UN Special Rapporteur on the Rights of Indigenous Peoples: Visit to Canada
7-15 October 2013

Issues of National Concern

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We welcome Special Rapporteur James Anaya and his colleagues on the occasion of his official visit to Canada. The following human rights issues of national concern are shared by our organizations. Other issues of national, regional or local concern are being highlighted in separate reports submitted to the Special Rapporteur.

Honour of the Crown. In the diverse examples that follow, the constitutional principle of the honour of the Crown has not been upheld. As affirmed by the Supreme Court of Canada: "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. The honour of the Crown has since become an important anchor in this area of the law".[1] The Court has declared that governments' duty to consult with Indigenous peoples and accommodate their interests is grounded in this principle, which compels them to act generously in a spirit of reconciliation as required by section 35 of the *Constitution Act, 1982,* and to adopt standards of fairness and generosity that go beyond conduct that can be justified by a strict reading of laws or Treaty language.[2]

In regard to the interpretation of Treaties, the honour of the Crown and the very nature of Treaties themselves require that "uncertainties, ambiguities or doubts should be resolved in favour of the natives" [3] Governments must not be bound by a narrow interpretation of the text but must also give considerable weight to the oral history with respect to promises made when Treaties were signed. The Court has also established that in cases where no treaty has been signed, the honour of the Crown obliges the government to address Indigenous peoples' rights generously. In the *Haida* judgment the Court states: "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."[4]

Colonialism continues. The law has been a primary vehicle of colonialism in what is now known as Canada. In the 1800s, efforts to legitimate Indigenous dispossession and displacement and legislate First Nations out of existence culminated in the *Indian Act* of 1876. Scholars are unanimous in their characterization of the *Indian Act*[5] as a deeply colonial and racist legislation

intended to infantilize, control, and, ultimately, assimilate Indigenous peoples.[6] Its rationale was infamously summarized by Duncan Campbell Scott, an influential administrator of the federal Indian Affairs department in the early 1900s, who stated that he wanted to "get rid of the Indian problem… Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department".[7] The *Indian Act* remains as the central piece of legislation governing First Nations in Canada today.

As a result, the relationship between Canada and First Nations continues to be characterized by unilateral and paternalistic actions by the federal government and an assimilationist agenda that continues to refute or devalue the human rights of Indigenous peoples, including their inherent Aboriginal and Treaty rights. In addition to maintaining and defending the application of the *Indian Act*, Canada continues to impose legislation that interferes with Indigenous peoples' right of self-determination, including the right to free, prior and informed consent.

Access to justice – rights without remedy. Despite the *Royal Proclamation of 1763*,[8] 19th and 20th century jurisprudence is littered with examples of First Nations' inability to enforce collective property rights through the legal system.[9] Canadian law reflected extreme preferences for liberal, individual forms of proprietary rights and discrimination against collective property rights of Indigenous peoples.

Although it is widely recognized that Indigenous rights, particularly land rights, are legal rights – they are too often rights without an effective remedy.[10] No Canadian court has ever affirmed collective Aboriginal title rights. The *William* case, currently being appealed to the Supreme Court of Canada, is a request for recognition and demarcation of Tsilhqot'in Aboriginal title.[11] The British Columbia Court of Appeal rendered a decision that relied in part on the "principle of discovery".[12] This case presents the Supreme Court with an opportunity to harmonize Aboriginal title jurisprudence with international human rights norms pertaining to Indigenous land rights.

Aboriginal rights are the only constitutionalized rights that are subjected to constant government challenge and negotiations.[13] If Aboriginal people litigate and lose, government is unwilling to negotiate further. If Aboriginal people win, then the 'win' is often subject to yet more negotiation.[14] The length of time required to pursue land rights can deprive Indigenous peoples of an effective remedy.[15] The time and cost to pursue a claim is a function of the complexity of legal rules and tests developed by the judiciary and the sharp litigation practices applied by the Crown.[16]

Double standard on human rights. Every draft law and regulation in Canada must be examined to ascertain if there are inconsistencies with the "purposes and provisions" of the *Canadian Charter of Rights and Freedoms*.[17] The *Charter* is in Part I of the *Constitution Act, 1982*. Yet in Part II of the same *Act*, there is no equivalent safeguard for Aboriginal peoples' human rights in s. 35. This constitutes a discriminatory double standard. In contrast, in Australia, "all legislation proposals ... are scrutinised by a parliamentary committee to ensure their consistency with human rights, and the Declaration [on the Rights of Indigenous Peoples] is considered in this context".[18]

