed consent.[180]

Endnotes

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

[2] *E.g.*, "consent" is a key element of the right of self-determination, including self-government, as well as in the *Royal Proclamation, 1763*.

[3] Ken S. Coates & Blaine Favel, "Understanding FPIC", Macdonald-Laurier Institute, April 2016, http://macdonaldlaurier.ca/files/pdf/MLINumber9-FPICCoates-Flavel04-29-WebReady.pdf.

[4] General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (adopted without a vote), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2, para. 3: "We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples". Following the adoption by consensus of the Outcome document, Canada indicated that it would issue a written statement on this instrument. Such statement has no legal effect on the consensus adoption. If Canada had wished to formally object, it would have had to call for a vote and then voted against the Outcome document.

See also General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble: "*Reaffirming* the United Nations Declaration on the Rights of Indigenous Peoples, which addresses their individual and collective rights".

[5] *Ibid.*, para. 20 [emphasis added]

[6] See, *e.g.*, House of Commons Debates, Hansard, 41st Parl., 2nd sess., vol. 147, no. 18, at 12084 (quoting Mark Strahl (Parliamentary Secretary to the Minister of Aboriginal Affairs and Northern Development, CPC)): "According to the language in [Bill C-641], aboriginal Canadians would have a veto over any piece of legislation brought forward by a Canadian government."

See Private Member's Bill C-641 – *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, House of Commons, 2nd sess., 41st Parl., First reading (defeated by Conservative government). The Bill requires that the government of Canada, "in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that all laws of Canada are consistent with the United Nations Declaration" (s. 2). The Indian Affairs minister is required in s. 3 of the Bill to submit a report on such collaborative implementation each year from 2016 to 2036.

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

[8] See, *e.g.*, Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc. E/C.12/COL/CO/5 (21 May 2010), para. 9: "The Committee is concerned that infrastructure, development and mining mega-projects are being carried out in the State party without *the free, prior and informed consent* of the affected indigenous and afro-colombian communities." [emphasis added]

Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* UN Doc. CERD/C/CAN/CO/19-20 (4 April 2012), para. 20: "the Committee recommends that the State party, in consultation with Aboriginal peoples: (a) Implement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples whenever their rights may be affected by projects carried out on their lands, as set forth in international standards and the State party's legislation".

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

[10] This issue is discussed in detail below. The term "veto" is also raised in *Beckman* v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 14: "The First Nation does not have a veto over the approval process." However, a veto over the approval process is a different issue from a veto over a proposed development.

[11] See also Paul Joffe, "*United Nations Declaration on the Rights of Indigenous Peoples*: Provisions Relevant to 'Consent'", 14 June 2013, http://quakerservice.ca/news/un-declaration-on-the-rights-of-indigenous-peoples-consent/.

[12] See heading 3 below.

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

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

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

[15] *UN Declaration*, 7th preambular para.

[16] James Y. Henderson, "A snapshot in the journey of the adoption of the UN Declaration on the Rights of Indigenous Peoples", *Justice as Healing*, Newsletter, Native Law Centre, University of Saskatchewan, vol. 13, No. 1, 2008, at 2-3.

[17] 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.

[18] Committee on the Elimination of Racial Discrimination, "Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (*continued*): *Nineteenth and twentieth periodic reports of Canada* (continued)", Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39. [emphasis added]

[19] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting). [emphasis added] Cited with approval in *United States of America* v. *Burns*, [2001] 1 S.C.R. 283, para. 80.

[20] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 142: "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." [emphasis added] The Court is referring here to the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

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

[22] *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."

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

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

[25] Rt. Hon. Beverley McLachlin, P.C., Chief Justice of Canada, "Aboriginal Peoples and Reconciliation", (2003) 9 Canterbury Law Review 240. [emphasis added] See also John Borrows, "Wampum at Niagara: The Royal

Proclamation, Canadian Legal History and Self-Government" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 159-160.

[26] Royal Commission on Aboriginal Peoples, "Looking Forward, Looking Back", *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 1, at 209-210.

