

THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A PRIMER

Recent Developments: What your Governments were doing while you were on summer vacation

1. The 2015 Truth and Reconciliation Commission Calls to Action recommended full adoption and implementation of the United Nations Declaration on the Rights of Indigenous Peoples (the “Declaration” or “UNDRIP”) “as the framework for reconciliation”.
2. Call to Action 92 calls upon the corporate sector to adopt The Declaration as a reconciliation framework and to:
 - (a) Commit to obtaining the free, prior and informed consent (sometimes “FPIC”) of Indigenous peoples before proceeding with economic development projects;
 - (b) Ensure access to jobs, training and education, and long term benefits from economic development; and
 - (c) Provide management and staff education on Indigenous history and rights and training in intercultural competency, conflict resolution, human rights and anti-racism.
3. Prime Minister Trudeau campaigned on the basis that his government accepted all of the Commission’s recommendations. On February 22, 2017, he appointed six Ministers who, in consultation with Indigenous peoples, will review federal laws, policies and practices to ensure respect for Indigenous rights and to implement the Declaration.
4. On July 14, 2017, the Government of Canada released a set of “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples”. The ten principles are stated to be “rooted in s. 35 of the Constitution and the Declaration and

informed by the Royal Commission on Aboriginal Peoples and the Truth and Reconciliation Commission Calls to Action”.

5. In June 2017, the BC Green Caucus and the BC New Democrat Caucus, in their relationship agreement, stated:

A foundational piece of this relationship is that both caucuses support the adoption of the UN Declaration on the Rights of Indigenous Peoples, the Truth and Reconciliation Commission Calls to action and the *Tsilhqot’in* Supreme Court Decision

6. On July 24, 2017, Premier Horgan issued letters to his 22 Cabinet Ministers, reminding them of his government’s promise to adopt the Declaration and the Calls to Action, stating:

As Minister, you are responsible for moving forward on the Calls to Action and reviewing policies, programs and legislation to determine how to bring the principles of the Declaration into action in British Columbia.

7. This resembles the letter sent by Premier Rachel Notley of Alberta in the summer of 2015 to her Ministers urging them to find ways to incorporate the Declaration into the work of their ministries.

8. In light of these developments, it is increasingly important to understand the Declaration – what it is, and what it isn’t.

9. The Declaration is aimed at States and not the corporate sector. But, as Call to Action 92 provides, it sets out principles that, if applied by corporations would, in the Commission’s and the U.N.’s view, contribute to reconciliation: see United Nations Global Compact, *A Business Reference Guide to United Nations Declaration on the Rights of Indigenous Peoples*, (2013); Performance Standard 7: *Indigenous Peoples International Finance Corporation* (1 January 2012).

Background to the Declaration

10. Some of the concepts of the Declaration, including a version of free, prior and informed consent, were first contained in the *Indigenous and Tribal Peoples Convention, 1981* (the ILO Convention, (No. 169) (27 June 1989) Geneva, 76th ILC Session) negotiated within the International Labour Organization.. Article 16 of the ILO Convention guarantees to Indigenous peoples the right not to be removed from their lands unless necessary, and with their free, prior and informed consent. The ILO Convention has been ratified by 22 countries, not including Canada. The Inter-American Commission on Human Rights and Court of Human Rights has addressed some of the concepts now included in the Declaration. Canada has not ratified the American Convention on Human Rights and has not accepted the jurisdiction of the Court of Human Rights.

11. The process leading to a Draft Declaration in 2007 started in the 1980's when the United Nations working group on Indigenous Populations decided to produce a draft declaration on Indigenous rights for eventual adoption and proclamation by the General Assembly.

12. A group of independent experts led the process, in which thousands of Indigenous representatives contributed proposals. Canadian representatives later commented that "...experts were drafting a Declaration by and for Indigenous peoples, and that the concerns of States were not given adequate consideration in this process."

13. A number of versions of the Draft Declaration were submitted for consideration, including a compromise text prepared by the Chairperson – Rapporteur without State involvement, which text was released at the end of February 2006 and referred to the newly created United Nations Human Rights Council.

14. In June 2006 (under then Prime Minister Harper), Canada expressed to the Human Rights Council its desire for more consultations and its objections to the compromise text. The proposal for more consultations did not attract the necessary support. Canada later summarized what occurred:

As Canada expressed in its statement to the Human Rights Council, the current provisions on lands, territories and resources are broad, unclear and capable of a wide variety of interpretations. They could be interpreted to support claims to broad ownership rights over traditional territories, even where rights to such territories were lawfully ceded through treaty. These provisions could also hinder our claims processes in Canada, whereby Aboriginal land and resource rights are premised on balancing the rights of Aboriginal peoples with those of other Canadians, within the Canadian constitutional framework – our framework for working together.

In addition, the concept of free, prior and informed consent is used in many contexts within the Draft Declaration. It could be interpreted as giving a veto to indigenous peoples over many administrative matters, legislation, development proposals and national defence activities which concern the broader population and may affect indigenous peoples.

Also, in relation to self-government provisions, the text does not provide effective guidance about how indigenous governments might work with other levels of government, including laws of overriding national importance and matters of financing.

Canada has a long and proud tradition of not only supporting, but actively advancing, Aboriginal and treaty rights domestically and is fully committed to continuing to work internationally on indigenous issues.

