Bill C-641 – *United Nations Declaration on the Rights of Indigenous Peoples Act*
A Commentary on the Federal Government's Response

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April 13, 2015

The *United Nations Declaration on the Rights of Indigenous Peoples* is a consensus, universal international instrument.[1] No country in the world formally objects to it. The *Declaration* applies to all Indigenous peoples in the world.

In the *UN Declaration*, all States have recognized the "urgent need to respect and promote the inherent rights of indigenous peoples".[2] In his 2014 Report on Canada, former UN Special Rapporteur James Anaya concluded: "The United Nations Declaration on the Rights of Indigenous Peoples, which has been endorsed by Canada, provides a common framework within which the issues faced by indigenous peoples in the country can be addressed."[3]

Thus, it is timely and pressing to consider and adopt Bill C-641 – *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*.

Other States are already engaging in productive implementation of the *UN Declaration*.[4] New Zealand's Waitangi Tribunal[5] has concluded that the *UN Declaration* "represents the most important statement of indigenous rights ever formulated."[6] In 2011, the Australian Human Rights Commission recommended: "All legislation, policies and programs should be reviewed for consistency with the rights affirmed by the Declaration on the Rights of Indigenous Peoples."[7]

On March 12, 2015, Romeo Saganash moved that his Private Member's Bill C-641 be read the second time and referred to a committee.[8] While opposition members of Parliament expressed support for Bill C-641, the federal government vigorously opposed it.

This Commentary focuses on the speech in the House of Commons by Mark Strahl, Parliamentary Secretary to the Minister of Aboriginal Affairs and Northern Development,[9] who presented the opposition to the Bill. The central objection highlighted is article 19 of the *Declaration* and "free, prior and informed consent" (FPIC).

In this regard, it is useful to make some preliminary remarks. None of the provisions in the *Declaration* should be read in isolation. In each case, it is important to read a particular provision in the context of the whole *Declaration* and other international human rights law. While other

important provisions will be cited later in this Commentary, it is useful to refer here to the following articles:

> **Article 18**
> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> **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.
>
> **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.

The Waitangi Tribunal has already carefully examined FPIC and article 19 of the *UN Declaration* in a broader context. The Tribunal has made the following observations and conclusions in the overall context of "partnership",[10] as included in the *Declaration*:

> Articles 18 and 19 of UNDRIP are important in understanding the principle of partnership … but they also speak to the need for the Crown to actively protect Māori interests by engaging through the appropriate Māori representatives, and to use and allow time for Māori decision-making processes to occur. Consultation is key to this and the Crown should in certain circumstances strive to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them. … such an approach is linked back to the right to self-determination and the ability to be self-governing. Whilst the obligation varies depending on the subject matter of any legislation and policy, we consider this claim is at the high end of the spectrum for consultation and cooperation requiring free, prior, and informed consent, rather than mere participatory processes.[11]

In contrast, Strahl's response on Bill C-641 appears to consider article 19 of the *Declaration* in isolation from the rest of the *Declaration* and other international human rights law.

Misleading Parliament and the public on *UN Declaration*

Strahl's statement follows a well-established pattern when federal government spokespersons are addressing the rights of Indigenous peoples. While claiming to support Aboriginal rights, the political rhetoric is designed to alarm the Canadian public. Little or no regard is accorded to accuracy, justice or truth.

As in the past,[12] this raises concerns about misleading Parliament and the public. Speaking points often reflect strategies and messaging that is similar to those the government of Canada has been engaged in since 2006.