See also Brian Slattery, "Is the Royal Proclamation of 1763 a dead letter?", *Canada Watch*, Fall 2013, http://activehistory.ca/wp-content/uploads/2013/09/CW_Fall2013.pdf, 6 at 6: "the Proclamation, like the Magna Carta, sets out timeless legal principles. … Changes in circumstances have altered the way in which these principles apply, but the principles themselves are as fresh and significant as ever. … [Indigenous] peoples hold legal title to their traditional territories, which cannot be settled or taken from them without their consent."

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

[28] *Tsilhqot'in Nation*, *supra*, para. 76.

[29] *Haida Nation*, *supra*, para. 24 (emphasis added, quotes from *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 168). [emphasis added]

[30] *Delgamuukw*, *supra*, para. 168. [emphasis added]

[31] *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C.C.A.), at para. 160. This paragraph was cited with approval in *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 64 [emphasis added by Supreme Court of Canada].

[32] *Tsilhqot'in Nation*, *supra*, para. 92. [emphasis added]

[33] *Ibid.* [emphasis added]

[34] 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]

[35] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 118: "It has been clear from the outset that self-determination was not tied only to independence. *The peoples of an independent territory have always had the right to choose the form of their political and economic future*." [emphasis added]

[36] *Tsilhqot'in Nation*, *supra*, paras. 67 and 75.

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

[38] *Tsilhqot'in Nation*, *supra*, para. 88: "Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the *enjoyment of the land by future generations*." [emphasis added]

Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court of Human Rights, Ser. C No. 79, 13 August 2001 (Judgment), at para. 149: "For indigenous communities, 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." [emphasis added] See also *UN Declaration*, article 25.

[39] *UN Declaration*, 2nd preambular para. See also article 2: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights".

[40] *Ibid.*, 17th preambular para.

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

[42] Human Rights Council, *Free, prior and informed consent: a human rights-based approach: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/39/62 (10 August 2018), para. 7.

[43] *Ibid.*, at para. 14.

[44] See, *e.g.*, Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1 (18 June 2007), Annex – Agenda and Framework for the Programme of Work, Item 3: "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development" includes "*Rights of peoples*, and specific groups and individuals". [emphasis added]

[45] See, *e.g.*, *R. v. Hape*, [2007] 2 S.C.R. 292, where LeBel J. confirms at para. 55 that in interpreting the *Canadian Charter*, the Court "has sought to ensure consistency between its interpretation of the *Charter*, on the one hand, and Canada's *international obligations and the relevant principles of international law*, on the other". [emphasis added]

See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, "the *Charter* should be presumed to provide *at least as great a level of protection* as is found in the international human rights documents that Canada has ratified". [emphasis added] Similarly, see *Saskatchewan Federation of Labour* v. *Saskatchewan*, 2015 SCC 4, majority judgment delivered by Abella J., at para. 64; *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70; *India v. Badesha*, 2017 SCC 44, at para. 38; and *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 349, per Dickson C.J. In regard to Indigenous peoples' rights in section 35 of the *Constitution Act, 1982* – which includes a wide range of economic, social, cultural and political rights, Canada has obligations that are reflected in international human rights law, including the right of self-determination.

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

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

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

[49] See, *e.g.*, Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-first to twenty-third periodic reports of Canada*, UN Doc. CERD/C/CAN/CO/21-23 (13 September 2017), para. 20 "(c) end the substitution of costly legal challenges as post facto recourse in place of obtaining meaningful free prior and informed consent of Indigenous Peoples" and "(d) Incorporate the free, prior and informed consent principle in the Canadian

regulatory system"; Committee on Economic, Social and Cultural Rights, *Concluding observations of the sixth periodic report of Canada*, UN Doc. E/C.12/CAN/CO/6 (23 March 2016), para. 13: "the right to free, prior and informed consent of indigenous peoples to any change to their lands and territories is not adequately incorporated in domestic legislation and not consistently applied by the State party"; Human Rights Committee, *Concluding observations on the fourth periodic report of the Bolivarian Republic of Venezuela*, UN Doc. CCPR/C/VEN/CO/4 (14 August 2015), para. 21(a): "obtain their free, prior and informed consent before any measure is adopted or implemented that may substantively compromise [Indigenous peoples'] way of life and culture, in particular in relation to projects that may have an impact on their lands and territories and other resources".