Regretfully, however, Canada had to call a vote on the Draft Declaration. The official results were as follows: 30 in favour, 12 abstentions, and 2 against (Canada and Russia). A number of States made statements of interpretations which highlighted a number of on-going concerns with the Draft Declaration, many of which were shared by Canada. At the time of the vote, Canada took the position that the Declaration will have no legal effect in Canada and does not represent customary international law.”

15. As noted, a majority of the Human Rights Council voted to recommend to the General Assembly for adoption of the draft text. The Declaration was adopted by resolution of the General Assembly of the United Nations on September 7, 2007. One hundred and forty-three States voted in favour, eleven abstained, and four – Canada, Australia, New Zealand and the United States – voted against. Thirty-five States were absent.

16. Many States, including those who voted in favour of the Declaration, delivered statements to explain their votes, emphasizing that the Declaration was non-binding and that its provisions were subject to varying interpretations.

17. Those States voting against the Declaration delivered statements outlining their concerns. Ambassador John McNee, Permanent Representative of Canada to the United Nations, stated in part:

Canada's Position has remained consistent and based on principle. We have stated publicly that Canada has significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self-government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, Member States and third parties.

18. Australia's representative stated in part:

In conclusion, with regard to the nature of the declaration, it is the clear intention of all States that it be an aspirational declaration with political and moral force but not legal force. It is not intended itself to be legally binding or reflective of international law. As this declaration does not describe current State practice or actions States consider themselves obliged to take as a matter of law, it cannot be cited as evidence of the evolution of customary international law. This declaration does not provide a proper basis for legal actions, complaints or other claims in any international, domestic or other proceedings. Nor does it provide a basis for the elaboration of other international instruments, whether binding or non-binding.

19. New Zealand's representative stated in part:

It is therefore a matter of deep regret that we find ourselves unable to support the text before us today annexed to draft resolution A/61/L.67. Unfortunately, we have difficulties with a number of provisions in the text. Four provisions in the Declaration are fundamentally incompatible with New Zealand's constitutional and legal arrangements, with the Treaty of Waitangi and with the principle of governing for the good of all our citizens. These are

article 26 on lands and resources, article 28 on redress and articles 19 and 32 on the right to veto over the State.

The provision on lands and resources simply cannot be implemented in New Zealand. Article 26 states that indigenous peoples have a right to own, use, develop or control lands and territories that they have traditionally owned, occupied or used. For New Zealand, the entire country is potentially caught within the scope of the article. The article appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous and does not take into account the customs, traditions and land tenure systems for the indigenous peoples concerned. Furthermore, that article implies that indigenous peoples have rights that others do not have.

...

This Declaration is explained by its supporters as being an aspirational document, intended to inspire rather than to have legal effect. New Zealand does not, however, accept that a State can reasonably take such a stance towards a document that purports to declare the contents of the rights of indigenous people. We take the statements in the Declaration very seriously. For that reason we have felt compelled to take the position that we do.

Lest there be any doubt, we place on record our firm view that the history of the negotiations on the Declaration and the divided manner in which it has been adopted demonstrate that this text, particularly in the Articles to which I have referred, does not state propositions which are reflected in State practice or which are or will be recognized as general principles of law.

20. The Representative of the United States made the following observation:

With respect to the nature of the declaration, it was the clear intention of all States that it be an aspirational declaration with political and moral, rather than legal, force. Its persuasiveness and usefulness to the international community therefore critically depends upon the extent to which it enjoys unqualified support among States. This text contains recommendations regarding how States can promote the welfare of indigenous peoples. It is not in itself legally binding nor reflective of international law.

The United States rejects any possibility that this document is or can become customary international law. We have continually expressed our rejection of fundamental parts of the former

Subcommission text, and of this text, as evidence of the evolution of customary international law.

This declaration does not provide a proper basis for legal actions, complains, or other claims in any international, domestic, or other proceedings.

21. Subsequently, these four States have endorsed the Declaration through public announcements some as “aspirational only” endorsements. As will be seen below, the “aspirational only” endorsements have been criticized by the UN Special Rapporteur on The Rights of Indigenous Peoples, James Anaya.

22. For example, the New Zealand government supports the Declaration only as an affirmation of international human rights, but not as creating legal obligations.¹

23. In Canada, the initial endorsement by the Harper government was qualified but has since become unqualified by the Liberal government. On November 12, 2010 the Harper government published a statement declaring support of the Declaration as an “aspirational document” that is “non-legally binding” and “does not reflect customary international law nor change Canadian laws”.

24. In 2014, the United Nations General Assembly, on the occasion of a meeting known as The World Conference on Indigenous Peoples, issued an “Outcome Document”, that included two paragraphs that prompted the Harper government to repeat the qualifications stated in 2010.

25. Paragraph 3 of the Outcome Document provided:

We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007, and our commitments made in this respect to 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

¹ *Greenpeace of New Zealand Incorporated v Minister of Energy and Resources* [2012] NZHC 1422 at para 141.

implementing legislative or administrative measures that may affect them, in accordance with the applicable principles of the Declaration.

26. Paragraph 20 of the Outcome Document provided:

We recognize the commitments made by States, with regard to the United Nations Declaration on the Rights of Indigenous Peoples, to consult and cooperate in good faith with the indigenous peoples concerned 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.

