

**Indigenous Peoples' Human Rights, *UN Declaration* and
Sustainable Development in International Law**

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Indigenous Peoples' Human Rights, *UN Declaration* and Sustainable Development: Importance of International Perspectives

Paul Joffe

Introduction

The central purpose of this paper is to address Indigenous peoples' human rights and the *UN Declaration on the Rights of Indigenous Peoples*¹ in the context of sustainable development. All these elements are grounded in international law² and this paper addresses these issues from an international law perspective.

At the global level, the international community has taken the lead in crafting sustainable development strategies and approaches that have gained widespread support. Over the years, the United Nations has adopted by consensus key instruments that have contributed to a more robust strategy for sustainable development. The most significant instrument to date is *Transforming Our World: The 2030 Agenda for Sustainable Development*.³

Sustainable development – as defined in international law – should prove highly beneficial to Indigenous peoples and to Canada as a whole. Yet sustainable development has largely not taken place in Canada, despite the severe and ongoing impacts of resource development in regard to Indigenous peoples. The *UN Declaration* recognizes that “respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”.⁴

Prior to delving into sustainable development in the Indigenous context in Canada, this paper addresses aspects of the *UN Declaration*. Since the *Declaration* is often misunderstood, it is important to emphasize that this universal human rights instrument that applies to over 370 million Indigenous people worldwide is not merely aspirational. It has diverse legal effects.

Moreover, the *UN Declaration* is inseparably linked to the Calls to Action of the Truth and Reconciliation Commission of Canada (TRC).⁵ This affects the importance of the *Declaration* in both legal and political terms. Further, the nature and extent of the Trudeau government commitments in regard to both the *Declaration* and the TRC Calls to Action have far-reaching positive effects that relate to sustainable development.

The rest of the paper addresses sustainable development. It examines how the eradication of poverty and protection of human rights are essential elements of the global sustainable strategy. In addition, certain groups, such as Indigenous peoples, women and children – because of their heightened vulnerability – must be protected according to a higher standard.

Taking into account all of the above factors, Canada's sustainable development strategy and initiatives for reform are examined.

The paper concludes that, when States working in collaboration with Indigenous peoples take a human rights based approach, sustainable development and justice for Indigenous peoples in Canada can be achieved.

1. “Principles” of the *UN Declaration*

The terms of reference of the National Energy Board Modernization Expert Panel includes, *inter alia*, the following:

The Panel shall, in reviewing the NEB structure, role, and mandate, consider the relationship between NEB processes and the Aboriginal and treaty rights of Indigenous peoples, as well as the *relationship between NEB processes and the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.⁶

It is of interest to note that, in the Terms of Reference for the Expert Panel for the Review of Environmental Assessment Processes, the government of Canada indicated that it “fully supports the principles of the United Nations Declaration on the Rights of Indigenous Peoples”.⁷ It also called on the Panel to “reflect the principles of the Declaration in its recommendations”.⁸

In light of the above, it is useful to examine what the term “principles” in the context of the *UN Declaration* entails. The Minister of Justice and Attorney General of Canada Jody Wilson-Raybould has referred synonymously to the “principles” of the *Declaration* as “minimum standards”:

... for Indian, Inuit and Metis peoples we can and will breathe life into section 35 of Canada’s Constitution, which recognizes and affirms existing Aboriginal and treaty rights, *by embracing the principles or minimum standards* articulated in the United Nations Declaration on the Rights of Indigenous peoples and guided by the dozens of court decisions that provide instruction.⁹

Clearly, the term “principles” of the *UN Declaration* does not deny that the *Declaration* has legal effect. As former Special Rapporteur on the rights of indigenous peoples, James Anaya, has underlined: “[I]mplementation of the Declaration should be regarded as political, moral and, yes, *legal imperative* without qualification”.¹⁰

Further, the first preambular paragraph of the *UN Declaration* affirms that it is “[g]uided by the purposes and principles of the Charter of the United Nations”. Such purposes and principles in the UN Charter are legally binding.¹¹

It is also worth noting that, in the outcome document of the World Conference on Indigenous Peoples, States reaffirmed by consensus their “solemn commitment to respect, promote and advance and in no way diminish the rights of indigenous peoples and to *uphold the principles of the Declaration*”.¹²

2. *UN Declaration* is not merely aspirational – has diverse legal effects

To date, the UN General Assembly has reaffirmed the *UN Declaration* by consensus three times.¹³ This reinforces its overall influence and legal effect. In 2011, New Zealand’s Waitangi Tribunal declared that the *UN Declaration* “represents the most important statement of indigenous rights ever formulated.”¹⁴

In his 2016 book on the *UN Declaration*, Mauro Barelli concluded: “in light of the authoritativeness and legitimacy that the Declaration has acquired in the international legal system, States are *not in a position to dismiss it as a mere aspirational text*. ... In particular ... the UNDRIP can be used as an authoritative instrument to clarify, interpret and expand the meaning and scope of regional and domestic laws.”¹⁵

It is important to underscore that the *Declaration* affirms the inherent¹⁶ human rights of Indigenous peoples. It does not create new rights. The *UN Declaration* is “an interpretative document that explains how the existing human rights are applied to Indigenous peoples and their contexts. It is a restatement of principles for postcolonial self-determination and human rights”.¹⁷ Former Special Rapporteur on the rights of Indigenous peoples James Anaya has concluded:

... the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a **contextualized elaboration** of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.¹⁸

In 2013, in *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, the Federal Court ruled: “International instruments such as the [*UN Declaration on the Rights of Indigenous Peoples*] and the *Convention on the Rights of the Child* may also inform the contextual approach to statutory interpretation”.¹⁹

In 2012, Canada highlighted to the UN Committee on the Elimination of Racial Discrimination the relevance of the *UN Declaration*: “While it had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, *including the Constitution*.”²⁰ This interpretive rule is not new.

Former Chief Justice Brian Dickson of the Supreme Court of Canada stressed in 1987: “The various sources of international human rights law - *declarations*, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms - must, in my opinion, be *relevant and persuasive sources for interpretation* of the Charter's provisions.”²¹ The same rule necessarily applies to the “guarantee of Aboriginal rights” in s. 35 of the *Constitution Act, 1982*.²²

If international declarations are being used by Canada’s highest court to interpret human rights in the *Canadian Charter of Rights and Freedoms*²³ in Part I of the *Constitution Act, 1982*, then the same rule must be applied to Indigenous peoples’ human rights²⁴ in Part II of the same *Act*, namely section 35. To do otherwise, would create a discriminatory double standard.