Generally, on Indigenous issues the government fails to take a human rights-based approach. To date, court cases relating to s. 35 have focused on the land, territorial and resource rights of Aboriginal peoples. In international law, such property rights constitute human rights.[19]

***UN Declaration* devalued.** In March 2011, Canada released updated guidelines to federal officials on "Aboriginal Consultation and Accommodation". These guidelines refer to 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] In June 2013, the federal Aboriginal Affairs Minister added: "the UN Declaration is an 'aspirational document' that doesn't affect the government's treaty and aboriginal rights obligations under the Constitution."[21]

Such claims are inconsistent with domestic and international law and contradict other government statements. The Supreme Court of Canada has ruled that declarations and other international human rights instruments are "relevant and persuasive sources" for the interpretation of human rights in Canada.[22] Canada conceded in 2012 to the UN Committee on the Elimination of Racial Discrimination: "Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution."[23]

Unilateral amendments re *Indian Act*. At the Crown-First Nations Gathering in January 2012, the Prime Minister assured First Nations that his "Government has no grand scheme to repeal or to unilaterally re-write the Indian Act".[24] Yet as part of the federal omnibus Bill C-45 (discussed below), amendments were unilaterally made to the *Indian Act*.[25] The Aboriginal Affairs Minister simply forwarded a copy of the proposed amendments to all the Chiefs and referred to such action as "consultations".

Federal "omnibus" bills imposed. In June 2012, the government adopted Bill C-38[26] which included 70 different bills and did not allow for scrutiny by Indigenous peoples or members of Parliament. This "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; significantly lowers the number of projects that will be assessed for environmental, social and economic impacts; restricts public participation in environmental assessments; and reduces the number and types of projects that will be subjected to environmental assessment.[27] This was followed by the adoption of Bill C-45,[28] which amneded 60 different pieces of existing legislation.

Together, the two Bills total about 900 pages. The legislative processes allowed for virtually no amendments. The integrity of Parliament has been seriously impaired.[29] Many aspects of these omnibus bills have real and potential impacts on Indigenous peoples' rights and interests. Genuine consultation and accommodation, as well as Crown-Aboriginal cooperation, were lacking. Canada's highest court has highlighted that "the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it."[30] Aside from what duty Parliament may have prior to passing legislation, the government has a duty to consult – including consent – when contemplating measures that potentially affect Aboriginal or treaty rights.[31]

Resource extraction at expense of environmental safeguards. The federal government's current Economic Action Plan promises to "unleash Canada's natural resource potential" by streamlining the approval of resource development projects.[32] The Action Plan estimates that more than 600 major resource development projects will get underway across Canada over the next decade.[33] This is in addition to the extensive development activities already taking place in many regions of the country. While the Economic Action Plan promises to strengthen environmental protection and enhance consultation with Indigenous peoples, the opposite has happened.

Apart from provisions of certain modern land claims agreements, Canada has failed to establish formal mechanisms to enable the full and effective participation of Indigenous peoples in decisions about resource development on their traditional territories or to otherwise ensure that their rights are upheld when such decisions are made. In this context, the government continues to oppose the requirement of "free, prior and informed consent" of the peoples concerned.

While federal guidelines on implementing the constitutional duty of consultation and accommodation claim that government departments and agencies are implementing a "wide array of consultation practices" to protect the rights of Indigenous peoples, the primary example provided is that of consultation "within the context of environmental assessments."[34] New federal environmental assessment legislation introduced in 2012, without prior consultation with Indigenous peoples,[35] is expected to reduce the number of independent assessments, while also curtailing their scope and the time available to consider comments from affected communities.[36]

Impacts of resource development on Indigenous women. In the face of large-scale resource extraction projects, insufficient data is available on the possible economic, social and cultural impacts that economic development projects might have on women, particularly near Indigenous communities.[37] However, past experience reveals that such development often has a negative impact on the situation of Indigenous women by exacerbating existing prejudices, violence, health issues and inequality. While women generally represent a small proportion of the workforce of resource development projects, men have higher incomes and more stable jobs. It is also common that Indigenous employees suffer racism or discrimination in these work places, therefore Indigenous women are subjected to multiple forms of discrimination.