27. The Harper government repeated its 2010 qualifications, stating:

In 2010, our statement of support for the UN Declaration on the Rights of Indigenous Peoples clearly recorded that the Declaration is an “aspirational document which speaks to the individual and collective rights of indigenous peoples, taking into account their specific, cultural, social and economic circumstances”. Also in this statement, Canada placed on the record its concerns with various provisions of the declaration including free, prior and informed consent when used as a veto.

Canada’s unique constitutional framework recognizes and affirms Aboriginal and Treaty rights. Thus, in Canada, governments have a legal duty to consult Aboriginal Peoples and, where appropriate, accommodate Aboriginal peoples, when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights, Canada interprets the principles expressed in the Declaration in a matter that is consistent with our constitution.

Free, prior and informed consent, as it is considered in paragraphs 3 and 20 of the WCIP Outcome Document, could be interpreted as providing a veto to Aboriginal Groups and in that regard, cannot be reconciled with Canadian law, as it exists.

Agreeing to paragraph 3 of the Outcome Document would commit Canada to work to integrate FPIC in its processes with respect to implementing legislative or administrative measures affecting Aboriginal peoples. This would run counter to Canada’s constitution, and if implemented, would risk fettering Parliamentary supremacy.

28. The Liberal government has resiled from these qualifications. On May 10, 2016, the Liberal government stated that Canada was “now a full supporter, without qualification of the Declaration.”

29. But, what does being an unqualified supporter of the Declaration mean in the Constitutional and legal context of the Canadian federation. In a speech given by the Honourable Judy Wilson-Raybould, Minister of Justice and Attorney General of Canada on September 7, 2016 at the annual British Columbian and First Nations Leaders Gathering, some of the practical problems were recognized. The first problem is the meaning of “Indigenous Nations”. The Minister said:

First and foremost, it begs the question, “What are the Indigenous Nations that are to be recognized?”

That is, “How will you define yourself as Nations?” “What are the structures through which you will deliver programs and services?” And, then, “what will your relationship with Canada, the Province, with your neighbours, and with other Indigenous nations, look like? “How will you resolve your differences between and amongst yourselves?”

30. The Minister recognized the practical challenge of implementing the Declaration, stating:

...with respect to the UNDRIP, it is important to appreciate how come it cannot be simply incorporated, word for word, into Canadian law.

First, the Declaration itself contemplates that it is to be implemented in many different ways through various instruments.

Second, the federal government simply does not have the jurisdiction to unilaterally address all of the minimum standards and principles set out in the Declaration. Many issues will benefit from a national approach that reflects federal, provincial and territorial, and Indigenous governments each playing their parts. Still other are specifically aimed at the United Nations itself and other international bodies.

Third, and in truth, every party involved in implementation needs the time to develop practical and effective approaches to issues such as free, prior and informed consent – when it comes to resource development, addressing issues such as the proper title holder, for instance.

Again, these approaches could mean amending legislation, or developing new policies, depending on which element of the Declaration we are concerned with. All parties need to be involved in identifying the most appropriate and effective mechanisms.

And in order for that involvement to happen, Indigenous nations must be organized and empowered to contribute to these discussions – that is, being able to participate in developing approaches according to their own aspirations and needs as Nations.

Fourth and finally, and I think most importantly, the implementation of the Declaration has to take into account our specific constitutional and legal context here in Canada. That includes our federal system, our Constitution – particularly Section 35 of the *Constitution Act*, and the *Charter of Rights and Freedoms*. Accordingly we will want to identify which laws, policies and practices need to be changed to give full effect to both Section 35 and the UN Declaration.

Moreover, how we, as a society, choose to balance the various rights and interests protected by our Constitution, set out in our *Charter of Rights*, or expressed in the UN Declaration, is also a decision we have to make together.

And without going through every article in the Declaration, we can think about the important clarification that the combination of section 35 and Canadian common law has brought to our understanding of Aboriginal title and rights in the Canadian context.

I cannot see us simply setting aside the important guidance we have from our courts – from *Tsilhqot'in* for example – and starting afresh from the Declaration's articles.

The actions we take to implement the UN Declaration must be guided by the important advances that have been made within the framework of s. 35 of the Constitution.

31. On April 24, 2017, at The UN Forum on Indigenous Issues, a session marking the tenth anniversary of the Declaration, Minister Bennett specifically acknowledged that Canada was removing its objections to the free, prior and informed consent paragraphs of the Outcome Document, noted above but disagreed as to what that meant. The Globe and Mail reported:

The former Conservative government objected to some elements of the 2014 “outcome document.” It said the wording could be seen

as giving a veto to aboriginal groups and could not, therefore, be reconciled with Canadian law.

But the Liberal government does not agree with that interpretation. Dr. Bennett said “free, prior and informed consent” merely means there is a commitment to developing policies in conjunction with Indigenous people on matters that will affect them.

“This is about making decisions together” from the inception, the minister said. “It means not putting some fully baked project in front of people and getting them to vote yes or no.”

32. The debate as to whether “free, prior and informed consent” included a veto power was mooted well before the adoption of the Declaration. In the World Bank Group’s Extractive Industries Review² the author stated:

Free prior and informed consent should not be understood as a one-off, yes-no vote or as a veto power for a single person or group. Rather, it is a process by which indigenous peoples, local communities, government, and companies may come to mutual agreements in a forum that gives affected communities enough leverage to negotiate conditions under which they may proceed and an outcome leaving the community clearly better off. Companies have to make the offer attractive enough for host communities to prefer that the project happen and negotiate agreements on how the project can take place and therefore give the company a “social license” to operate. Clearly, such consent processes ought to take different forms in different cultural settings. However, they should always be undertaken in a way that incorporates and requires the FPIC of affected indigenous peoples and local communities.

