

**Joint Submission to the United Nations Human Rights Council
in regard to the
Universal Periodic Review Concerning Canada
(Second Cycle)**

Submitted By:

Grand Council of the Crees (Eeyou Istchee); First Nations Summit; Federation of Saskatchewan Indian Nations; Union of British Columbia Indian Chiefs; Chiefs of Ontario; Native Women's Association of Canada; Canadian Friends Service Committee (Quakers); Treaty Four First Nations; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Atlantic Policy Congress of First Nations Chiefs Secretariat; Hul'qumi'num Treaty Group; KAIROS: Canadian Ecumenical Justice Initiatives; Maritime Aboriginal Peoples Council; IKANAWTIKET; First Peoples Human Rights Coalition

October 2012

Universal Periodic Review Concerning Canada (Second Cycle)

1. This Joint Submission is made in regard to the Universal Periodic Review (UPR) of Canada, scheduled to take place during the Human Rights Council's 16th session 22 April – 3 May 2013. As required, a primary focus is, *inter alia*, the "implementation of the accepted recommendations and the development of human rights situations" in Canada.¹
2. This includes implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*² (hereinafter "*UN Declaration*" or "*Declaration*"). The *Declaration* is a consensus international human rights instrument – no State in the world formally opposes it. The global consensus in support of the *Declaration* reinforces its weight as a universal³ instrument.
3. The *Declaration* has diverse legal effects and commands "utmost respect".⁴ UN treaty bodies are increasingly using it to interpret Indigenous rights and State obligations in existing human rights treaties, as well as encouraging its implementation.⁵
4. **A central concern in this Submission is the Canadian government's double standard on democracy, human rights, security and rule of law.** Canada purportedly champions these fundamental principles and values,⁶ as well as their interrelationships.⁷ Yet the government repeatedly violates them when addressing Indigenous peoples' rights.
5. In its responses to the UPR Working Group during the 1st cycle, Canada sought to portray a positive view of its record on Indigenous peoples' rights⁸ and its acceptance of diverse State recommendations.⁹
6. Since its election in 2006, the Canadian government has refused to acknowledge that Indigenous peoples' collective rights are human rights. This is inconsistent with the position of its own Canadian Human Rights Commission,¹⁰ as well as the practice within the UN system for the past 30 years. In June 2007, in its Agenda and Framework for the programme of work, the UN Human Rights Council permanently included the "rights of peoples" under the heading "Promotion and protection of all human rights".¹¹
7. Indigenous peoples' collective rights are human rights, as affirmed in the *UN Declaration* and other international and regional instruments.¹² Canada's ongoing failure to affirm and address Indigenous peoples' collective rights as human rights constitutes racial discrimination.¹³
8. In November 2010, Canada reversed its position and endorsed the *UN Declaration*. However, Canada has not fundamentally changed its positions and continues to devalue this human rights instrument.
9. Contrary to international and Canadian law,¹⁴ Canada erroneously¹⁵ claims that the *Declaration* is merely an "aspirational" instrument with no legal effect.¹⁶ It is only when Canada is being actively challenged before a domestic court¹⁷ or a UN treaty body¹⁸ that the government may alter its excessive positions – and even then only in part.¹⁹

10. In March 2011, Canada released updated guidelines to federal officials on “Aboriginal Consultation and Accommodation”. These guidelines refer to the *UN Declaration*, so as to diminish erroneously its value and legal significance. The guidelines characterize the *Declaration* as "aspirational" and "a non-legally binding document that does not change Canadian laws. Therefore, it does not alter the legal duty to consult".²⁰
11. In these updated guidelines on consultation and accommodation, the Canadian government has removed any reference to "consent". However, the Supreme Court of Canada has ruled that the Crown's duty to consult includes a wide range of possible requirements. At the high end of the spectrum is "'full consent of [the] aboriginal nation' on very serious issues."²¹ On crucial issues of "consent", Canada cannot selectively ignore the ruling of its highest court, as well as international human rights law.²²
12. Indigenous peoples' rights are increasingly addressed in international forums, including those relating to food security, biodiversity, climate change, and intellectual property. **Since 2006, the government of Canada has been unwilling to discuss its obligations to consult and accommodate Indigenous peoples under international and Canadian law.** Such actions violate the rule of law.²³
13. In such international forums, Canada takes positions that are often prejudicial to Indigenous peoples' rights. Yet Canada generally refuses to provide such information in advance.²⁴ The failure to provide "all necessary information in a timely way" violates its duty to consult and accommodate Indigenous peoples.²⁵ Failure to provide such information also violates the right to freedom of expression.²⁶
14. Such actions are incompatible with basic principles of democracy, accountability, transparency and good governance.²⁷ They undermine the rights of Indigenous peoples to full and effective participation, as required by the *UN Declaration* and other international human rights law.²⁸
15. In the international negotiations of the *Nagoya Protocol*²⁹ on access and benefit sharing, Canada played a lead role in undermining Indigenous peoples' rights to genetic resources.³⁰ Canada exploited the practice of consensus to insist that the *Protocol* only recognize “established” rights of Indigenous peoples "in accordance with domestic legislation".³¹ Genetic resource rights based on customary use would not be recognized. This could lead to massive dispossessions of Indigenous peoples' inherent rights to genetic resources.³²
16. Such an approach is incompatible with Canada's obligations in the *Charter of the United Nations*,³³ *Convention on Biological Diversity*³⁴ and international human rights law.³⁵ It could deprive Indigenous peoples of their rights to self-determination,³⁶ culture and resources contrary to principles of equality and non-discrimination.³⁷
17. The restrictive "established" rights approach is incompatible with the jurisprudence of the Committee on the Elimination of Racial Discrimination.³⁸ The Canadian government has been unsuccessful in its attempts to restrict its constitutional duty to consult Indigenous

peoples to situations where their rights were already “established”. In this regard, the Supreme Court of Canada rejected Canada’s approach as “not honourable”.³⁹