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

[51] *E.g.*, Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex, para. 98 (Conclusions): "In accordance with the Canadian constitution and relevant international human rights standards, **as a general rule** resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned." [emphasis added]

And at para. 99: "Resource development projects, where they occur, should be fully consistent with aboriginal and treaty rights, and **should in no case be prejudicial to unsettled claims**. The federal and provincial governments should strive to maximize the control of indigenous peoples themselves over extractive operations within their lands and the development of benefits derived therefrom." [emphasis added]

See also Office of the High Commissioner for Human Rights, "A New Climate Change Agreement Must Include Human Rights Protections For All", An Open Letter from 27 Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014), 17 October 2014, http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf: "**The principle of free, prior and informed consent of indigenous peoples must be respected.** Particular care must be taken to anticipate, prevent and remedy negative effects on **vulnerable groups**, which may include indigenous peoples, minorities, persons living in poverty, migrants and displaced persons, older persons, persons with disabilities, and children, as well as to empower and protect the rights of women." (p. 3) [emphasis added]

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

[53] 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."

[54] In earlier years, Special Rapporteur on the rights of Indigenous peoples James Anaya interpreted articles 10 and 29(2) of the *UN Declaration* as including a veto. However, his more recent reports make no reference to veto.

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

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

[57] General Assembly, *Human rights and transnational corporations and other business enterprises: Note by the Secretary-General*, report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, UN Doc. A/71/291 (4 August 2016), para. 71.

[58] International Finance Corporation (member of the World Bank Group), "IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency", 12 May 2011, http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=0ADE5C1923DC4CF48525788E0071FAAA.

[59] United Nations Development Programme, *UNDP Social and Environmental Standards*, 14 July 2014, http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP%20Social%20and%20Environmental%20Standards-14%20July%202014.pdf, "Standard 6: Indigenous Peoples", para. 4 (Respect for domestic and international law). In regard to "Applicable Law", see the "Overarching Policy and Principles" at 5, para. 9: "UNDP will not support activities that do not comply with national law and obligations under international law, *whichever is the higher standard* …" [emphasis added]

[60] *Ibid.*, at 34, para. 9 (Full, effective and meaningful participation).

[61] Committee on Economic, Social and Cultural Rights, *Concluding observations of the sixth periodic report of Canada*, UN Doc. E/C.12/CAN/CO/6 (4 March 2016) (advance unedited version), para. 14.

[62] *Ibid.*

[63] Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-first to twenty-third periodic reports of Canada*, UN Doc. CERD/C/CAN/CO/21-23 (13 September 2017), para. 19.

[64] *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.

[65] *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, International Labour Organization, Convention No. 169, I.L.O. 76th Sess., art. 4. [emphasis added] Although Canada has not ratified this human rights instrument, it may be used to interpret Indigenous peoples' rights in the domestic context: see *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348, *per* Dickson C.J. (dissenting). This same passage has been cited with approval by the Supreme Court of Canada in *United States of America* v. *Burns*, [2001] 1 S.C.R. 283, para. 80.

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

[67] *Ibid.* [*Report of the Special Rapporteur*], para. 27. [emphasis added]

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

[69] Inter-Parliamentary Union (IPU), *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians N° 23*, 2014, http://www.ipu.org/PDF/publications/indigenous-en.pdf.

[70] *Ibid.*, at 31. The IPU *Handbook* adds: "In this regard, it is necessary for parliaments to … include and strengthen participation of indigenous peoples in hearings and committees, while respecting the principle of free, prior and informed consent in relation to legislative and administrative matters affecting them".

[71] 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, paras. 204, n. 108; 207; 232; and 243.

[72] *Ibid.*, para. 291.

[73] *E.g.*, *Sarstoon Temash Institute for Indigenous Management* [SATIIM] v. *Attorney General of Belize*, Claim No. 394 of 2013, Supreme Court of Belize, decision rendered by the Hon. Michelle Arana, 3 April 2014, para. 19; *Paki and other* v. *Attorney-General*, [2014] NZSC 118; *Takamore* v. *Clarke*, [2011] NZCA 587, *per* Glazebrook and Wild JJ, (appeal denied [2012] NZSC 116), para. 250, n. 259; *Aurukun Shire Council & Anor v. CEO Office of Liquor Gaming and Racing in the Department of Treasury*, [2010] QCA 37, Supreme Ct. Queensland, paras. 33-35.