In *Tsilhqot’in Nation v. British Columbia*, the Supreme Court ruled “Parts I and II are *sister provisions*, both operating to limit governmental powers, whether federal or provincial.”²⁵

The Supreme Court of Canada has also determined: “Compliance with *Charter* standards is a foundational principle of good governance.”²⁶ Thus, the same rule of compliance and good governance must be applied to Indigenous peoples’ human rights in section 35.²⁷

Good governance requires “full protection of human rights”.²⁸ The UN Office of the High Commissioner for Human Rights has underlined: “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.”²⁹

Aboriginal rights affirmed in section 35 of the *Constitution Act, 1982* are subject to progressive interpretation.³⁰ This is consistent with the “living tree” doctrine³¹ that applies to Canada’s Constitution. As decided by Canada’s highest Court: “Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”³²

The *UN Declaration* constitutes such a “new social, political and historical” reality – a consensus human rights instrument that elaborates on the rights of Indigenous peoples globally. As the Supreme Court indicated in *Reference re Same-Sex Marriage*: “A large and liberal, or progressive, interpretation ensures the *continued relevance and, indeed, legitimacy* of Canada’s constituting document.”³³

Human rights instruments, such as the *UN Declaration*, are generally drafted in broad terms so as to accommodate a wide range of circumstances both foreseen and unforeseen. Should any human rights dispute arise, a “contextual analysis” would take place based on the particular facts and law in a specific situation. This is the just approach that is generally accepted in both international³⁴ and domestic³⁵ law.

It is worth noting that the *American Declaration on the Rights of Indigenous Peoples*,³⁶ adopted in June 2015, affirms in Article XIX:

1. Indigenous peoples have the right to live in harmony with nature and to a **healthy, safe, and sustainable environment**, essential conditions for the full enjoyment of the rights to life and to their spirituality, cosmovision, and collective well-being.
2. Indigenous peoples have the right to conserve, restore, and protect the environment and to manage their lands, territories and resources **in a sustainable way**.³⁷

Indigenous peoples in the Americas³⁸ now have two declarations that explicitly affirm and elaborate upon their human rights and related State obligations. The *American Declaration* includes some provisions that fall below the *UN Declaration* and others that go beyond. In addition, both include provisions that the other does not have.

In any specific situation, the minimum standard is the one that is *higher* in these two human rights instruments.³⁹ Canada must respect the synergies between the *American Declaration* and the *UN Declaration*, which have far-reaching effects.

3. *UN Declaration* and TRC Calls to Action are inseparably linked

In its Calls to Action 43, the Truth and Reconciliation Commission (TRC) highlighted a most crucial aspect:

We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.⁴⁰

Since the *UN Declaration* is “the framework” for reconciliation, then failure of any of these four levels of government to adopt and implement this human rights instrument would also serve to unjustly undermine the TRC Calls to Action. Moreover, the *Declaration* is included in 16 Calls to Action.

In the Summary of its Final Report, the TRC emphasized: “The Commission is convinced that a refusal to respect the rights and remedies in the *Declaration* will serve to *further aggravate the legacy* of residential schools, and will *constitute a barrier to progress towards reconciliation*.”⁴¹

In Call to Action 44, the TRC calls upon the Government of Canada “to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.” The need for such a national action plan has been emphasized by international bodies,⁴² as well as the Minister of Justice and Attorney General of Canada.⁴³

Call to Action 92 calls upon the corporate sector in Canada to “adopt the *United Nations Declaration* ... as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.”⁴⁴ This would include, *inter alia*: “Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.”

According to the “Guiding Principles on Business and Human Rights”: “The responsibility of business enterprises to respect human rights refers to internationally recognized human rights”.⁴⁵ This would clearly include Indigenous peoples’ human rights in the *UN Declaration*.

In regard to conflict, former Special Rapporteur Anaya has identified “natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide.”⁴⁶ In relation to Indigenous consent, Anaya has concluded:

It is generally understood that indigenous peoples’ rights over lands and resources in accordance with customary tenure are necessary to their survival. Accordingly, indigenous consent is presumptively a requirement for those aspects of any extractive project taking place within the officially recognized or customary land use areas of indigenous peoples, or that otherwise affect resources that are important to their survival.⁴⁷

Reconciliation is an essential process when addressing Indigenous peoples' Aboriginal and Treaty rights and related injustices. As the Supreme Court has emphasized, reconciliation is “a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.”⁴⁸

This means that such rights are subject to balancing that takes into account a wide range of principles including respect for the rights of others. As affirmed in the *UN Declaration*, Indigenous rights may be subject to limitations or lawful infringement, based on strict criteria that can be objectively determined.⁴⁹

4. *UN Declaration* – Trudeau government commitments

Prime Minister Justin Trudeau has included the following commitment in the mandate letters of all Ministers:

No relationship is more important to me and to Canada than the one with Indigenous Peoples. It is time for a **renewed, nation-to-nation relationship** with Indigenous Peoples, based on **recognition of rights, respect, co-operation, and partnership**.⁵⁰

The Prime Minister added in such mandate letters: “Our platform guides our government. Over the course of our four-year mandate, I expect us to deliver on all of our commitments.”

Further, Canada requested that its statement be added as a footnote in the *American Declaration on the Rights of Indigenous Peoples*. This statement included, *inter alia*, the following commitment: “Canada reiterates its commitment to a renewed relationship with its indigenous peoples, based on recognition of rights, respect, cooperation and partnership.”⁵¹ Such “commitment” in a regional human rights instrument appears to have legal, and not just political, implications.

In October 2016, the Prime Minister declared: “We’re absolutely committed to [the UN Declaration], as we are to the Calls to Action of the Truth and Reconciliation Commission.”⁵² In May 2016, the Minister of Indigenous and Northern Affairs declared at the UN Permanent Forum on Indigenous Issues: “I’m here to announce, on behalf of Canada, that we are now a full supporter of the Declaration *without qualification*.”⁵³

The Minister added: “By adopting and implementing the Declaration ... *we are breathing life into Section 35 and recognizing it now as a full box of rights* for Indigenous peoples in Canada. ... [O]ur constitutional obligations serve to fulfil all of the principles of the declaration, including “free, prior and informed consent.”

In February 2017, the Prime Minister announced the creation of a Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples and whose mandate includes three essential criteria:

The Working Group of Ministers responsible for the review will examine relevant federal laws, policies, and operational practices to help ensure the Crown is *meeting its constitutional obligations* with respect to Aboriginal and treaty rights;

*adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission's Calls to Action.*⁵⁴

The Working Group will be comprised of six Ministers⁵⁵ and will work with Indigenous leaders, youth, and experts on various legal and policy questions relating to Indigenous peoples.