The strategy of the federal government against the *UN Declaration* was described by Paul Joffe at the *Aboriginal Law Conference—2008*, hosted by the Continuing Legal Education Society of British Columbia:

> A secret federal document obtained in September 2007 discloses anything but a reconciliatory approach. In anticipation of Canada's No vote at the General Assembly on the *UN Declaration*, an international and domestic strategy for the post-vote period was devised ... Excerpts of the Tory government's prejudicial approach reveal a relentless and divisive strategy to undermine Indigenous peoples' rights in the *UN Declaration*:
>
> > The provinces and territories will be encouraged to make public statements of support for Canada's position and approach.
> >
> > Domestically and internationally, Canada will take every opportunity to reiterate our position that the … Declaration is not a legally binding instrument, has no legal effect in Canada, and does not represent customary international law.[13]
> >
> > In the international arena, Canada will raise objections when the Declaration is referenced, and will encourage other States with concerns about the Declaration to make these known through Statements of Understanding or Explanations of Vote.[14]
> >
> > Negotiations at the Organization of American States (OAS), where a similar document is under consideration, will likely be impacted by the UN process. Canada will continue to take positions at the OAS consistent with those articulated at the UN.[15]

At the OAS, the majority of States supported the use of the *UN Declaration* as the baseline for negotiations.[16] As a result, Canada indicated in April 2008 that it would no longer actively negotiate or table text.[17] Despite its subsequent endorsement of the *UN Declaration*, Canada has not resumed its active participation within these negotiations.

In "*UN Declaration on the Rights of Indigenous Peoples*: Statements by the Government of Canada and Brief Responses", examples are provided of the "erroneous, misleading, and unsubstantiated pronouncements made by the Canadian government in an effort to justify its ongoing opposition of the *UN Declaration*".[18] Positions against the *Declaration* were mainly crafted by the Indian Affairs minister Jim Prentice in 2006-07. An early example is the interview of minister Prentice on Mike Duffy's television show in June 2006:

> DUFFY: … this UN declaration on indigenous rights would give auto-determination for indigenous peoples, giving them the right to reclaim traditional territory and refuse military activity upon traditional land. This is quite a sweeping and radical proposal.
>
> PRENTICE: It's very sweeping. It's very radical. We don't support it. It is inconsistent with the Canadian charter. It's inconsistent with the Canadian constitution. It contravenes the Canadian National Defence Act and, frankly, it runs contrary to all of the policies under which we've negotiated land claims in this country for the last 100 years.[19]

The *Declaration* only reaffirms the Indigenous right to self-determination. Canada had already ratified the two international human rights Covenants in 1976, which affirmed: "All peoples have the right of self-determination".[20] This "foundational"[21] right has been repeatedly applied by UN treaty bodies to Indigenous peoples in Canada and other regions of the world.[22] Further, Canada did not have land claims policies "for the last 100 years". Its first land claims policy was only in 1973. Efforts by representatives of Indigenous peoples to obtain substantiation of the minister's statements were not successful.

In May 2008, an Open Letter from over 100 scholars and experts took issue with the Canadian government's ongoing inaccurate and unfair positions:

> The Declaration provides a principled framework that promotes a vision of justice and reconciliation. In our considered opinion, it is consistent with the Canadian Constitution and Charter and is profoundly important for fulfilling their promise. Government claims to the contrary do a grave disservice to the cause of human rights and to the promotion of harmonious and cooperative relations.[23]

The trend for sensationalist and erroneous government positions still prevails today.

Commentary on Strahl's response to Bill C-641

In regard to Strahl's response to Bill C-641, the following statements are inaccurate, excessive or otherwise raise serious concerns:

1. **Strahl**: " ... while we support the general principles behind the declaration, there are several portions of the document with which our government has grave concerns, and we have articulated those concerns clearly to Canadians and to the international community".

   Comment: This contradicts what the government declared in its November 2010 endorsement of the *Declaration*. Despite its concerns, the federal government concluded: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."

2. **Strahl**: "... this proposal is simply impossible to support in view of Canada's existing legal and constitutional framework."

Comment: It is difficult to fathom how implementation of the *Declaration* would be "impossible" to support, unless the federal government fabricates the most extreme and absolute interpretations of Indigenous rights and related State obligations. Such a position has no credibility. It fails to uphold the honour of the Crown and constitutes bad faith. The government is well aware that human rights are generally relative (not absolute). As States have agreed by consensus, diverse legislative and other measures are explicitly contemplated in the *Declaration*.