18. Doctrines of racial superiority are invalid and discriminatory.⁴⁰ Yet federal and provincial governments in Canada are still invoking the doctrine of “discovery” to deny or limit Aboriginal title to lands or territories.⁴¹ This impedes the progressive development of Indigenous peoples’ rights. As a result, no Indigenous peoples in Canada have succeeded in affirming such title through the courts.⁴² The impoverishment of Indigenous peoples is perpetuated.
19. In the contemporary context of justice, reconciliation and international human rights, the doctrine of discovery must have no place in determining Indigenous peoples’ title and rights.⁴³ True implementation of the *UN Declaration* requires the repudiation⁴⁴ of this racist and colonial doctrine.⁴⁵
20. Throughout Canada’s history, in virtually every court case relating to Aboriginal and Treaty rights, the government of Canada chooses to act as an adversary. No other people in Canada are automatically subjected to such consistently adverse⁴⁶ and discriminatory treatment.⁴⁷
21. Canada has a dismal record on treaty implementation. In regard to historic treaties, Canada has failed to honour and implement these sacred⁴⁸ agreements in accordance with their spirit and intent⁴⁹ – especially in relation to lands and resources. Also, the Land Claims Agreements Coalition has indicated the “Government of Canada has failed universally to fully implement the spirit and intent and the broad socio-economic objectives of all modern land agreements.”⁵⁰
22. Despite widespread opposition, the Canadian government is proceeding with its *Safe Drinking Water for First Nations Act* (Bill S-8). The government purportedly confers on itself the power to abrogate or derogate from Aboriginal or Treaty rights protected by Canada’s Constitution – “to the extent necessary to ensure the safety of drinking water on First Nation lands”.⁵¹ For such purposes, rights of self-determination and self-government are being cast aside.⁵² No other peoples in Canada are compelled to relinquish their human rights in order to enjoy safe drinking water.
23. Despite repeated warnings from Canada’s Auditor General⁵³ and the constitutional commitments of federal and provincial legislatures and governments,⁵⁴ **Canada continues to discriminate in providing essential services to First Nations people on reserves.**⁵⁵ In this context, the Canadian government disregards the *UN Declaration* and the human rights implications of its actions.⁵⁶
24. In the 8 June 2009 report of the UPR Working, the Canadian government claims: “Canada has supported the work of the United Nations human rights system ... and maintains a standing invitation to all Special Rapporteurs.”⁵⁷ However, Canada responded negatively when Special Rapporteurs raised concerns. When the Special Rapporteur on the rights of indigenous peoples issued a statement expressing concern about disparities of services in Canada,⁵⁸ the Canadian government characterized his statement as a “publicity stunt”.⁵⁹

25. In May 2012, when the Special Rapporteur on the right to food visited Canada, no Cabinet minister chose to meet with him.⁶⁰ When the Special Rapporteur expressed concerns of a "widespread problem of food insecurity" in Canada,⁶¹ government ministers chose to insult him rather than respond to his criticisms.⁶²
26. During the negotiations of the *Nagoya Protocol*, Canada and other Parties insisted on the term used in the 1993 *Convention on Biological Diversity*, namely, "indigenous and local communities" (rather than "indigenous peoples and local communities"). Despite use of the term "peoples" in Canada's Constitution,⁶³ the government maintains the same position today.
27. With the historic adoption of the *UN Declaration* in 2007, the issue of "peoples" was resolved. Today, the term "indigenous peoples" is used consistently by the General Assembly, Office of the High Commissioner for Human Rights, Human Rights Council, treaty monitoring bodies, specialized agencies, special rapporteurs and other mechanisms within the international system.⁶⁴
28. For Canada to restrict or deny the status of Indigenous peoples as "peoples", so that the effect is to impair or deny them their human rights constitutes racial discrimination. This violates the *International Convention on the Elimination of All Forms of Racial Discrimination*⁶⁵ and the *International Covenant on Civil and Political Rights*.⁶⁶ Impairing the status of Indigenous peoples is part of a broader strategy to undermine their rights in the *Protocol*, including the right to self-determination.
29. In 1999, the Human Rights Committee expressed its regret to Canada that "no explanation was given ... concerning the elements that make up [the concept of self-determination]" as it applies to Indigenous peoples in Canada.⁶⁷ The Committee emphasized "the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence".⁶⁸ Canada was urged "to report adequately on implementation of article 1 of the Covenant in its next periodic report."⁶⁹ This request has not been fulfilled.
30. In regard to environment and development issues, Canada devalues the *UN Declaration* and avoids any specific mention of Indigenous peoples' human rights. A current example is the Northern Gateway pipeline,⁷⁰ where the government has sought to discredit Indigenous peoples and environmental organizations opposing the project.⁷¹ Rather than apply the *Declaration* and acknowledge Indigenous environmental and human rights concerns, Canada has taken measures to unjustly influence the review process.⁷²
31. Without consultation with Indigenous peoples, the government has undemocratically⁷³ adopted Bill C-38.⁷⁴ This omnibus "budget" bill, *inter alia*: empowers the government to approve projects, even if they have been refused approval by the National Energy Board; enables the government to significantly limit the time period for environmental assessments; reduces fisheries protection for fish; significantly lowers the number of projects that will be assessed for environmental, social and economic impacts; restricts

public participation in environmental assessment of projects; and reduces the number and types of projects that will be subjected to environmental assessment.⁷⁵