In February 2017, the Minister of Justice and Attorney General of Canada Jody Wilson-Raybould highlighted:

Two of the most important articles ... of the UNDRIP are articles 3 [**right of self-determination**] and 4 [**right of self-government**]. ... In stark contrast to the Declaration, the *Indian Act* imposes a system of band council government. Obviously, on the face of it, a federal statute such as the *Indian Act* determining the political status of a group of Indigenous peoples is contrary to Article 3 and 4 of the Declaration.⁵⁶

Minister Wilson-Raybould has also previously indicated: “many of our current realities do not align with the standards of UNDRIP and, as such, they must be systematically and coherently dismantled.”⁵⁷ In November 2016, the Minister elaborated: “Indigenous laws and legal orders are central to the work of reconciliation and creating new nation-to-nation relationships. Both Section 35 of the Constitution and the United Nations Declaration speak to this. And many of the truth and reconciliation calls to action touch on the need to understand and engage Indigenous laws. Canada has always been a country with dimensions of legal pluralism”.⁵⁸

To date, the implementation of all of the above commitments has been to a large extent very slow. In most instances, concrete progress is not readily apparent. Therefore, it is all the more important to adopt a *legislative framework*⁵⁹ for ongoing implementation of the *UN Declaration*. As the Minister of Justice and Attorney General of Canada indicated in the House of Commons in April 2016:

We need to develop a national reconciliation framework in partnership with indigenous communities ... *That reconciliation framework needs to survive the life of one government.*

... I look to *international minimum standards that are articulated in the United Nations Declaration on the Rights of Indigenous Peoples*. We need to ensure that we look at the Truth and Reconciliation Commission recommendations. We need to ensure, with respect to our relationship with indigenous peoples in the country, that we put it in place in terms of the constitutional relationship that is required with respect to section 35.⁶⁰

The Trudeau government's focus on Indigenous peoples' human rights and the *UN Declaration* is wholly consistent with the human rights-based approach to sustainable development in international law. As the December 2016 Report of the UN Secretary-General underscores the “2030 Agenda is *unequivocally anchored in human rights* ... the Sustainable Development Goals aim to realize the human rights of all, and emphasizes the responsibilities of all States to respect, protect and promote human rights ... for all, without distinction of any kind”.⁶¹

5. Sustainable development, poverty and human rights

In September 2015, the UN General Assembly adopted by consensus a key instrument for achieving sustainable development globally – *Transforming Our World: The 2030 Agenda for Sustainable Development*.⁶² In particular, States resolved:

between now and 2030, to *end poverty and hunger everywhere*; to combat inequalities within and among countries; to build peaceful, just and inclusive societies; to *protect human rights and promote gender equality and the empowerment of women and girls*; and to *ensure the lasting protection of the planet and its natural resources*.⁶³

States added: “we pledge that *no one will be left behind*. ... we wish to see the Goals and targets met for all nations and peoples and for all segments of society. And we will *endeavour to reach the furthest behind first*.”⁶⁴ In December 2015, the General Assembly stressed “the need to ensure that no one is left behind, including indigenous peoples, who will benefit from and participate in the implementation of the 2030 Agenda”.⁶⁵

On January 1, 2016, the 17 Sustainable Development Goals of the 2030 Agenda for Sustainable Development came into force. Along with such Goals, there are 169 associated targets. However, sustainable development existed in international law prior to the 2030 Agenda.

In 1987, the World Commission on Environment and Development defined “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁶⁶

“Development” in international law had always included both economic and social development.⁶⁷ However, the 1992 Rio Conference on Environment and Development added environmental considerations to such development – and introduced the term “sustainable development” into international law.

Principle 3 of the *Rio Declaration on Environment and Development* provides: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”⁶⁸ Principle 22 adds: “Indigenous people and their communities ... have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly *support their identity, culture and interests and enable their effective participation* in the achievement of sustainable development.”⁶⁹

In 2012, in *The future we want*, the Rio+20 United Nations Commission on Sustainable Development emphasized the importance of respecting all human rights:

We also reaffirm the importance of freedom, peace and security, *respect for all human rights, including the right to development and the right to an adequate standard of living*, including the right to food, the rule of law, gender equality, the

empowerment of women and the overall commitment to just and democratic societies for development.⁷⁰

The same instrument reaffirms the importance of “international instruments relating to human rights and international law” and the “responsibilities of all States ... to respect, protect and promote human rights ... for all, without distinction of any kind”.⁷¹ It is also indicated that “democracy, *good governance* and the rule of law ... are essential for sustainable development, including environmental protection and the *eradication of poverty* and hunger”.⁷²

It is important to note that *The future we want* also recognized by consensus “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*.”⁷³

In July 2015, the General Assembly adopted by consensus the *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*:

Our goal is to *end poverty* and hunger, and to achieve sustainable development in its three dimensions ... We commit to *respect all human rights*, including the right to development. We will ensure gender equality and *women’s and girls’ empowerment*. We will promote peaceful and inclusive societies and advance fully towards an equitable global economic system where no country or person is left behind, enabling decent work and productive livelihoods for all, *while preserving the planet for our children and future generations*.⁷⁴

In the context of sustainable development, it is important to underline that Indigenous peoples have the “right to determine and develop priorities and strategies for exercising their right to development.”⁷⁵ Indigenous peoples’ right to development is an integral part of their right to self-determination and is included in other provisions of the *UN Declaration*.⁷⁶

5.1 Ending poverty

In *The future we want*, States affirmed by consensus: “*Eradicating poverty is the greatest global challenge facing the world today* and an indispensable requirement for sustainable development. In this regard we are committed to freeing humanity from poverty and hunger as a matter of urgency.”⁷⁷ Further, UNICEF has underlined: “Poverty is a denial of human rights and human dignity.”⁷⁸

In December 2016, the General Assembly emphasized: “*poverty is an affront to human dignity* ... extreme poverty and hunger are among the greatest global threats and require the collective commitment of the international community for their eradication, pursuant to ... Sustainable Development Goals”.⁷⁹

5.2 Protecting vulnerable groups

The 2017 *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* elaborates on the general obligations of States to protect against environmental harm where human rights are threatened:

States have obligations to adopt legal and institutional frameworks that effectively protect against environmental harm that interferes with the enjoyment of human rights. ... [T]he loss of ecosystem services and biodiversity threatens a broad spectrum of rights, including the rights to life, health, food, water, culture and non-discrimination. *States therefore have a general obligation to safeguard biodiversity in order to protect those rights from infringement.* That obligation includes a duty to protect against environmental harm from private actors ...⁸⁰

The UN Human Rights Council has cautioned that “while the human rights implications of environmental damage are felt by individuals and communities around the world, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations”.⁸¹

In regard to climate change, the Office of the High Commissioner for Human Rights (OHCHR) has cautioned: “... negative impacts will increase exponentially according to the degree of climate change that ultimately takes place and will disproportionately affect *individuals, groups and peoples in vulnerable situations* including, *women, children, older persons, indigenous peoples*, minorities, migrants, rural workers, persons with disabilities and the poor.”⁸²

As elaborated under the sub-headings below, States have heightened duties in regard to groups that are particularly vulnerable. These include Indigenous peoples, women and children.