The migration of mainly male workers near these economic development projects also raise the price of rent and reduce the housing available, further increasing the housing crisis in Indigenous communities.[38] Since most these workers are young single males, there is also an increase in demand for prostitution and the precarious situation of Indigenous women make them first targets for recruitment, which in turn leads to drug and alcohol abuse and potential victims of violence.[39] Therefore, economic development initiatives from the federal and provincial governments to exploit natural resources must involve Indigenous women and their organizations in order to identify all possible impacts of these projects, in particular on the health of Indigenous women and children,[40] and involve them actively in resolving these issues. Gender-based analyses of projects receiving public investments are necessary, taking into account the distinct realities and needs of women and men.[41] Furthermore, public awareness campaigns are also essential to avoid cultural tensions, racism and discrimination.

Safe drinking water. Despite widespread opposition from Indigenous organizations across Canada, the government adopted the *Safe Drinking Water for First Nations Act*.[42] 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".[43] For such purposes, rights of self-determination and self-government are being cast aside.[44] No other peoples in Canada are compelled to relinquish their human rights in order to enjoy safe drinking water. Such actions undermine the security of Indigenous peoples and constitute racial discrimination.

The *Act* allows regulations to incorporate by reference laws of a province – with no assurance that adequate consultations will take place.[45] On "very serious issues", the "full consent of [the] aboriginal nation" is required.[46] The *Act* is incompatible with Indigenous peoples' rights and related State obligations in the *UN Declaration*. Such federal actions perpetuate colonialism and are the antithesis of a human rights-based approach.

In August 2013, Health Canada reported that 122 First Nations communities were under boil water advisories because of unsafe drinking water.[47] A government-appointed expert panel had previously concluded that deficiencies in First Nations water and waste systems persist primarily because the government has failed to provide adequate resources "to ensure that the quality of First Nations water and wastewater is at least as good as that in similar communities and that systems are properly run and maintained."[48] The expert panel warned that "it is not credible" to attempt to introduce any new regulatory regime without first closing the resource gap.[49]

Indigenous languages. There is neither federal statutory legislation nor an overarching policy for the recognition and revitalization of Indigenous languages in Canada. During the late 1990s until the time the *Indian Residential Schools Settlement Agreement* was ratified, the federal government was addressing the mounting cases of former students for physical and sexual abuse experienced at residential schools. While legal and other strategies were being explored toward the resolution of abuse issues, the federal government was developing a "programmatic response," a form of restitution for the loss of language and culture. Indian Residential Schools Resolution Canada (which has been subsequently subsumed into Indian and Northern Affairs Canada) and the Department of Canadian Heritage were partnering on this initiative. The buzz was that a programmatic response would follow the finalization of the 2005 report by the Task Force on Aboriginal Languages and Cultures.[50]

Written in the wake of the settlement process for legal claims, the Task Force proposed a national strategy to preserve, revitalize, and promote Indigenous languages and cultures. In 2002, while the Task Force's work was underway, the government at that time committed $172.7 million over 11 years towards this work. More than $15 million per year would have been available for language revitalization. The change in federal political leadership meant that this allocation would not come to fruition. In December of 2006, the new Minister of Canadian Heritage announced that the allocation of $160 million had been removed from the fiscal framework.

Canada cannot undo what it has done as it gears up a reconciliation process while gearing down funding efforts to revitalize languages. A substantial long-term investment for language revitalization would be in keeping with reconciliation as would official recognition in the form of

federal legislation. A preliminary examination in *Recognition and Revitalization of Indigenous Languages* reveals that, primarily, there has been a lack of long-term sustainable federal legislative, policy, and program initiatives for Indigenous language revitalization.[51]

Discrimination in child welfare services. The Canadian Human Rights Tribunal is currently examining whether the systemic underfunding of child welfare services in First Nations reserves constitutes discrimination under the *Canadian Human Rights Act* (CHRA). The complaint was filed in 2007 by the First Nations Child and Family Caring Society and the Assembly of First Nations. The hearing process has been repeatedly delayed and threatened by the federal government's vigorous opposition to the CHRA being applied to this complaint. In April 2012, the Federal Court rejected the government's arguments since First Nations people would be "limited in their ability to seek the protection of the Act…. This is not a reasonable outcome."[52]

