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RENEWING THE FEDERAL COMPREHENSIVE LAND CLAIMS POLICY

Joint Submission of the Coalition on the UN Declaration on the Rights of Indigenous Peoples:

Amnesty International Canada; Assembly of First Nations; Canadian Friends Service Committee (Quakers); Chiefs of Ontario; First Nations Summit; Grand Council of the Crees (Eeyou Istchee); Indigenous World Association; Inuit Tapiriit Kanatami; KAIROS: Canadian Ecumenical Justice Initiatives; Native Women's Association of Canada; Québec Native Women/Femmes Autochtones du Québec; Union of British Columbia Indian Chiefs

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I. Introduction

This joint submission has been prepared by the Coalition on the UN Declaration on the Rights of Indigenous Peoples, a coalition of Indigenous[1] Peoples' and human rights organizations. We have prepared this submission in response to the unilateral announcement issued by the Minister of Aboriginal Affairs and Northern Development Canada (AANDC), Bernard Valcourt, on July 28, 2014, regarding the renewal and reform of the federal Comprehensive Land Claims Policy (CCP).

The federal government has issued an "Interim Policy",[2] which is described as "as a starting point for discussions with partners and outlines the Government of Canada's current approach to the negotiation of treaties, including the developments that have occurred since the publication of the last policy in 1986."[3] While the Interim Policy does not profess to be comprehensive, it is inexcusable that it fails to take into account and ensure consistency with crucial advances in legal protections for the rights of Indigenous Peoples, in both Canadian and international law. The Interim Policy should not invite dialogue or negotiations based on regressive and out-dated positions.

It is particularly concerning that there is no mention of "consent" of Aboriginal title-holders or their extensive constitutional jurisdiction in accordance with the landmark decision of *Tsilhqot'in Nation* v. *British Columbia*.[4] There is also no acknowledgement that the Crown has no beneficial interest in Aboriginal title lands. The federal government cannot evade the rule of law, as determined by Canada's highest court.

The Interim Policy also wholly ignores international standards relating to Indigenous Peoples. For the past 30 years, Indigenous Peoples in Canada and other regions of the world have been involved with States and others at the United Nations in the formulation, negotiation, adoption and implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.[5] It is troubling that Canada is using international forums to undermine Indigenous Peoples' status as "Peoples" and their human rights, as well as the *UN Declaration*.

Almost two decades ago the Royal Commission on Aboriginal Peoples concluded:

> Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction.[6]

This submission focuses on certain key elements that relate to Aboriginal title and other rights issues in the context of comprehensive claims.

II. The Current CCP Review Process

The current comprehensive claims review process as set out in various statements issued by AANDC since July 28 does not exist in isolation from other initiatives that have preceded it –

including the Senior Oversight Committee (SOC) process that was initiated early in 2013.

Although superseded by the *Tsilhqot'in Nation* decision, the SOC process serves as an important learning experience in the comprehensive claims review process. Following a meeting on January 11, 2013, between the Prime Minister and First Nation leaders from across Canada, the SOC was established with representatives from the Prime Minister's Office, the Office of the Privy Council, the Minister's office, AANDC, and the Assembly of First Nations (AFN) to review the existing CCP and consider policy options. The SOC process was a joint process that combined both extensive technical engagement and senior political oversight to:

> …examine Canada's various policies respecting comprehensive claims (CCP) to more efficiently and effectively reconcile the section 35 rights and interests of Aboriginal peoples with the rights and interests of all Canadians and propose options to renew, update or reform the policy framework to more effectively address section 35 rights in Canada.[7]

Despite efforts that went into this process over a period of 8-10 months, the terms of reference for the SOC were not renewed by Canada and work that was well underway was unilaterally halted mid-stream in December 2013.

Despite the short-lived nature of this initiative, diverse insights were garnered – some of these were substantive, others related to process. Foremost in this regard was the emerging recognition that the complexity of the comprehensive claims system and its reform was itself a barrier to the meaningful and effective participation of a variety of government officials. While senior "oversight" was a desire of all parties, the fact that senior officials had multiple priorities and limited time to dedicate to the complexity of CCP reform created disequilibrium at the SOC table. At the technical table, two-day in-person meetings reflected an in-depth focus on various aspects of CCP reform that did not easily translate into simple policy issues.

The substantive focus of the SOC table was set out in the Terms of Reference: recognition/ reconciliation; certainty; shared territories; fiscal arrangements; expeditious resolution; self-government; accountability; land status.

The work culminated in preliminary recommendations relating to the first three items set out above, but these recommendations were not given the courtesy of a response by AANDC, the Minister or Prime Minister.

Instead, the Minister appointed a Special Ministerial Representative who is tasked to carry out work over a period of 4-5 months. The terms of reference for the Ministerial Special Representative have not been made public, so it is not entirely clear what, precisely, he is seeking to do beyond "making recommendations". To this end, we urge that the terms of reference for Douglas Eyford be made public by the government.

One can assume that the intent of this process is preliminary rather than conclusive, and that the outcomes will seek to set the tone for a process of substantive engagement with Indigenous Peoples rather than culminate in policy reforms. We suggest that the report issued by Douglas Eyford should represent one of many steps in engaging Indigenous Peoples in a collaborative process of renewal and reform, rather than a definitive statement on the direction that renewal and reform will take.

It will be important to ensure that Mr. Eyford's report and recommendations are made public. This will establish a level of transparency that has so far eluded this process and that, without which, a meaningful outcome will not result.

Finally, it is necessary to underline that Canada has provided no funding for this process. Indigenous Peoples and Aboriginal organizations – many of which have seen dramatic cuts to their funding over the last several years – are expected to respond to Mr. Eyford with little or no access to legal or technical expertise, and in a very short timeframe. This in and of itself presents a significant barrier to their meaningful and effective participation in this process.

Given that no funding has been provided to Indigenous Peoples to engage in this process, it is also critical to assert that this process cannot be deemed to constitute "consultation" as defined by the Supreme Court of Canada.

Notwithstanding our concerns with the overall context from which this process emerges, we remain hopeful that this and other submissions to Mr. Eyford will contribute to a broader appreciation of the challenges relating to the existing CCP and the need for a principled framework and process of renewal and reform regarding a comprehensive claims process and the recognition of Aboriginal title and rights.

III. Challenges with the CCP and Process

As a submission from a coalition of Indigenous and social justice organizations, this document is not intended to represent the interests of any one group or to reflect the interests of any one Indigenous Nation – whether it be First Nation, Inuit or Métis – based on an assertion of its Aboriginal title and rights. Rather, we are advancing a set of high level concerns and interests that are reflective of the current state of claims in Canada, grounded in Canadian and international law. Our expectation is that Indigenous Peoples themselves will raise issues pertaining to their individual needs and interests as regard their Aboriginal rights and title, and the issue of CCP reform.

We also wish to clarify that the Interim Policy that was issued by the Minister in late August / early September, 2014, does not constitute a "new" policy, nor even an old policy that is being assessed for its merits, for the purposes of Mr. Eyford's appointment. Our understanding is that the Interim Policy represents a consolidation of Canada's existing mandates with respect to comprehensive claims (negotiations) – including the various iterations of the CCP itself.

However, in view of its regressive and out-dated contents, the Interim Policy does not constitute even a minimum standard or baseline for the consideration of any policy renewal or reform options. The ongoing underlying nature of federal policy based on racist underpinnings arising from the doctrine of "discovery" must be wholly rejected.[8] As affirmed in the *International Convention on the Elimination of All Forms of Racial Discrimination*: "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere".[9]

What is required is a principled framework that ensures a dynamic policy that remains consistent with international standards and new advancements in the rule of law. There must be a real option that the current CCP would be fully withdrawn and replaced by a new set of options that have yet to be defined.

Canada's focus on "Principles respecting the recognition and reconciliation of Section 35 rights" represents an important step forward in thinking about the nature and content of Aboriginal rights. However, the content of such Principles requires careful consideration. Reconciliation does not take place in a vacuum. It is an outcome that is emblematic of a relationship that is based on ongoing respect and cooperation with all Indigenous Peoples.

Reconciliation cannot take place in a piecemeal fashion; Canada cannot focus its attention solely on those Indigenous Nations where the government seeks "a secure climate for economic and resource development"[10], while disregarding relations with other Nations where the government believes it has no pressing economic interest. Circumstances of reconciliation will differ from one Indigenous Nation to the next. However reconciliation with Indigenous Peoples is also a commitment that must take place writ large.

Similarly, where reconciliation is an objective, it cannot be an objective with respect to one policy area (e.g., CCP) and not another (e.g., Specific Claims). Reconciliation is necessarily a whole-of-government objective and, as such, must be considered along such lines. Reform of the CCP must allow consideration of diverse policy documents, but must be based on contemporary standards consistent with precedent-setting judicial decisions and international human rights law.

Ultimately, a "Framework for Addressing Section 35 Aboriginal Rights" will need to go beyond issues that relate to the CCP, to address the much wider range of issues, policy areas, and legislation that continue to affect Indigenous-state relations in Canada.

This submission is based on the view that recognition is the basis upon which Indigenous Peoples must be able to exercise their inherent Aboriginal title and rights, including Treaty rights, over the lands and resources they have historically occupied or otherwise used. The *Tsilhqot'in Nation* decision by the Supreme Court of Canada re-affirmed in no uncertain terms the fact that Aboriginal title and rights exist on the ground – that the time for speculation and denial is now unequivocally behind us.

Recognition is the basis upon which decades of costly and time-consuming legal wrangling can finally be replaced with a more constructive and cooperative approach. Recognition encompasses the inherent right of Indigenous Peoples to exist alongside all Canadians, and, to do so, on a basis that fully respects their right to be self-determining in the pursuit of social, economic, political and cultural objectives. The starting point for engagement between an Indigenous Nation and the Crown cannot be subject to conditions or limitations with respect to the scope and extent of recognition.

Since 1982, more than forty Supreme Court of Canada decisions have provided guidance on the nature and content of Aboriginal rights, including Aboriginal title to land, and on the Crown's obligations with respect to such rights. AANDC has identified risks and potential consequences arising from these cases, but the development of meaningful responses to these court decisions has been wanting.

The Supreme Court has made it clear that pre-existing Aboriginal sovereignty must be reconciled with assumed Crown sovereignty.[11] It has interpreted treaty negotiations as a "reconciliation" process in which the rights of Indigenous Peoples are from the outset implicitly recognized given that negotiations on those rights are taking place. The state of the law is, accordingly, inconsistent with the federal government's position that modern treaty negotiations are essentially based on policy and conducted "without prejudice", and that the Crown does not

recognize rights until after a final agreement is ratified, and then only in accordance with the agreement.

As affirmed in *Tsilhqot'in Nation*: "The Court in *Haida* stated that the Crown had not only a moral duty, but a legal duty to negotiate in good faith to resolve land claims (para. 25). The governing ethos is not one of competing interests but of reconciliation."[12] The Court added: "It is in the broader public interest that land claims and rights issues be resolved in a way that reflects the substance of the matter."[13]

A commitment to reconciliation is a commitment to a principled and sustained relationship focused on ensuring the security and well-being of Indigenous Peoples, as distinct self-determining peoples.[14] How this is achieved may vary from place to place, but it is this commitment at its core that must not vary. To date, we have seen no such commitment.

The inherent problem in Canada's current CCP and approach is confirmed by the actions of Crown negotiators who routinely ignore key legal principles established by the Courts and refuse to recognize Indigenous Peoples' existing rights. The issue of "extinguishment" is foremost in this regard.

Whatever terminology may have been introduced euphemistically, Canada's objective in negotiating modern treaties remains the same – a comprehensive agreement that sets out a hierarchy of powers that necessarily quash an Indigenous Nation's inherent Aboriginal title and rights, whether through their express extinguishment, circumscription, replacement, or modification.

Whatever the terminology, Indigenous Peoples must not be required to engage in a significant diminution of their inherent Aboriginal rights or title as a precondition for reaching comprehensive agreements or other constructive arrangements.

Why would an Indigenous Nation agree to negotiate a modern treaty in the first place? The answer to this question is multifaceted and grounded in the respective circumstances and aspirations of each Indigenous Nation. We do not purport to speak for them. However, there are a common set of issues that help to inform this question. Too often the option of not agreeing to negotiate is set against a backdrop of federal / provincial / territorial denial.

Indigenous Peoples exercising their Aboriginal title and rights generally have the following options:

- Go to court to seek an affirmation of title and other rights
- Negotiate a treaty under the CCP
- Assert Indigenous title and rights, based solely on customary tenure of lands and resources
- Seek international affirmation and support through UN or regional human rights bodies, which may serve to apply pressure domestically.

Each of these options is fraught with challenges for Indigenous Peoples. It is critical to ensure that the CCP provides a viable, dynamic and effective process that fully reflects contemporary standards in domestic and international law.

It is also necessary to ensure that the parties to a negotiation are appropriately mandated to address the range of issues that may arise, which includes ensuring that negotiations are taking place with the proper title-holder of a respective territory. Quick deals with smaller bands of

Indigenous Peoples cannot represent an appropriate model for seeking reconciliation with Indigenous Peoples. This may, in part, be an issue that relates to overlapping territories, but it is not necessarily the only factor affecting title.

Canada's policies have long contributed to a politics of "division", and this has included both non-recognition of some Nations, and the forced amalgamation of others. This history has unfolded over a period of centuries and will require both time and resources to undo.