5.2.1 Indigenous peoples

The 2017 *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* emphasizes:

In general, States have heightened duties with respect to those who are particularly vulnerable to environmental harm⁸³ ... [I]ndigenous peoples and others who closely depend on nature for their material and cultural needs are especially vulnerable to actions that adversely affect ecosystems. States should ensure that such actions, whether carried out by Governments or private actors, do not prevent the enjoyment of their human rights, including their rights to life, health, food, water, housing and culture.

The Special Rapporteur adds: “Although the global failure to protect biodiversity ultimately affects everyone, it is already having *catastrophic consequences for indigenous peoples* and others who depend directly on ecosystems for their food, water, fuel and culture.”⁸⁴

Similarly, the UN Working Group on human rights and transnational corporations and other business enterprises has especially underlined the heightened vulnerability of Indigenous peoples, children and others:

Socially, environmentally sustainable and inclusive development cannot be achieved unless business respects the human rights of people affected by their activities. This is *especially relevant for groups that are particularly vulnerable to*

*negative human rights impacts, including children, indigenous peoples and marginalized population groups.*⁸⁵

See also *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, where the Federal Court stressed: “no one can seriously dispute that Canada's First Nations people are amongst the most disadvantaged and marginalized members of our society.”⁸⁶

5.2.2 Women and girls

In the World Bank’s *Extractive Industries Review*, women, children and Indigenous peoples are highlighted as among the most disadvantaged and they require “respect for and protection of [their] human rights”:

The international community’s recent focus on *poverty alleviation involves the four main pillars of sustainable development*: improved social conditions, environmental protection, economic progress, and good governance. This requires a broader framework of development that has many elements. Among them are the rule of law, *respect for and protection of human rights*, ... social and environmental considerations in policymaking and project implementation, and *provision for the vulnerable* of the world—the *poorest among us, women, children, and indigenous peoples*.⁸⁷

In 2004, the former Special Rapporteur on the rights of Indigenous peoples, Rodolfo Stavenhagen, emphasized the extremely vulnerable situation of Indigenous girls: “The *particularly sensitive situation of indigenous girls* is of paramount importance in as much as they are often the *most vulnerable victims* of discrimination, exclusion and marginalization. The Special Rapporteur appeals to the national and international authorities and bodies responsible for promoting *gender equality and the rights of the child* to pay particular attention to indigenous children and adolescents throughout the world.”⁸⁸

In regard to pipelines in British Columbia, a 2017 study describes the severe and unconscionable impacts from industrial camps near remote communities:

... new pressures, from locating temporary and permanent industrial camps near ... remote communities, introduces a new set of risks. ... *Indigenous women and girls are subjected to the worst of the negative impacts of resource extraction at every phase* ... Increased domestic violence, sexual assault, substance abuse, and an increased incidence of sexually transmitted infections (STIs) and HIV/AIDS due to rape, prostitution, and sex trafficking ...

Such vulnerabilities – both real and potential – should have been addressed in a timely way. These horrendous impacts were foreseeable, especially with regard to remote communities. Any development that includes such damaging actions against Indigenous women and girls is the antithesis of “sustainable development”. Neither the federal nor British Columbia government should have approved such a development without first ensuring effective safeguards.

The diverse mining, hydroelectric, forestry and oil and gas pipeline projects in BC – existing or planned – have a wide range of real or potential adverse impacts on Indigenous peoples’ human rights, cultures and governance. While some environmental legislation exists, British Columbia does not have a sustainable development act.⁸⁹ Positive precedents exist in other parts of Canada, particularly in Québec.⁹⁰

5.2.3 Children

This paper has already highlighted some widespread effects of poverty affecting Indigenous peoples, as well as adverse impacts from resource developments on Indigenous children. In a December 2016 resolution adopted by consensus, the General Assembly called upon “all States and the international community to cooperate, support and participate in the global efforts towards poverty eradication ... implementing the 2030 Agenda for Sustainable Development and mobilizing all necessary resources and support in that regard ... including through an *integrated and multifaceted approach based on the rights and well-being of children*”.⁹¹

UNICEF’s 2016 report on *The State of the World’s Children* highlights the extreme vulnerability of children:

*No one is more vulnerable to poverty than children. Poverty perpetuates the cycle of disadvantage and inequity, which robs millions of children of their potential and causes irreparable damage that reverberates throughout a lifetime. Putting children at the heart of poverty reduction is one of the best ways to break that cycle and create a level playing field for every child.*⁹²

5.3 Canada’s sustainable development strategy

In Canada, the position of Commissioner of the Environment and Sustainable Development was created in 1995. Under the *Auditor General Act*, the Commissioner reports directly to the Auditor General.⁹³ Since then, Canada has done little to advance sustainable development.

In 2008, the *Federal Sustainable Development Act* was adopted.⁹⁴ The purpose of this Act is to “provide the legal framework for developing and implementing a Federal Sustainable Development Strategy that will make environmental decision-making more transparent and accountable to Parliament.” (s.3) The Act and regulations are binding on Her Majesty in right of Canada. (s. 4)

Yet, to date, there is no indication that the federal government is meeting Canada’s international commitments to sustainable development.

Currently, the federal government acknowledges in effect that its Federal Sustainable Development Strategy (FSDS) does not safeguard Indigenous peoples’ rights. Thus, the government has indicated that it is undertaking a review of existing processes that will include the *UN Declaration on the Rights of Indigenous Peoples*.⁹⁵ Key steps include:

Conducting robust and thorough environmental assessments, *respecting the rights of Indigenous Peoples*, and implementing *strong environmental legislation will support progress in all areas of the FSDS*.

To advance these priorities, we launched a review of environmental and regulatory processes on June 20, 2016.⁹⁶

In *Building Common Ground: A New Vision for Impact Assessment in Canada*,⁹⁷ the Expert Panel for the Review of Environmental Assessment Processes has recently produced an insightful and valuable Final Report. While some aspects are likely to be further debated and require further reflection, the Report addresses a wide range of issues that should serve to vastly improve the existing impact assessment process.

In particular, the new proposed Impact Assessment (IA) process would go well beyond environmental aspects. Consistent with its terms of reference, the Panel recommends a way forward that is inclusive of Indigenous peoples at every stage. The Report affirmatively addresses Indigenous rights and participation and the *United Nations Declaration on the Rights of Indigenous Peoples*.

The Final Report proposes an overall process that “would seek to restore trust by bringing parties together, benefiting communities and advancing the national interest in sustainable development.”⁹⁸ In order to achieve sustainable development, future IA decisions would be based on “five pillars” of sustainability (environment, economy, social, cultural and health) which are all interrelated.⁹⁹ While the Report repeatedly refers to “sustainable development”,¹⁰⁰ which is an international term used in Canadian legislation,¹⁰¹ the Panel makes no reference to the significance and application of this term in international law.