For example, the *Declaration* stipulates in article 38: "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration." Article 42 adds: "States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

3. **Strahl**: "... our government is dedicated to protecting aboriginal rights in Canada".

Comment: The federal government has consistently opposed Aboriginal rights, which has resulted in extensive litigation by the Indigenous peoples concerned. As former Special Rapporteur on the rights of indigenous peoples, James Anaya, concluded in his 2014 report on Canada: "…the Government should take a less adversarial, position-based approach than the one in which it typically seeks the most restrictive interpretation of aboriginal and treaty rights possible."[24]

Despite widespread opposition from Indigenous organizations across Canada, the government adopted the *Safe Drinking Water for First Nations Act* in 2013. In this Act, the government purportedly conferred on itself the power to "abrogate or derogate" from Aboriginal or Treaty rights protected by Canada's Constitution – "to the extent necessary to ensure the safety of drinking water on First Nation lands". The claimed federal power to extinguish such rights is incompatible with section 35 of the *Constitution Act, 1982*.[25]

The federal government is not "dedicated to protecting aboriginal rights in Canada" or internationally. In order to avoid scrutiny by UN treaty bodies, the government includes Aboriginal and Treaty rights in its "Core Document" for such bodies under the heading "Legal framework protecting human rights at the domestic level".[26] Yet since 2006, the government has refused to acknowledge in Canada that Indigenous peoples' collective rights constitute human rights. Federal representatives are not allowed to even discuss this critical issue with Indigenous representatives. The government refuses to engage with Indigenous peoples on a human rights-based approach.[27]

In August 2012, Foreign Affairs minister John Baird declared: "We support freedom, democracy, and respect for the rule of law, and we don't apologize for it … these values are universal."[28] In an October 2012 address to the General Assembly, the minister underlined the relationship between security and human rights:

> The world's security is closely linked to … protecting the dignity and worth of every person by upholding and protecting fundamental freedoms … protecting human rights and human dignity is an obligation that each state owes its citizens, and a mutual obligation of all members of the international community.[29]

To our knowledge, former minister Baird never spoke of the human rights of Indigenous peoples. The Canadian government applies a different and lesser standard on democracy, human rights, security and the rule of law when addressing the rights of Indigenous peoples. This double standard is highly discriminatory.

The government continues to resist respecting and protecting Indigenous peoples' human rights and related State obligations affirmed in the *UN Declaration*. It repeatedly insists that the *Declaration* does not represent any customary international law – which former Special Rapporteur Anaya has declared is a "manifestly untenable position".[30] Also "Canada's International Human Rights Law Policy" confirms: "The UN Charter and customary international law impose on all countries the responsibility to promote and protect human rights … a mutual obligation of all members of the international community, as well as an obligation of a state towards its citizens."[31]

Various rights, obligations and principles affirmed in the *Declaration* are considered to be a part of customary international law – if not also peremptory[32] norms. These include, *inter alia*: international principle of *pacta sunt servanda* ("treaties must be kept"); prohibition against racial discrimination; right of self-determination; and right not to be subjected to genocide.[33] In the *Declaration*, the right to an effective remedy and redress are also customary international law.[34]

4. **Strahl**: "... our government has also issued a statement of support for the principles of the very document at the core of this bill, the United Nations Declaration ... which are consistent with our own commitment to continue working in partnership with aboriginal peoples to improve the well-being of aboriginal Canadians.

   Comment: The November 12, 2010 endorsement was posted to the Aboriginal Affairs website on a Friday afternoon, presumably to avoid attention. The endorsement was made without notice to, or consultation with, Indigenous rights holders. Since 2006, the federal government has refused any substantive discussion of the government's adverse positions on the *Declaration* and clearly fails to "work in partnership" with Indigenous peoples.

   The term "partnership" connotes a consensual relationship. As indicated in the *Canadian Oxford Dictionary*, 1998, "partner" refers to "a country, organization, etc. that has an agreement with ... others". Yet the key reason emphasized by the federal government for opposing Bill C-641 is the principle of "free, prior and informed consent" (FPIC) and the wording of article 19 of the *Declaration*.