Matrimonial property inadequately addressed. While the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Bill S-2)[53] is intended to address serious gaps in the law, it was adopted without the consent of First Nations and without taking a comprehensive approach. The *Act* does not ensure justice for women and men and it gives rise to a diverse challenges and problems. The *Act* is not consistent with First Nations governance and self-determination. The government claims, without any evidence, that individualizing property rights, and creating avenues for legal protective orders without any resources to enforce those orders, are necessary to address high rates of violence against Aboriginal women. A further limitation is that it does not address the limited land base and inadequate housing that already exists on reserves. The remedies in the *Act* rely somewhat on access to provincial courts. The general assumption of access to provincial courts is unfortunately not practical or realistic in many parts of the country.

In order to ensure that Aboriginal peoples, and particularly women, will have equitable rights and benefits regarding matrimonial property, the government must also deal with issues regarding socio-economical aspects, such as "Indian" status or lack thereof, violence, poverty and housing, and the lack of financial resources to access legal remedies. Further, the *Act* does not reconcile the system of land tenure under the *Indian Act* with First Nation rules for customary interests in land that exist outside of the *Indian Act*; and the rules of wills and estates. It also does not harmonize First Nations law with applicable provincial family law that may be at play at the same time. For example, policy research must be carried out regarding the situation of Indigenous communities in the province of Québec and the lack of harmonization with Québec's Civil Code.[54]

Failure to consult on international issues. Indigenous peoples' rights are increasingly addressed in international forums, including those relating to food security, biodiversity, climate change, and intellectual property.[55] Canada cannot use international forums to evade its human rights obligations.[56] Since 2006, the federal government has been unwilling to fulfill – or even discuss – its obligations to consult and accommodate Indigenous peoples. Such actions violate the rule of law.[57]

In international forums, Canada takes positions that are often prejudicial to Indigenous peoples' rights including those in the *UN Declaration*. Yet Canada generally refuses to provide information in advance.[58] The failure to provide "all necessary information in a timely way"

violates its duty to consult and accommodate Indigenous peoples.[59] Failure to provide such information also violates the right to freedom of expression.[60]

Refusal to use term "Indigenous peoples". During the negotiations of the *Nagoya Protocol*,[61] Canada insisted on the term used in the 1993 *Convention on Biological Diversity*, namely, "indigenous and local communities". With the adoption of the *UN Declaration* in September 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.[62]

For Canada to restrict or deny the status of Indigenous peoples as "peoples", so that the purpose or 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* and the *International Covenant on Civil and Political Rights*.[63] Impairing or denying the status of Indigenous peoples is part of a broader strategy to undermine their rights in the *Protocol*. The issue of "peoples" will be addressed again at the next meeting of the Working Group on Article 8(j) and Related Provisions in Montreal, 7-11 October 2013.[64]

Discriminatory approach to genetic resource rights. Also in the *Nagoya Protocol* negotiations, Canada played a lead role in undermining Indigenous peoples' rights to genetic resources.[65] Canada insisted that the *Protocol* only recognize "established" rights of Indigenous peoples "in accordance with domestic legislation".[66] 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.[67] Such an approach is incompatible with Canada's obligations in the *Charter of the United Nations*,[68] *Convention on Biological Diversity*[69] and international human rights law.[70] It could deprive Indigenous peoples of their rights to self-determination,[71] culture and resources contrary to principles of equality and non-discrimination.[72]

In its September 2011 "Discussion Document" relating to Canada's possible domestic implementation of the *Protocol*, the government confirms that "established" rights may only be recognized in regard to Indigenous peoples with "comprehensive land-claim and self-government agreements which provide them authority to manage their lands".[73] Thus, peoples in Canada facing possible dispossession of their customary rights to genetic resources would include Indigenous peoples with numbered treaties or specific claims agreements or uncompleted land-claim and self-government agreements.