Canada's policy on the provision of loan funding[15] is another area that continues to interfere with the objective of reconciliation and the advancement of a level playing field as regards meaningful and transparent negotiations. Upwards of $1 billion dollars of loan funding has already been spent in an effort to reach final treaties in Canada, with some disastrous consequences.

It is unconscionable to perpetuate a process, where governments steadfastly refuse to alter unreasonable positions, while debt and interest continue to build and further impoverish disadvantaged and often dispossessed Peoples. Some Indigenous Nations feel compelled to stay within such a process for fear of having to pay back the huge debt that has accrued. Some have suggested that this relationship of indebtedness amounts to a form of *extortion*. Surely, this is not in keeping with the honour of the Crown and genuine reconciliation.

A policy that addresses Aboriginal title and rights, or treaty implementation that is grounded in the recognition of Indigenous Peoples, begins to level a playing field that has long been skewed against Indigenous Peoples, and is the subject of both domestic and international criticism.

The unequivocal recognition of Indigenous Peoples as a starting point for the resolution of outstanding Aboriginal title and rights issues, including treaty rights, would confer a new level of equivalence with respect to the status of the parties to a negotiation, something that has been sorely lacking.

Recognition does not in and of itself predetermine the outcome of reconciliation or any negotiation in respect thereof. However, reconciliation does arise from a respectful relationship among parties, where the path forward is mutually determined in good faith, rather than unilaterally prescribed. A policy framework that has this as a starting point has a far greater likelihood of achieving success.

These and other issues relating to the federal CCP have already been exhaustively examined in a wide variety of works, the most recent having arisen as part of the SOC process. The British Columbia Assembly of First Nations (BCAFN), with involvement from the AFN, developed a comprehensive Discussion Paper focused on the development of a new approach to Aboriginal rights and title.[16] In addition to setting out a comprehensive list of focal areas, the Discussion Paper asks a series of 106 questions about the nature and content of Aboriginal rights and title that would need to be addressed as part of advancing the objectives of recognition and reconciliation. In addition, the Discussion Paper includes a condensed list of policy reform objectives that can be helpful in distilling specific directions with respect to the way forward.

IV. Constitutionalism and Rule of Law

Constitutionalism and Rule of Law is a principle that underlies Canadian law and society and is prominently reflected in the Canadian Constitution.[17] Constitutionalism and Rule of Law is an

overarching and norm generating principle, permeating Canadian law and policy.[18]

Constitutionalism means that all sources of administrative or legislative power must be capable of being traced to an authority sourced in Canada's Constitution.[19] Rule of Law means that "all government action must comply with the law, including the Constitution."[20] Any policy on comprehensive claims is a source of administrative power, and as such, must be consistent with Canada's Constitution and law.

The Rule of Law is a foundational principle of constitutional law, which must be read with other principles, such as, federalism, democracy, and respect for minority rights. The Supreme Court has determined that: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[21] The protection of existing Aboriginal and treaty rights may be "looked at in their own right" or as part of the underlying constitutional principle related to minorities.[22] The "protection of existing aboriginal and treaty rights" is more accurately an underlying constitutional principle in its own right, rather than part of "respect for minority rights". Minorities, *per se*, do not have the right of self-determination.[23]

The rule of law in the Constitution requires that human rights, including the human rights of Indigenous Peoples, be protected against excessive government actions. Indigenous Peoples are particularly vulnerable to government regulation and executive action, due to the power exerted by the federal government over collective and individual identity, through government finances and operations. While Canada may be generally supportive of Aboriginal rights, "there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively."[24]

The Constitution may also be used "to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."[25] This is a critical consideration in the context of a policy, which has as an objective the protection and promotion of distinct Indigenous cultures.

The rule of law requires adherence to a coherent framework of law, to prevent the actions of officials or governments from depriving individuals or groups the protection of the law. As the Supreme Court stated in the *Manitoba Language Reference*, "The Constitution, as the Supreme Law, must be understood as a purposive ordering of social relations providing a basis upon which an actual order of positive laws can be brought into existence. The founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law."[26]

In absence of rule of law and the honour of the Crown, respect for minority rights and democracy itself may be threatened, particularly "if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally."[27] Without careful consideration and honourable engagement, the Crown risks using its considerable political power over Aboriginal Peoples in a comprehensive claims process in a unilateral fashion, undermining democracy, threatening Aboriginal cultures and livelihoods, and grid-locking development.

The rule of law serves to protect Indigenous Peoples from arbitrary or self-serving state action by requiring government compliance with relevant customary[28], constitutional[29] and international law rules.[30]

The Interim Policy itself maximizes the amount of discretion afforded to the Minister and provides little, if any, explicit guidance on implementation.[31] While the Minister must seek the advice of the Minister of Justice as to the legal acceptability of the claim, the Interim Policy provides no guidance on what 'legal criteria' make a claim acceptable or unacceptable. This absolute discretion of the Minister of AANDC is not in keeping with the Supreme Court determination that: "In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance."[32] Reliance on exercises of Ministerial discretion does not provide "a stable, predictable and ordered society" to protect Indigenous Peoples from "arbitrary state action."[33]

Indigenous Nations must have recourse to the law. The rule of law also applies to all executive acts of the government, including development and administration of policy. In the *Patriation Reference*, the Supreme Court noted the rule of law requires executive actions adhere to legal rules and "of executive accountability to legal authority."[34] The comprehensive claims policy deals with lands, territories and resources – an issue of critical importance to the cultural survival of Indigenous Peoples. As a consequence, the policy should contain adequate means of accountability.[35]

Any new policy must avoid the appearance of a conflict of interest. The CCP is a policy of the Crown, which is meant to address section 35 Aboriginal rights.[36] However, the Crown has a direct legal and financial interest in how section 35 rights are addressed because it is a defendant in several court actions addressing Aboriginal rights. The potential for a conflict of interest in matters related to Aboriginal lands has been recognized by the Court.[37] The Interim Policy fails to address this potential for conflict of interest. In fact, as a consequence, the Policy provides the Crown the ability to test positions it is advancing in litigation. In addition, the Crown may advance positions which have failed in litigation, in the context of comprehensive claims negotiation and in public policy.

V. Indigenous Peoples' Rights in International Law

The right of Indigenous Peoples to own, control and use their traditional lands, territories and resources is directly and explicitly protected in international human rights law. Indigenous land rights are also understood to be an indispensable foundation for the full and equal enjoyment of a wide range of other human rights, including rights to culture and identity, the right to health, the right to subsistence, and the right to livelihood. All states have a positive obligation to recognize and provide effective legal protection to the territories of Indigenous Peoples. This obligation must be met in a manner that is consistent with Indigenous Peoples' unique cultures and histories, and which does not discriminate against them in any way.

State obligations include a responsibility to ensure just and timely resolution of disputes and provide full redress for past violations of Indigenous Peoples' land rights, consistent with fundamental standards of justice. The right of Indigenous Peoples to full and meaningful participation in the development and implementation of any means to fulfill these rights is also protected in international law. These rights are never merely aspirational, but are an integral part of Canada's domestic legal responsibilities.

5.1 *United Nations Declaration on the Rights of Indigenous Peoples*

The *UN Declaration* is a comprehensive, universal, human rights instrument explicitly addressing the rights of Indigenous Peoples. The core land rights provisions of the *UN Declaration* are introduced in Article 25:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Indigenous Peoples' rights to own, control, use and develop their lands, territories and resources are further elaborated in Article 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Resolution of land disputes and redress for past failures to respect and protect the land rights of Indigenous Peoples is addressed in greater detail in Articles 27 and 28:

> *Article 27* - States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous Peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
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> *Article 28* - 1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
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> 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

In all, more than 19 articles in the *UN Declaration* address Indigenous Peoples' land rights either directly or indirectly. This includes Article 3 (self-determination); Article 4 (self-government); Article 10 (prohibition of forcible removal); Articles 11, 12, 13 and 31 (rights to cultural practice and cultural heritage); Article 20 (right to their own means of subsistence and development, and to engage freely in all their traditional and other economic activities); Articles 23 and 32 (right to determine priorities and strategies for exercising the right to development, including any

development of their lands, territories and resources); Article 24 (right to traditional medicines); Article 29 (right of conservation and protection of the environment); Article 30 (limitations on military activities on their lands or territories); Article 34 (right to maintain and develop distinctive institutions and juridical structures); and Article 37 (right to observance and enforcement of treaties and other constructive arrangements with states).

The *UN Declaration* was elaborated on a foundation of human rights norms and standards that, at the time of its adoption by the UN General Assembly in 2007, were already well established in international law. These norms and standards are reflected in human rights treaties and in other universal instruments adopted by the UN General Assembly.

These norms and standards are also part of the progressive elaboration of international human rights standards through the jurisprudence of international and regional human rights tribunals and the expert interpretations provided by the independent bodies and mechanisms set up to monitor state compliance with treaty obligations.

A full decade before the adoption of the *Declaration*, the UN Committee on the Elimination of Racial Discrimination, concluded that states parties to the *Convention on the Elimination of Racial Discrimination* have a legal obligation "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories."[38]

Human rights treaties ratified by Canada such as the *Convention on the Elimination of Racial Discrimination, International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*[39], establish binding legal commitments. While not binding in the same manner as treaties, human rights declarations also have diverse legal effects.[40]

A human rights declaration is understood to be a "solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected."[41] Furthermore, declarations adopted by the General Assembly may incorporate provisions that are contained in treaties, are already recognized as part of customary international law, or are established as necessary means to fulfill the legal responsibilities set out in treaties.

The purpose of the *UN Declaration* was to codify the minimum universal standards for the protection of Indigenous Peoples' human rights by all states – *not* by creating new rights, but by providing "a contextualized elaboration of general human rights principles and rights as they relate to the specific, historical, cultural and social circumstances of indigenous peoples."[42] The *UN Declaration* incorporates norms and standards that already form part of customary and conventional international law[43] and is "grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity."[44]

The UN General Assembly adopted the *UN Declaration* after more than 20 years of deliberations involving states, Indigenous Peoples, and expert mechanisms of the United Nations. The *UN Declaration* was adopted by a vote of the overwhelming majority of the UN General Assembly. Today, no country in the world opposes the *UN Declaration*.[45] The lengthy process through which the *UN Declaration* was elaborated, and the consensus which it now enjoys, reinforce the expectation of maximum compliance.

5.2 Expectation and obligation to uphold collective human rights

There is a well-established practice within international and regional human rights systems – a practice which can be traced back more than 30 years – to address Indigenous Peoples' collective rights as part of the human rights obligations of states.[46] In its Agenda and Framework for the programme of work, the UN Human Rights Council has permanently included the "rights of peoples" under Item 3 "Promotion and protection of all human rights … including the right to development"[47] The Canadian Human Rights Commission affirmed: "human rights have a dual nature. Both collective and individual human rights must be protected; both types of rights are important to human freedom and dignity."[48]

In Canada's *Core Document*, which forms part of Canada's reports to UN treaty bodies, collective Aboriginal and treaty rights are included under the heading "Legal framework for protecting human rights at the domestic level."[49] A similar characterization was made in Canada's previous Core Document in 1998.[50] Yet, in practice, the federal government does not address Indigenous Peoples' collective rights as human rights. Canadians expect that their government will not only respect its human rights obligations, but will in fact demonstrate global leadership in the fulfillment of such rights. Successive governments have affirmed Canada's commitment to upholding all international human rights standards.