32. A prominent former federal Cabinet minister "has slammed Ottawa for failing to meet its constitutional obligations to consult first nations on West Coast pipelines".⁷⁶ In an "open letter" to Canada's Prime Minister, four former ministers of Fisheries and Oceans in past federal governments expressed "serious concern regarding the content of Bill C-38 and the process being used to bring it into force."⁷⁷
33. In regard to Indigenous women and girls, there is a wide range of issues where they receive substandard treatment and continue to be discriminated against in Canada.⁷⁸ A critical, ongoing concern is the violence against Aboriginal women – especially the hundreds of unresolved cases of missing and murdered Aboriginal women. As the Native Women's Association of Canada describes:
- Despite our years of effort, our goal has not been achieved. Canada does not yet have in place a co-ordinated National Plan, with detailed and concrete measures, to address the root causes and remedy the consequences of the violence against Aboriginal women and girls. Some small steps have been taken, but when these steps are assessed against the long-standing and continuing pattern of violence and the harms that it causes to women, girls, families and communities, the response of the Government of Canada, and the provincial and territorial governments, remains weak, un-coordinated, and inadequate.⁷⁹
34. For Indigenous peoples, the human right to an effective remedy remains crucial.⁸⁰ Yet when they seek a legal remedy in domestic courts, the Canadian government finds ways to delay such cases for years by arguing technicalities.⁸¹ Such an approach is inconsistent with principles of justice, fairness, cooperation and good faith.
35. From the time of Canada's first UPR, Canada has failed to improve its record in promoting and protecting Indigenous peoples' human rights. There is a broad range of issues where the government's conduct falls far short of its constitutional and international human rights obligations.
36. It is widely recognized that the core principles of domestic and international legal systems are "justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith". These are also the principles on which the *UN Declaration* is based.⁸²
37. As a key step – Canada, in conjunction with Indigenous peoples, must fully and effectively implement the *UN Declaration* in good faith. This entails ensuring that its policies, laws and other measures are consistent with the *Declaration* and a human rights-based approach.

Endnotes

[Note: These endnotes are included as a more detailed and factual report that is attached as a reference to the above 5-page document.]

¹ Human Rights Council, *Decision adopted by the Human Rights Council: Follow-up to the Human Rights Council resolution 16/21 with regard to the universal periodic review*, UN Doc. A/HRC/DEC/17/119 (17 June 2011) (adopted without vote), para. 2.

It is provided in Human Rights Council resolution 5/1 of 18 June 2007 that the basis of the UPR is: (a) The Charter of the United Nations; (b) The Universal Declaration of Human Rights; (c) Human rights instruments to which a State is a party; (d) Voluntary pledges and commitments made by States; and applicable international humanitarian law.

² *UN Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

³ *UN Declaration*, art. 43: "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: Office of the High Commissioner for Human Rights*, E/C.19/2008/4/Add.14j (14 February 2008), para. 25: "the Declaration on the Rights of Indigenous Peoples ... establish[es] for the first time universal standards that can guide public policy."

⁴ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 63: "Implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."

International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), <http://www.ila-hq.org/en/committees/index.cfm/cid/1024>, para. 5: "UNDRIP is ... a declaration deserving of utmost respect. This is confirmed by the words used in the first preambular paragraph of the Declaration, according to which, in adopting it, the General Assembly was '[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter'; this text clearly implies that respect of the UNDRIP represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter." [underlining added]

⁵ See, e.g., Committee on the Rights of the Child, *Concluding observations: Cameroon*, UN Doc. CRC/C/CMR/CO/2 (29 January 2010), para.83; Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), para. 82; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Peru*, UN Doc. CERD/C/PER/CO/14-17 (3 September 2009), para. 11; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Brazil*, UN Doc. E/C.12/BRA/CO/2 (12 June 2009), para. 9; and Committee on the Elimination of All Forms of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc. CEDAW/C/AUS/CO/7 (30 July 2010), para. 12.

⁶ John Baird (Minister of Foreign Affairs and International Trade), "Canadian values 'the envy of the world,' says Baird", *Embassy*, Daily Update, 27 August 2012, <http://www.embassymag.ca/dailyupdate/view/306>: "Like our resources, Canadian values are the envy of the world. We support freedom, democracy, and respect for the rule of law, and we don't apologize for it. ... These values are universal ..."

John Baird (Minister of Foreign Affairs and International Trade), "If Canada won't stand up for these girls, who will?", *Embassy*, Daily Update, 18 September 2012, <http://www.embassymag.ca/dailyupdate/view/318>: "Canada stands as a beacon of light, built around our fundamental values of freedom, democracy, human rights and the rule

of law. We have a clear vision of what it takes to build the conditions in which people live with the dignity others crave."

⁷ Canada (John Baird), "Address by Minister Baird to United Nations General Assembly", New York, 1 October 2012, <http://www.international.gc.ca/media/aff/speeches-discours/2012/10/01a.aspx?lang=eng&view=d>: "The world's security is closely linked to ... protecting the dignity and worth of every person by upholding and protecting fundamental freedoms. ... Protecting human rights and human dignity is an obligation that each state owes its citizens, and a mutual obligation of all members of the international community."

⁸ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UN Doc. A/HRC/11/17 (3 March 2009).

⁹ Human Rights Council (Working Group on the Universal Periodic Review), *Report of the Working Group on the Universal Periodic Review: Canada: Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc. A/HRC/11/17/Add.1 (8 June 2009).

¹⁰ Canadian Human Rights Commission, "Still A Matter of Rights", A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act, January 2008, at 8: "... human rights have a dual nature. Both collective and individual human rights must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of rights without diminishing either."

¹¹ Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1 (18 June 2007), Annex. Resolution 5/1 was adopted without vote and subsequently approved by General Assembly, Res. 62/219 (22 December 2007).

See also Office of the High Commissioner for Human Rights, "OHCHR Fact Sheet: The UN Declaration on the Rights of Indigenous Peoples", United Nations, <http://www2.ohchr.org/english/issues/indigenous/docs/IntDay/IndigenousDeclarationeng.pdf>: "The Declaration ... provides the foundation – along with other human rights standards – for the development of policies and laws to protect the collective human rights of indigenous peoples."

¹² See, e.g., *UN Declaration*, article 1: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."

Committee on the Elimination of Racial Discrimination, General Recommendation 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (adopted at the Committee's 75th session, August 2009), at para. 26: "The notion of inadmissible 'separate rights' must be distinguished from rights accepted and recognised by the international community to secure the existence and identity of groups such as minorities, indigenous peoples and other categories of person whose rights are similarly accepted and recognised within the framework of universal human rights." [emphasis added]

African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Comm. No. 155/96, 15th Activity Report 2001-02, 31 at para. 68: "Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective." [emphasis added]

¹³ World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, adopted in Durban, South Africa, 8 September 2001, para. 41: "We reiterate our conviction that the full realization by indigenous peoples of their human rights and fundamental freedoms is indispensable for eliminating racism, racial discrimination, xenophobia and related intolerance."