Disregard for UPR recommendations.[74] Canada received 162 recommendations from States during its second Universal Periodic Review (UPR) in April 2013.[75] Canada has reported that it "accepts 122 recommendations, either in full, in part or in principle".[76] Based on its explanation of this statement, Canada is not prepared to accept any State recommendation "in full or in part" unless federal, provincial and territorial (FPT) governments "are already implementing through existing legislative or administrative measures, and are committed to continuing to take steps to achieve".[77] Also, recommendations Canada accepts "in principle" are solely those that FPT governments are "taking steps towards achieving the objectives of the recommendations, but do not accept the specific proposed action".[78]

Recommendations are not accepted "if they call for specific actions that are not under consideration at this time, whether or not Canada supports the underlying objectives".[79] In particular, the government does not accept any State recommendations that "relate to the UN *Declaration on the Rights of Indigenous Peoples*, which Canada views as an aspirational, non-binding instrument".[80] Canada does not accept addressing violence against women through a "national action plan," holding a national public inquiry, or ensuring accurate police data collection and reporting on numbers of missing and murdered Indigenous women.[81] In the absence of such essential measures, the responses across police jurisdictions and various departments of government lack coordination and accountability to the affected families and communities. A recent Statistics Canada report suggests that the national homicide rate for Indigenous women is at least seven times higher than for non-Indigenous women.[82]

National Leadership Needed. The ongoing disparities in living conditions and life prospects between Aboriginal Peoples in Canada and their non-aboriginal neighbours are well documented.[83] Aboriginal Peoples have, among other indicators, the most inadequate housing, the highest suicide and tuberculosis rates, the shortest life expectancies, the smallest incomes, the highest proportion of children in care, and the worst criminal justice incarceration rates. Statistics are, of course, only part of the picture. At the community and family levels, there are many stories that provide a compelling and urgent context.

The depth, and duration, and corrosiveness of these disparities are not acceptable and are inconsistent with existing constitutional commitments.[84] Canada has choices. Law-making choices, policy-making choices, public investment choices. Political and moral choices. Canada can resolve to do what is necessary --- in close, committed and creative partnership with Aboriginal peoples --- to narrow and close them.[85] This requires clarity of purpose. It requires a high level of political will. It requires concerted and skilled leadership. Instead, we continue to have unilateral actions, based on colonial mentality and disregard for Indigenous peoples' self-determination.[86] This situation is not tolerable or sustainable. Fundamental change must be a matter of the highest national priority.

Last winter, the Idle No More Movement demonstrated to Canadians and the wider world a high degree of frustration and disaffection. The Movement also showed a great hunger for change, and a great hope in the opportunities and capacities for change. The government ignored Idle No More. Closing the gap requires national leadership, which currently does not exist.

Endnotes

[1] *Beckman* v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 42. The *Royal Proclamation of 1763* is reproduced in R.S.C. 1985, App. II, No. 1. See also *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 131, *per* La Forest J.: "since the signing of the Royal Proclamation of 1763 ... the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold qua Indians".

[2] In *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, paras. 68 and 69, the Supreme Court confirmed that the "honour of the Crown imposes a heavy obligation" and is engaged by s. 35(1) of the Constitution. In *Mohawks of the Bay of Quinte* v. *Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 669, paras. 6 and 7, the Federal Court ruled that, in regard to the Minister of Aboriginal Affairs, the "duty

to negotiate in good faith precludes him from publicly mischaracterizing the Policy" of the government and denying the possibility of returning land to the Mohawks that had been taken from them in 1837.

[3] *R.* v. *Van der Peet*, [1996] 2 S.C.R. 507, para. 143. See also *R.* v. *Badger*, [1996] 1 S.C.R. 771, 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."

[4] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 27.

[5] *Indian Act*, R.S.C. 1985, c. I-5.

[6] See also *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, paras. 352-254, where the Supreme Court affirmed that s. 91(24) of the *Constitution Act 1867* was used to "civilize and assimilate" Aboriginal peoples.

[7] John Leslie, *The Historical Development of the Indian Act, second edition* (Ottawa: Department of Indian Affairs and Northern Development, Treaties and Historical Research Branch, 1978), at 114 (quoting Duncan Campbell Scott).

[8] Brian Slattery, "Is the Royal Proclamation of 1763 a dead letter?", *Canada Watch*, Fall 2013, 6, http://activehistory.ca/wp-content/uploads/2013/09/CW_Fall2013.pdf 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."