In 2009, the federal government told the United Nations Human Rights Council, "Canada agrees that all human rights are universal, indivisible, interdependent and interrelated and strives to give the same importance to all rights." [51] This commitment to uphold international human rights standards is not merely symbolic. This commitment, for example, has been consistently part of the Cabinet Directive on Regulatory Management. The most recent version of which came into effect in April 2012, states that all federal "[d]epartments and agencies are to respect Canada's international obligations in areas such as human rights, health, safety, security, international trade, and the environment. They are also to implement provisions related to these obligations at all stages of regulatory activity, including consultation and notification, as applicable."[52]

In fact, the incorporation of international human rights standards in the interpretation and application of Canadian law is a matter of legal necessity. The Supreme Court of Canada has repeatedly affirmed "the important role of international human rights law as an aid in interpreting domestic law."[53] In a 1987 decision, then Supreme Court Chief Justice Brian Dickson characterized "[t]he various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms" as "relevant and persuasive sources" for the interpretation of domestic law.[54]

The Supreme Court has also said that unless there is a clear, contrary legislative intent, domestic laws "will be presumed to conform to international law".[55] The legislature is presumed to act in compliance with "Canada's obligations as a signatory of international treaties and as a member of the international community" and with "the values and principles of customary and conventional international law."[56] As a consequence, the Supreme Court has held that any interpretation of domestic law that would put the government in violation of its international obligations must be strictly avoided.[57]

This means that failure to give proper weight and consideration to international human rights law can be considered a breach of Canadian legal standards. In 2012, in a case concerning allegations of discrimination against First Nations children, the Federal Court ruled that the Canadian

Human Rights Tribunal had erred when it failed to adequately consider international human rights standards, including the *UN Declaration*, in interpreting and applying the *Canadian Human Rights Act*.[58] The conclusion was upheld on appeal.[59]

The role of international human rights standards in the interpretation of domestic law is not contested. In 2012, in discussing Canada's endorsement of the *UN Declaration*, Canadian representatives told the UN Committee on the Elimination of Racial Discrimination: "Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution."[60]

VI. Canada's Comprehensive Land Claims Policy in an International Context

Canada's approach to the recognition and protection of Indigenous Peoples' land and resource rights has been repeatedly condemned by international human rights bodies. In 1998, in its Concluding Observations on Canada's compliance with the *International Covenant on Economic, Social and Cultural Rights*, the UN Committee on Economic, Social and Cultural Rights stated that "the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party."[61]

The following year, the UN Human Rights Committee told Canada that any practice of extinguishing inherent Indigenous rights must be "abandoned" as "incompatible" with the Covenant on Civil and Political Rights.[62] When Canada was next reviewed by the Human Rights Committee in 2006, the Committee, responding to the new certainty formulations then being pursued by federal negotiators, expressed concern "that these alternatives may in practice amount to extinguishment of aboriginal rights".[63]

In 2007, the UN Committee on the Elimination of Racial Discrimination criticized Canada for the "strongly adversarial positions taken by the federal and provincial governments" and the "disproportionate costs" for Indigenous Peoples seeking resolution of their land and title claims. The Committee called on Canada to ensure that "approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights."[64]

In 2009, in response to a petition brought by the Hul'qumi'num Treaty Group on behalf of six First Nations on Vancouver Island, the Inter-American Commission ruled that the available means to resolve outstanding land and title disputes in Canada, whether through negotiation under the BC Treaty process or through legal action, were too slow and onerous to meet basic standards of justice, which require timely and effective remedy.[65] In 2012, the UN Committee on the Elimination of Racial Discrimination again expressed concern over "rigidly adversarial positions taken by the State party" in respect to resolution of Indigenous land disputes.[66]

In the following, we highlight key principles that our organizations believe must be incorporated into Canada's comprehensive claims policy to address the criticisms of international human rights bodies and to ensure Canada complies with its international human rights obligations.

6.1 Indigenous systems of land ownership and management

Under international law, the fact that a state has not provided formal legal recognition to Indigenous land rights and title does not negate the existence of these rights or justify their violation.[67]

International human rights bodies have recognized that contemporary practices that fail to recognize and protect the customary land rights of Indigenous Peoples, or which provide a lower standard of protection for the customary rights of Indigenous Peoples than for other modes of land ownership and control, are also a form of racial discrimination and thus strictly prohibited.[68] In fact, the Inter-American Commission on Human Rights has characterized the failure to protect Indigenous Peoples' customary forms of possession and use of land as "one of the greatest manifestations" of racial discrimination.[69]

The Inter-American Court has identified a number of characteristics that may distinguish Indigenous Peoples' rights to land from the property rights of others, including the fact that Indigenous rights are typically collective in nature, may include areas of non-exclusive use where the territory of one people overlaps with another, and may be grounded in pre-colonial traditions not recognized in national law or discriminated against in practice.[70] Critically, the court has concluded that the factors that make Indigenous Peoples' land rights distinct must not lead to any diminishment of state protection for these rights.[71] In the *Dann* case against the United States, the Inter-American Commission called for legal recognition of Indigenous Peoples' "varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property", regardless of whether these forms of property rights are currently recognized in domestic law.[72]

Article 26 of the *UN Declaration* states Indigenous Peoples have rights over lands, territories and resources based on their having "traditionally owned, occupied or otherwise used or acquired" these lands, territories and resources. The broad range of possible basis of Indigenous land rights reflects the principle of non-discrimination. As the UN Special Rapporteur on the rights of indigenous peoples has noted, this approach "effectively rejects" rigid tests for Aboriginal title such as "a strict requirement of continuous occupation or cultural connection."[73]

Recognition of Indigenous land rights must be accompanied by effective protection. As the Inter-American Court of Human Rights has stated, "the mere possibility of recognition of rights through a certain judicial process is no substitute for the actual recognition of such rights"[74] and "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[75]

This ruling by the Inter-American Court is part of an extensive body of jurisprudence recognizing a positive state obligation to work with Indigenous Peoples to ensure effective formal protection of their land rights. The *UN Declaration* calls on states to "give legal recognition and protection" to Indigenous Peoples' lands, territories and resources" and states that "Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[76]

6.2 International standards of justice

The right to an effective remedy is provided for in a range of international human rights instruments, including the *American Convention on Human Rights*[77], the *International Covenant on Civil and Political Rights* [78] and the *American Declaration of the Rights and Duties of Man.*[79] The Inter-American Court has described the right to remedy as "one of the basic principles of contemporary International Law regarding the responsibility of States."[80] The first objective of redress is always to ensure, to the fullest extent possible, that the victims of human rights violations can be restored to the situation they enjoyed prior to the violation.[81]

Given the fundamental importance of lands, territories and resources to Indigenous Peoples, international human rights bodies have consistently affirmed that the preferred option to remedy violations of Indigenous Peoples' land rights must be, wherever possible, the full restoration of Indigenous lands and their future protection. In the *Sawhoyamaxa* case, the Inter-American Court, having noted that Indigenous Peoples who have "unwillingly left their traditional lands, or lost possession thereof" still retain property rights "even though they lack legal title," ruled that "Indigenous Peoples who have unwillingly lost possession of their lands, are entitled to restitution thereof."[82]

If full restitution is genuinely not possible, other measures may be taken, guided always by the goals of ensuring respect for the rights that were violated and addressing the consequences.[83] The determination of alternatives is "regulated in all aspects" by international law" and "cannot be modified by the State on the basis of domestic law or policy."[84]

Noting that there may be instances in which for "concrete and justified reasons" the full return of land may not always possible, the Inter-American Court has stated that the provision of redress must still be "guided primarily by the meaning of the land" for the affected people.[85] The Court cited *ILO Convention 169* which states that when it is not possible to restore lands to Indigenous Peoples, they shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the Peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.[86]

The Court went on to state:

> Selection and delivery of alternative lands, payment of fair compensation, or both, *are not subject to purely discretionary criteria of the State*, but rather… there must be a consensus with the peoples involved, in accordance with their own mechanism of consultation, values, customs and customary law [emphasis added].[87]

The same principles are affirmed in Article 28 of the *UN Declaration* (see above).

6.3 Reconciliation of Indigenous and non-Indigenous interests

Few human rights are absolute. The *UN Declaration* expressly sets out the intention of achieving a balancing of rights, among Indigenous Peoples and between Indigenous and non-Indigenous Peoples. In all instances, however, the balance that is struck must be based on the overall goal of protecting the rights of all. The *UN Declaration* states,

> In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. [88]

International human rights bodies have been clear that an appropriate balancing of rights does not mean treating all claims as equivalent or requiring the same forms of protection and remedy. While state obligations to third parties and broader societal interests can often be appropriately addressed in a wide range of ways, recognition and protection of Indigenous Peoples' rights to

specific lands, territories and resources may be indispensable to their very physical and cultural survival. Furthermore, the history of dispossession and continued discrimination faced by Indigenous Peoples creates special obligations on the State that must be addressed if true reconciliation is to be achieved.

In attempting to reconcile potentially competing rights, international human rights bodies have generally sought to protect the relationship of Indigenous Peoples to their lands, even if doing so requires accommodation by other sectors of society. In the *Yakye Axa* case, the Inter-American Court provided the following example of considerations that must be taken into account in resolving conflicts between Indigenous Peoples and private claimants:

> …States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.
>
> Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.
>
> On the other hand, restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society.[89]

As this example illustrates, in the kind of case-specific, purposeful balancing of rights required by international human rights law, private interests should not be assumed to trump the land rights of Indigenous Peoples, even when the state has already granted concessions to the lands in question. Otherwise, as the Inter-American Court has stated, "restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands."[90]

6.4 Effective interim protections

International human rights bodies have consistently found that where the land rights of Indigenous Peoples are at stake, and the fundamental obligation to recognize and restore title cannot be immediately met, effective interim measures are necessary to prevent any further erosion of Indigenous Peoples' current and future ability to use the land. In the case of the *Maya Communities of Toledo District*, the Inter-American Commission determined that the State was obliged to prevent any acts by "the State itself, or third parties acting with its acquiescence or its tolerance" that would "affect the existence, value, use or enjoyment of the property."[91] In the *Xákmok Kásek* case in Paraguay, the Court ruled that, pending demarcation and titling of lands:

> ...the State must guarantee that such territory will not be damaged by acts of the State itself or of private third parties. Thus, it must ensure that the area will not be deforested, that sites which are culturally important for the community will not be destroyed, that the lands will not be transferred and that the territory will not be exploited in such a manner as to cause irreparable harm to the area or to the natural resources present therein.[92]

Effective interim protection of Indigenous Peoples' land rights necessarily includes Indigenous Peoples' meaningful involvement in decisions over how that land will be used. In the *Saramaka*

decision, the Court ruled that, as a safeguard "to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people" the State must "must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan… within Saramaka territory."[93] The Court went on to state that:

> …in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.[94]

The Inter-American Commission has similarly described the requirement of free, prior and informed consent "as a heightened safeguard for the rights of indigenous peoples, given its direct connection to the right to life, to cultural identity and other essential human rights, in relation to the execution of development or investment plans that affect the basic content of said rights."[95]

The right of free, prior and informed consent is similarly well established within the UN human rights system. In a general recommendation interpreting the *UN Convention on the Elimination of All Forms of Discrimination*, the UN Committee on the Elimination of Racial Discrimination has called on states to ensure that "no decisions directly relating" to the rights and interests of Indigenous Peoples should be taken without their informed consent.[96] The *UN Declaration* states that free, prior and informed consent should be the precondition for state approval of "any project" affecting Indigenous Peoples' lands, territories and resources:

> *Article 32(2):* States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The *UN Declaration* also affirms the right of free, prior and informed consent in a wide range of other contexts:

> *Article 10:* Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.
>
> *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.

Finally, the *UN Declaration* also requires redress for the failure to uphold the right of free, prior and informed consent in respect to expropriation of cultural, intellectual, religious and spiritual property and for the confiscation, occupation, use of, or damage to, their traditional territories (Article 11(2) and Article 28).

VII. The *Tsilhqot'in Nation* Decision by the Supreme Court of Canada

As indicated by the trial judge in *Tsilhqot'in Nation*: "the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations."[97] In *Tsilhqot'in Nation*, the Supreme Court of Canada affirmed a broad territorial approach to Aboriginal title rather than a "postage stamp" approach.[98] The approach taken on Aboriginal title lands in the Interim Policy is incompatible with the Supreme Court's ruling.[99]

In addressing Aboriginal title, the Supreme Court of Canada repeatedly emphasized the requirement of obtaining Indigenous Peoples' "consent".[100] The right to "control" title land "means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders."[101] If the Aboriginal group does not consent to the use, "the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*."[102]

The Court's ruling on "consent" is reinforced by the *UN Declaration* Article 26(2): "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

"Consent" is not limited to Aboriginal title and applies to other Aboriginal rights.[103] As described by the Supreme Court of Canada in *Haida Nation*, the high end of the spectrum of consultation requires "'full consent of [the] aboriginal nation' on very serious issues. This applies as much to unresolved claims as to intrusions on settled claims."[104]

Former UN Special Rapporteur on the rights of indigenous peoples, James Anaya, has concluded: "Indigenous peoples' free, prior and informed consent [FPIC] is required, as a general rule, when extractive activities are carried out within indigenous territories."[105] In his July 2014 report on Canada, Anaya concluded:

> In accordance with the Canadian constitution and relevant international human rights standards, as a general rule resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned. Further, Canada should endeavor to put in place a policy framework for implementing the duty to consult that allows for indigenous peoples' genuine input and involvement at the earliest stages of project development.[106]

Indigenous Peoples' "consent", as elaborated by the Court, reflects "free, prior and informed consent" in international law. "Consent" must always be "free", that is, obtained without duress. It must also be "prior and informed" in that all necessary information must be provided in a timely manner,[107] so that a decision can be made with full knowledge of the risks involved.

In *Tsilhqot'in Nation*, the Supreme Court ruled: "Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward."[108] In this regard, the Court gave two examples:

> … if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was

> validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.[109]

An example of federal legislation that requires amendment to respect the Tsilhqot'in ruling on Aboriginal title is the *Canadian Environmental Assessment Act, 2012* (*CEAA*). The Act allows consideration of "environmental effects" with respect to Aboriginal Peoples that pertain to "current use of lands and resources for traditional purposes".[110] In contrast, the Supreme Court affirmed that Aboriginal title includes land uses that "need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures".[111] The Court added: "uses are not confined to the uses and customs of pre-sovereignty times; … Aboriginal title holders of modern times can use their land in modern ways, if that is their choice."[112]

The interpretation of this limitation in *CEAA* was used by the National Energy Board's Joint Review Panel on Northern Gateway to not consider fully environmental effects on much broader uses relating to Aboriginal title lands both now and in the future. Such limitation is a reflection of the impoverished approach generally taken by the federal government in regard to its comprehensive claims policy and Aboriginal title.

7.1 "Consent" evaded by federal government

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

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

Canada has declared that it opposes "free, prior and informed consent" when it could be interpreted as a "veto".[113] Yet Canada has never explained what constitutes "consent" and what constitutes a "veto". Is "veto" synonymous with "consent"?[114] Is "veto" absolute?[115] The government has refused for years to discuss or explain its positions. In *Tsilhqot'in Nation*, there are many references to "consent" and no mention of "veto".