[74] *Cal et al. v. Attorney General of Belize* and *Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize* and *Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice.

[75] *Attorney-General of Belize et al.* v. *Maya Leaders Alliance et al.*, Belize Court of Appeal, Civil Appeal No. 27 of 2010, judgment rendered on 25 July 2013.

[76] *Ibid.*, paras. 276 and 277.

[77] *Haida Nation*, *supra*, para. 27. [emphasis added]

[78] *Haida Nation*, para. 44. [emphasis added]

[79] *Ibid.*, para. 47. [emphasis added]

[80] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 161. In regard to rights in the *Canadian Charter of Rights and Freedoms* and constitutionally guaranteed Aboriginal rights, see *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, at 1057-58 (*per* Cory J.).

[81] 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 the heading "Promotion and protection of all human rights … including the right to development": 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).

[82] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf, at 4, para. 43. At para. 44, the Commission calls upon the Government of Canada "to develop a national action plan, strategies, and other concrete measures to achieve the goals" of the *UN Declaration*.

See also UN Secretary-General (Ban Ki-moon), "Secretary-General Praises Canada's Truth, Reconciliation Commission for Setting Example by Addressing Systemic Rights Violations against Indigenous Peoples", SG/SM/16812, 1 June 2015, http://www.un.org/press/en/2015/sgsm16812.doc.htm, where the Secretary-General encouraged follow-up of the TRC's recommendations using the *UN Declaration* as a "roadmap".

[83] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation*, Final Report of the Truth and Reconciliation Commission of Canada, (Montreal/Kingston: McGill-Queen's University Press, 2015), Volume 6, http://www.myrobust.com/websites/trcinstitution/File/Reports/Volume_6_Reconciliation_English_Web.pdf, at 3. [emphasis added]

[84] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35 (11 July 2011), para. 82 (Conclusions and Recommendations).

[85] 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*, UN Doc. A/HRC/21/47/Add.1 (30 August 2012), para. 85.

[86] *Haida Nation* v. *British Columbia (Minister of Forests)*, *supra*, para. 32

[87] *E.g.*, *UN Declaration*, article 46(2): "The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be 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."

[88] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, *per* La Forest and L'Heureux-Dubé JJ., paras. 202-203. [emphasis added]

[89] *Tsilhqot'in Nation*, *supra*, paras. 2 and 88.

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

[91] *Ibid.*, para. 88.

[92] Matthew Collins et al., "2013: Long-term Climate Change: Projections, Commitments and Irreversibility", ch. 12 in T.F. Stocker et al., eds.., Climate Change 2013: The Physical Science Basis, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, http://www.ipcc.ch/pdf/assessmentreport/ar5/wg1/WG1AR5_Chapter12_FINAL.pdf, at 1033: "A large fraction of climate change is largely irreversible on human time scales, unless net anthropogenic CO2 emissions were strongly negative over a sustained period." [bold in original, underline added]

[93] Office of the Auditor General of Canada, Report of the Commissioner of the Environment and Sustainable Development – Fall 2014 (Ottawa: Minister of Public Works and Government Services, 2014), ch. 1 "Mitigating Climate Change", at 32 "Conclusions", para. 1.80: "We are concerned that Canada will not meet its 2020 emission reduction target and that the federal government does not yet have a plan for how it will work toward the greater reductions required beyond 2020."

[94] *Tsilhqot'in Nation*, *supra*, para. 87.

[95] OHCHR, Understanding Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 26 November 2015, at 4.

[96] Office of the High Commissioner for Human Rights, "A New Climate Change Agreement Must Include Human Rights Protections For All", An Open Letter from 27 Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014), 17 October 2014, http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf, at 3. [emphasis added]

[97] 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. 32.

[98] *Ibid.* [emphasis added] In the same paragraph, Anaya highlights the allowable limitations in the *UN Declaration*, article 46(2).