33. The argument that the free, prior and informed consent requirement does not confer a veto also finds support in the Report of the Special Rapporteurs on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, James Anaya, A/HRC/12/34 who wrote in July 2009:

² *Striking a Better Balance. The World Bank Group and Extractive Industries. The Final Report of the Extractive Industries Review.* Vol 1, 2003 at 50.

The Declaration established that, in general, consultations with indigenous peoples are to be carried out in “good faith ... in order to obtain their free, prior and informed consent” (art. 19). This provision of the Declaration should not be regarded as according indigenous peoples a general “veto power” over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples. In this regard, ILO Convention No. 169 provides that consultations are to take place “with the objective of achieving agreement or consent on the proposed measure” (art. 6, para. 2). The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually agreeable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.

Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. The Declaration recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. These situations include when the project will result in the relocation of a group from its traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands (arts. 10 and 29, para. 2, respectively). In the same vein, in a case involving the Saramaka people of Suriname, the Inter-American Court of Human Rights held that “regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.

In all cases in which indigenous peoples’ particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. As stated, this requirement does not provide indigenous peoples with a “veto power”, but rather establishes the need to frame consultation

procedures in order to make every effort to build consensus on the part of all concerned. The Special Rapporteur regrets that in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development projects. The Special Rapporteur considers that focusing the debate in this way is not in line with the spirit or character of the principles of consultation and consent as they have developed in international human rights law and have been incorporated into the Declaration.

34. In 2012, the Special Rapporteur recognized that the discussions about the meaning of the principles of consultation and free, prior and informed consent “has become highly contentious, with conflicting points of view about the scope of the duty of States to consult Indigenous peoples and about the need to obtain their consent to extractive projects that may affect them.”³ He argued:

The Special Rapporteur is of the view that the pre-eminent focus on consultation and consent is blurring understanding about the relevant human rights framework by which to discern the conditions under which extractive industries may legitimately operate within or near indigenous territories. It is simply misguided to tend to reduce examination of the rights of indigenous peoples in the context of resource development projects to examination of the contours of a right to be consulted or a right to free, prior and informed consent. To be sure, understanding the contours of principles of consultation and consent is of critical importance. Arriving at such understanding cannot be adequately achieved by framing the discussion within these principles alone, however.

A better approach appreciates, first, that neither consultation nor consent is an end in itself, nor are consultation and consent stand-alone rights. As instructed by the Inter-American Court of Human rights in *Saramaka v. Suriname*, principles of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples’ substantive rights. It is a standard that supplements and helps effectuate substantive rights, including the right to property, which

³ Report of the Special Rapporteurs on the Rights of Indigenous Peoples, James Anaya, A/HRC/21/34 at para 46.

was the focus of the Court's judgement in that case, and other rights that may be implicated in natural resource development and extraction.

The primary substantive rights of indigenous peoples that may be implicated in natural resource development and extraction, as has been extensively documented include, in particular, rights to property, culture, religion, and non-discrimination in relation to lands, territories and natural resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development, including development of natural resources, as part of their fundamental right to self-determination. These rights are grounded in multiple international instruments, including binding multilateral human rights treaties that have been widely ratified, and are articulated in the United Nations Declaration on the Rights of Indigenous Peoples.

By their very nature, the rights that are potentially affected by natural resource extraction entail autonomy of decision-making in their exercise. This is especially obvious with regard to the rights to set development priorities and to property, but it is also true of the other rights. Accordingly, the consultation and consent standard that applies specifically to indigenous peoples is a means of effectuating these rights, and is further justified by the generally marginalized character of indigenous peoples in the political sphere, but it is a standard that certainly does not represent the full scope of these rights (A/HRC/18/35, at para. 82).

Furthermore, it is important to comprehend that the consultation and consent standard is not the only safeguard against measures that may affect indigenous peoples' rights over their lands, territories and natural resources, among others. Such additional safeguards include but are not limited to the undertaking of prior impact assessments that provide adequate attention to the full range of indigenous peoples' rights, the establishment of mitigation measures to avoid or minimize impacts on the exercise of those rights, benefit-sharing and compensation for impacts in accordance with relevant international standards. All these safeguards, including the State's duty to consult, are specific expressions of a precautionary approach that should guide decision-making about any measure that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples.

Consultation and consent and related safeguards are instrumental to securing indigenous peoples' rights in the fact of extractive industries that operate or seek to operate on or near their territories, but understanding the reach of those underlying substantive rights and the potential impacts on those rights must be a starting point for solving the many questions that arise in this context.

35. In a subsequent Report of the Special Rapporteur on The Rights of Indigenous Peoples – Extractive Industries and Indigenous Peoples, James Anaya, A/HRC/24/41, dated 1 July 2013, elaborated on the situation where consent is achieved, and where it is not, stating:

It will be recalled that consent performs a safeguard role for indigenous peoples' fundamental rights. When indigenous peoples freely give consent to extractive projects under terms that are aimed to be protective of their rights, there can be a presumption that any limitation on the exercise of rights is permissible and that rights are not being infringed. On the other hand, when indigenous peoples withhold their consent to extractive projects within their territories, no such presumption applies, and in order for a project to be implemented the State has the burden of demonstrating either that no rights are being limited or that, if they are, the limitation was valid.