The term "veto" implies an absolute power, i.e. an Indigenous people could block a proposed development regardless of the facts and law in any given case. However, human rights, including the rights of Indigenous Peoples, are generally relative and not absolute.

Aboriginal title and Indigenous Peoples' right to give or withhold consent, right to control such land, right to determine the uses of such land; and the right to decide such uses must all be an integral part of any renewed federal policy and framework relating to comprehensive claims. Such renewal must take place in conjunction with Indigenous Peoples.

7.2 Good governance, the duty to consult, and consent

Effective regimes of consultation and consent are part of good governance. In *Tsilhqot'in Nation*, it is provided: "Absent consent, development of title land cannot proceed unless the Crown has discharged its duty to consult and can justify the intrusion on title under s. 35 of the *Constitution Act, 1982*."[116]

According to the UN Human Rights Council, "States are guarantors of democracy, human rights, good governance and the rule of law, and bear responsibility for their full implementation".[117] Yet, in regard to these essential duties and principles, the Interim Policy makes no mention of any federal government responsibility.

In *Tsilhqot'in Nation*, the Court indicated that the *Canadian Charter of Rights and Freedoms* in Part I of the *Constitution Act, 1982* and the guarantee of Aboriginal rights in Part II are "sister provisions, both operating to limit governmental powers, whether federal or provincial".[118]

In regard to the *Canadian Charter*, the Supreme Court has ruled: "Compliance with *Charter* standards is a foundational principle of good governance."[119] The same rule of compliance must be applied in regard to the human rights of Indigenous Peoples in s. 35 of the *Constitution Act, 1982*. There should not be any discriminatory double standard.

As emphasized by the Office of the UN High Commissioner for Human Rights: "The true test of 'good' governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights."[120] The UN Permanent Forum on Indigenous Issues has elaborated: "Good governance consists of the following elements or principles, which are interlinked and mutually reinforcing: transparency; responsiveness; consensus-building; equity and inclusiveness; effectiveness and efficiency; accountability; participation; consultation and consent; human rights; and the rule of law."[121]

The federal government's 2011 Updated Guidelines on consultation and accommodation indicate: "The Government of Canada consults with First Nation, Métis and Inuit people for many reasons, including: … good governance".[122] Yet, in practice, the government has failed to fulfill its obligations relating to good governance and to consult and accommodate Indigenous Peoples. Since 2006, the federal government has refused to even discuss with Indigenous Peoples whether it acknowledges that their collective rights constitute inherent human rights.

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."[123] The Supreme Court has added: "the duty to consult extends to 'strategic, higher level decisions' that may have an impact on Aboriginal claims and rights"[124]

In regard to proposed resource developments, the federal government has failed to consult in a timely manner. In relation to the proposed Northern Gateway pipeline, it made little sense for the Joint Review Panel (JRP) of the National Energy Board to examine the environmental effects on Indigenous Peoples' rights, prior to the government first consulting on what title or rights may potentially be affected. Real and potential impacts on Aboriginal title may differ significantly from those on specific rights. Yet such distinctions were not made by either Northern Gateway or the Joint Review Panel, since neither had a mandate to examine Aboriginal or treaty rights.[125]

A similar flaw affects the JRP Report's consideration of the "public interest", which is affirmed as being "local, regional, and national in scope" (vol. 1, p. 11). Aboriginal title was not explicitly considered, which includes the "right to exclusive use and occupation of land" and the "right to choose to what uses land can be put".[126] These concerns relating to Northern Gateway were raised in a joint submission[127] by Indigenous and human rights organizations to the Prime Minister, but never received any response.

In international forums, the federal government has refused to consult Indigenous Peoples on their rights since 2006 or on the *UN Declaration*. Most recently, in the context of the Convention on Biological Diversity, the government took unilateral positions to undermine Indigenous Peoples' status as "Peoples" and their rights, the *UN Declaration,* and the Outcome Document[128] of the World Conference on Indigenous Peoples (WCIP).[129]

In taking these positions, Canada provided no information and acted with impunity as it has done in other forums for years – despite the numerous commitments to consult and cooperate with Indigenous Peoples in the consensus WCIP Outcome Document[130] and the *UN Declaration*.[131]

In October 2014, the government of Canada chose to oppose free, prior and informed consent (FPIC) at the meeting of the Committee on World Food Security (CFS) in Rome in the context of "Principles for Responsible Investment in Agriculture and Food Systems".[132] Indigenous and civil society organizations worldwide jointly condemned Canada: "Canada's actions to block FPIC … are unacceptable and a step backwards in the global governance of resource rights. They risk seriously undermining the rights of indigenous peoples worldwide, further weakening the Principles".[133]

The government's ongoing adversarial actions erode confidence and trust. Genuine reconciliation is not possible when such far-reaching and prejudicial conduct continues to take place at the international level. The government does not generally fund Indigenous Peoples to participate at international meetings, where their status and rights are the focus of discussion. This serves to marginalize or exclude Indigenous Peoples, while Canada continues to prejudice their human rights.

In relation to international forums, the federal government rarely provides Indigenous Peoples with timely information, if at all, on its positions – even when such positions are public. This failure to provide information seriously impedes Indigenous Peoples' right to freedom of expression and opinion, including the right to receive information from public bodies.[134] Such failure impedes Indigenous Peoples' right to democratic participation,[135] as well as accountability and transparency by the government. Canada's constitutional and international duty to consult Indigenous Peoples remains consistently unfulfilled.

In October 2014, 27 special rapporteurs and other independent experts jointly issued an "Open Letter" in the global climate change context, which included the following excerpt on States' duties:

> Respecting human rights in the formulation and implementation of climate policy requires, among other things, that the State Parties meet their duties to provide access to information and facilitate informed public participation in decision making, especially the participation of those most affected by climate change and by the actions taken to address it. The principle of free, prior and informed consent of indigenous peoples must be respected.[136]

7.3 Indigenous Peoples' governance

In *Tsilhqot'in Nation*, the Supreme Court affirmed that Aboriginal title confers ownership rights.[137] The principles in any renewed federal claims policy must specify that the "Crown does not retain a beneficial interest in Aboriginal title land."[138] However, Aboriginal title to lands and resources is much more than a right to property.

In order to appreciate the full scope of "consent" it is important to underline the legal nature of Aboriginal title. Indigenous Peoples' consent is not only exercised as owner of title lands, but also through exercise of government jurisdiction. Such Indigenous jurisdiction is supported by Canadian constitutional and international human rights law.

As described by Brian Slattery: "Aboriginal title is a doctrine of public law rather than private law. It does not deal with relations between private individuals or groups but rather between constituent parts of the Canadian federation. … The closest correlate to Aboriginal title is not fee simple but Provincial title to public lands."[139]

Slattery added: "Just as Provincial title is complemented by Provincial jurisdiction to manage its lands, so also Aboriginal title is complemented by Aboriginal jurisdiction to manage its lands. … Just as Provincial title and jurisdiction are shielded by constitutional provisions ordaining a division of powers between the Province and the Federal Government (in sections 91-92A, Constitution Act, 1867), so also Aboriginal title and jurisdiction are shielded by constitutional guarantees that put in place a division of powers between Federal, Provincial and Aboriginal governments (in section 35, Constitution Act, 1982)."[140]

7.4 Indigenous legal orders in Canada's Constitution

In regard to Aboriginal title land, the *Tsilhqot'in* decision concluded that Indigenous Peoples have the collective right, *inter alia*, to "decide how the land will be used" and to "pro-actively … manage the land"[141] and to "control"[142] the land. In light of "pre-existing Aboriginal sovereignty",[143] these constitutional rights include inherent self-government powers.

In *Tsilhqot'in Nation*, the Supreme Court ruled in the context of European assertion of sovereignty in Canada: "Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group - most notably the right to control how the land is used."[144]

Such rights go beyond ownership. From an international law perspective, these are essential elements of the collective human right of Indigenous Peoples to self-determination,[145] including self-government,[146] and the human right to development.[147] The human right of self-determination includes "consent" as an essential element,[148] as well as the "right to choose".[149] In *Tsilhqot'in Nation*, the Supreme Court referred to Indigenous Peoples' "right to choose",[150] but did not elaborate on governance aspects.

In the context of *Tsilhqot'in Nation*, Brian Slattery concluded: "Communal decisions as to how to manage the lands are made under the Aboriginal Nation's land laws, presumptively based on customary law. The Nation must also have the inherent power to make new laws governing the use and management of its lands."[151]

Slattery has emphasized: "Aboriginal title finds its constitutional expression in the *Royal Proclamation of 1763*,[152] just as Provincial title is recognized in the *Constitution Act, 1867*. Like Provincial title, Aboriginal title is a collective right that is protected by strong rules against alienation and that carries with it extensive jurisdictional powers."[153]

The *Tsilhqot'in Nation* decision referred to Aboriginal laws in several paragraphs.[154] Indigenous law making, including entering into treaties with other Indigenous Nations, is evidence of governmental authority.[155] In this context, the underlying constitutional principle of democracy

is an essential consideration. As the Supreme Court previously concluded: "democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government."[156]

UN human rights bodies have repeatedly applied to Indigenous Peoples the right of self-determination in the international human rights Covenants.[157] The Royal Commission on Aboriginal Peoples concluded that s. 35 of the *Constitution Act, 1982* "provides the basis for recognizing Aboriginal governments as constituting one of three orders of government in Canada".[158]

In the federal Interim Policy on comprehensive claims, there are conflicting messages as to Indigenous Peoples' right to self-government being an inherent or pre-existing right[159] or one contingent on negotiated agreement. "Aboriginal self-government" is defined as: "governments designed, established and administered by Aboriginal peoples under the Canadian *Constitution* through a process of negotiation with Canada and, where applicable, the provincial government."[160] Such a government approach is inconsistent with Canadian constitutional and international law, including the right of self-determination.

The definition of "Aboriginal self-government" is also inconsistent with the federal government's own policy on the inherent right of self-government:

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*. …
>
> The Government acknowledges that the inherent right of self-government may be enforceable through the courts...[161]

While there are differences of opinion as to the nature, scope and content of this inherent right of self-government, the federal government has in effect acknowledged that there are three orders of government in Canada's Constitution – federal, provincial and Aboriginal.

At the same time, it is essential to emphasize that both the federal government's Interim Policy and inherent self-government policy urgently require extensive reforms. This should only be undertaken in conjunction with Indigenous Peoples in Canada.

Indigenous Peoples are recognized internationally as both domestic and international actors. Such Peoples, their governments and other institutions are not limited to acting within national contexts, in respect to a wide range of matters including those covered by federal comprehensive claims policy. For example, in the consensus WCIP Outcome Document, States requested the UN Secretary-General, in consultation with the Inter-Agency Support Group on Indigenous Peoples' Issues and Member States, taking into account the views expressed by Indigenous Peoples, to report to the General Assembly at its seventieth session the following:

> to submit at the same session, through the Economic and Social Council, recommendations regarding how to use, modify and improve existing United Nations mechanisms to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, ways to enhance a coherent, system-wide approach to achieving the ends of the Declaration and specific proposals to enable the participation of indigenous peoples' representatives and institutions, building on his report on ways and means of promoting participation at the United Nations of indigenous peoples' representatives on the issues affecting them.[162]

7.5 Cooperative federalism

According to the Interim Policy: "Reconciliation is an ongoing process through which Aboriginal Peoples and the Crown work cooperatively to establish and maintain a mutually respectful framework for living together in Canada with a view to fostering strong, healthy and sustainable Aboriginal communities."[163]

The Interim Policy adds: "Reconciliation frames the Crown's actions in relation to Section 35 rights and informs the Crown's broader relationship with Aboriginal Peoples. … Canada's approach to reconciliation is informed by legal principles articulated by the courts and by negotiation and dialogue with Aboriginal Peoples and provincial and territorial governments."[164]

Since the ongoing process of reconciliation flows from s. 35 of the *Constitution Act, 1982* and necessarily includes "cooperation" with Indigenous Peoples, there is a Crown duty to cooperate with Indigenous Peoples. Yet too often the federal government opts to act unilaterally, in order to diminish Indigenous Peoples' status and human rights, especially in international forums. In practice, the government demonstrates a lack of respect for court decisions particularly in the comprehensive claims process. Such actions fail to uphold the honour of the Crown and the rule of law.

In *Tsilhqot'in Nation*, the Supreme Court underlined the importance of "cooperative federalism", but only referred to federal and provincial governments.[165] However, federalism must apply to all three orders of government in Canada's Constitution. As indicated in *Reference re Secession of Québec*, the "protection of existing aboriginal and treaty rights" cannot be defined in isolation from other underlying constitutional principles, such as federalism, democracy and the rule of law.[166] The Court has also ruled that cooperation is the "animating force" and the federalism principle "demands nothing less".[167]

In the Interim Policy text, the federal government makes one meagre reference to dialogue with Aboriginal "partners".[168] In contrast, in *Gathering Strength - Canada's Aboriginal Action Plan*, there are 78 references to partnership.[169] These include "Federal-Provincial-Territorial-Aboriginal Partnership and Co-ordination" and "International Partnerships" relating to the realization of the UN Declaration on the Rights of Indigenous Peoples" and the *Convention on Biological Diversity*.