   In relation to Indigenous peoples, Canada's endorsement refers four times to the government's "partnership" and "partners". If such a consensual relationship is central in

achieving Indigenous well-being, then the government should not take unilateral actions that undermine Indigenous peoples' human rights and the *UN Declaration*. The rights in the *Declaration* constitute "minimum standards for the[ir] survival, dignity and well-being".[35]

Despite repeated requests, the government of Canada refuses to discuss with Indigenous peoples' representatives the positions it takes in international forums – either before or after such meetings. Even **public statements by the government are not generally shared**. Any Indigenous people on the Canadian delegation are not permitted to disclose discussions with others.

Such government actions run counter to basic principles of democratic participation, transparency and accountability that serve to impoverish Indigenous peoples and further impair their human rights. As emphasized in the 2013 *Report of the Special Rapporteur on extreme poverty and human rights*:

> From a human rights perspective, effective access to public information is a precondition for exercising other human rights. Exercise of the right to participation depends on transparency and access to complete, up-to-date and comprehensible information. ... Transparency is essential to ensure rights holders are fully aware of the aims and scope of the process, the other actors involved and their role and level of influence.[36]

In October 2014, the government insisted in Korea that the use of the term "indigenous peoples" should have no legal significance within the context of the *Convention on Biological Diversity* – despite the use of the term "Indigenous peoples" throughout the *UN Declaration*.[37] At this CBD meeting, Canada argued:

> The term 'indigenous peoples' as used in the Declaration on the Rights of Indigenous Peoples focuses on human rights considerations and not primarily on biodiversity issues, so we question why using this term in future decisions and secondary documents under the Convention.

Such assumed separation between human rights and biodiversity is patently false.[38]

Protecting the environment is a human right and Canada and other States have human rights obligations relating to the environment.[39] The *Declaration* includes environmental, cultural, social and other diverse human rights. Article 31 affirms: "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions". States, in conjunction with Indigenous peoples, have a duty to "take effective measures to recognize and protect the exercise of these rights".

The *Nagoya Protocol* to the *Convention on Biological Diversity* not only refers to the *UN Declaration*, but also affirms the "importance of … traditional knowledge for the conservation of biological diversity".[40] In the Outcome Document of the 2014 World

Conference on Indigenous Peoples,[41] Canada and other States in the General Assembly recognized by consensus: "the traditional knowledge, innovations and practices of indigenous peoples and local communities make an important contribution to the conservation and sustainable use of biodiversity."

Canada's above-stated position is contradicted by Canada's own laws. Traditional knowledge is tied to Aboriginal "peoples".[42] Further, "community knowledge" is distinguished from "Aboriginal traditional knowledge".[43] The UN Committee on Economic, Social and Cultural Rights has indicated to Canada the need for concrete measures "for the protection and promotion of ancestral rights and traditional knowledge of Aboriginal peoples".[44] In seeking to deny Indigenous peoples their existing status as "peoples", Canada ignored "subsequent practice" as set out in the *Vienna Convention on the Law of Treaties*[45] and its own domestic laws.

5. **Strahl**: "... the member … is asking the House to take an aspirational, non-legally binding document and enshrine it in Canadian law".

   Comment: The *Declaration* is not merely aspirational. This has been affirmed by the former Special Rapporteur on the rights of indigenous peoples, James Anaya, who indicated in this 2013 report to the UN General Assembly: "implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."[46] In a 1962 opinion from the UN Office of Legal Affairs, it is concluded: "in United Nations practice, a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected".[47]

   The Supreme Court of Canada has affirmed that declarations and other international human rights instruments are "relevant and persuasive sources" for interpreting human rights in Canada's Constitution and other domestic law.[48]

   At the October 2014 meeting in Korea on the *Convention on Biological Diversity*, Canada claimed that the *UN Declaration* 'has no legal effect on the implementation of treaty obligations". This statement is simply false. It contradicts Canada's own position in *Canada's Action Plan Against Racism*: "The declaration should provide guidance on the relationship between states and the indigenous peoples who live there, and guidance to various UN bodies and other international organizations."[49]