In order for a limitation to be valid, first, the right involved must be one subject to limitation by the State and, second, as indicated by the Declaration, the limitation must be necessary and proportional in relation to a valid State objective motivated by concern for the human rights of others. The Inter-American Court of Human Rights has pointed out that indigenous peoples' proprietary interests in the lands and resources, while being protected the American Convention on Human Rights, are subject to limitations by the State, but only those limitations that meet criteria of necessity and proportionality in relation to a valid objective.

...

Whether or not indigenous consent is a strict requirement in particular cases, States should ensure good faith consultations with indigenous peoples about extractive activities that would affect them, and engage in efforts to reach agreement or consent, as required by the United Nations Declaration on the Rights of

Indigenous Peoples (arts. 19 and 32, para. 2), ILO Convention No. 169 (art. 6, para. 2) and other sources.

When a State determines that it is permissible to proceed with an extractive project that affects indigenous peoples without their consent, and chooses to do so, it remains bound to respect and protect the rights of indigenous peoples and must ensure that other applicable safeguards are implemented, in particular steps to minimize or offset the limitation on the rights through impact assessments, measures of mitigation, compensation and benefit sharing. States should ensure good faith efforts to consult with indigenous peoples and to develop and reach agreement on the measures and the consultations about them will also be factors in the calculus of proportionality in regard to any limitations on rights.

Any decision by the State to proceed with or permit with an extractive project without the consent of indigenous peoples affected by the project should be subject to review by an impartial judicial authority. Judicial review should ensure compliance with the applicable international standards regarding the rights of indigenous peoples and provide for an independent determination of whether or not the State has met its burden of justifying any limitations on rights.

For their part, in keeping with their independent responsibility to respect human rights, companies should conduct due diligence before proceeding, or committing themselves to proceed, with extractive operations without the prior consent of the indigenous peoples concerned and conduct their own independent assessment of whether or not the operations, in the absence of indigenous consent, would be in compliance with international standards, and under what conditions. If they would not be in compliance, the extractive operations should not be implemented, regardless of any authorization by the State to do so.

The Domestic Legal Effect of the Declaration

36. In a recent article in *The Advocate*, Gib van Ert⁴, explains the problem:

⁴ *Three Good Reasons Why UNDRIP Can't be Law – and One Good Reason Why it Can*, 75 *The Advocate* 29.

There are at least three good reasons, based on well-established and largely uncontroversial principles of international and Canadian law, why Canada's endorsement of the United Nations Declaration on the Rights of Indigenous Peoples 2007 ("UNDRIP" or the "Declaration") can have no effect on Canada's domestic law. There is also at least one good reason why, despite these other weighty considerations, it may.

The effect of the Declaration in Canadian law matters. Its dispositions go well beyond the prevailing understanding of s. 35 of the *Constitution Act, 1982*. Education, economic and social conditions, self-government, resource ownership and the concept of free, prior and informed consent are among the Declaration's many promises. Full adoption and implementation of the Declaration "as the framework for reconciliation" is a key demand of the Truth and Reconciliation Commission. Recognition of the Declaration through judicial action could reshape Canadian Aboriginal law.

37. van Ert explains that declarations by the General Assembly have no legal binding effect on members, do not necessarily represent customary international law and cannot be given domestic force without action by Parliament. But van Ert goes on as follows⁵:

There is no doubt that Canada's actions on the international plane in respect of the Declaration are, as a matter of Canadian constitutional law, attributable to the Crown. All of Canada's interactions with the Declaration – when it voted against its adoption by the General Assembly in 2007, when it offered a qualified endorsement of the Declaration in 2010, and when it retracted those qualifications in 2016 – have been Crown acts.

The Crown character of these gestures is the very reason why, following reception law orthodoxy, they can have no direct domestic legal effect. That conclusion is important and valuable in the rest of Canadian law. But how can it be reconciled with the honour of the Crown in its dealings with Canada's Indigenous peoples? How can the Crown, in keeping with the assumption that it intends to fulfill its promises and the principle that no sharp dealing with be sanctioned, be heard to say in court or elsewhere

⁵ Gib van Ert, *Three Good Reasons Why UNDRIP Can't Be Law – and One Good Reason Why It Can*, 75 *The Advocate* 29.

that Canada's endorsement of the Declaration is an act without domestic legal significance?

38. The Special Rapporteur has also commented on the normative weight of the Declaration. In his 2013 Report on the Rights of Indigenous Peoples, James Anaya, A/68/317 stated at para. 61-67:

The Special Rapporteur readily acknowledges that, under prevailing international law doctrine, declarations adopted by resolution of the United Nations General Assembly, unlike treaties, are not themselves direct sources of law. But to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight. It has long been widely understood that standard-setting resolutions of the General Assembly can and usually do have legal implications, especially if called "declarations", a denomination usually reserved for standard-setting resolutions of profound significance.

...