The *UN Declaration* proclaims itself "as a standard of achievement to be pursued in a spirit of partnership and mutual respect".[170] It also affirms: "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States".[171]

7.6 Present and future generations

Aboriginal title inheres in present and future generations.[172] The Supreme Court emphasized in *Tsilhqot'in Nation*: "What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society".[173]

Aboriginal title "means it cannot be … encumbered in ways that would prevent future generations of the group from using and enjoying it. Nor can the land be developed or misused in a way that would substantially deprive future generations of the benefit of the land."[174] Thus, there cannot be permanent despoliations of the land.[175]

The Supreme Court indicated that incursions on title lands are permitted only with the consent of the Indigenous Nation or group, or if they are justified by a compelling and substantial public purpose. "Valid legislative purposes" for general economic development are not necessarily "compelling and substantial" and will depend on the facts "on a case-by-case basis".[176]

Any intrusions must be consistent with the Crown's fiduciary duty to the Aboriginal group.[177] Incursions on Aboriginal title "cannot be justified if they would substantially deprive future generations of the benefit of the land".[178] Therefore, there can be agreements to share the land but no extinguishment.

Further, the incursion must be "necessary to achieve the government's goal (rational connection); that the government go no further than necessary to achieve it (minimal impairment); and that the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest (proportionality of impact)."[179] Such limiting criteria by the Court provide necessary safeguards.

The Interim Policy does not address the new constitutional limitation imposed on the Crown by the Supreme Court, namely, that incursions on Aboriginal title "cannot be justified if they would substantially deprive future generations of the benefit of the land". The Interim Policy makes no reference to Crown fiduciary duty. Federal government action or inaction continues to contribute to increased greenhouse gas emissions. There is no indication how new modern treaties would be safeguarded from unlawful incursions affecting future generations. In the context of climate change, the federal government has no plan that addresses effectively the growing threats to present and future generations of Indigenous Peoples and their lands, territories and resources.

The federal government cannot unilaterally exclude the effects of climate change from the comprehensive claims process and other processes, when assessing the effects of proposed resource development on Aboriginal title. Some climate change impacts are predicted to be irreversible[180] and would significantly affect present and future generations. In view of their inadequate responses,[181] federal and provincial governments may find it exceedingly difficult to satisfy the "minimal impairment" and other criteria required of them as fiduciaries.

In *The future we want*, Heads of State and Government affirmed by consensus: "We are deeply concerned that all countries … are vulnerable to the adverse impacts of climate change, and are already experiencing increased impacts … further threatening food security and efforts to eradicate poverty and achieve sustainable development."[182]

The future we want adds: "[In] protecting biodiversity and the marine environment and addressing the impacts of climate change ... We … commit to protect, and restore, the health, productivity and resilience of oceans and marine ecosystems, and to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations … in accordance with international law".[183]

7.7 Sustainable and equitable development

In Canadian and international law, development must be sustainable and equitable for present and future generations of Indigenous Peoples.[184] As illustrated by the safeguards described for future generations (see above), the *Tsilhqot'in Nation* decision contributes to this principle.[185] Also, in regard to Aboriginal title, the Supreme Court affirmed "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the

right to the economic benefits of the land; and the right to pro-actively use and manage the land."[186] Proposed developments by the Crown and other third parties cannot simply be imposed on Aboriginal title lands.[187] The Interim Policy makes no mention of sustainable and equitable development or related rights and protections in favour of Indigenous Peoples.

In the *Convention on Biological Diversity*,[188] which Canada has ratified, the preamble declares: "Determined to conserve and sustainably use biological diversity for the benefit of present and future generations".

In the *Federal Sustainable Development Act*, the government of Canada "accepts the basic principle that sustainable development is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government."[189]

In *The future we want*, the "responsibilities of all States … to respect, protect and promote human rights … for all, without distinction of any kind" was affirmed in the overall context of sustainable development.[190] Such human rights would include those of Indigenous Peoples, as affirmed in the *UN Declaration*.

The future we want also affirms: "We … recognize the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies."[191]

Canadian and international law reinforce the significance of the present and future generations, particularly in the context of sustainable and equitable development. Any future comprehensive claims policy must fully reflect this reality. Crucial concerns, such as those relating to climate change, must not be suppressed by the federal government.

7.8 *Royal Proclamation of 1763* precludes extinguishment

If one fully considers the *Royal Proclamation*, Canada's pre-1982 constitutional framework prohibited unilateral extinguishment of land and resource rights by the Crown. Extinguishment is a "relic of colonialism" and "is used to ensure state domination of indigenous peoples".[192] Such wholesale dispossessions of Indigenous Peoples' land and resource rights cause destruction of cultures[193] and impoverish present and future generations.[194]

In *Tsilhqot'in Nation*, it is said that "s. 35 of the *Constitution Act, 1982* constitutionally protected all Aboriginal rights that had not been extinguished prior to April 17, 1982, and imposed a fiduciary duty on the Crown with respect to those rights".[195]

The issue of "extinguishment" was not considered in the decision. However, it is an ongoing issue that motivates government positions, including those on the existence of Aboriginal title and other rights. The CCP remains an ongoing denial policy that severely undermines the possibility of genuine reconciliation and justice with the Indigenous Peoples concerned. In many parts of Canada, rejection of Indigenous Peoples' assertions to title and other land rights is made without due process.[196] Such determinations are made according to the government's subjective interpretation of the law.

In referring to the "pre-existing" land rights of Indigenous Peoples, the Supreme Court emphasized in *Tsilhqot'in Nation*: "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal*

Proclamation (1763)".[197] Thus, the equitable principles in the *Proclamation* have applied throughout Canada since its creation.[198] These principles remain relevant today and are "as fresh and significant as ever".[199] Based on the same logic, the doctrine of "discovery" never applied in Canada, as also confirmed by the *Royal Proclamation*.

Prior to 1982, Canada's constitutional framework included the *Royal Proclamation*. As affirmed in s. 25 of the *Constitution Act, 1982*, there are rights of Aboriginal Peoples recognized in the *Royal Proclamation*. In view of the status of the *Proclamation*, the majority of the Court indicated in *R.* v. *Kapp* that these rights are of a "constitutional character."[200] In the *Proclamation*, the British Crown "pledged its honour to the protection of Aboriginal Peoples from exploitation by non-Aboriginal Peoples."[201]

In his analysis of *Tsilhqot'in Nation*, Brian Slattery underlined that "Aboriginal title finds its constitutional expression in the *Royal Proclamation of 1763*, just as Provincial title is recognized in the *Constitution Act, 1867*."[202]

Extinguishment is incompatible with the constitutional duty to uphold the honour of the Crown. It is also "incompatible with article 1 of the Covenant [on Civil and Political Rights]", which affirms the right of all peoples to self-determination.[203]

International law allows limitations on human rights, but not their destruction.[204] In regard to extinguishment of Aboriginal land rights by Canada, both the UN Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Racial Discrimination (CERD) viewed with concern "the direct connection between Aboriginal economic marginalisation and the ongoing dispossession of Aboriginal people from their land, as recognized by the Royal Commission [of Aboriginal Peoples]".[205]

Based on all of the above, federal land claims policy must not be based in any way on extinguishment of Indigenous Peoples' rights. Both prior and after 1982, the *Royal Proclamation of 1763* must be accorded its full constitutional effect. In light of the *Tsilhqot'in Nation* decision, a claims policy that leads to significant diminution of Aboriginal title lands cannot be a viable basis for negotiating treaties with Indigenous Peoples.

VIII. Treaty Implementation

Treaties are dynamic and living agreements that must continue to have relevance for present and future generations. Far from signalling the severance of a relationship between Aboriginal Peoples and the Crown, modern treaties serve to formalize this enduring relationship for present and future generations.

From a constitutional perspective, Brian Slattery has emphasized: "... aboriginal treaties not only contributed in a general way to the evolution of the Constitution, but also supplied part of its federal structure. This situation, sometimes described as 'treaty federalism', has now been formally recognized and consolidated in section 35 of the Constitution Act, 1982."[206]

The preamble of the *UN Declaration* recognizes "the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States" and affirms that such "treaties … and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States". Article 37 affirms Indigenous Peoples' "right to the recognition, observance and enforcement of treaties".

The significance of all treaties relating to Indigenous Peoples, including modern treaties, must be fully appreciated. It is up to Indigenous Peoples to describe their own respective treaties.

Modern treaties were first entered into in 1975, with the signing of the *James Bay and Northern Québec Agreement*. Treaty rights of Aboriginal Peoples were "recognized and affirmed" in the *Constitution Act, 1982*.[207] Such treaties were negotiated under challenging conditions, where the federal government devised comprehensive claims policies that were unjustly skewed in favour of federal, provincial and territorial governments. While some changes were made, many of the fundamental problems in the CCP still have far-reaching adverse consequences today.

More than 26 modern treaties have been concluded since 1975. For those Indigenous Peoples that have entered into modern treaties, treaty implementation remains a central and compelling concern. Modern treaties must be fully implemented in accordance with their provisions and consistent with their spirit and intent. Any policy that addresses comprehensive land claims agreements and Section 35 rights must acknowledge this obligation and facilitate the fulfillment of it across all federal ministries, departments and agencies.

In 2008, the Land Claims Agreements Coalition finalized its *Honour, Spirit and Intent: A Model Canadian Policy on the Full Implementation of Modern Treaties between Aboriginal Peoples and the Crown*.[208] This document contains essential insights and proposals generated on a collaborative basis by all Aboriginal Peoples who have concluded modern land claims agreements in Canada. The positions set out in that document proposing reform of Crown policies and practice in relation to treaty implementation have only been strengthened and supplemented by recent judicial decisions, including the *Tsilhqot'in Nation* decision. These positions include:

- The Modern Treaty Relationship between the Crown and Aboriginal Peoples relies upon the "honour of the Crown." Federal departments and agencies must be effectively coordinated and must cooperate with relevant provincial and territorial governments, to properly meet the obligations, objectives, and spirit and intent, of modern treaties.
- The developmental objectives and the measurable outcomes of land claims agreements must be achieved through their ongoing implementation. Treaty signatories must be engaged in discussions in order to develop the broad interpretation of the nature of the obligations and objectives under modern treaties and to design implementation activities to achieve those objectives. There is no place for the narrow and technical understandings of treaty obligations that hinder effective implementation of agreements.
- Self-government is an inherent right of Indigenous Peoples. Dynamic implementation of self-government agreements must be achieved through the affirmation of Indigenous government jurisdictions. Stable, predictable and adequate funding arrangements must be based on the objective evaluation of the costs of governing and the social, economic and cultural needs of Aboriginal Peoples.
- Appropriate multi-year implementation plans and fiscal agreements and arrangements must be negotiated in good faith. Results of evaluations, reviews and audits must be incorporated in negotiations of amendments and renewals of implementation plans and fiscal agreements. Sufficient and timely funding must be provided in order to implement the objectives of modern treaties. Structural and procedural barriers in the current

budgetary systems must be removed to facilitate the ongoing implementation of all modern treaties.

- Dispute resolution mechanisms in agreements must be used effectively and in good faith. Consent to binding arbitration, where required, must not be withheld as a matter of course.
- Evaluative processes that generate objective data about treaty implementation – particularly concerning the social, economic and cultural impacts thereof – must be undertaken. Indicators must be developed cooperatively with Indigenous Peoples and results must be used to improve implementation planning and decision-making.

IX. Conclusion: Final Thoughts on Reconciliation

Throughout this submission, we have discussed reconciliation in the context of domestic and international law. In *Tsilhqot'in Nation*, the Supreme Court emphasized: "What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society.[209] This clearly is a minimum standard.

Reconciliation is "a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal Peoples".[210] In Aboriginal law, "the honour of the Crown goes back to the Royal Proclamation of 1763."[211]

Genuine reconciliation requires an approach that is built on a foundation of mutually reinforcing principles of justice, non-discrimination, respect for human rights, good governance, democracy, rule of law, and good faith.[212] As emphasized by the UN High Commissioner for Human Rights, "the rule of law without human rights is only an empty shell" and "the rule of law constitutes the backbone for the legal protection of human rights".[213]

The United Nations Expert Mechanism on the Rights of Indigenous Peoples has concluded: "The United Nations Declaration on the Rights of Indigenous Peoples constitutes a principled framework for justice, reconciliation, healing and peace."[214] These are all essential aspects in addressing Indigenous dispossession of lands, territories and resources – including severe impoverishment, loss of identity and culture, and other inter-generational effects.

The Supreme Court of Canada has recognized the need for reconciliation of "pre-existing aboriginal sovereignty with assumed Crown sovereignty"[215] and has described reconciliation as the "basic purpose" of section 35.[216] This process of reconciliation is taking place "in the shadow of a long history of grievances and misunderstanding."[217] In addition, the Supreme Court has taken judicial notice of "such matters as colonialism displacement and residential schools"[218], which demonstrate how "assumed" sovereign powers were abused by the Crown throughout history.

Achieving reconciliation is an essential part of the constitutional framework for Aboriginal rights and title under s. 35. However, reconciliation is not what the current federal comprehensive claims policy seeks to achieve. What this policy seeks to achieve is massive diminutions of Aboriginal title in Canada. Reconciliation, in contrast, is about redress.