   In addition, the Committee on the Rights of the Child has urged States parties to "adopt a rights-based approach to indigenous children based on the Convention [on the Rights of the Child] and other relevant international standards, such as … the United Nations Declaration on the Rights of Indigenous Peoples."[50] Former Special Rapporteur James Anaya has underlined: "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."[51]

Even when the United States had voted against the *UN Declaration*, the Committee on the Elimination of Racial Discrimination urged the U.S. "that the declaration be used as a guide to interpret [its] obligations under the Convention relating to indigenous peoples".[52] The International Labour Organization (ILO) and others have also affirmed: "With the adoption of the UN Declaration, the international normative framework regulating the protection of the rights of indigenous peoples has been firmly strengthened. The [*Indigenous and Tribal Peoples Convention, 1989*], is fully compatible with the UN Declaration on the Rights of Indigenous Peoples and the two instruments are mutually reinforcing."[53]

Further it is also misleading, if not inaccurate, for Mark Strahl to claim that Bill C-641 is a request to "enshrine [the *UN Declaration*] in Canadian law". The Bill requires the government of Canada, "in consultation and cooperation with Indigenous peoples, [to] take all measures necessary to ensure that all laws of Canada are consistent with the United Nations Declaration".[54] In accordance with existing precedent,[55] the Indian Affairs minister is required in s. 3 of the Bill to submit a report on such collaborative implementation each year from 2016 to 2036.

6. **Strahl**: "... in July 2013, the UN Special Rapporteur on the rights of indigenous peoples released a report following his visit to Canada. In it, he said, 'Canada's relationship with the indigenous peoples within its borders is governed by a well-developed legal framework...that in many respects are protective of indigenous peoples' rights'."

   Comment: It is misleading for the federal government to highlight a positive statement by the Special Rapporteur in regard to Canada's Constitution – and, at the same time, make no mention of the many "human rights problems" that Anaya highlighted throughout his July 2014 Report on Canada:

   > It is difficult to reconcile Canada's well-developed legal framework and general prosperity with the human rights problems faced by indigenous peoples in Canada, which have reached crisis proportions in many respects. ... The most jarring manifestation of those human rights problems is the distressing socioeconomic conditions of indigenous peoples in a highly developed country. (paras. 14 and 15)
   >
   > ... overall there appear to be high levels of distrust among indigenous peoples towards government at both the federal and provincial levels. (para. 80)

7. **Strahl**: "... aboriginal rights in Canada, entrenched in section 35 of the Constitution and further defined by the Supreme Court of Canada, identify a duty to consult for government and industry.

Comment: It is incorrect to declare that the duty to consult in s. 35 applies to "industry".[56] As indicated in *Haida Nation* v. *British Columbia (Minister of Forests)*, third parties have no duty to consult under s. 35 of the *Constitution Act, 1982*:

> The Crown alone remains legally responsible for the consequences of its actions and interactions with third parties, that affect Aboriginal interests. The Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development; this is not infrequently done in environmental assessments. ... However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated.[57]
>
> The fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal peoples. If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable. But they cannot be held liable for failing to discharge the Crown's duty to consult and accommodate.[58] (para. 56)

8. **Strahl**: "The passage of this bill would effectively replace this duty to consult with a duty to seek free, prior, and informed consent. This means ... that this would provide first nations with a veto over any sort of legislation or development that concerns them. This would have a significant impact on legislative initiatives as well as on Canada's economy."

   Comment: It is incorrect to declare that Bill C-641, if adopted, "would effectively replace this duty to consult with a duty to seek [FPIC]". As affirmed by the Supreme Court of Canada, international standards such as those in the *Declaration* may be used to interpret human rights in Canada's Constitution and other domestic law.[59] In addition, "consent" is at the high end of the spectrum of the duty to consult. FPIC is not "replacing" the duty to consult.