Canada voted in favour of four key consensus instruments on sustainable development,¹⁰² as well as other related resolutions adopted by the General Assembly and Human Rights Council. Therefore, the Panel should have made the necessary links to international law. In this same context of sustainable development, the Final Report should have indicated that the protection of human rights is an essential element. In addition, the Report makes no reference to “poverty”¹⁰³ or “vulnerability”¹⁰⁴ – or to Indigenous women or children¹⁰⁵ to who the standard of vulnerability applies.

The Final Report addresses free, prior and informed consent (FPIC) in a fair and collaborative manner.¹⁰⁶ However, it would have been useful to indicate that the elements of “free”, “prior” and “informed” consent in international law have the same meaning as they would in relation to “consent” in Canadian law.¹⁰⁷ Without these elements, there would be no valid consent in the Indigenous context.

The Final Report underlines: “To reflect FPIC, all Indigenous Peoples who are impacted by a project have the right to provide or withhold consent.” (p. 29) It would have been useful to also point out that FPIC or consent was not created by the *UN Declaration*. The rights in this human rights instrument are inherent¹⁰⁸ and no new rights are created. On the same page, the Report refers to “basic human rights as expressed through UNDRIP, as well as their Section 35 Aboriginal and treaty rights”. It should be made clear that Aboriginal rights are human rights and that treaty rights include human rights. “Indigenous rights” and “Aboriginal rights” are synonymous. The terms “Indigenous peoples” and “Aboriginal peoples” are also used synonymously in international and Canadian law.

In international law, "free, prior and informed consent" (FPIC) is an essential standard that is an integral element of the right of self-determination.¹⁰⁹ Self-determining peoples have a right to choose.¹¹⁰ As affirmed in *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, Canada has an affirmative obligation to "promote the realization of the right of self-determination, and ... respect that right, in conformity with the provisions of the Charter of the United Nations."¹¹¹ Since Canada ratified these two Covenants in 1976, federal and provincial governments have failed repeatedly to fulfill this obligation in relation to Indigenous peoples.

In accordance with its mandate, the Panel and its Final Report rightfully focus on the *UN Declaration*. However, for IA purposes, it is important to emphasize that the interpretation of Indigenous peoples' human rights and related State obligations in the *Declaration* can, and should, be reinforced by other international law.

Clearly, the federal government needs to ensure that all work within or by the federal government fully considers and respects international standards. This should also apply to any new Impact Assessment process, as well as to the modernization of the National Energy Board.

In this regard, Prime Minister Trudeau appropriately mandated the Working Group of Ministers to review relevant federal laws, policies, and operational practices in order to ensure the Crown is not only "meeting its constitutional obligations with respect to Aboriginal and treaty rights" but also "**adhering to international human rights standards, including the United Nations Declaration**".¹¹² At the same time, the Working Group is required to support implementation of the TRC's Calls to Action.

A commitment to a "whole-of-government" approach has been made by the Prime Minister in regard to this Working Group of Ministers. In addition, in its *Federal Sustainable Development Strategy for Canada 2016-2019*, Canada indicated: "The 2008 *Federal Sustainable Development Act* requires the Minister of Environment and Climate Change to consult on and table a *whole-of-government strategy* every three years."¹¹³

Conclusions and recommendations

In light of the diverse commitments made by the federal government, led by Prime Minister Justin Trudeau, there are real opportunities to make significant progress in safeguarding the human rights of Indigenous peoples in Canada and implementing the *United Nations Declaration on the Rights of Indigenous Peoples*. The government has also made commitments, both at home and internationally, to implement global sustainable development strategies in Canada. All such actions are urgent and long overdue.

Sustainable development – as defined in international law – should prove highly beneficial to Indigenous peoples and Canada as a whole. Justice for present and future generations can be achieved. However, all key steps taken by the federal government should only be taken in conjunction with Indigenous peoples, whenever their human rights and interests may be affected.

Good governance requires full protection of human rights. As indicated in this paper, good governance has been affirmed by the Supreme Court of Canada as a key principle in ensuring compliance with human rights in Canada's Constitution. Good governance is also affirmed in the *UN Declaration* as one of the key principles to interpret all of its provisions.

It is essential that the government of Canada fully implement its commitment to fulfill its constitutional obligations with respect to Aboriginal and treaty rights, as well as adhere to international human rights standards, including those in the *UN Declaration*. At the same time, the government must honour its commitments to implement the Truth and Reconciliation Commission's Calls to Action.

Such essential standards would include those relating to sustainable development. As agreed to at the United Nations, sustainable development must ensure the protection of Indigenous peoples' human rights including those of Indigenous women and children. In view of their heightened vulnerability, Canada and other States must meet a higher standard and certainly not impoverish those concerned. Proposed development projects that undermine Indigenous peoples' own means of subsistence or otherwise adversely affect their right of self-determination would severely violate their human rights. Such developments are not sustainable.

A whole-of-government approach must be effectively implemented within the federal government to ensure that there is full respect and protection for Indigenous peoples and individuals. In particular, in every situation, government bodies and civil servants must adhere to the international standards described above.

Such international standards as described above must apply to any new Impact Assessment process, as well as to the modernization of the National Energy Board.

The federal government must encourage provincial and territorial governments to adhere to similar standards. The federal government should uphold Canada's constitutional and international commitments, even if other levels of government should assume a lesser role. At home and internationally, Canada can and must assume a leadership role.

Endnotes

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

² In regard to Indigenous peoples' rights, see, for example, Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, "Aboriginal Rights: International Perspectives", Order of Canada Luncheon, Canadian Club of Vancouver, Vancouver, British Columbia, February 8, 2002: "Aboriginal rights from the beginning have been shaped by international concepts. ... Canada, as a respected member of the international community, cannot ignore ... new international norms ... Whether we like it or not, aboriginal rights are an international matter."

³ General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (25 September 2015) (adopted without a vote).

⁴ *UN Declaration*, 11th preambular para.

⁵ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf.

⁶ Government of Canada, National Energy Board Modernization: Expert Panel, “Terms of Reference”, <http://www.neb-modernization.ca/terms-of-reference>. [emphasis added]

⁷ Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada, Final Report*, (Ottawa: Canada (Min. of Environment and Climate Change), 2017), at 108 (Annex I: Expert Panel Terms of Reference): “The Government of Canada *fully supports the principles of the United Nations Declaration on the Rights of Indigenous Peoples*, with the goal of renewing its relationship with Indigenous people in Canada and moving toward reconciliation.” [emphasis added]

⁸ *Ibid.*, at 109, the Terms of Reference add: “To recognize the objectives of the United Nations Declaration on the Rights of Indigenous Peoples, the Panel shall *reflect the principles of the Declaration in its recommendations*, as appropriate, especially with respect to the manner in which environmental assessment processes can be used to address potential impacts to potential or established Aboriginal and treaty rights.” [emphasis added]