Redress must include decolonization processes that effectively restore Indigenous Peoples' sovereignty and jurisdiction in contemporary contexts to achieve genuine reconciliation.[219] Key issues relating to making jurisdictional space for Indigenous sovereignty,[220] and self-determination including the effective operation of distinct Indigenous legal orders over their territories, urgently require resolution.

Former Chief Justice Lance Finch of the British Columbia Court of Appeal emphasized: "To guard against imbalance and resulting injustice, we must conceive of reconciliation, in the legal context as well as in social and political terms, as a two-way street: just as the pre-existence of aboriginal societies must be reconciled with the sovereignty of the Crown, so must the Crown, in its assertion of sovereignty, equally be reconciled with the pre-existence of aboriginal societies."[221]

X. RECOMMENDATIONS

1. The terms of reference for Douglas Eyford must be made public, in order to clarify the scope and mandate of his role as Ministerial Special Representative on comprehensive claims policy (CCP) renewal and reform. Such transparency is essential in building confidence and trust and ensuring accountability.

2. The report and recommendations issued by Douglas Eyford must be made public upon its submission to the AANDC Minister. It must represent solely a first step in engaging Indigenous Peoples in a collaborative process of renewal and reform.

3. In addressing the complex policy issues related to such renewal and reform, the government of Canada must work in partnership with Indigenous Peoples and provide adequate funding to ensure their full, effective and democratic participation.

4. The report of Douglas Eyford must identify the different aspects in the current CCP that are unjust and prejudicial to Indigenous Peoples and, therefore, incompatible with any process of genuine reconciliation.

5. The report must also identify key principles for a framework and policy that are consistent with Indigenous Peoples' inherent rights and jurisdiction. Such recommended principles must be subject to further review and acceptance by Indigenous Peoples.

6. Such principles must fully take into account the *Tsilhqot'in Nation* decision, as well as the *United Nations Declaration on the Rights of Indigenous Peoples* and other international human rights law.

7. In all its forms, extinguishment of Aboriginal title, and other measures aimed at the destruction of Indigenous rights, are incompatible with the constitutional duty to recognize and affirm Aboriginal rights and uphold the honour of the Crown. Such negotiating positions are also incompatible with the right of self-determination and with other international human rights standards.

8. The report by Douglas Eyford must specify that the federal government must not unilaterally impose any recommendations. Any renewal and reform of the CCP must include widespread approval of Indigenous Peoples affected.

Interim Policy not a basis for CCP reform

9. The Interim Policy must not be viewed as a reasonable basis on which to build a just and effective CCP. It is inexcusable that it fails to ensure consistency with the landmark decision of *Tsilhqot'in Nation* v. *British Columbia*. The federal government cannot evade the rule of law, as determined by Canada's highest court.

10. Renewal and reform of the CCP must not perpetuate the defective and prejudicial land claims and self-government policies. It must include the right to give or withhold "consent" of Aboriginal title-holders and their extensive constitutional jurisdiction that accompanies the inherent land and resource rights affirmed in *Tsilhqot'in Nation*. It must acknowledge that the Crown has no beneficial interest in Indigenous Peoples' title lands.

11. The Interim Policy must also be rejected, since it completely ignores international standards relating to Indigenous Peoples, including those in the *United Nations Declaration on the Rights of Indigenous Peoples*. The *Declaration* constitutes a consensus international human rights instrument.

Key principles integral to any new framework and policy

12. All negotiations must reflect the Crown's fiduciary relationship with Indigenous Peoples. The Crown has both a moral and legal duty to negotiate in good faith to resolve land claims.

13. Comprehensive claims policy must be the joint result of an interactive process between Indigenous Peoples and the Crown, and must accordingly recognize and incorporate the views and priorities of Indigenous participants.

14. There must be no pre-determined limits on negotiations and any resulting agreements, including with respect to the exercise of Aboriginal rights, the scope of possible economic benefits from resource development, or the exercise of Indigenous self-government.

15. A viable approach includes consent-based decision-making and title-based fiscal relations, including revenue-sharing, in relationships, negotiations and agreement.

16. Canada's policy on loan funding must be altered. It is unconscionable to perpetuate a process where governments refuse to alter unreasonable positions while debt and interest continue to build. This relationship of indebtedness amounts to a form of extortion. Such policies are inconsistent with the honour of the Crown, genuine reconciliation and good faith. In all such cases, the debt should be forgiven.

Indigenous Peoples' consent

17. The Crown must obtain the consent of Indigenous Peoples concerned prior to making decisions that will affect their Aboriginal title lands. Incursions on Aboriginal title cannot be justified, if they would substantially deprive future generations of the benefit of the land.

18. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and accommodate. They must also be justifiable on the basis of an objective, compelling and substantial public interest commensurate with the risk of harm, be consistent with the Crown's fiduciary duty to the Aboriginal group, and ensure that Aboriginal Peoples share in the benefit from the decision.

19. Negotiating compensation for past and ongoing infringements of Aboriginal title and rights is a part of achieving reconciliation between Indigenous Peoples and the Crown.

Indigenous title and jurisdiction

20. Affirmation of Aboriginal title is essential to the process of reconciliation between Indigenous Peoples and the Crown. Negotiation processes and agreements must be based on recognition, not denial.

21. Indigenous Peoples' decision-making authority is a critical component of Aboriginal title. Indigenous laws, protocols and jurisdiction must be incorporated into the policy, negotiation processes and resulting agreements.

22. The federal government's reduction of Indigenous Peoples' ownership of lands to a small percentage covered by treaty is inconsistent with the broad, territorial nature of Aboriginal title as affirmed in *Tsilhqot'in Nation*.

23. Reform of the comprehensive claims policy must include a clear obligation by the Crown to ensure effective interim protection of lands, territories and resources to which Indigenous Peoples assert title and rights. This must include full and consistent implementation of the constitutional and international standard of utmost good faith in regard to consultation, accommodation and obtaining consent on "very serious issues."

24. Government negotiators must be provided a clear mandate that recognizes the existence of customary rights and title and seeks the fullest protection for these rights.

25. Private interests in lands where Indigenous title is asserted must be addressed through a careful reconciliation of rights, guided by the goal of respecting the rights of all, but also recognizing the unique circumstances of Indigenous Peoples and the need to provide meaningful redress for unresolved violations of their rights. The existence of private interests must not be used to preclude any consideration of redress.

Crown-Indigenous relationships and Treaties

26. Treaties are dynamic and living agreements that must continue to have relevance for present and future generations. Treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between Indigenous Peoples and the Crown.

27. Indigenous Peoples have the right to the recognition, observance and enforcement of their treaties. Modern treaties must be fully implemented in good faith, in accordance with their provisions and consistent with their spirit and intent. This Crown obligation must be acknowledged and the Crown must facilitate its fulfillment across all federal ministries, departments and agencies. Reform of Crown policies and practice with respect to modern treaty implementation should engage fully and constructively the positions that have been put forward consistently by the Land Claims Agreement Coalition, which is composed of all modern treaty signatories in Canada.

28. The Modern Treaty Relationship between the Crown and Aboriginal Peoples relies upon the "honour of the Crown." Federal departments and agencies must be effectively coordinated and must cooperate with relevant provincial and territorial governments, to fully meet the obligations, objectives and spirit and intent of modern treaties.

29. Sufficient and timely funding must be provided, in order to implement the objectives and terms of modern treaties. Structural and procedural barriers in the current budgetary systems must be removed to facilitate the ongoing implementation of all modern treaties.

UN Declaration and other international law

30. It must be explicitly affirmed that Indigenous Peoples' collective rights are human rights and recognized as such within international and regional human rights systems. For over thirty years, the practice within the UN human rights system and regional human rights bodies has been to address Indigenous Peoples' collective rights as human rights.. The federal government's resistance to address such rights as human rights is inconsistent with Canada's constitutional and international obligations.

31. Any new framework and policy must not only be consistent with the *Tsilhqot'in Nation* decision, but also the *UN Declaration on the Rights of Indigenous Peoples* and other international human rights law.

32. The new framework and policy must also be consistent with the right of Indigenous Peoples to self-determination, including the right to self-government. This foundational right is affirmed in the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, as well as in the *UN Declaration*.

33. Canada must cease using international forums to undermine Indigenous Peoples' status as "Peoples" and their human rights, as well as the *UN Declaration* and the consensus Outcome Document of the World Conference on Indigenous Peoples. The report of Douglas Eyford must address this serious problem. The government's ongoing adversarial actions erode confidence and trust, including in any new comprehensive claims policy.

34. Genuine reconciliation is not possible, when such far-reaching and prejudicial conduct continues to take place at the international level. Canada's actions are incompatible with upholding the honour of the Crown.

Reconciliation

35. The new framework and policy must affirm that reconciliation is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal Peoples. In Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation of 1763*.

36. The federal government must demonstrate that its commitment to reconciliation is an unwavering commitment to a principled and sustained relationship focused on significantly improving the conditions and well-being of all Indigenous Peoples in Canada. Indigenous Peoples must not continue to be impoverished through dispossession of their lands, territories and resources.

37. Canada must acknowledge that the meaning of reconciliation arises from a respectful relationship among all parties, where the path forward is mutually determined rather than unilaterally prescribed.

Endnotes

[1] In Canadian and international law, "Aboriginal Peoples" and "Indigenous Peoples" are used interchangeably. *E.g.*, *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 4.
[2] Aboriginal Affairs and Northern Development Canada, "Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights", September 2014 ["Interim Policy"], http://www.aadnc-aandc.gc.ca/eng/1408631807053/1408631881247.
[3] See *Ibid*., "*A Note on the Text*" that precedes the text.
[4] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44.
[5] *United Nations 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. In regard to Canada's endorsement, see Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010, http://www.aadnc-aandc.gc.ca/eng/1309374239861: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework." [emphasis added]
[6] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(2), at 557
[7] Terms of Reference (July 4, 2013) - Canada/AFN Senior Oversight Committee for Comprehensive Claims (see Appendix 1).
[8] Permanent Forum on Indigenous Issues, *Study on the impacts of the Doctrine of Discovery on indigenous Peoples, including mechanisms, processes and instruments of redress: Note by the secretariat*, UN Doc. E /C.19/2014/3 (20 February 2014) [Study by Forum member Edward John], para 22, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/241/84/PDF/N1424184.pdf?OpenElement
[9] *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352. *Adopted by* U.N. General Assembly on 21 December 1965, opened for signature on 7 March 1966, and *entered into force* on 4 January 1969, preamble. See also *UN Declaration*, fourth preambular para.
[10] Interim Policy (*Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*), September 2014, p. 6.
[11] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*." See also *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 67.
[12] *Tsilhqot'in Nation*, para. 17.
[13] *Ibid.*, para. 23.

[14] *UN Declaration*, arts. 7 (collective security as distinct peoples) and 43 (minimum standards for survival, dignity and well-being).
[15] Interim Policy, at 15: "Outstanding debts owed by the Aboriginal group to the federal Crown will be deducted from final settlements."
[16] *Reconsidering Canada's Comprehensive Claims Policy: A New Approach Based on Recognition and Reconciliation* (July 23, 2013) – available at: http://www.afn.ca/uploads/files/sc/comp_-_bcafn_chiefs_ccp_discussion_guide_-_revised_july_16_2013_(final).pdf

[17] See, *e.g.*, *Canadian Charter of Rights and Freedoms*, preamble: "Whereas Canada is founded upon principles that recognize the Supremacy of God and the rule of law".
[18] See *Canadian Bill of Rights*, S.C. 1960, c. 44: preamble: "Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law".
[19] *Reference re Secession of Québec*, para. 72: "The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the *Constitution Act, 1982*, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. See also *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII), para 28. *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 (CanLII), at para 28.
[20] *Reference re Secession of Québec* at para 72. While some consider Constitutionalism and the Rule of Law to be distinct, this submission will focus mainly on the importance of Rule of Law, including the importance of constitutionalism.
[21] *Reference re Secession of Québec*, para 49.
[22] *Ibid*. at para. 82, read together with para. 49.
[23] For a similar view, see Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dalhousie L.J. 5, at 12, n. 15.
[24] *Reference re Secession of Québec* at para 74. Note the draft policy cites the 2013 report, *Forging Partnerships, Building Relationships Aboriginal Canadians and Energy Development.* Development of extractive industries viewed by the Crown to be in the best interests of Canada may come into conflict with the rights of Indigenous Peoples. See generally, United Nations Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples; Extractive industries and indigenous peoples*, A/HRC/24/41 (1 July 2013).
[25] *Reference re Secession of Québec*, at para. 74.
[26] *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212, at para 64.
[27] *Reference re Secession of Québec*, at para. 74.
[28] *Casimel v. Insurance Corp. of British Columbia*, 1993 CanLII 1258 (BC CA) .
[29] See generally *Reference re Secession of Québec*, as discussed *supra*.
[30] R. *v. Hape,* [2007] 2 SCR 292, 2007 SCC 26 (CanLII) . See, more specifically, *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445. (CanLII). The importance of international law rules will be explored below.
[31] For example, once a claim has been accepted for negotiation, preliminary negotiations commence only "when the Minister of Aboriginal Affairs and Northern Development judges the likelihood of successful negotiations to be high, the settlement of claims in the area to be a priority and where active provincial and territorial involvement may be obtained as necessary." This suggests that claims may be accepted for negotiations, but not moved into preliminary negotiations for any number of 'policy reasons' – the Interim Policy does not even specify that the likelihood of success is linked in any way to the legal positions of the parties. Each of these considerations is a policy consideration, which is not subjected to any explicit legal guidance. In effect, whether preliminary negotiations proceed appears to be a decision that is made by the Minister without any regard for any law, nor for the rights of the aboriginal claimant.
[32] *R. v. Adams*, [1996] 3 SCR 101, 1996 CanLII 169 (SCC), at para 54.
[33] *Reference re Secession of Québec* at para. 70. Consider the Negotiation of Non-Treaty Agreements outlined in the Interim Policy. At page 17, the Interim Policy notes, "Entry into non-treaty agreement negotiations with Canada will commence once a proposal has been received and approved by Canada." The criteria for approval are left unstated, leaving claimants with no meaningful direction in terms of whether to pursue a non-treaty arrangement.