Although technically is a resolution, the Declaration has legal significance, first, because it reflects an important level of consensus at the global level about the content of indigenous peoples' rights, and that consensus informs the general obligation that States have under the Charter – and undoubtedly binding multilateral treaty of the highest order – to respect and promote human rights, including under Articles 1 (2), 1 (3), 55 and 56 of the Charter. The Declaration was adopted by an overwhelming majority of Member States and with the support of indigenous peoples worldwide and, as noted earlier, the few States that voted against the Declaration each subsequently reversed their positions. Especially when representing such a widespread consensus, General Assembly resolutions on matters of human rights, having been adopted under the authority of the Charter itself, can and do inform Member States' obligations under the human rights clauses of the Charter.

Secondly, some aspects of the Declaration – including core principles of non-discrimination, cultural integrity, property, self-determination and related concepts that are articulated in the Declaration – constitute, or are becoming, part of customary international law or are general principles of international law, as found by the International Law Association after a committee of experts conducted an extensive survey of international and State practice in relation to the Declaration. A norm of customary

international law arises when a preponderance of States (and other factors with international personality) converge on a common understanding of the norm's content and generally expect compliance with, and share a sense of obligation to, the norm. It cannot be much disputed that at least some of the core provisions of the Declaration, with their grounding in well-established human rights principles, possess these characteristics and thus reflect customary international law.

Finally, the Declaration is an extension of standards found in various human rights treaties that have been widely ratified and that are legally binding on States. Human rights treaties with provisions relating to the rights of indigenous peoples include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on the Elimination of All Forms of Racial Discrimination. The human rights treaty bodies that interpret and apply these treaties now frequently apply their provisions in ways that reflect the standards in the Declaration and sometimes explicitly refer to the Declaration in doing so. This happens, in particular, with regard to treaty provisions affirming principles of non-discrimination, cultural integrity and self-determination: principles that are also incorporated into the Declaration and upon which the Declaration elaborates with specific reference to indigenous peoples. Although the Declaration is not necessarily dispositive when interpreting a treaty the provisions of which intersect with those of the Declaration, it provides important guidance of significant weight.

Whatever its legal significance, moreover, the Declaration has a significant normative weight grounded in its high degree of legitimacy. This legitimacy is a function not only of the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves. The norms of the Declaration substantially reflect indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community. The Declaration's wording, which has been endorsed by Member States, explicitly manifests a commitment to the rights and principles embodied in the Declaration. It is simply a matter of good faith that States adhere to that expression of commitment to the norms that indigenous peoples themselves have advanced.

In sum, the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has

a non-legally binding character. The Special Rapporteur reiterates that implementation of the Declaration should be regarded as political, moral and yes, legal imperative without qualification.

Initial Consideration by the Courts

39. Advocates for Indigenous people have referred to the Declaration in numerous cases. In *Hupacasath First Nation v Canada*, 2013 FC 900, the court noted at paragraph 51:

Although HFN also briefly stated in its Application that Canada's duty to consult also arises from the Crown's fiduciary obligations towards First Nations Peoples and the United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295, 13 September 2007, I agree with the Respondents that the question of whether the alleged duty to consult is owed to HFN must be determined solely by application of the test set forth immediately above. I would add in passing that HFN did not pursue these assertions in either written or oral argument, and that, in a press release issued by Aboriginal Affairs and Northern Development Canada, entitled Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples, that Declaration is described as "an aspirational document" and as "a non-legally binding document that does not reflect customary international law nor change Canadian laws." HFN did not make submissions or lead evidence to the contrary.

40. In *Sackaney v The Queen*, 2013 TCC 303 (CanLII) it was argued that the Crown did not have jurisdiction to impose tax on Aboriginals because they had not been consulted. Justice Paris of the Tax Court rejected the argument, stating:

The UNDRIP is an international instrument regarding the rights and treatment of indigenous peoples, adopted in 2007 by the United Nations, As pointed out by counsel for the respondent, it is not legally binding under international law and, although endorsed by Canada in 2010, it has not been ratified by Parliament. It does not give rise to any substantive rights in Canada. International instruments such as the UNDRIP may help inform the contextual approach to statutory interpretation, but no issue of statute interpretation has been raised in this case. The appellant's argument relating to the UNDRIP also has no chance of success.

41. In *Snuneymuxw First Nation v Board of Education*, 2014 BCSC 1173, a challenge to a decision to close schools, Chief Justice Hinkson held that the plaintiff could not rely on the Declaration, it not having been given legal effect by Parliament.

42. In *Taku River Tlingit First Nation v Canada*, 2016 YKSC 7, the court approved reference to the Declaration on the interpretation of domestic law stating:

[91] On November 12, 2010, Canada endorsed the “United Nations Declaration on the Rights of Indigenous Peoples” (UNDRIP).

[100] Although not enforceable against Canada, the Supreme Court has confirmed UNDRIP’s usefulness in interpreting Canada’s Constitution in *Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 091 (CanLII).

103. I agree with the NCC’s general premise that UNDRIP may be used to inform the interpretation of domestic law. As Justice L’Heureux Dubé stated in *Baker*, values reflected in international instruments, while not having the force of law, may be used to inform the contextual approach to statutory interpretation and judicial review (at paras 70-71). In *Simon*, Justice Scott, then of this Court, similarly concluded that while the Court will favour interpretations of the law embodying UNDRIP’s values, the instrument does not create substantive rights. When interpreting Canadian law there is a rebuttable presumption that Canadian legislation is enacted in conformity to Canada’s international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured.