[9] D*oe Ex. Dem. Jackson v. Wilkes* (1835) 4 U.C.K.B. (O.S.) 142. The dispute over land rights related to this area continues to this day. See *John Voortman & Associates Limited v. Haudenosaunee Confederacy Chiefs Council*, 2009 CanLII 14797 (ON SC).

[10] Remedies become illusory if they are not accessible. *B.C.G.E.U.* v. *British Columbia (A.G.)*, [1988] 2 S.C.R. 214, Dickson C.J. for the majority, para. 25: "There cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice."

[11] *William v. British Columbia,* 2012 BCCA 285.

[12] *Ibid.*, para. 166. Some argue that the Court's analysis is founded on the legal fiction of *terra nullius*.

[13] Nationally, for example, Aboriginal peoples negotiated the protection of Aboriginal Rights in the *Constitution Act, 1982*, three subsequent constitutional conferences without results and the Kelowna Accord, which was ultimately scrapped by the current federal government. While negotiations have ultimately concluded on a number of modern Treaties, signatories of those Treaties have encountered profound issues with Treaty implementation – leading to further negotiations and in some cases, litigation.

[14] Assembly of First Nations, AFN Resolution 67/2010, *Implementation of Supreme Court of Canada Judgments*. Assembly of First Nations, draft AFN SCA Resolution 12/2012, *Action to Implement Fisheries Supreme Court Case decisions*.

[15] See, *e.g.*, Inter-American Commission on Human Rights, *Hul'qumi'num Treaty Group v Canada*, Petition 592-07, Report 105/09, especially paras. 39-42.

[16] See, for example, *Lameman v Alberta*, 2013 ABCA 148 at paras 22-23. Canada effectively argues that principles of access to justice articulated by the Supreme Court in 2010 should not apply to Aboriginal claims. Responding to such arguments prolongs and increases the cost of litigations. Even when Indigenous land rights are recognized by international bodies, Canada is reluctant to provide an effective remedy. See, for example, Lubicon Lake Indian Band, *Submission to the 70th Session of the UN Committee on the Elimination of Racial Discrimination with Regard to Lack of Canadian Compliance with UN Human Rights Decisions and General Recommendation No. 23 of the Committee on the Elimination of Racial Discrimination* (2007).

[17] *Department of Justice Act*, R.S.C. 1985, c. J-2, s. 4.1; and *Statutory Instruments Act*, R.S.C. 1985, c. S-22, s. 3.

[18] Australia, Statement, Expert Mechanism on the Rights of Indigenous Peoples, Agenda item 6: United Nations Declaration on the Rights of Indigenous Peoples, July 2013, http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH01b0/cbdb4f0e.dir/EM13dea143.pdf. The Australian government is referring here to the *Human Rights (Parliamentary Scrutiny) Act 2011*, No. 186, 2011 and the government's policy to consider the *UN Declaration* in this context.

[19] In regard to the human right to property, see, *e.g.*, *Universal Declaration on Human Rights*, art. 17 (1); *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 5(d)(v); *American Convention on Human Rights*, art. 21; *American Declaration on the Rights and Duties of Man*, art. XXIII; *African Charter of Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, *entered into force* 21 October 1986, art. 14; *United Nations Declaration on the Rights of Indigenous Peoples*, arts. 25-28 and 31.