[34] *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 1981 CanLII 25 at pp 805-806.
[35] The Interim Policy contains no means for Aboriginal claimants who disagree with a discretionary decision to file a complaint or seek a hearing. Moreover, because much of the Interim Policy is dependent on non-legal discretionary criteria, Aboriginal claimants would have difficulty challenging such decisions via judicial review. This issue will be explored in more depth below.
[36] Aboriginal Affairs and Northern Development Canada, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 (2014)*.
[37] *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245, 2002 SCC 79, at para 96. See also *Guerin v. The Queen*, [1984] 2 SCR 335 1984 CanLII 25 (SCC).
[38] UN Committee on the Elimination of Racial Discrimination General Recommendation XXIII: Rights of indigenous peoples (Fifty-first session, 1997), UN Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003).
[39] U.N. General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965; *International Covenant on Economic, Social and Cultural Rights,* adopted by General Assembly resolution 2200 (XXI) of 16 December 1966; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966.
[40] 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.
[41] Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. l), 18th session, 19 March – 14 April 1962, at para. 105 (emphasis added).
[42] U.N. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,* S. James Anaya, 11 August 2008, U.N. Doc. A/HRC/9/9, at paras. 85, 86
[43] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, U.N. Doc. A/HRC/15/37/Add.1 (15 September 2010) (Advance Version), at para. 112; P. Joffe, "U.N. Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation" (2010) 26 NJCL 121, at paras 206-207
[44] 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, U.N. Doc. A/65/264 (9 August 2010), at para. 62
[45] General Assembly, *Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, U.N. Doc. A/67/273 (8 August 2012), at para. 6.
[46] Regional systems include the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.
[47] See Annex in Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007 (adopted without vote), approved in General Assembly, *Report of the Human Rights Council*, UN Doc. A/RES/62/219 (22 December 2007).
[48] 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.
[49] Canada, *Core Document Forming Part of the Reports of States Parties: Canada*, UN Doc. HRI/CORE/CAN/2013 (30 May 2013), III, B. See para. 109.
[50] Canada, *Core Document Forming Part of the Reports of States Parties: Canada*, UN Doc. HRI/CORE/1/Add.91 (12 January 1998), III, C. See para. 124.
[51] Canadian Heritage. Canada's Universal Periodic Review Response to the Recommendations. 2009. http://www.pch.gc.ca/pgm/pdp-hrp/inter/101-eng.cfm
[52] Treasury Board of Canada. *Cabinet Directive on Regulatory Management.* 1 April 2012.
[53] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Para. 70.
[54] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313. Para. 57.
[55] *R* v. *Hape* [2007] 2 S.C.R. 292. Para 53.

[56] *Ibid.*
[57] *Ibid.* R v. Hape [2007] 2 S.C.R. 292. Para. 53.
[58] *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445. Paras. 351-354.
[59] *Canada (Attorney General) v. Canadian Human Rights Commission,* 2013 FCA 75.
[60] Committee on the Elimination of Racial Discrimination, 18th session, Summary record of the 2142nd meeting – 19th and 20th periodic reports of Canada (March 2012), Para. 39.
[61] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada,* UN Doc. E/C.12/1/Add.31 (10 December 1998). Para.18.
[62] UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada.* U.N. Doc. CCPR/C/79/Add.105 (1999). Para 8.
[63] UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada,* UN Doc. CCPR/C/CAN/CO/5 (20 April 2006). Para. 8.
[64] UN 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/18 (25 May 2007), para. 22.
[65] IACHR. *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada*. October 30, 2009. Paras. 37-9.
[66] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* UN Doc. CERD/C/CAN/CO/19-20 (4 April 2012), para. 20.
[67] cf. IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 130.
[68] *Xákmok Kásek Indigenous Community* v. *Paraguay (Merits, Reparations and Costs),* Inter-American Court of Human Rights ("IACtHR"), Ser C No. 214 (Judgment) 24 August 2010, at para. 273.
[69] IACHR, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), October 12, 2004. Para. 167.
[70] cf. IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001.
[71] IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* Judgment of August 31, 2001.
[72] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 130.
[73] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, U.N. Doc. A/HRC/15/37/Add.4 (1 June 2010), at para. 29
[74] IACtHR. *Case of the Saramaka People v. Suriname*. Judgment of November 28, 2007. Para 105. *Cf. United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. General Assembly resolution 60/147 of 16 December 2005, Principle 11. UN Human Rights Committee, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess., UN Doc. CCPR/C/21/Rev.1/Add.13 (26 May 2004). Para. 8.
[75] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay*, *Final Decision.* Judgment of June 17, 2005. Para 143.
[76] *UN Declaration,* Art. 26.
[77] *American Convention on Human Rights*. 1144 U.N.T.S. 123 ("ACHR"), art. 63 (1).
[78] *International Covenant on Civil and Political Rights*. 999 U.N.T.S. 171 ("ICCPR"), Art. 2(3).
[79] *American Declaration of the Rights and Duties of Man Art*. Art. XXIV.
[80] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 180.
[81] *Ibid,* Para. 181.
[82] IACtHR. *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs*. Judgment of March 29, 2006. Para. 128.
[83] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 181.
[84] *Ibid,* Para. 181.
[85] *Ibid,* Para. 149.
[86] *ILO Convention 169 (Indigenous and Tribal Peoples),* 1989, art. 16(4).

[87] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Para. 151.
[88] *UN Declaration* Art. 46(2).
[89] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay*, *Final Decision.* Judgment of June 17, 2005. Paras. 146-148.
[90] IACtHR. *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs*. Judgment of March 29, 2006. Para. 138.
[91] IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize),* October 12, 2004, par. 197 – Recommendation 2.
[92] IACtHR. *Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of August 24, 2010. Series C No. 214. Para. 291 [informal translation from Spanish found in IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010, p. 73]. The Court reached a similar conclusion in the *Awas Tingi* case. Cf. IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 79. Para. 164.
[93] IACtHR. *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 12, 2008. Series C No. 185. Para. 129.
[94] *Ibid,* Para. 137.
[95] IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010. Para. 333.
[96] UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).
[97] *Tsilhqot'in Nation* v. *British Columbia*, [2008] 1 C.N.L.R. 112 (BC Supreme Ct.), para. 1376.
[98] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, paras. 43, 56 and 62: "The territorial boundaries drawn by the trial judge and his conclusions as to Aboriginal title appear to be logical and fully supported by the evidence."
[99] See, *e.g.*, Interim Policy, at 14, in regard to "Subsurface Rights" and "Resource Revenue Sharing".
[100] *Ibid.*, paras. 2, 5, 76, 88, 90-92, 97 and 124.
[101] *Ibid.*, para. 76. In regard to the right to "control", see also paras. 2, 15, 18, 31, 36, 38, 47, 48, 50, 75 and 76.
[102] *Ibid.*, para. 76.
[103] *E.g.*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v *Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, at para. 291: "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."
[104] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24 (where Supreme Court quotes *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 168). In regard to consent, the Court has yet to fully elaborate as to what "very serious issues" may entail.
[105] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, UN Doc. A/ HRC/24/41 (1 July 2013), para. 84. Anaya adds: "Indigenous consent may also be required when extractive activities otherwise affect indigenous peoples, depending on the nature of the activities and their potential impact on the exercise of indigenous peoples' rights." [emphasis added]
[106] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex (Conclusions), at para. 98. [emphasis added]
[107] Such full and timely information must be provided by the Crown in carrying out its duty to consult: see, *e.g.*, *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C.C.A.), at para. 160, cited with approval in *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 64
[108] *Tsilhqot'in Nation*, para. 92. [emphasis added]
[109] *Ibid.* [emphasis added]
[110] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, s. 5(1)(c). [emphasis added]
[111] *Tsilhqot'in Nation*, para. 15. [emphasis added]

[112] *Ibid.*, para. 75.
[113] Permanent Mission of Canada to the United Nations, "Canada's Statement on the World Conference on Indigenous Peoples Outcome Document", New York, 22 September 2014, http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx?lang=eng.
[114] Ryan Beaton, "Aboriginal Title in Recent Supreme Court of Canada Jurisprudence: What Remains of Radical Crown Title?", 33 N.J.C.L. 61 at 78: "the Court has already recognized that such a "veto" is *constitutionally guaranteed* in certain circumstances, if by "veto" we mean simply the right to stop (through recourse to the courts) the Crown from acting unilaterally in cases where the Crown's proposed action is unconstitutional, e.g. where the full consent of the Aboriginal group(s) is constitutionally required but not obtained."
[115] *Ibid.* at 79: "no one is claiming any *arbitrary* veto power".
[116] *Tsilhqot'in Nation*, para. 90.
[117] Human Rights Council, *Human rights, democracy and the rule of law*, UN Doc. A/HRC/RES/19/36 (23 March 2012) (adopted by consensus vote), para. 12.
[118] *Tsilhqot'in Nation*, para. 142. [emphasis added]
[119] *Vancouver (City)* v. *Ward*, 2010 SCC 27, para. 38.
[120] Office of the High Commissioner for Human Rights, "Good Governance and Human Rights", http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.
[121] Permanent Forum on Indigenous Issues, *Report on the thirteenth session (12 – 23 May 2014)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2014/43-E/C.19/2014/11, para. 3. [emphasis added]
[122] Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675, at 12.
[123] *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, para. 25.
[124] *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, para. 44.
[125] Canada (National Energy Board), "Considerations", Report of the Joint Review Panel for the Enbridge Northern Gateway Project, vol. 2, 2013, http://gatewaypanel.review-examen.gc.ca/clf-nsi/dcmnt/rcmndtnsrprt/rcmndtnsrprt-eng.html, at 47: "In keeping with its mandate, the Panel has not made any determinations regarding Aboriginal rights, including Métis rights, treaty rights, or the strength of an Aboriginal group's claim respecting Aboriginal rights."
[126] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 166.
[127] BC Assembly of First Nations, First Nations Summit, Union of BC Indian Chiefs *et al.*, "Resource development in western Canada: Indigenous Peoples' human rights must be respected", joint submission to Prime Minister Stephen Harper, March 26, 2014, http://quakerservice.ca/wp-content/uploads/2014/04/Western-Canada-resource-devt-Joint-Response-Apr-10-14.pdf, at 3.
[128] General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (without a vote).
[129] See Grand Council of the Crees (Eeyou Istchee), Letter, dated 7 November 2014, from Paul Joffe, Legal Counsel, to Robert S. McLean, Executive Director, Environmental Stewardship Branch, Environment Canada (re prejudicial positions by government of Canada at 12th session of the Conference of the Parties in Pyeongchang, Republic of Korea on 6-17 October 2014), http://www.quakerservice.ca/CanadaCOP12Letter.
[130] In the WCIP Outcome Document, State "cooperation" or some other form of collaboration with Indigenous Peoples is included in paras. 1, 3, 5, 7, 8, 9, 16, 17, 18, 20, 21, 23, 25, 27 and 31.
[131] In achieving the ends of the *UN Declaration*, States are required generally as a minimum standard to take appropriate measures "in consultation and cooperation with indigenous peoples": see *UN Declaration*, arts. 38 and 43. See also preambular paras. 18, 19 and articles 15(2), 17(2), 19, 32(2) and 36. In regard to international cooperation, see articles 39 and 41.
[132] Committee on World Food Security, "Making a Difference in Food Security and Nutrition", Forty-first Session, Rome, Italy, 13-18 October 2014, CFS 2014/41/4, http://www.panap.net/sites/default/files/CFS_rai_Principles.pdf. The final version is not yet available.