   Strahl builds on his government's false analysis by declaring that to "replace" the duty to consult "would provide first nations with a veto over any sort of legislation or development that concerns them". The term "veto" is not used in the *UN Declaration*.

   The *Canadian Oxford Dictionary*, 1998, defines "veto" as a "rejection" or "prohibition". "Veto" implies an absolute right or power to reject a law or development that concerns Indigenous peoples, regardless of the facts and law in any given situation. No balancing of rights would occur. No considerations of the rights of others or justice or non-discrimination or good governance would be permitted. Strahl then further builds on this imagined frenzy of absolute power and declares that the federal government would not be able "to fulfill the honour of the Crown and our constitutional obligations" and "it would be irresponsible to give any one group in Canada a veto over these decisions". He adds: "what is being proposed here is to provide a de facto veto over government legislation to

each one of the 633 first nations chiefs in the country, not to mention the fact that Inuit and Métis leaders would presumably be required to provide their consent as well."

Strahl began by falsely claiming Bill C-641 would provide First Nations with a "veto of any sort of legislation or development that concerns them." However, Strahl concludes by claiming such a veto would apply to "any" law brought forward by the federal government and that this is the real intention of the Bill:

> According to the language in the bill, aboriginal Canadians would have a veto over any piece of legislation brought forward by a Canadian government. To be clear, through this initiative, the NDP wants to provide that veto to all first nations across the country on any law or bill that this government wants to implement.

It is unconscionable that, on March 13, 2015, Aboriginal Affairs minister Bernard Valcourt unequivocally supported the false scenario of absolute rights and power of Indigenous peoples fabricated by MP Mark Strahl in the House of Commons:

> [MP Mark Strahl] simply said that the hon. member's bill would give a group of Canadians, in this case aboriginal Canadians, a veto over the will of Parliament. ... That flies in the face of the Canadian Constitution, which is why we will not be supporting his bill.

In rejecting Bill C-641, it is significant that the federal government has failed to consider the landmark decision of the Supreme Court of Canada in *Tsilhqot'in Nation*. The Court repeatedly referred to the constitutional right of Aboriginal title holders to give or withhold consent. Such title holders have the right to use and control the land and enjoy its benefits. Such right to control "means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders" (para. 76). The Court did not use the term "veto". The Supreme Court of Canada did not describe "consent" in absolute terms.

A similar approach was taken by Canada in opposing FPIC in para. 3 of the consensus Outcome Document of the World Conference on Indigenous Peoples in September 2014.[60] Subsequently, Canada indicated that agreeing to such paragraph "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."[61] However, the Supreme Court of Canada ruled that with the enactment of the *Constitution Act, 1982*, "the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy."[62]

In *Tsilhqot'in Nation*, the Supreme Court ruled that, in the absence of Aboriginal consent, "legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title." (para. 92)

Further, at the Committee on World Food Security in Rome last October, Canada would not accept a reference to FPIC without inserting a formal explanation of position in the consensus Report: "Canada interprets FPIC as calling for a process of meaningful consultation with indigenous peoples on issues of concern to them".[63] Such a view contradicts the Supreme Court of Canada's rulings that explicitly refer to "consent".

For example, in *Tsilhqot'in Nation* v. *British Columbia*,[64] the Supreme Court of Canada highlighted Indigenous "consent" in 9 paragraphs; the "right to control" the land in 11 paras.; and the "right to determine" land uses in 2 paras. The Court added that the "right to control" means that the governments and others seeking to use the land must obtain the consent of the Aboriginal title holders unless stringent infringement tests are met.[65] Moreover, the Court ruled that "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land."[66]

"Consent" is not limited to Aboriginal title and applies to other Aboriginal rights. As described in 2004 by the Supreme Court in *Haida Nation* v. *British Columbia (Minister of Forests)*, the high end of the spectrum of consultation requires "'full consent of [the] aboriginal nation' on very serious issues."[67] Yet, in March 2011, Canada released updated guidelines to federal officials on "Aboriginal Consultation and Accommodation" that deleted any existing reference to Indigenous peoples' "consent".[68]

It is disturbing that the government of Canada claims to uphold the Aboriginal rights of Aboriginal peoples and Canada's Constitution, but ignores key rulings of Canada's highest court that favour such peoples.