[99] Emphasis added. In regard to Indigenous peoples, the allowable limitations on their human rights are much narrower than in the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11*. Reasons include, *inter alia*: Indigenous peoples are peoples with the right of self-determination, including self-government. They are still suffering the debilitating effects of colonization, land and resource dispossession; racial discrimination; marginalization – and the resulting effects of severe impoverishment. The *UN Declaration* and the *Indigenous and Tribal Peoples Convention, 1989* affirm that Indigenous peoples have a distinctive relationship with their lands, territories, resources and environment that must receive full consideration and respect.

See also *R. v. Ipeelee*, 2012 SCC 13, para. 60: "To be clear, *courts must take judicial notice* of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." [emphasis added]

[100] See, *e.g.*, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" in Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31 (21 March 2011), Annex, Principle 12 and Commentary.

The "Guiding Principles on Business and Human Rights" were endorsed by Human Rights Council, *Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/17/4/ (16 June 2011) (without a vote).

[101] Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/23/32 (14 March 2013), para. 53: "The Working Group identified as priorities the need: (a) To encourage the use of the Guiding Principles in promoting the corporate responsibility to respect human rights in relation to indigenous peoples and business activities in alignment with other relevant standards, *including the United Nations Declaration on the Rights of Indigenous Peoples*".

[102] Human Rights Council, *Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu*, UN Doc. A/HRC/21/48 (2 July 2012), para. 70(d).

[103] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 61.

[104] "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", *supra*, The State Duty to Protect Human Rights, Principle 1. [emphasis added]

[105] Amy K. Lehr & Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*, eBook (Boston/Washington, D.C.: Foley Hoag LLP, 2010), http://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy, at 37.

[106] International Finance Corporation (World Bank Group), "Performance Standard 7: Indigenous Peoples", 1 January 2012, http://www1.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7_English_2012.pdf?MOD=AJPERES, at 3-5, paras. 13-17.

[107] 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 large corporate responsibility initiative in the world, with over 8,400 business signatories from 162 countries.

[108] *Ibid*., at 25.

[109] *Ibid*.

[110] *Ibid*.

[111] *Ibid*., at 26.

[112] International Council on Mining and Metals, "Indigenous Peoples and Mining", Position Statement, May 2013, http://www.icmm.com/document/5433, at 2.

[113] Boreal Leadership Council, "Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada", September 2015, http://borealcouncil.ca/wp-content/uploads/2015/09/BLC_FPIC_Successes_Report_Sept_2015_E.pdf, at 21. The Council is self-described as "comprised of leading conservation groups, First Nations, resource companies and financial institutions".

[114] CAPP, "Discussion Paper on Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada", April 26, 2016, at 1. CAPP indicates that its "member companies produce about 90 per cent of Canada's natural gas and crude oil".

[115] *Ibid.*

[116] *Ibid.*, at 3.

[117] Pacific Future Energy, http://www.pacificfutureenergy.com/faqs/#1448921135046-2dca20c5-ff3f.

[118] Pacific Future Energy, http://www.pacificfutureenergy.com/first-nations-first/.

[119] For example, implementation of the principles of the *UN Declaration* "in a manner consistent with the Canadian Constitution and law" must not suggest that the *Declaration* be read down or otherwise diminished so as to conform to existing domestic law. Consistent with progressive rules of constitutional interpretation, the UN Declaration must be read to *reinforce* Canadian constitutional and other law.

[120] TRC, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, *supra*, at 10, para. 92.

[121] *Ibid.*, para. 92i. See also Robert Walker and Dave Porter, "A New Path Forward For Resource Development – And Reconciliation", http://solutions-network.org/site-fpic/files/2012/09/Boreal-Leadership-Council-FPIC-op-ed-final.pdf: "The Truth and Reconciliation Commission report has further demonstrated the need to reconcile a dismal past with a positive future based on mutual respect, trust and partnership. Resource development and FPIC are at the heart of this journey. … Quite simply, this is the 21st Century and the time to recognize rights, develop genuine respect and trust, and work together as equal partners is long overdue."

[122] Council of Europe, *Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business*, adopted by the Committee of Ministers on 2 March 2016 at the 1249th meeting of the Ministers' Deputies, Appendix (VII. Additional protection for indigenous peoples).