[133] Food and Agriculture Organization, "No Compromise on the Rights of Indigenous Peoples to FPIC in the CFS!", joint statement of Indigenous Peoples and CSOs, Committee on World Food Security, October 2014, http://www.tni.org/sites/www.tni.org/files/final_statement_on_the_fpic_for_indigenous_people.pdf.
[134] See, *e.g.*, *Universal Declaration of Human Rights*, article 19; *International Covenant on Civil and Political Rights*, article 19(2); and Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of Opinion and Expression*, UN Doc. CCPR /C/GC/34 (12 September 2011), para. 18: "Article 19, paragraph 2 embraces a right of access to information held by public bodies."
[135] Toby Mendel, *Freedom of Information: A Comparative Legal Survey*, 2nd ed. (Paris: UNESCO, 2008), at 4: "Information is an essential underpinning of democracy at every level. … Effective participation … depends, in fairly obvious ways, on access to information, including information held by public bodies."
[136] Office of the High Commissioner for Human Rights, "A New Climate Change Agreement Must Include Human Rights Protections For All", An Open Letter from Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the occasion of the meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn (20-25 October 2014), 17 October 2014, http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf.
[137] *Tsilhqot'in Nation*, para. 73.
[138] *Ibid.*, para. 70. [emphasis added]
[139] Brian Slattery, "The Constitutional Dimensions of Aboriginal Title", Speaking Notes, Pacific Business and Law Institute, Conference on 7-8 October 2014 re Tsilhqot'in Nation and Recognition of Aboriginal Title at the Supreme Court of Canada: Analysis & Impact, Vancouver, 2 October 2014, at 1.
[140] *Ibid.*, at 2.
[141] *Tsilhqot'in Nation*, para. 73.
[142] *Ibid.*, paras. 2, 18, 75 and 76.
[143] *Ibid.*, para. 75. See also *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 66: "The ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty." And at para. 67: "'... when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights.'" (quoting Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 *S.C.L.R.* (2d) 433, at 436, emphasis added). *Haida Nation*, *supra*, para. 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty and assumed Crown sovereignty".
[144] *Ibid.*, para. 75.
[145] *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical art. 1. In regard to the right of self-determination, see also *UN Declaration*, preambular paras.16, 17 and arts. 1-4.
[146] S. James Anaya, *Indigenous Peoples in International Law*, 2nd ed. (Oxford/New York: Oxford University Press, 2004), at 150: "Self-government is the overarching political dimension of ongoing self-determination." See also *UN Declaration*, article 4; and Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at 175: "Self-government ... is one natural outcome of the exercise of self-determination".
[147] The right to development is affirmed in *UN Declaration*, arts. 20, 23, 26(2) and 32(1); and *Declaration on the Right to Development*, GA Res. 41/128, 41 UN GAOR, Supp. (No. 53) UN Doc. A/41/925 (1986), http://www.un.org/documents/ga/res/41/a41r128.htm. The right to development, as included in this 1986 *Declaration*, was affirmed in *Vienna Declaration and Programme of Action*, adopted by consensus at World Conference on Human Rights, 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), which in turn was endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993) (adopted without vote).
[148] Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex - Expert Mechanism Advice No. 2 (2011), para. 20: "... the right to free, prior and informed consent is embedded in the right to self-determination. ... [T]he right of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is an integral element of that right." [emphasis added]

[149] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 119: "Self-determination has never simply meant independence. It has meant the free choice of peoples."; and Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at 175: "Self-government ... is one natural outcome of the exercise of self-determination and refers to the right of peoples to exercise political autonomy. Self-determination refers to the collective power of choice; self-government is one possible result of that choice." [emphasis added]
[150] *Tsilhqot'in Nation*, paras. 67 and 75.
[151] Brian Slattery, "The Constitutional Dimensions of Aboriginal Title", *supra*, at 12. [emphasis added]
[152] See also *Canada* v. *Kitselas First Nation*, 2014 FCA 150, para. 34, where the Federal Court of Appeal referred to "deep underlying constitutional underpinnings stemming notably from the *Royal Proclamation, 1763*".
[153] Brian Slattery, "The Constitutional Dimensions of Aboriginal Title", *supra*, at 17-18.
[154] *Tsilhqot'in Nation*, *supra*, paras. 35, 41 and 49. Similarly, see *Delgamuukw*, *supra*, para. 157.
[155] Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?", (2012) 91 Can. Bar Rev. 745 at 751: "Indigenous Peoples …were in occupation because they exercised governmental authority over their territories, in part through the application of their own laws". See also pp. 749 and 752.
[156] *Reference re Secession of Quebec, supra*, para. 64.
[157] See, *e.g.*, Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.
[158] Royal Commission on Aboriginal Peoples, Report of the Royal Commission on Aboriginal Peoples, (Ottawa: Canada Communication Group, 1996), vol. 2(1), para. 168.
[159] "Interim Policy", at 7.
[160] "Interim Policy", at 21. [emphasis added]
[161] Aboriginal Affairs and Northern Development Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government", http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844. [emphasis added]
[162] WCIP Outcome Document, *supra*, para. 40. The above quote refers to UN Human Rights Council report A/HRC/21/24.
[163] Interim Policy, at 7.
[164] *Ibid.*
[165] *Tsilhqot'in Nation*, para. 149. See also para. 105: "it is to be hoped that Aboriginal groups and the provincial government will work cooperatively to sustain the natural environment so important to them both." [emphasis added]
[166] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 49 and 82, where Court added that "protection of existing aboriginal and treaty rights" could be looked at in its own right or as part of the underlying constitutional principle of "respect for minorities". [emphasis added]
[167] *Reference re Securities Act*, [2011] 3 S.C.R. 837, para. 133.
[168] Interim Policy, "Forward", at 6.
[169] Indian Affairs and Northern Development, *Gathering Strength - Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services, 1997), http://www.ahf.ca/downloads/gathering-strength.pdf.
[170] *UN Declaration*, last preambular para.
[171] *Ibid.*, preambular para. 15. See also preambular para. 19: "*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned". [emphasis added]
[172] *Ibid.*, para. 86.

[173] *Ibid.*, para. 23.
[174] *Ibid.*, para. 74.
[175] See also Brian Slattery, "The Constitutional Dimensions of Aboriginal Title", *supra*, at 14.
[176] *Ibid.*, para. 83.
[177] *Ibid.*, paras. 2 and 88.
[178] *Ibid.*, para. 86.
[179] *Ibid.*, para. 87.
[180] Matthew Collins *et al.*, "2013: Long-term Climate Change: Projections, Commitments and Irreversibility", ch. 12 in T.F. Stocker *et al.*, eds.., *Climate Change 2013: The Physical Science Basis*, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_Chapter12_FINAL.pdf, at 1033: "A large fraction of climate change is largely irreversible on human time scales, unless net anthropogenic CO2 emissions were strongly negative over a sustained period." [bold in original, underline added]
[181] Office of the Auditor General of Canada, *Report of the Commissioner of the Environment and Sustainable Development – Fall 2014* (Ottawa: Minister of Public Works and Government Services, 2014), ch. 1 "Mitigating Climate Change", at 32 "Conclusions", para. 1.80: "We are concerned that Canada will not meet its 2020 emission reduction target and that the federal government does not yet have a plan for how it will work toward the greater reductions required beyond 2020."
See also "No more excuses on climate", *The [Montreal] Gazette*, editorial (14 November 2014) A18: "Canada … increasingly finds itself isolated on environmental issues. The governing Conservatives' record on climate change is one of the worst in the world. … Canada has not implemented emission rules for the oilpatch, has not committed itself to even monitor emissions from the oilsands sector after 2015, has no plan to meet its Copenhagen target of reducing emissions by 17 per cent compared to 2005 levels by 2020 …"
[182] Rio+20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), para. 190. Endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote).
[183] *Ibid.* para. 158.
[184] See, *e.g.*, *Rio Declaration on Environment and Development*, UN Doc. A/Conf. 151/5/Rev. 1(13 June 1992) endorsed by General Assembly, *Report of the United Nations Conference on Environment and Development*, UN Doc. A/RES/47/190 (22 December 1992) (adopted without vote), Principle 3: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." [emphasis added] See also *UN Declaration*, preambular para. 11 ("sustainable and equitable development").
[185] In regard to safeguarding present and future generations, see *Tsilhqot'in Nation*, paras. 15, 74, 86, 88, 94 and 121.
[186] See, *e.g.*, *Tsilhqot'in Nation*, para. 73.
[187] *Ibid.*, para. 76.
[188] *Convention on Biological Diversity*, concluded at Rio de Janeiro (5 June 1992) (entered into force 29 December 1993), http://www.cbd.int/convention/text/.
[189] *Federal Sustainable Development Act*, S.C. 2008, c. 33, s. 5.
[190] Rio+20 United Nations Commission on Sustainable Development, *The future we want*, *supra*, para. 9. See also para. 39: "in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature."
[191] *Ibid.* para. 49.
[192] Dalee Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?, (1993) 3 Transnat'l L. & Contemp. Probs. 13, at 31. The author adds: "No other people are pressured to 'extinguish' their rights to lands. This is racial discrimination."
See also UN 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), October 12, 1970, para. 1 (continued colonialism is a "crime" that violates *Charter of the United Nations*); and *R. v. Ipeelee*, 2012 SCC 13, para. 60 (effects of colonialism).
[193] *UN Declaration*, art. 8(1) and 8(2)(b).
[194] UNICEF, *Poverty Reduction Begins with Children*, New York, March 2000, at 39 (Summary): "Poverty is a denial of human rights and human dignity." World Conference against Racism, Racial Discrimination, Xenophobia

and Related Intolerance, *Declaration*, adopted in Durban, South Africa, 8 September 2001, para. 18: "poverty, underdevelopment, marginalization, social exclusion and economic disparities are closely associated with racism, racial discrimination, xenophobia and related intolerance, and contribute to the persistence of racist attitudes and practices which in turn generate more poverty".
See also Rio+20 United Nations Commission on Sustainable Development, *The future we want*, *supra*, at para. 2: "Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development."
[195] *Tsilhqot'in Nation*, para. 13. [emphasis added]
[196] Interim Policy, at 18: "The Aboriginal group will be advised by the Minister of Aboriginal Affairs and Northern Development, within twelve months, as to whether the claim is accepted or rejected. In the event that a claim is rejected, reasons will be provided in writing to the Aboriginal group."
[197] *Ibid*, para. 69 [underline added].
[198] See also *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 200 (reasons of La Forest and L'Heureux-Dubé JJ. were delivered by La Forest): "In essence, the rights set out in the Proclamation … were applied in principle to aboriginal peoples across the country". [emphasis added]
[199] Brian Slattery, "Is the Royal Proclamation of 1763 a dead letter?", *Canada Watch*, Fall 2013, 6 at 6, http://activehistory.ca/wp-content/uploads/2013/09/CW_Fall2013.pdf. See also Aboriginal Affairs and Northern Development Canada, "'Creating Canada: From the Royal Proclamation of 1763 to Modern Treaties' Symposium", Speaking Notes for Minister Bernard Valcourt, Museum of Civilization, Gatineau, Québec, October 7, 2013, http://www.aadnc-aandc.gc.ca/eng/1381156885861/1381156990723: "Two hundred and fifty years after the Royal Proclamation was issued, the guiding principles of that decree continue to guide the negotiation and implementation of modern treaties in Canada today."
[200] *R. v. Kapp*, 2008 SCC 41, *per* McLachlin CJ and Abella J. on behalf of the majority, para. 63.
[201] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 42.
[202] Brian Slattery, "The Constitutional Dimensions of Aboriginal Title", Speaking Notes, Pacific Business and Law Institute, Conference on 7-8 October 2014 re Tsilhqot'in Nation and Recognition of Aboriginal Title at the Supreme Court of Canada: Analysis & Impact, Vancouver, 2 October 2014, at 17.
[203] Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8, where it is indicated: "the practice of extinguishing inherent aboriginal rights be abandoned".
[204] *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, identical article 5(1): "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights … recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."
[205] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N. Doc. E/C.12/1/Add.31 (10 December 1998), para. 18; and Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* CERD/C/61/CO/3 (3 August 2002), paras. 17, 22.
[206] Brian Slattery, *The Organic Constitution: Aboriginal Peoples and the Evolution of Canada*, (1995) 34 Osgoode Hall L.J. 101, at 111.
[207] Subsection 35(3) of the *Constitution Act, 1982* was subsequently added: "For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired."
[208] Land Claims Agreements Coalition, *Honour, Spirit and Intent: A Model Canadian Policy on the Full Implementation of Modern Treaties between Aboriginal Peoples and the Crown*, 2008, http://www.landclaimscoalition.ca/assets/LCAC_Model_Policy_Document2.pdf.
[209] *Tsilhqot'in Nation*, para. 23. [emphasis added]
[210] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 32. [emphasis added]
[211] *Manitoba Metis Federation Inc.* v. *Canada (Attorney General)*, 2013 SCC 14, para. 66.
[212] *UN Declaration*, preambular para. 18. See also Office of the High Commissioner for Human Rights, "Good Governance and Human Rights", at p. 1.
[213] Office of the High Commissioner for Human Rights, "Rule of law without human rights is an empty shell", 5 October 2012, http://www.ohchr.org/EN/NewYork/Stories/Pages/Ruleoflawmeeting.aspx.

[214] Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex – Expert Mechanism Advice No. 6 (2014): Restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, para. 1.
[215] *Haida Nation* para. 20
[216] *Delgamuukw*, at para. 186
[217] *Misikew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, at para. 1
[218] *R v Ipeelee,* 2012 SCC 13, para. 60
[219] Permanent Forum on Indigenous Issues, *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress: Note by the secretariat*, UN Doc. E /C.19/2014/3 (20 February 2014) [Study by Forum member Edward John], para 22, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/241/84/PDF/N1424184.pdf?OpenElement
[220] Courtney Jung, "Transitional justice for indigenous people in a non-transitional society", International Center for Transitional Justice, October 2009, at p. 3: "one of the historic injustices that lie at the heart of indigenous identity is loss of sovereignty. Indigenous peoples are defined in part by the fact that their sovereignty was not recognized by colonial powers that appropriated territory and sovereignty under the doctrine of terra nullius."
[221] Hon. Lance Finch, "The duty to learn: taking account of indigenous legal orders in practice", Continuing Legal Education Society of British Columbia Indigenous Legal Orders and the Common Law Conference, 15 November 2012.