¹⁴ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 62:

... even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. [emphasis added]

Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313, at 348: "The various sources of international human rights law -- *declarations*, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms -- must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions." [emphasis added]

¹⁵ For a detailed refutation of Canada's position, see Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Not Merely 'Aspirational'", 16 September 2012, <http://quakerservice.ca/wp-content/uploads/2012/09/UN-Decl-Not-merely-aspirational-.pdf>.

¹⁶ Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010, <http://www.aadnc-aandc.gc.ca/eng/1309374239861>: "The Declaration is an aspirational document ... a non-legally binding document that does not reflect customary international law nor change Canadian laws."

See *First Nations Child and Family Caring Society et al. v. Attorney General of Canada*, Submissions by Attorney General of Canada in response to Assembly of First Nations' submissions on the endorsement by Canada of the UN Declaration on the Rights of Indigenous Peoples, December 17, 2010, Human Rights Tribunal File No. T1340/7008, para. 10 In a human rights complaint alleging Canadian government discrimination in funding child welfare services for First Nations children on reserves, Canada claimed: "the Declaration does not change Canadian laws. It represents an expression of political, not legal, commitment. Canadian laws define the bounds of Canada's engagement with the Declaration". [emphasis added]

¹⁷ *First Nations Child and Family Caring Society et al. v. Canada (Attorney General)*, "Memorandum of Fact and Law of the Respondent, the Attorney General of Canada", Respondent's Record, vol. 5, Federal Court of Canada, Dockets T-578-11, T-630-11, T-638-11, 17 November 2011, para. 71, where Canada concedes that the *UN Declaration* can have legal effect: "Non-binding international law may provide legal context that is of assistance in interpreting domestic legislation."

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: "The Declaration was a non-legally-binding document that did not reflect customary international law. While it had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution." [emphasis added]

¹⁹ In response to Canada's claim that the *Declaration* does not include any customary international law, see Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010), UN Doc. A/HRC/15/37/Add.1 (15 September 2010), para. 112: "It is one thing to argue that not all of the Declaration's provisions reflect customary international law, which may be a reasonable position. It is quite another thing to sustain that none of them does, a manifestly untenable position. The question is not whether the Declaration in its entirety reflects customary international law, but rather which of its provisions do so and to what extent. In the

view of the Special Rapporteur, a number of the provisions of the Declaration reflect customary international law". [emphasis added]

For examples of customary international law in the *Declaration*, see Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121, <http://quakerservice.ca/wp-content/uploads/2011/05/NJCLPJAArticleUNDeclaration2010.pdf> at 206-207: " Examples in the *Declaration* include, *inter alia*: the general principle of international law of *pacta sunt servanda* ("treaties must be kept"); the prohibition against racial discrimination; the right to self-determination; the right to one's own means of subsistence; the right not to be subjected to genocide; the *UN Charter* obligation of States to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all"; and the requirement of good faith in the fulfilment of the obligations assumed by States in accordance with the *Charter*. Some prominent jurists have highlighted that the rule banning gender discrimination is also now customary international law."

²⁰ Minister of the Department of Indian Affairs and Northern Development, *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>. [emphasis added]

²¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24 (quote from *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168).

²² *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."

General Assembly, *Enhancement of international cooperation in the field of human rights*, UN Doc. A/65/218 (31 March 2011) (adopted without a vote), para. 7: "Reaffirms that the promotion, protection and full realization of all human rights and fundamental freedoms should be guided by the principles of universality, non-selectivity, objectivity and transparency, in a manner consistent with the purposes and principles set out in the Charter".

²³ *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 72: "The rule of law principle requires that all government action must comply with the law, including the Constitution. ... The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source." [emphasis added]

Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43, para. 44: "... government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights ..." [emphasis added]

²⁴ A few Indigenous representatives from national organizations were allowed to be a part of the Canadian delegation in some international meetings. Indigenous members of the Canadian delegation must sign legal documents to ensure non-disclosure of information to other Indigenous people.

²⁵ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C. Court of Appeal), at para. 160: "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." [This paragraph was cited with approval in *Mikisew Cree First Nation, supra*, para. 64, emphasis added by Supreme Court of Canada]

See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, para. 25: "The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential

existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation." [emphasis added].

²⁶ *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, s. 2(b). See also *International Covenant on Civil and Political Rights*, article 19; and *Universal Declaration of Human Rights*, article 19: "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers." [emphasis added]

²⁷ Canada's laws on "access to information" are generally substandard. See Centre for Law and Democracy, "Failing to Measure Up: An Analysis of Access to Information Legislation in Canadian Jurisdictions", Halifax, Nova Scotia, September 2012, <http://www.law-democracy.org/live/wp-content/uploads/2012/08/Canada-report-on-RTI.pdf>, at 1 (Executive Summary): "British Columbia proved to have the strongest legal framework for the right to information in Canada ... New Brunswick, Alberta and Canada's national framework tied for last place ... Every jurisdiction in Canada fared poorly from an international perspective." [emphasis added]

²⁸ See, e.g., Centre for Law and Democracy, "Entrenching RTI: An Analysis of Constitutional Protections of the Right to Information", Halifax, Nova Scotia, March 2012, <http://www.law-democracy.org/wp-content/uploads/2012/04/Const-Report-with-Annex.pdf>, at 1: "The right to information, or the right to access information held by public authorities, is a fundamental ingredient in accountability and democratic participation."

²⁹ *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010, <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

³⁰ For a detailed account, see Grand Council of the Crees (Eeyou Istchee) *et al.*, "Response to Canada's 19th and 20th Periodic Reports: Alternative Report on Canada's Actions on the *Nagoya Protocol*", UN Committee on the Elimination of Racial Discrimination (January 2012), http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NGOs_Nagoya_Protocol_Canada_CERD80.pdf.

³¹ In regard to *use* of genetic resources, article 5(2) of the *Protocol* provides: "Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms."