The Council of Europe is the continent's leading human rights organization. The Council of Europe promotes human rights through international conventions ... It monitors member states' progress in these areas and makes recommendations through independent expert monitoring bodies.

[123] *Ibid.*, para. 65. [emphasis added]

[124] *Ibid.*

[125] *Ibid.*, para. 66.

[126] *Ibid.*, para. 67a. [emphasis added]

[127] *Ibid.*, para. 67b. [emphasis added]

[128] Prime Minister Justin Trudeau, "Statement by Prime Minister on release of the Final Report of the Truth and Reconciliation Commission", 15 December 2015, http://pm.gc.ca/eng/news/2015/12/15/statement-prime-minister-release-final-report-truth-and-reconciliation-commission. See also Office of the Prime Minister (Rt. Hon. Justin Trudeau), "Minister of Indigenous and Northern Affairs Mandate Letter", November 2015, http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter.

[129] Permanent Mission of Canada to the United Nations, "Canada's Statement on the World Conference on Indigenous Peoples Outcome Document", New York, 22 September 2014, http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx?lang=eng.

[130] Ryan Beaton, "Aboriginal Title in Recent Supreme Court of Canada Jurisprudence: What Remains of Radical Crown Title?", 33 N.J.C.L. 61 at 78: "the Court has already recognized that such a "veto" is *constitutionally guaranteed* in certain circumstances, if by "veto" we mean simply the right to stop (through recourse to the courts) the Crown from acting unilaterally in cases where the Crown's proposed action is unconstitutional, e.g. where the full consent of the Aboriginal group(s) is constitutionally required but not obtained."

[131] *Ibid.* at 79: "no one is claiming any *arbitrary* veto power".

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

[133] 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.

[134] Canada, "Explanations of Position of Members Which Requested that They Be Included in the Final Report", Annex E in Committee on World Food Security, *Report of the 41st Session of the Committee on World Food Security (Rome, 13-18 October 2014)*, CFS 41 Final Report, November 2014, http://www.fao.org/fileadmin/templates/cfs/Docs1314/CFS41/CFS41_Final_Report_EN.pdf, at 39. [emphasis added]

[135] Identical article 1(2) of the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*.

[136] *UN Declaration*, article 20(1).

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

[138] *Ibid.*, para. 55.

[139] *Ibid.*, para. 55(d).

[140] *Ibid.*, para. 55(e).

[141] *Human Rights Council, Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum: Mission to Canada,* UN Doc. A/HRC/22/50/Add.1 (24 December 2012), para. 67. See also Human Rights Council, *Report of the Special Rapporteur on the right to food on her mission to Philippines*, UN Doc. A/HRC/31/51/Add.1 (29 December 2015), para. 37: "the Special Rapporteur [Hilal Elver] stresses the importance of the principle of free, prior and informed consent to any change to the lands and territories of indigenous peoples, as also provided for in the United Nations Declaration on the Rights of Indigenous Peoples."

[142] *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), 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]

[143] Ken S. Coates & Blaine Favel, "Understanding FPIC", Macdonald-Laurier Institute, April 2016, http://macdonaldlaurier.ca/files/pdf/MLINumber9-FPICCoates-Flavel04-29-WebReady.pdf.

[144] *Ibid.*, at 1(Executive Summary) and 5.

[145] See text accompanying notes 13-17 *supra*.

[146] Ken S. Coates & Blaine Favel, "Understanding FPIC", note 143 *supra*, at 1.

[147] *Ibid.*, at 25.

[148] See text accompanying note 31 *supra*.

[149] See text accompanying note 29 *supra*.

[150] TRC, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, *supra* note 82, at 10, para. 92.

[151] *Ibid.*

[152] Ken S. Coates & Blaine Favel, "Understanding FPIC", note 143 *supra*, at 21.

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

[154] Ken S. Coates & Blaine Favel, "Understanding FPIC", note 143 *supra*, at 11.

[155] 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, http://quakerservice.ca/wp-content/uploads/2011/05/NJCLPJArticleUNDeclaration2010.pdf, at 202 *et seq.*

[156] *Ibid.*, at 205 *et seq.*, where various examples of customary international law in the *UN Declaration* are provided.