9. **Strahl**: "... our government understands … that these rights must be balanced against the rights of other Canadians. ... our government will continue to govern in the interests of all Canadians, and we will reject giving a veto to any group as is proposed by Bill C-641. It is for these reasons our government cannot support this bill."

   Comment: The *Declaration* includes one of the most comprehensive balancing provisions in any international human rights instrument. Every provision in the *Declaration* – including those related to FPIC – must be interpreted in accordance with the "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith" (art. 46(3)). These are the same core principles as in the Canadian and international legal systems. These are also the same principles that have been denied Indigenous peoples throughout history.

   Thus, it is not possible that the rights in the *Declaration* would be interpreted in an absolute manner or that the rights of others would not be respected. In the final years of negotiations, a previous Canadian government played a key role together with Indigenous peoples in crafting the comprehensive balancing provisions for interpreting all provisions in the *Declaration*. The government then successfully promoted such provisions among other States.

Bill C-641 calls on the government of Canada, in consultation and cooperation with Indigenous peoples, to take all measures necessary to ensure that the laws of Canada are consistent with the *UN Declaration*. In view of this collaborative process, it is not possible to claim that unconstitutional legislation that undermines the rights of others would be the result.

Article 19 of the *Declaration* affirms: "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

In *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians N° 23*, 2014, the Inter-Parliamentary Union (IPU) indicates: "it is necessary for parliaments to:

> • include and strengthen participation of indigenous peoples in hearings and committees, while respecting the principle of free, prior and informed consent in relation to legislative and administrative matters affecting them;
> ...
> • allocate sufficient resources to parliamentary committees on indigenous peoples' rights to guarantee the involvement and participation by indigenous peoples in public hearings and other activities.[69]

In 2011, the Australian Human Rights Commission underlined: "the Australian Government should consult and cooperate with Aboriginal and Torres Strait Islander peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[70]

In its General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, the Committee on Economic, Social and Cultural Rights (CESCR) indicated that the following minimum "core obligation is "applicable with immediate effect":

> (e) To allow and encourage the participation of ... indigenous peoples ... in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.[71] (para. 55(e))

It would be ill-advised for the government of Canada to ignore the General Comment No. 21 of the CESCR as a non-binding recommendation. This Committee has an official mandate to interpret Canada's international obligations under the *International Covenant on Economic, Social and Cultural Rights*. For example, in *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo),* the International Court of Justice held that the "Human Rights Committee has built up a considerable body of interpretative case law, in particular ... in the form of its 'General Comments'."[72] Thus, the

ICJ should "ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty".

The Supreme Court of Canada encourages democratic dialogue and other procedures in Canada's Parliament. This does not signify that illegal interference in Parliamentary procedures are the result. In *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, the Supreme Court of Canada ruled in 1999:

> ... the best remedy is one that will encourage and allow Parliament to consult with and listen to the opinions of Aboriginal people affected by it. The link between public discussion and consultation and the principles of democracy was recently reiterated by this Court in *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 68: "a functioning democracy requires a continuous process of discussion". The principle of democracy underlies the Constitution and the *Charter*, and is one of the important factors guiding the exercise of a court's remedial discretion. It encourages remedies that allow the democratic process of consultation and dialogue to occur... [73]

Conclusions

10. The *UN Declaration on the Rights of Indigenous Peoples* is not merely an "aspirational" instrument. As affirmed by Canadian courts, the *Declaration* and other international human rights instruments can be relied upon to interpret the rights of Indigenous peoples and related State obligations. Moreover, some of its provisions represent customary international law.

11. Since 2006, the government of Canada has not fundamentally changed its adverse strategies and positions in relation to Indigenous peoples' human rights. Consistent with its duty to respect and protect human rights and other constitutional and international obligations, the government has a crucial opportunity to embark together with Indigenous peoples on a collaborative and principled process in supporting and adopting Bill C-641.