⁹ Minister of Justice and Attorney General of Canada (Hon. Jody Wilson-Raybould), “Special Statement at the Opening Ceremonies of the United Nations Permanent Forum on Indigenous Issues, 15th Session”, UN General Assembly, New York, May 9, 2016, http://news.gc.ca/web/article-en.do?nid=1063249&tp=970&_ga=1.85627738.291599297.1462200129. [emphasis added] See also *UN Declaration*, art. 43: “The rights recognized herein constitute the *minimum standards* for the survival, dignity and well-being of the indigenous peoples of the world.” [emphasis added]

¹⁰ General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (14 August 2013) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), para. 67. [emphasis added]

¹¹ See, e.g., Andreas Paulus, “Article 2” in Bruno Simma *et al.*, eds., *The Charter of the United Nations: A Commentary*, 3rd ed. (New York: Oxford University Press, 2013) 121 at 128: “The *equally binding nature of both principles and purposes* can also be deduced from Arts. 14, 24 (2) sentence 1 and 52 (1), where the ‘purposes and principles’ appear of one cloth, equally binding the other organs of the United Nations.” [emphasis added]

¹² General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (adopted without a vote), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2, para. 4. [emphasis added]

¹³ General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/71/178 (19 December 2016) (without a vote), preamble: “*Reaffirming* the United Nations Declaration on the Rights of Indigenous Peoples, which addresses their individual and collective rights”. See also General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble.

General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, note 12 *supra*, para. 3: “We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples”.

¹⁴ Ko Aotearoa Tēnei: *A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, Volume 2, WAI 262, Waitangi Tribunal Report 2011, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf, at 672.

¹⁵ Mauro Barelli, *Seeking Justice in International Law: The Significance and Implications of the UN Declaration on the Rights of Indigenous Peoples (Routledge Research in International Law)* (New York: Routledge, 2016), at 67. [emphasis added]

¹⁶ *UN Declaration*, 7th preambular para.

¹⁷ James Y. Henderson, “A snapshot in the journey of the adoption of the UN Declaration on the Rights of Indigenous Peoples”, *Justice as Healing*, Newsletter, Native Law Centre, University of Saskatchewan, vol. 13, No. 1, 2008, at 2-3.

¹⁸ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, UN Doc. A/HRC/9/9 (11 August 2008), para. 86.

¹⁹ *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, para. 353, aff’d 2013 FCA 75.

²⁰ Committee on the Elimination of Racial Discrimination, "Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (*continued*): *Nineteenth and twentieth periodic reports of Canada* (continued)", Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39. [emphasis added]

²¹ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting). [emphasis added] Cited with approval in *United States of America v. Burns*, [2001] 1 S.C.R. 283, para. 80.

In interpreting Canada’s Constitution and laws, international declarations have been relied upon by the Supreme Court of Canada in a wide range of cases. See, e.g., *Declaration on fundamental principles and rights at work*, 6 IHRR 285 (1999), cited in *Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391; *Declaration on the Elimination of Violence Against Women*, GA Res. 48/104, cited in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV) and *Declaration on the Occasion of the Fiftieth Anniversary of the United Nations*, GA Res. 50/6, both cited in *Reference re Secession of Québec*, [1998] 2 S.C.R. 217; *Declaration on the Protection of All Persons from Enforced Disappearance*, GA Res. 47/133, cited in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Declaration on Measures to Eliminate Terrorism*, GA Res. 51/210, cited in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.

See also William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed. (Toronto: Carswell, 2007), at 138-139: “Since that first case, in 1971, the *Universal Declaration of Human Rights* has been cited by Canadian courts in *literally hundreds of cases*”. [emphasis added]

²² *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44, para. 142.

²³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²⁴ In its Agenda and Framework for the programme of work, the UN Human Rights Council has permanently included the “rights of peoples ... and specific groups” under the heading “Promotion and protection of all human rights ... including the right to development”: see Annex in Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007 (adopted without vote), approved in General Assembly, *Report of the Human Rights Council*, UN Doc. A/RES/62/219 (22 December 2007).

For over 35 years, Indigenous peoples’ collective rights have been addressed within the United Nations human rights system. Such rights are also addressed as human rights within the Inter-American human rights system and by the African Commission on Human and Peoples’ Rights.

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

²⁵ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 142. [emphasis added]

²⁶ *Vancouver (City) v. Ward*, 2010 SCC 27, para. 38.

²⁷ See *UN Declaration*, art. 46(3), where good governance is one of the principles required to interpret Indigenous peoples' rights and related State obligations in the *Declaration*.

²⁸ United Nations Economic and Social Commission on Asia and the Pacific (ESCAP), "What is Good Governance?", <http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>.

²⁹ Office of the High Commissioner for Human Rights, "Good Governance and Human Rights", <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>.

³⁰ Peter Hogg, *Constitutional Law of Canada*, Loose-leaf Edition (Toronto: Thompson Carswell, 1997), vol. 2 at 33-17: "It is never seriously doubted that progressive interpretation is necessary and desirable in order to adapt the Constitution to facts that did not exist and could not have been foreseen at the time when it was written."

³¹ *Edwards v. A.-G. Canada*, [1930] A.C. 124 at 136: "The [*Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits."

³² *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155.

³³ *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para. 23. [emphasis added]

³⁴ Robert McCorquodale, "Self-Determination: A Human Rights Approach", (1994) 43 Int'l & Comp. L.Q. 857, at pp. 884-885: "the human rights approach...does provide a framework to enable every situation to be considered and all the relevant rights and interests to be taken into account, balanced and analysed. This balance means that the geopolitical context of the right being claimed – the particular historical circumstances – and the present constitutional order of the State and of international society, is acknowledged and addressed."

³⁵ See, e.g., *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 54: "the contextual approach to s. 15 [of the *Canadian Charter of Rights and Freedoms*] requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history."

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

³⁶ *American Declaration on the Rights of Indigenous Peoples*, Res. AG/doc.5537, adopted without vote by Organization of American States, General Assembly, 46th sess., Santo Domingo, Dominican Republic, 15 June 2016.

³⁷ Emphasis added. See also the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), International Labour Organization, adopted Geneva, 76th ILC session 27 June 1989 (entered into force 5 September 1991) (not yet ratified by Canada). Article 23(2) of this Convention affirms the "importance of sustainable and equitable development", in relation to Indigenous and tribal peoples.

³⁸ In this context, the Americas refers to North, South and Central America and the Caribbean.

³⁹ Paul Joffe, "Advancing Indigenous Peoples' Human Rights: New Developments in the Americas", January 4, 2017, <http://quakerservice.ca/wp-content/uploads/2017/03/Advancing-IPs-Human-Rts-New-Devts-in-the-Americas-Joffe-FINAL-Jan-4-17.pdf>.

⁴⁰ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, at 4.

⁴¹ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, May 31, 2015, at 185. [emphasis added]

⁴² General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, note 12 *supra*, para. 8 (States' commitment to "cooperating with indigenous peoples ... to develop and implement national action plans").

See also 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. 19(g): "The Committee requests that the State party, in consultation with indigenous peoples, consider elaborating and adopting a national plan of action in order to implement the United Nations Declaration on the Rights of Indigenous Peoples."