43. In *Simon v Canada*, 2013 FC 117, to similar effect, the court said at paragraph 121:

The Supreme Court of Canada has acknowledged the importance of international human rights law in the interpretation of domestic legislation such as the Canadian *Human Rights Act*, RSC 1985, c H-6. When it comes to interpreting Canadian law, there is a presumption, albeit refutable, that Canadian legislation is enacted in conformity to Canada’s international obligations. Consequently, when a provision of domestic law can be ascribed more than one meaning, the interpretation that conforms to international agreements that Canada has signed should be favoured. In the

present instance, the Applicants invoke UNDRIP to inform the contextual approach to statutory interpretation as per *Baker* cited about, at paras 69-71. Indeed, while this instrument does not create substantive rights, the Court nonetheless favours an interpretation that will embody its values.

44. In *Hamilton Health Services Corporation v DH*, 2015 ONCJ 229, a case involving a claimed right to pursue traditional medicine, the court said at paragraph 5:

This approach recognizes the province's acceptance of the family's right to practice traditional medicine and the family's acceptance western medicine will most certainly help their daughter. It is simply a recognition of what is in J.J.'s best interest. Such an approach bodes well for the future. It is also an approach that is reflected in Article 24 of the *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, which states in part:

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices ... Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

45. In *R. v Sayers*, 2017 ONCJ 77, in the context of an application by the Crown to be allowed to withdraw criminal charges, Justice Kwolek observed:

In addition, in dealing with aboriginal people and aboriginal land claims and rights, the Crown has a special responsibility and relationship with its indigenous peoples. The Crown must deal with such peoples and related issues fairly and appropriately, especially in light of the recent recommendations as released by the Truth and Reconciliation Commission and Canada's recent adoption of the United Nations Declaration of the Rights of Indigenous Peoples.

46. The Supreme Court of Canada was invited by an intervener to comment on FPIC in two consultation cases heard in November 2016. The court released its reasons on July 25, 2017 without any express reference to the Declaration: *Chippewas of the Thomas First Nation v Enbridge Pipelines Inc*, 2017 SCC 41; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40.

The Content of the Declaration

47. The Declaration contains 46 articles, many of which have multiple parts. In its explanation for its negative vote in 2007, the Canadian representative made reference to the issues involving:

- (a) ambiguities regarding the extent of lands, territories and resources;
- (b) free, prior and informed consent when used as a veto;
- (c) self-government without recognition of the importance of negotiations;
- (d) intellectual property;
- (e) military issues; and
- (f) the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, member States and third parties.

48. These topics can be found in the following articles.

Lands, Territories, and Resources

Article 8(2)(b) “States shall provide effective mechanisms for prevention of, and redress for:

...

Any action which has the aim or effect of dispossessing them of their lands, territories or resources.”

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 26(1)(2)(3) “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. ”

“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.”

“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 system of the indigenous peoples concerned.”

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.”

Article 28(1)(2)

“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 or 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.”

“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.”

Article 29 (1)(2)

“Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”

“States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.”

Article 32 (1)(2)(3) “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”

“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.”

“States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”

Free, Prior and Informed Consent

Articles 28 and 29 and 32 above.

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.”

Self Government

Article 3 “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

Article 4 “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”

Intellectual Property

Article 11(1)(2) “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as

archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.”

“States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”

Military

Article 30(1)(2) “Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a significant threat to relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.”

“States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.”

49. Other topics addressed in the Declaration include matters such as an educational rights (Article 14), economic and social conditions (Article 21), the right to development (Article 23) and financial and technical assistance (Article 39).

The Relationship Between FPIC and Recognition of Territories

50. There is a direct relationship between the recognition of Indigenous rights to their lands and FPIC. In *Indigenous Peoples’ Rights to Free, Prior and Informed Consent and to World Bank’s Extractive Industries Review*⁶, Fergus Mackay writes at p. 55:

FPIC has a number of elements that need to be accounted for in its operationalization: 1) *free*, 2) *prior*, 3) *informed*, and 4) *consent*. To this obvious list, I would add a fifth component: adequate

⁶ 4 Sustainable Development Law & Policy 43 2004.

recognition of indigenous peoples' rights to their lands, territories, and resources traditionally owned or otherwise occupied and used.

And at p. 57:

FPIC is dependent on clear recognition and protection of indigenous peoples' rights, particularly to lands, territories and resources traditionally owned or otherwise occupied and used. Without full recognition of indigenous peoples' territorial rights, FPIC will not fully provide the protection it is designed to provide. In this sense, it is important to note that under international law indigenous peoples' territorial rights arise from and are grounded in indigenous custom and practice and exist independently of formal recognition by the states. States are obligated to delimit, demarcate, and title indigenous lands and territories in accordance with their customary laws and values.

While this may seem an obvious point, it is not uncommon for states to limit FPIC to lands that are legally recognized by their own legal systems rather than the lands and territories traditionally owned by indigenous peoples. In many cases, there is a large disparity between the two categories, and requiring FPIC only in connection with the former potentially exempts large areas of indigenous lands from the FPIC requirement.