[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.
[21] Michael Woods, "Minister defends aboriginal cuts", *The [Montreal] Gazette* (10 June 2013) A7, http://www.montrealgazette.com/news/Minister+defends+aboriginal+cuts/8502012/story.html.
[22] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348; and *R.* v. *Sharpe*, [2001] 1 S.C.R. 45, at paras. 175, 178.
[23] 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. See also *First Nations Child and Family Caring Society of Canada* v. *Canada (Attorney General)*, 2012 FC 445, aff'd 2013 FCA 75, para. 353: "International instruments such as the *UNDRIP* and the *Convention on the Rights of the Child* may also inform the contextual approach to statutory interpretation".
[24] Government of Canada, "Statement by the Prime Minister of Canada at the Crown-First Nations Gathering", Ottawa, Ontario, 24 January 2012, http://pm.gc.ca/eng/media.asp?category=3&featureId=6&pageId=49&id=4597.
[25] *Indian Act*, R.S.C. 1985, c. I-5, ss. 37-41. The amendments are made in Bill C-45, ss. 206, 209.
[26] *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*".
[27] 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=twt.
[28] *A second Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*" (Bill C-45), S.C. 2012, c. 31. Its short title is "*Jobs and Growth Act*".
[29] See, *e.g.*, 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.
[30] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 116.
[31] *UN Declaration*, arts. 19, 38 and 42. See also *Tsuu T'ina Nation* v. *Alberta (Minister of Environment)*, 2010 ABCA 137, para. 55: "the duty may still fall upon those assigned the task of developing the policy behind the legislation, or upon those who are charged with making recommendations concerning future policies and actions."
[32] The Plan states, "…our Government has a plan to unleash Canada's natural resource potential. We call it *Responsible Resource Development*. This plan will streamline reviews of major projects by ensuring more predictable and timely reviews, reducing duplication, strengthening environmental protection, and enhancing consultations with Aboriginal peoples." See Treasury Board of Canada, *Canada's Economic Action Plan*. http://actionplan.gc.ca/en/page/r2d-dr2/overview.
[33] *Ibid.*
[34] Aboriginal Affairs and Northern Development 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, at 39.
[35] These changes were a critical factor catalyzing protests across the country under the banner of a grassroots Indigenous rights movement called "Idle No More." See www.idlenomore.ca.
[36] Ecojustice, *Legal Backgrounder: Canadian Environmental Assessment Act (2012)*, May 2012, http://www.ecojustice.ca/files/ceaa-2012-regulations-legal-backgrounder-august-2012.
[37] See, *e.g.*, Northern Health British Columbia, *Understanding the State of Industrial Camps in Northern BC: A Background Paper.* Version 1, October 17, 2012, http://northernhealth.ca/Portals/0/About/NH_Reports/documents/2012%2010%2017_Ind_Camps_Backgrounder_P1V1Comb.pdf.
[38] Conseil du statut de la femme, *Women and Plan Nord: for Equality in Northern Development*, Government of Quebec, October 18, 2012, http://www.csf.gouv.qc.ca/modules/fichierspublications/fichier-29-1679.pdf, at 28, 42 and 43.
[39] *Ibid.*, at 45-46.
[40] *Ibid.*, at 47-48.
[41] *Ibid.*, at 53.

[42] S.C. 2013, c. 21 (assented 19 June 2013).
[43] *Ibid.*, 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."
[44] *Ibid.*, section 7: "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."
[45] *Ibid.*, s. 5(3) "Regulations made under section 4 may incorporate by reference laws of a province, as amended from time to time, with any adaptations that the Governor in Council considers necessary."
[46] *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).
[47] Health Canada, "First Nations and Inuit Health: Drinking Water and Wastewater." http://www.hc-sc.gc.ca/fniah-spnia/promotion/public-publique/water-eau-eng.php
[48] Harry Swain, Stan Louttit and Steve Hrudey, *Report of the Expert Panel on Safe Drinking Water for First Nations,* Department of Indian Affairs and Northern Development*,* November 2006, p. 50. http://www.afn.ca/uploads/files/volume_1_e.pdf
[49] *Ibid.,* p. 49.
[50] Task Force on Aboriginal Languages and Cultures, "Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures", Report to the Minister of Canadian Heritage (June 2005), http://www.aboriginallanguagestaskforce.ca/pdf/foundrpt_e.pdf.
[51] Galley, Valerie. (2009). Reconciliation and the Revitalization of Indigenous Languages. In Gregory Younging, Jonathan Dewar and Mike DeGagné (Eds.), *Response, Responsibility, and Renewal: Canada's Truth and Reconciliation Journey*. Ottawa, ON: Aboriginal Healing Foundation.
[52] Canada (Human Rights Commission) v Canada (Attorney General) 2012 FC 445, para.337.
[53] S.C. 2013, c. 20 (assented 19 June 2013).
[54] Quebec Native Women Inc, "Government's Bill S-2 falls short to fully protect Aboriginal women" April 24, 2013, http://www.faq-qnw.org/press_media/press_release/government's-bill-s-2-fa
[55] See, *e.g.*, Grand Council of the Crees (Eeyou Istchee) *et al.*, "Undermining Indigenous Peoples' Rights and UN Declaration: Urgent Need for Procedural Reforms in International Organizations", UN Permanent Forum on Indigenous Issues, Eleventh sess., 12 June 2012, http://quakerservice.ca/wp-content/uploads/2012/06/IPs-Rts-and-UN-Decl-Need-for-Urgent-Reforms-in-Intl-Organizations.pdf.
[56] *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, GA Res. 67/1, 24 September 2012 (adopted without a vote), para. 2: "We recognize that the rule of law applies to all States equally, and to international organizations".
[57] *Ibid.*, para. 6. "We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all."
[58] 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.
[59] *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."
[60] *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."