⁴³ Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), "Special Statement at the Opening Ceremonies of the United Nations Permanent Forum on Indigenous Issues, 15th Session", UN General Assembly, New York, May 9, 2016: "beyond the necessary truth telling and healing, reconciliation requires laws to change and policies to be rewritten. We intend to do so in full partnership. ... There is a need for a national action plan in Canada".

⁴⁴ TRC, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, *supra*, at 10, para. 92.

⁴⁵ "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", endorsed by Human Rights Council, *Human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/RES/17/4/ (16 June 2011) (without a vote), Principle 12.

⁴⁶ Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35 (11 July 2011), para. 82 (Conclusions and Recommendations).

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

⁴⁸ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 32.

⁴⁹ *E.g.*, UN Declaration, article 46(2): "The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."

⁵⁰ See, *e.g.*, Office of the Prime Minister (Rt. Hon. Justin Trudeau), "Minister of Indigenous and Northern Affairs Mandate Letter", November 2015.

⁵¹ See *American Declaration*, footnote 2 (statement of Canada).

⁵² Prime Minister Justin Trudeau, "The Current" (with Anna Maria Tremonti), CBC Radio, October 19, 2016.

⁵³ Minister of Indigenous and Northern Affairs (Carolyn Bennett), Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10, 2016. [emphasis added]

⁵⁴ "Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples", February 22, 2017, <http://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>. [emphasis added]

⁵⁵ The Working Group will be chaired by the Minister of Justice and Attorney General of Canada. It will also include the Minister of Indigenous and Northern Affairs; Minister of Fisheries, Oceans and the Canadian Coast Guard; Minister of Health; Minister of Families, Children and Social Development; and Minister of Natural Resources.

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- ⁵⁶ Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), Notes for an address: Investing in Canada's Future: The Next 150 Years, To the Public Policy Forum, "Reconciliation: A Sure Path to Economic Growth", Ottawa, Ontario, February 15, 2017, at 10-11.[emphasis added]
- ⁵⁷ Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), "Notes for an address: B.C. Cabinet and First Nations Leaders' Gathering", Vancouver, BC, September 7, 2016, at 8.
- ⁵⁸ Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), "Notes for an address: 2016 Aboriginal Law Conference – Continuing Legal Education Society of British Columbia", Vancouver, BC, November 25, 2016.
- ⁵⁹ For an effective legislative framework, see, e.g., *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* (Private Member's Bill C-262), House of Commons, 1st sess., 42nd Parl. (tabled by Romeo Saganash, April 21, 2016). The short title is *United Nations Declaration on the Rights of Indigenous Peoples Act*.
- ⁶⁰ House of Commons, *Debates (Hansard)*, No. 037, 42nd Parl., 1st sess., April 12, 2016 (Statements made by Hon. Jody Wilson-Raybould (Minister of Justice and Attorney General of Canada)), at 2127.
- ⁶¹ Human Rights Council, *Question of the realization in all countries of economic, social and cultural rights: Report of the Secretary-General*, UN Doc. A/HRC/34/25 (14 December 2016), para. 4. [emphasis added]
- ⁶² General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, note 3 *supra*.
- ⁶³ *Ibid.*, at 3 (Declaration), para. 3. [emphasis added]
- ⁶⁴ *Ibid.*, at 3 (Declaration), para. 4. [emphasis added]
- ⁶⁵ General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble.
- ⁶⁶ World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987), at 43.
- ⁶⁷ Tobias Stoll, "Article 55 (a) and (b)" in Bruno Simma *et al.*, *The Charter of the United Nations: A Commentary*, 3rd ed. (New York: Oxford University Press, 2013), at 1545. It is added: "'Social' development is very much concerned with the specific situation of the individual or with groups in society, such as, for instance, families, women, children, people with disabilities, and indigenous peoples. ... Close connections exist with the human rights activities of the UN."
- ⁶⁸ *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) (without vote).
- ⁶⁹ *Ibid.* [emphasis added]
- ⁷⁰ 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), endorsed by General Assembly, *The future we want*, UN Doc. A/RES/66/288 (27 July 2012) (without vote), para. 8. [emphasis added]
- ⁷¹ *Ibid.*, para. 9.
- ⁷² *Ibid.*, para. 10. [emphasis added]
- ⁷³ *Ibid.*, para. 49 [emphasis added]
- ⁷⁴ General Assembly, *Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda)*, UN Doc. A/RES/69/313 (27 July 2015) (adopted without a vote), Annex, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/313&Lang=E, at para. 1. [emphasis added]

⁷⁵ *UN Declaration*, art. 23.

⁷⁶ *UN Declaration*, arts. 3, 20, 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), endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993) (without a vote).

⁷⁷ Rio+20 United Nations Commission on Sustainable Development, *The future we want*, note 70, *supra*, para. 2. [emphasis added]

⁷⁸ UNICEF, *Poverty Reduction Begins with Children*, New York, March 2000, at 39 (Summary).

⁷⁹ General Assembly, *The right to development*, UN Doc. A/RES/71/192 (19 December 2016), preamble.

⁸⁰ Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretariat*, UN Doc. A/HRC/34/49 (19 January 2017), para. 33. [emphasis added]

⁸¹ Human Rights Council, *Human rights and the environment*, UN Doc. A/HRC/RES/34/20 (24 March 2017) (adopted without a vote), preamble.

⁸² OHCHR, *Understanding Human Rights and Climate Change, Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change*, 26 November 2015, at 2.

⁸³ The Special Rapporteur cites here his earlier report: Human Rights Council, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox: Mapping report*, UN Doc. A/HRC/25/53 (30 December 2013), paras. 69-78.

⁸⁴ Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, note 80 *supra*, para. 50 [emphasis added]

⁸⁵ General Assembly, *Human rights and transnational corporations and other business enterprises: Report of the Secretary-General*, UN Doc. A/67/285 (10 August 2012), para. 31. [emphasis added]

⁸⁶ *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, para. 334.

⁸⁷ Emil Salim, *Striking a Better Balance: The Extractive Industries Review* (World Bank, 2003), vol. I, at 11. [emphasis added]

⁸⁸ General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people) A/59/258, 12 August 2004, p. 6, para. 51. [emphasis added]

⁸⁹ See, generally, *Environmental Management Act*, S.B.C. 2003, c. 53. In the *Water Protection Act*, R.S.B.C. 1996, c. 484, s. 4(1) stipulates that no one has the right to use, sell, transport, etc. water for removal from British Columbia, without a permit or other authorization under the *Water Sustainability Act*. In the *Water Sustainability Act*, S.B.C. 2014, c. 15, the Lieutenant Governor in Council has the *discretion* in s. 43(1) to make regulations for the purposes of sustaining water quantity, water quality and aquatic ecosystems in and for British Columbia. Such provisions are not a substitute for a provincial sustainable development act, consistent with “sustainable development” and its goals in international law.