51. It is this connection, together with the ambiguity of the geographic extent of Indigenous people's lands, territories and resources, that was one of the Harper government concerns in 2006 and 2007. Insofar as extractive projects are concerned, the Special Rapporteur considers that⁷:

“The Declaration and various other international sources of authority, along with practical considerations, lead to a general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent. Indigenous peoples' territories include lands that are in some form titled or reserved to them by the State, lands that they traditionally own or possess under customary tenure (whether officially titled or not), or other areas that are of cultural or religious significance to them or in which they traditionally have access to resources that are important to their physical well-being or cultural practices. Indigenous consent may also be required

⁷ A/HRC/24/41 at para. 27.

when extractive activities otherwise affect indigenous peoples, depending upon the nature of and potential impacts of the activities on the exercise of their rights. In all instances of proposed extractive projects that might affect indigenous peoples, consultations with them should take place and consent should at least be sought, even if consent is not strictly required.”

52. Of course, in British Columbia, with the exception of reserve lands, and the lands included in the *Tsilqot’in* declaration, Indigenous lands, territories and resources have not been delimited. In its ten principles, Canada recognizes the importance of FPIC beyond reserve and title, as follows:

The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

This Principle acknowledges the Government of Canada’s commitment to new nation-to-nation, government-to-government, and Inuit-Crown relationships that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Government recognizes the right of Indigenous peoples to participate in decision-making matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.

The Supreme Court of Canada has clarified that the standard to secure consent of Indigenous peoples is strongest in the case of Aboriginal title lands. The Supreme Court of Canada has confirmed the Aboriginal title gives the holder the right to use, control, and manage the land and the right to the economic benefits of the land and its resources. The Indigenous nation, as proper title holder, decides how to use and manages its lands for both traditional activities and modern purposes, subject to the limit that the land cannot be developed in a way that would deprive future generations of the benefit of the land.

The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands. To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper

collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in the public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.

The *Tsilhqot'in* Decisions

53. As noted above, the B.C. government (in the relationship agreement) has supported the adoption of the *Tsilhqot'in* Supreme Court of Canada decision (2014 SCC 44) and Minister Raybould said: "I cannot see us simply setting aside the important guidance we have from our Courts – from *Tsilhqot'in*, for example – and starting afresh from the Declaration articles".⁸

54. As can be expected, there is not a universally agreed upon interpretation of the *Tsilhqot'in* decision. In a September 7, 2017 Globe and Mail article, Ed John, Grand Chief of the First Nations Summit is reported to have said:

The Province's willingness to acknowledge the underlying legal right to land and title held by First Nations, as laid out in the landmark *Tsilhqot'in* decision and other Court rulings, gives him hope that the government's promises are more than just empty words.

55. First Nations argues that Aboriginal title is a unique collective territorial title that pre-existed and survived the assertion of Crown sovereignty, that has jurisdictional and economic aspects deriving from exclusive occupation of land prior to Crown assertion of sovereignty and pre-existing Indigenous laws. They submit both Crown title and Aboriginal title "underly" unsurrendered lands in British Columbia.

56. The question whether Aboriginal title contains any jurisdictional content, other than internal jurisdiction, is controversial. *Tsilhqot'in* recognizes Aboriginal title as a unique property right of land use, subject to the Provincial constitutional power to regulated land use, subject to some limits as follows:

⁸ At some level, the concern about setting the Declaration within the Canadian Constitutional framework, including s. 35, informed the precious government's 2007 vote against the Declaration.

A. Do Provincial Laws of General Application Apply to Land Held Under Aboriginal Title?

[101] Broadly put, provincial laws of general application apply to lands held under Aboriginal title. However, as we shall see, there are important constitutional limits on this proposition.

[102] As a general proposition, provincial governments have the power to regulate land use within the province. This applies to all lands, whether held by the Crown, by private owners, or by the holders of Aboriginal title. The foundation for this power lies in s. 92(13) of the *Constitution Act*, 1867, which gives the provinces the power to legislate with respect to property and civil rights in the province.

[103] Provincial power to regulate land held under Aboriginal title is constitutionally limited in two ways. First, it is limited by s. 35 of the *Constitution Act*, 1982. Section 35 requires any abridgment of the rights flowing from Aboriginal title to be backed by a compelling and substantial governmental objective and to be consistent with the Crown's fiduciary relationship with title holders. Second, a province's power to regulate lands under Aboriginal title may in some situations also be limited by the federal power over "Indians, and Lands reserved for the Indians" under s. 91(24) of the *Constitution Act*, 1867.

[104] This Court suggested in *Sparrow* that the following factors will be relevant in determining whether a law of general application results in a meaningful diminution of an Aboriginal right, giving rise to breach: (1) whether the limitation imposed by the legislation is unreasonable; (2) whether the legislation imposes undue hardship; and (3) whether the legislation denies the holders of the right their preferred means of exercising the right (p. 1112). All three factors must be considered; for example, even if laws of general application are found to be reasonable or not to cause undue hardship, this does not mean that there can be no infringement of Aboriginal title. As stated in *Gladstone*:

Simply because one of [the *Sparrow*] questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement. [para. 43]

[105] It may be predicted that laws and regulations of general application aimed at protecting the environment or assuring the continued health of the forests of British Columbia will usually be reasonable, not impose an undue hardship either directly or indirectly, and not interfere with the Aboriginal group's preferred method of exercising their right. And 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. This said, when conflicts arise, the foregoing template serves to resolve them.

[106] Subject to these constitutional constraints, provincial laws of general application apply to land held under Aboriginal title.