[157] *R.* v. *Hape*, [2007] 2 S.C.R. 292, *per* LeBel J., para. 39: "the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation."

[158] Ken S. Coates & Blaine Favel, "Understanding FPIC", note 143 *supra*, at 9.

[159] *Ibid.*, at 16.

[160] See text accompanying note 18 *supra*.

[161] See text accompanying notes 22-24 *supra*.

[162] Global Affairs Canada, "Canada's international human rights policy", http://www.international.gc.ca/rights-droits/policy-politique.aspx?lang=eng. [emphasis added]

[163] Global Affairs Canada, "Canada's human rights commitments", http://www.international.gc.ca/rights-droits/obligations.aspx?lang=eng. [emphasis added]

[164] *Ibid.* [emphasis added]

[165] See text accompanying note 41 *supra*.

[166] See text accompanying notes 34-36 *supra*.

[167] Ken S. Coates & Blaine Favel, "Understanding FPIC", note 143 *supra*, at 23. In the same paragraph, the authors added: "Doing this on a project-by-project basis would cause significant administrative, legal, and political complications."

[168] See text accompanying notes 89 *et seq. supra*. [emphasis added]

[169] Ken S. Coates & Blaine Favel, "Understanding FPIC", note 143 *supra*, at 21.

[170] *Ibid.*, at 21.

[171] 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. 49, endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote). [emphasis added]

[172] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (25 September 2015) (adopted without a vote), para. 3. [emphasis added]

[173] *Ibid.*, para. 4. See also Inter-American Commission on Human Rights, "Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System", OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009), at 81-82, para. 204: "development must necessarily be compatible with human rights, and specifically with the rights of indigenous and tribal peoples … There is no development as such without full respect for human rights."

[174] Minister of Indigenous and Northern Affairs (Carolyn Bennett), "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10", May 10, 2016, http://news.gc.ca/web/article-en.do?nid=1064009&tp=970&_ga=1.84170458.291599297.1462200129. [emphasis added] This same point is also emphasized on the Global Affairs Canada website at http://international.gc.ca/indig-autoch/index.aspx?lang=eng. (accessed 14 August 2016).

[175] See *United Nations Declaration on the Rights of Indigenous Peoples Act*, (Private Member's Bill C-262), House of Commons, 1st sess., 42nd Parl., First reading (tabled by Romeo Saganash, April 21, 2016). The Bill has passed third reading in the House of Commons and is currently before the Senate. Bill C-262 establishes collaborative processes with Indigenous peoples to ensure that the laws of Canada are consistent with the *UN Declaration* and to develop and implement a national action plan to achieve the objectives of the *Declaration*. The Bill also repudiates racist doctrines of superiority and rejects colonialism in favour of "a contemporary approach based on good faith and on principles of justice, democracy, equality, non-discrimination, good governance and respect for human rights".

[176] Kim Mackrael, "Federal government wary of UN indigenous rights declaration", *Globe and Mail* (05 June 2015), http://www.theglobeandmail.com/news/politics/federal-government-wary-of-un-indigenous-rights-declaration/article24833549/.

[177] See, *e.g.* Permanent Forum on Indigenous Issues, *Report on the fourteenth session (April 20 – 1 May 2015),* Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2015/43-

E/C.19/2015/10, http://www.un.org/ga/search/view_doc.asp?symbol=E/2015/43, para. 35: "In accordance with … the United Nations Declaration, States, in conjunction with indigenous peoples, should develop legislation and mechanisms at the national level to ensure that laws are consistent with the United Nations Declaration."

[178] For a similar perspective, see Canadian Association of Statutory Human Rights Agencies (CASHRA), "Canada's Human Rights Agencies call on all levels of Government to endorse the UN Declaration on the Rights of Indigenous Peoples", July 2012, http://www.cashra.ca/news.html.

[179] In regard to Bill C-262, see note 175 *supra*.

[180] Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: Reconciliation*, Final Report of the Truth and Reconciliation Commission of Canada, (Montreal/Kingston: McGill-Queen's University Press, 2015), Volume 6, http://www.myrobust.com/websites/trcinstitution/File/Reports/Volume_6_Reconciliation_English_Web.pdf, at 132.