Similarly, article 6(2) of the *Protocol* refers solely to situations where Indigenous peoples and local communities have the "established" right to *grant access* to genetic resources: "In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources." [emphasis added]

³² Third parties may gain access to and use of genetic resources in the territories of Indigenous peoples, without their free, prior and informed consent. Canadian government intentions to take such an approach are described in Grand Council of the Crees (Eeyou Istchee) *et al.*, "*Nagoya Protocol: Comments on Canada's Possible Signature and Draft Domestic Policy*", Joint Submission to the government of Canada (October 2011), <http://quakerservice.ca/wp-content/uploads/2011/12/Nagoya-Protocol-GCCEI-Joint-Submission-on-Canadas-possible-signature-Oct-28-11.pdf>.

See also Human Rights Council (EMRIP), *Expert Mechanism on the Rights of Indigenous Peoples: Study on the role of languages and culture in the promotion and protection of the rights and identity of indigenous peoples*, UN Doc. A/ HRC/EMRIP/2012/3 (30 April 2012), Annex – "Expert Mechanism advice No. 3 (2012): Indigenous peoples' languages and cultures", para. 28:

It is imperative that United Nations institutions and related entities take a human rights-based approach to the development of international legal standards and policies on traditional knowledge, traditional cultural expressions and genetic resources, including in relation to access and benefit sharing, to ensure that they conform to the Declaration on the Rights of Indigenous Peoples. [emphasis added]

UN Declaration, article 31(1): "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources ..."

³³ *Charter of the United Nations*, arts. 1(3), 2(2), 55 c and 56.

³⁴ *Convention*, art. 1 (central objective of "fair and equitable benefit sharing) and art. 3: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources".

³⁵ See, e.g., *International Covenant on Civil and Political Rights*, arts. 1 and 27; *International Covenant on Economic, Social and Cultural Rights*, arts. 1, 2, 6, 11, 12 and 15(1)(a); ICERD, arts. 2(1), 2(2), and 5(d)(v) and (e); and *UN Declaration*.

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):

States parties should take measures to guarantee ... the exercise of th[at] right ... States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ... (para. 36)

... the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant. (para. 48)

See also Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A /HRC/14/36 (22 March 2010), para. 9, where it is indicated that the right to "take part in cultural life" - as affirmed in the *International Covenant on Economic, Social and Cultural Rights* - includes "protecting access to cultural heritage and resources".

Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, UN Doc. A /HRC/17/38 (21 March 2011), para. 45: "The right of peoples to self-determination protects the right of peoples to freely pursue their cultural development, and dispose of their natural wealth and resources, which has a clear link with cultural heritage."

Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (2000), para. 27: "The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health."

³⁶ General Assembly, *Right to Food: Note by the Secretary-General*, UN Doc. A/60/350 (12 September 2005) (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler), para. 30:

Of special importance to the right to food of indigenous peoples is common article 1 of both human rights covenants, which recognizes the rights of all peoples to self-determination and the right to freely pursue their economic, social and cultural development. Moreover, paragraph 2 of that article also stipulates that in no case may a people be deprived of its own means of subsistence. The prohibition of discrimination, contained in article 2 of the International Covenant on Civil and Political Rights, is also of crucial importance for indigenous peoples. ... Control over and preservation of plant and animal genetic resources is today crucial for the economic interests of indigenous peoples and their long-term food security. [emphasis added]

³⁷ Human Rights Committee, *General Comment No. 18, Non-discrimination*, 37th sess., (1989), para. 1: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.”

See, e.g., *Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 93, where the Inter-American Court interpreted the Indigenous peoples’ right to property under Article 21 of the *American Convention on Human Rights* in a manner consistent with international human rights law: “... by virtue of the right of indigenous peoples to self-determination recognized under said Article 1 [of the two international Covenants], they may “freely pursue their economic, social and cultural development”, and may “freely dispose of their natural wealth and resources” so as not to be “deprived of [their] own means of subsistence”. Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.”

³⁸ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), para. 15, where in regard to Guyana’s legislation distinguishing “titled” and “untitled” lands, the Committee “urges the State party to remove the discriminatory distinction between titled and untitled communities from the 2006 Amerindian Act and from any other legislation.” [emphasis added]

See also 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. 27, where discrimination concerns are highlighted: “The Permanent Forum reiterates to the parties to the Convention on Biological Diversity, and especially to the parties to the Nagoya Protocol, the importance of respecting and protecting indigenous peoples’ rights to genetic resources consistent with the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with the objective of “fair and equitable” benefit sharing in the Convention and Protocol, all rights based on customary use must be safeguarded and not only “established” rights. The Committee on the Elimination of Racial Discrimination has concluded that such kinds of distinctions would be discriminatory.” [emphasis added]

³⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 27: “The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests ... It must respect these potential, but yet unproven, interests. ... 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.” [emphasis added]

At para. 33, the Court added: “To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of ... “meaningful content” ... It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable.” [emphasis added]

⁴⁰ *UN Declaration*, preamble: “... all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust”. See also *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble and art. 4; *Declaration*, adopted at World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, South Africa, 8

September 2001, preamble and para. 7; and Human Rights Council, *Incompatibility between democracy and racism*, UN Doc. A/HRC/RES/18/15 (29 September 2011), para. 5, where doctrines of superiority are condemned "as incompatible with democracy and transparent and accountable governance".

⁴¹ Most recently, see *Tsilhqot'in Nation v. British Columbia*, 2012 BCCA 285 (British Columbia Court of Appeal), para. 166: "European explorers considered that by virtue of the "principle of discovery" they were at liberty to claim territory in North America on behalf of their sovereigns ... While it is difficult to rationalize that view from a modern perspective, the history is clear." And at para. 219:

I do not see a broad territorial claim as fitting within the purposes behind s. 35 of the Constitution Act, 1982 or the rationale for the common law's recognition of Aboriginal title. ... I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians ... [emphasis added]

Such a colonial view contradicts Canada's position in 1998, which did not limit territorial claims. See Reference re Secession of Québec, "Reply By the Attorney General of Canada to Questions Posed By the Supreme Court of Canada", S.C.C. File No. 25506, 19 February 1998:

[Question by Supreme Court]

"Do you consider your obligations to extend to consideration of territorial claims of First Nations people?"