[61] *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.

[62] 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."

[63] 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]

[64] See heading G, paragraph 2 of the Conference of the Parties' Decision XI/14, available at http://www.cbd.int/cop11/doc.

[65] 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.

[66] 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, in regard to "established" rights to grant access to genetic resources, see art. 6(2).

[67] Third parties may gain access to and use of genetic resources in the territories of Indigenous peoples, without their free, prior and informed consent. In regard to Canadian government's draft approach, see 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 *UN Declaration*, art. 31(1); and 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.

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

[69] *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".

[70] 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), paras. 36 and 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 and 45. 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.

[71] 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.

[72] 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.

[73] Government of Canada, "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity: Discussion Document", September 2011, at 22: "Aboriginal communities in Canada that have completed comprehensive land-claim and self-government agreements which provide them authority to manage their lands would likely have responsibility for establishing mechanisms by which they can grant PIC for access to these genetic resources, and to establish MAT for benefit-sharing." [emphasis added] "PIC" refers to "prior informed consent" and "MAT" refers to "mutually agreed terms".

[74] See also "Harper government gives human rights the cold shoulder", 24 September 2013, http://nupge.ca/content/11188/harper-government-gives-human-rights-cold-shoulder (disgraceful response to UN Human Rights Review contains no new commitments).

[75] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UN Doc. A/HRC/24/11 (28 June 2013), http://www.ohchr.org/EN/HRBodies/UPR/Pages/CASession16.aspx.

[76] Human Rights Council, *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/24/11/Add.1 (17 September 2013), http://www.ohchr.org/EN/HRBodies/UPR/Pages/CASession16.aspx, para. 3.

[77] *Ibid.*

[78] *Ibid.*

[79] *Ibid.*

[80] *Ibid.*, para. 19.

[81] *Ibid.*, para. 39. For similar recommendations, see 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) (advance unedited version), para. 17.

[82] Vivian O'Donnell and Susan Wallace, *Women in Canada: A Gender-based Statistical Report: First Nations, Inuit and Métis Women,* Statistics Canada, July 2011. http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11442-eng.pdf.

[83] *First Nations Child and Family Caring Society of Canada* v. *Canada (Attorney General)*, 2012 FC 445, aff'd 2013 FCA 75, para. 334: "no one can seriously dispute that Canada's First Nations people are amongst the most disadvantaged and marginalized members of our society." See also General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), UN Doc. A/60/358 (16 September 2005), para. 15.

[84] In regard to the constitutional commitments of federal and provincial legislatures and governments to promote equal opportunities, reduce regional disparities and provide "essential public services of reasonable quality", see *Constitution Act, 1982*, section 36(1).

[85] In 2006 some of our organizations hosted a two-day symposium in follow-up to the 2004 visit of the previous Special Rapporteur on the rights of Indigenous peoples. This resulted in a comprehensive report, "Closing the Implementation Gap" on challenges and recommendations. The report was shared widely with government and ignored. http://quakerservice.ca/wp-content/uploads/2011/05/closingtheimplementationgap.pdf

[86] See, *e.g.*, "Federal unilateralism will not achieve reconciliation in First Nations education", *Nation Talk*, September 24, 2013, http://nationtalk.ca/story/federal-unilateralism-will-not-achieve-reconciliation-in-first-nations-education-2/: "The political leadership of the Union of BC Indian Chiefs, First Nations Summit and the BC Assembly of First Nations, along with the National Chief of the Assembly of First Nations, are calling on the Government of Canada to set aside its current Blueprint for First Nations education legislation and to work in partnership, and in the spirit of reconciliation, on any legislation or policy aimed at the education of First Nations children."