⁹⁰ In Québec, sustainable development legislation has existed for eleven years. See *Sustainable Development Act*, S.Q. 2006, c. 3, s. 6:

In order to better integrate the pursuit of sustainable development into its areas of intervention, the Administration is to **take the following set of principles into account when framing its actions**:

- (a) "**Health and quality of life**": People, human health and improved quality of life are at the centre of sustainable development concerns. People are entitled to a **healthy and productive life in harmony with nature**;
- (b) "**Social equity and solidarity**": Development must be undertaken in a spirit of intra- and inter-generational equity and social ethics and solidarity;
- (c) "Environmental protection": To achieve sustainable development, environmental protection must constitute an integral part of the development process;
- (d) "Economic efficiency": The economy of Québec and its regions must be effective, geared toward innovation and economic prosperity that is conducive to social progress and respectful of the environment;
- (e) "**Participation and commitment**": The participation and commitment of citizens and citizens' groups are needed to define a concerted vision of development and to **ensure its environmental, social and economic sustainability**;
- (f) "**Access to knowledge**": Measures favourable to education, access to information and research must be encouraged in order to stimulate innovation, raise awareness and ensure effective participation of the public in the implementation of sustainable development;
- (g) "**Subsidiarity**": Powers and responsibilities must be delegated to the appropriate level of authority. Decision-making centres should be adequately distributed and **as close as possible to the citizens and communities concerned**;
- (h) "**Inter-governmental partnership and cooperation**": Governments must collaborate to ensure that development is sustainable from an environmental, social and economic standpoint. The external impact of actions in a given territory must be taken into consideration;
- (i) "Prevention": In the presence of a known risk, preventive, mitigating and corrective actions must be taken, with priority given to actions at the source;
- (j) "**Precaution**": When there are threats of serious or irreversible damage, lack of full scientific certainty must not be used as a reason for postponing the adoption of effective measures to prevent environmental degradation;
- (k) "**Protection of cultural heritage**": The cultural heritage, made up of property, sites, landscapes, traditions and knowledge, reflects the identity of a society. It passes on the values of a society from generation to generation, and the preservation of this heritage fosters the sustainability of development. Cultural heritage components must be identified, protected and enhanced, taking their intrinsic rarity and fragility into account;
- (l) "**Biodiversity preservation**": Biological diversity offers incalculable advantages and must be preserved for the **benefit of present and future generations**. The protection of species, ecosystems and the natural processes that maintain life is essential if quality of human life is to be maintained;
- (m) "Respect for ecosystem support capacity": Human activities must be respectful of the support capacity of ecosystems and ensure the perenniality of ecosystems;
- (n) "Responsible production and consumption": Production and consumption patterns must be changed in order to make production and consumption more viable and more socially and environmentally responsible, in particular through an ecoefficient approach that avoids waste and optimizes the use of resources;
- (o) "Polluter pays": Those who generate pollution or whose actions otherwise degrade the environment must bear their share of the cost of measures to prevent, reduce, control and mitigate environmental damage;

(p) "Internalization of costs": The value of goods and services must reflect all the costs they generate for society during their whole life cycle, from their design to their final consumption and their disposal. [emphasis added]

⁹¹ General Assembly, *Rights of the child*, UN Doc. A/RES/71/177 (19 December 2016) (without a vote), para. 15.

⁹² UNICEF, *The State of the World's Children 2016: A fair chance for every child* (New York: United Nations Children's Fund (UNICEF), June 2016), at 69 (poverty). [emphasis added]

⁹³ *Auditor General Act*, R.S.C., 1985, c. A-17, s. 15.1.

⁹⁴ *Federal Sustainable Development Act*, S.C. 2008, c. 33.

⁹⁵ Canada, *Achieving a Sustainable Future: A Federal Sustainable Development Strategy for Canada 2016-2019*, https://www.ec.gc.ca/dd-sd/CD30F295-F19D-4FF9-8E03-EAE8965BE446/3130_FSDS_Eng_FINAL.pdf at iii (Executive Summary), at 6.

⁹⁶ *Ibid.*, at 10.

⁹⁷ Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada, Final Report*, (Ottawa: Canada (Min. of Environment and Climate Change), 2017), <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf>.

⁹⁸ *Ibid.*, at 5.

⁹⁹ *Ibid.*, at 20-21.

¹⁰⁰ *Ibid.*, at 5, 22, 56, 68, 81 and 82. This is consistent with the Panel's Terms of Reference (see page 108).

¹⁰¹ See *Federal Sustainable Development Act*, note 94 *supra*, **Error! Bookmark not defined.** s. 2 and accompanying text. See also *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, section 52 (enactment), s. 2(1).

¹⁰² See General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, note 62 *supra*; *Addis Ababa Action Agenda of the Third International Conference on Financing for Development*, note 74 *supra*; Rio+20 United Nations Commission on Sustainable Development, *The future we want*, note 70 *supra*; and *Rio Declaration on Environment and Development*, note 68 *supra*.

¹⁰³ See subheading 5.1 *supra*.

¹⁰⁴ See subheading 5.2 *supra*.

¹⁰⁵ See subheadings 5.2.2 and 5.2.3 *supra*.

¹⁰⁶ At 30, the Final Report indicates: "A new IA regime should be fundamentally based on collaborative consent, with Indigenous Peoples on par with other levels of government. The Panel wishes to make it clear that the provision of consent during an IA does not mean that the duty to consult and accommodate has been discharged for government decisions that occur *after* the IA is concluded." [emphasis added]

¹⁰⁷ "Free" means there must be no coercion or manipulation; "prior" means consent must be obtained in advance of the activity being approved; and "informed" means that information provided must not be misleading or inadequate".

¹⁰⁸ *UN Declaration*, 7th preambular para.

¹⁰⁹ 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]

Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 41: “The right of self-determination is a foundational right, without which indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”

¹¹⁰ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 118: “It has been clear from the outset that self-determination was not tied only to independence. *The peoples of an independent territory have always had the right to choose the form of their political and economic future.*” [emphasis added] In *Tsilhqot’in Nation v. British Columbia*, note 25 *supra*, paras. 67 and 75, the Supreme Court referred to Indigenous peoples’ “right to choose”.

¹¹¹ *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (1966), adopted by the UN General Assembly on December 16, 1966 and entered into force March 23, 1976, accession by Canada 1976 and *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, adopted by the UN General Assembly on December 16, 1966 and entered into force 3 January 1976, accession by Canada 1976, identical article 1(3).

¹¹² “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples”, February 22, 2017.

¹¹³ Canada, *Achieving a Sustainable Future: A Federal Sustainable Development Strategy for Canada 2016-2019*, https://www.ec.gc.ca/dd-sd/CD30F295-F19D-4FF9-8E03-EAE8965BE446/3130_FSDS_Eng_FINAL.pdf, at 1.