[Response by Attorney-General of Canada]

Our answer is clearly, and I wish to reiterate it, the obligation of the Government of Canada would clearly require that the federal government consider the issue of territorial claims of First Nations, certainly. Let there be no doubt about that. [emphasis added]

⁴² Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, CERD/C/61/CO/3 (23 August 2002), para. 16: "The Committee expresses concern about the difficulties which may be encountered by Aboriginal peoples before courts in the establishment of Aboriginal title over land. The Committee notes in that connection that to date, no Aboriginal group has proven Aboriginal title, and recommends that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before courts." [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 (9 March 2012) (adv. unedited version), para. 20, where it is recommended that Canada, "in consultation with Aboriginal peoples ... (b) find means and ways to establish titles over their lands, and respect their treaty rights".

⁴³ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 5, Appendix A: Summary of Recommendations Volumes 1-5, Recommendation 1.16.2:

Federal, provincial and territorial governments further the process of renewal by

- (a) acknowledging that concepts such as terra nullius and the doctrine of discovery are factually, legally and morally wrong;
- (b) declaring that such concepts no longer form part of law making or policy development by Canadian governments;
- (c) declaring that such concepts will not be the basis of arguments presented to the courts;
- (d) committing themselves to renewal of the federation through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation ... [emphasis added]

⁴⁴ Permanent Forum on Indigenous Issues, *Report on the eleventh session (7 – 18 May 2012)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2012/43-E/C.19/2012/13, para. 4: "The Permanent Forum calls upon States to repudiate such doctrines [e.g. "discovery"] as the basis for denying indigenous peoples' human rights."

⁴⁵ 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. 103: "The federal judiciary ... has ... articulated grounds for limiting [Indigenous peoples'] rights on the basis of colonial era doctrine that is out of step with contemporary human rights values." And at para. 104:

Consistent with well-established methods of judicial reasoning, the federal courts should discard such colonial era doctrine in favour of an alternative jurisprudence infused with the contemporary human rights values that have been embraced by the United States, including those values reflected in the United Nations Declaration on the Rights of Indigenous Peoples. (emphasis added)

General Assembly, *Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 2621 (XXV), 12 October 1970, para. 1: "... continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations ... and the principles of international law".

⁴⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1108: "The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

⁴⁷ In contrast, in litigation within the United States, it is very common for the federal government to act as *amicus curiae* in support of an Indigenous nation or individual. See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Company, Inc., v. Shirley*, 532 U.S. 645 (2001); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Duro v. Reina*, 495 U.S. 676 (1990); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1984); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁴⁸ *R. v. Badger*, [1996] 1 S.C.R. 771 (Supreme Court of Canada), at 793 (per Cory J.): "... it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred."

⁴⁹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 17: "The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required ..." [emphasis added]

Beckman v. Little Salmon/Carmacks First Nation, 2010 SCC 53, para. 42: "The obligation of honourable dealing was recognized from the outset by the Crown itself in the *Royal Proclamation* of 1763 ... in which the British Crown pledged its honour to the protection of Aboriginal peoples from exploitation by non-Aboriginal peoples."

⁵⁰ Land Claims Agreements Coalition (LCAC), "Universal Periodic Review of Canada: Submission of the Land Claims Agreements Coalition (LCAC) to the United Nations Human Rights Council September 8, 2008", http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/LCAC_CAN_UPR_S4_2009_LandClaimsAgreementsCoalition_JOINT.pdf, para. 2. Members of the Coalition include indigenous signatories of 21 modern treaties in Canada since 1975.

⁵¹ *Safe Drinking Water for First Nations Act* (Bill S-8), 1st sess., 41st Parl., 2012 (adopted by Senate, 18 June 2012), s. 3: "For greater certainty, nothing in this Act or the regulations is to be construed so as to abrogate or derogate from any existing Aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the

Constitution Act, 1982, except to the extent necessary to ensure the safety of drinking water on First Nation lands." [emphasis added]

⁵² *Ibid.*, section 6: "(1) Regulations made under this Act prevail over any laws or by-laws made by a first nation to the extent of any conflict or inconsistency between them, unless those regulations provide otherwise. (2) In respect of an aboriginal body named in column 1 of the schedule, this Act and the regulations prevail over the land claims agreement or self-government agreement to which the aboriginal body is a party, and over any Act of Parliament giving effect to it, in the event of a conflict or inconsistency between this Act and that agreement or Act." [emphasis added]

⁵³ See, e.g., Office of the Auditor General of Canada, *Status Report of the Auditor General of Canada to the House of Commons – 2011*, ch. 4 (Programs for First Nations on Reserves), http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html at 5: "Despite the federal government's many efforts ... we have seen a lack of progress in improving the lives and well-being of people living on reserves. Services available on reserves are often not comparable to those provided off reserves by provinces and municipalities. Conditions on reserves have remained poor. ... There needs to be stronger emphasis on achieving results." [emphasis added]

⁵⁴ *Constitution Act, 1982*, section 36(1):

... Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

- (a) promoting equal opportunities for the well-being of Canadians;
 - (b) furthering economic development to reduce disparity in opportunities; and
 - (c) providing essential public services of reasonable quality to all Canadians.
- [emphasis added]

⁵⁵ See, e.g., Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Miloon Kothari: Addendum – Mission to Canada*, UN Doc. A/HRC/10/7/Add.3 (17 February 2009), para. 72: "Overcrowded and inadequate housing conditions, as well as difficulties accessing basic services, including water and sanitation, are major problems for Aboriginal peoples. These challenges have been identified for many years but progress has been very slow leaving entire communities in poor living conditions for decades."

⁵⁶ General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1 (16 September 2005), adopted without vote, para. 143 (human security): "We [Heads of State and Government] stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential."

⁵⁷ Human Rights Council (Working Group on the Universal Periodic Review), *Report of the Working Group on the Universal Periodic Review: Canada: Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc. A/HRC/11/17/Add.1 (8 June 2009), para. 4. [emphasis added]

⁵⁸ United Nations, "Special Rapporteur On Indigenous Peoples Issues Statement On The Attawapiskat First Nation In Canada, 20 December 2011", [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/F2496F6E43E46883C125796C0033DCC6?OpenDocument&cntxt=0D4FB&cookieLang=en](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/F2496F6E43E46883C125796C0033DCC6?OpenDocument&cntxt=0D4FB&cookieLang=en): "The social and economic situation of the Attawapiskat seems to represent the condition of many First Nation communities living on reserves throughout Canada, which is allegedly akin to third world conditions. Yet, this situation is not representative of non-Aboriginal communities in Canada, a country with overall human rights indicators scoring among the top of all countries of the world." [emphasis added]

⁵⁹ Kim Mackrael, "UN official blasts 'dire' conditions in Attawapiskat", *Globe and Mail* (20 December 2011), <http://www.theglobeandmail.com/news/politics/un-official-blasts-dire-conditions-in-attawapiskat/article2278146/>.

:

A spokeswoman for Aboriginal Affairs Minister John Duncan quickly fired back, characterizing the special rapporteur's missive as an attention-grabbing stunt.

"Anyone who reads the letter will see it lacks credibility," Michelle Yao wrote in an e-mail to The Globe and Mail. "Our government is focused on the needs of the residents of Attawapiskat – not publicity stunts." [emphasis added]

⁶⁰ Ally Foster, "Canada's human rights reputation under fire", *Embassy*, Canada's Foreign Policy Weekly, May 16, 2012, p. 1: "Olivier De Schutter, the UN special rapporteur for the right to food, was responding to the fact that the government provided no ministers to meet with him during his 11-day stay. ... 'There should be an understanding on the part of the Canadian government that its international reputation is in very serious jeopardy as a result of this very dismissive view it takes about its human rights obligations,' he said".

⁶¹ Sarah Schmidt, "UN food envoy blasts Canada", *The [Montreal] Gazette* (16 May 2012), p. A11: "Canada needs to drop its 'self-righteous' attitude about how great a country it is and start dealing with its widespread problem of food insecurity, the United Nations right to food envoy says. ... Olivier De Schutter also blasted Canada for its 'appalling poor' record of taking recommendations from UN human-rights bodies seriously."

⁶² CTVNews Staff, "Feds dismiss UN envoy's findings on hunger, poor diets", 16 May 2012, http://news.sympatico.ctv.ca/home/kenney_lashes_out_at_un_over_food_security_criticism/f89dda6e:

Health Minister Leona Aglukkaq said De Schutter is simply an 'ill-informed' and 'patronizing' academic who is 'studying us from afar.'

...

Immigration Minister Jason Kenney also lashed out at De Schutter, suggesting the envoy wasted both his time and the UN's resources by spending 11 days here. ... When asked why no Conservative cabinet ministers met with De Schutter during his trip, Kenney responded that the trip was nothing more than a "political mission" and said the UN was out of line by investigating Canada.

Food and Agriculture Organization (HLPE), *Climate change and food security: A report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security* (Rome: HLPE, 2012), http://www.fao.org/fileadmin/user_upload/hlpe/hlpe_documents/HLPE_Reports/HLPE_Report-3-Food_security_and_climate_change-June_2012.pdf, at 12, para. 4 (Summary and Recommendations): "... food insecurity is reported even in the richest countries and it is possible that development pathways that worsen inequality ignore marginalized groups, or result in degradation of the environment will make more people susceptible to food insecurity from climate change in the future." [emphasis added]

⁶³ *Constitution Act, 1982*, section 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

⁶⁴ 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. 26: "Affirmation of the status of indigenous peoples as "peoples" is important in fully respecting and protecting their human rights. Consistent with its 2010 report (E/2010/43-E/C.19/2010/15), the Permanent Forum calls upon the parties to the Convention on Biological Diversity, and especially including the Nagoya Protocol, to adopt the terminology "indigenous peoples and local communities" as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago."

⁶⁵ ICERD, art. 1(1): " In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect

of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." [emphasis added]

⁶⁶ Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at para. 7: "... the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." [emphasis added]

⁶⁷ Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), at para. 7.

⁶⁸ *Ibid.*, para. 8.

⁶⁹ *Ibid.*, para. 7. The Committee is referring here to the right of all peoples to self-determination in article 1 of the *International Covenant on Civil and Political Rights*.

⁷⁰ Gerald Butts, "Our ecological treasure is the issue with Northern Gateway", *Globe and Mail* (11 January 2012), <http://www.theglobeandmail.com/news/opinions/opinion/our-ecological-treasure-is-the-issue-with-northern-gateway/article2297912/>; and Nathan Vanderklippe, "Enbridge reports leak from U.S. pipeline as Northern Gateway hearings begin", *Globe and Mail* (10 January 2012), <http://www.theglobeandmail.com/report-on-business/enbridge-reports-leak-from-us-pipeline-as-northern-gateway-hearings-begin/article2298173/>.

⁷¹ "Pipeline rhetoric is a radical attack on due process", *Globe and Mail*, editorial (11 January 2012), <http://www.theglobeandmail.com/news/opinions/editorials/pipeline-rhetoric-is-a-radical-attack-on-due-process/article2297894/>: "There are legitimate concerns about oil tankers and the possibility of a spill. The government should respect the process enough not to heap scorn on the participants."

Shawn McCarthy and Steven Chase, "For the Harper government, the Gateway must be open", *Globe and Mail* (11 January 2012), <http://www.theglobeandmail.com/news/politics/for-the-harper-government-the-gateway-must-be-open/article2296804/singlepage/#articlecontent>: "Environmental groups say the Harper government is engaging in diversionary tactics aimed at tarnishing the image of pipeline opponents and deflecting attention from the serious risks posed by the project."

⁷² "Aboriginal Leaders Angered by Outright Government Support of Northern Gateway Pipeline", *Indian Country Today* (13 January 2012), <http://indiancountrytodaymedianetwork.com/2012/01/13/aboriginal-leaders-angered-by-outright-government-support-of-northern-gateway-pipeline-72312#ixzz1jSAIrGxQ>: "Grand Chief Edward John said in the chiefs' statement. 'We question how the three National Energy Board panelists, who were appointed by the federal government, can fairly review this proposal when the Prime Minister and Minister of Environment openly promote what they perceive as the necessary outcome? In the end, it will be the federal government which decides on the panel's report, a decision that has apparently already been made.'"

⁷³ *UN Declaration*, article 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

"Time to flip: The voters may be starting to tire of the prime minister's bullying", *The Economist*, 7 July 2012, <http://www.economist.com/node/21558303>: "The government [budget] bill was a massive 425 pages, amending almost 70 laws ... its provisions include a long list of apparently unrelated matters: cutting fisheries protection, curbing government oversight of the federal intelligence agency, limiting environmental reviews of big natural-resource projects ... The opposition said lumping all this together was an abuse of Parliament."

Andrew Coyne, "Illegitimate use of omnibus bills renders Parliament a lame duck", *The Gazette* (1 May 2012), A15, <http://www.montrealgazette.com/news/Illegitimate+omnibus+bills+renders+Parliament+lame+duck/6544558/story>.

[html](#): "The environmental chapters are the most extraordinary. Along with the new act, they give cabinet broader power to override decisions of the National Energy Board, shorten the list of protected species, and abolish the Kyoto Protocol Implementation Act - among 'other measures.' For much of this the first public notice was its inclusion in the bill. ... So this is not remotely a budget bill, despite its name. It is what is known as an omnibus bill. If you want to know how far Parliament has fallen, how little real oversight it now exercises over government, this should give you a clue. ... But there is something quite alarming about Parliament being obliged to rubber-stamp the government's whole legislative agenda at one go." [emphasis added]

⁷⁴ *An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures* (Bill C-38), S.C. 2012, c. 19. Its short title is: "*Jobs, Growth and Long-term Prosperity Act*".

⁷⁵ For a brief analysis of environmental concerns relating to Bill C-38, see, for example, Suzuki Foundation, "Bill C-38: What you need to know", <http://www.davidsuzuki.org/publications/downloads/2012/C-38%20factsheet.pdf>; and West Coast Environmental Law, "Six Questions for your MP about Bill C-38", 27 June 2012, http://wcel.org/resources/environmental-law-alert/six-questions-your-mp-about-bill-c-38?utm_source=twl.

⁷⁶ Shawn McCarthy and Nathan Vanderklippe, "Crucial pipelines jeopardized by failure to consult first nations, Prentice warns", *Globe and Mail* (28 September 2012), <http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/crucial-pipelines-jeopardized-by-failure-to-consult-first-nations-prentice-warns/article4572255/>, where it is added:

[Canadian Imperial Bank of Commerce] vice-chairman Jim Prentice – who held several senior posts in the Conservative government, and is an expert on aboriginal law – delivered a scathing critique of complacency and short-sightedness in both the government and oil industry ...

...

"The obligation to consult with and accommodate first nations ... these are responsibilities of the federal government," said Mr. Prentice, who held posts as minister of Indian affairs, industry, and environment before leaving government in 2010. "And take it from me as a former minister and former co-chair of the Indian Claims Commission of Canada, there will be no way forward on West Coast access without the central participation of the first nations of British Columbia."

He argued that Ottawa should negotiate an agreement that ensures native communities can support pipeline projects without affecting their unsettled land claims and launch a co-management regime with those aboriginal communities for port terminals and shipping.

⁷⁷ See Tom Siddon, David Anderson, John Fraser and Herb Dhaliwal, "An open letter to Stephen Harper on fisheries, 1 June 2012, page A13, <http://www.theglobeandmail.com/commentary/an-open-letter-to-stephen-harper-on-fisheries/article4224866/>, where it is added: "Major changes to such critical legislation warrant extensive and factual discussion and a broad consultation process. We therefore strongly recommend a full examination of the proposed Fisheries Act amendments, and of the proposed staff reductions, by the standing committee on fisheries and oceans (not the finance committee) of the House of Commons. That examination must include appropriate testimony from industry and first nations representatives, academic experts and present and past personnel of the Department of Fisheries and Oceans." [emphasis added] The former ministers underline that they "collectively have served in cabinet in Progressive Conservative and Liberal governments alike."

⁷⁸ See, e.g., Native Women's Association of Canada, "NWAC Shadow Report, United Nations Committee on the Elimination of Racial Discrimination, 80th Session, 13 February - 9 March 2012 Geneva, 30 January 2012.

⁷⁹ *Ibid.*, at 12. [emphasis added] NWAC adds: "the voices of Aboriginal women and their organizations are still ignored and disrespected, and they are excluded from participation in deliberations about their lives and their deaths."

⁸⁰ See, e.g., *UN Declaration*, art. 40: "Indigenous peoples have the right ... to effective remedies for all infringements of their individual and collective rights."

⁸¹ See, e.g., *Nunavut Tunngavik Inc. v. Canada (Attorney General)*, 2012 NUCJ 11 (Nunavut Court of Justice), where the Canadian government has delayed fulfillment of a major treaty obligation for many years. After losing its case in the Nunavut Court of Justice, the government has filed an appeal.

See also *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, <http://quakerservice.ca/wp-content/uploads/2012/04/Fed-Ct-Judicial-Review-JUDGMENT-Discrim-re-federal-funding-on-FNs-reserves-Apr-18-12-copy.pdf>, where the government has delayed the hearing of a complaint filed in 2007 for alleged discrimination in relation to federal funding of child welfare services on First Nations reserves. After unsuccessfully opposing the applications for judicial review in the Federal Court of Canada, the government has filed an appeal. An access to information request by FNCFCS revealed that the Department of Justice, acting for the Department of Aboriginal Affairs, has spent 3.1 million dollars for legal services between 2007 and 2012: see "Ottawa dépense 3 millions pour tenter d'étouffer des allégations", *La Presse* (2 October 2012), p. A12.

⁸² *UN Declaration*, article 46(3).