12. Yet the Canadian government applies a different and lesser standard on democracy, human rights, security and the rule of law when addressing the rights of Indigenous peoples. This double standard is highly discriminatory.

13. In opposing Bill C-641, the federal government claims it is upholding core values and principles and defending Canada's Constitution in the interests of all Canadians. It also insists that it is devoted to safeguarding Aboriginal rights. Such claims do not withstand careful scrutiny.

14. In reality, the government willfully ignores the rule of law. This includes crucial rulings of the Supreme Court of Canada, such as the 2014 *Tsilhqot'in Nation* decision, which affirms Indigenous peoples' right to give or withhold consent.

15. For the past 9 years, the Canadian government's secret strategies have been repeatedly applied in a prejudicial manner. This is especially evident in international forums, where few Indigenous peoples from Canada have the resources to attend.[74] Requests for copies of government positions at such forums are most often ignored or rejected.

16. Such prejudicial actions serve to further impoverish Indigenous peoples and undermine their security and human rights as self-determining peoples.[75]

17. For over thirty years, Indigenous peoples have been involved in the formulation, adoption and implementation of the *UN Declaration*. It is highly destructive for the government of Canada to take positions that devalue the *Declaration* and Indigenous human rights. Such adverse positions at the international level are harming Indigenous peoples worldwide.

18. All such government actions are the antithesis of the rights, principles and related State obligations in the *UN Declaration*. The government appears to view the *Declaration* as a threat to the government's ongoing colonial domination. However, as underlined by a former Special Rapporteur on the rights of indigenous peoples:

> no country has ever been diminished by supporting an international human rights instrument; rather the contrary is the case.[76]

19. Bill C-641 – if fairly implemented in close collaboration with Indigenous peoples – can mark a new beginning. Canada can be significantly strengthened for the benefit of all.

ENDNOTES

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

[2] *UN Declaration*, preambular para. 7.

[3] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex, para. 82 (Conclusions and recommendations).

[4] In Bolivia, the *Declaration* was adopted at the national level as Law No. 3760 of 7 November 2007 and parts were incorporated into the new Constitution promulgated on 7 February 2009.

In July 2014, the government of Germany stressed: "Human rights are a guiding principle for German development policy. This is laid down in our binding **human rights strategy** from 2011. Indigenous Peoples' Rights are explicitly integrated with reference to UNDRIP." See Germany, "United Nations Declaration on the Rights of Indigenous Peoples: Panel discussion on the role of parliaments in the implementation of the Declaration, German Statement", 7th Session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 10 July 2014. [bold in original]

[5] The Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act 1975. The Tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown that potentially breach the promises made in the Treaty of Waitangi.

[6] 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.

[7] Australian Human Rights Commission, "Information concerning Australia and the Convention on the Rights of the Child", Submission to the Committee on the Rights of the Child, August 2011, http://www.humanrights.gov.au/information-concerning-australia-and-convention-rights-child-0#s3_2, Recommendation 4.

The government of Australia confirmed: "All legislation proposals in Australia are scrutinised by a parliamentary committee to ensure their consistency with human rights, and the Declaration is considered in this context." See Australia, Statement, Expert Mechanism on the Rights of Indigenous Peoples, Agenda item 6: United Nations Declaration on the Rights of Indigenous Peoples, July 2013, http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH01b0/cbdb4f0e.dir/EM13dea143.pdf.

[8] House of Commons, *Debates* (Hansard), 141st Parl., 2nd sess., vol. 147, No. 185, March 12, 2015 at 12081.

[9] *Ibid.* at 12083.

[10] *UN Declaration*, preambular para. 15: "treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States"; and last preambular para.: "*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect".

[11] Whaiate Mana Motuhake In Pursuit of Mana Motuhake: *Report on the Māori Community Development Act Claim*, Pre-publication Version, WAI 2417, Waitangi Tribunal Report 2014, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_85007148/Maori%20Council%20Pre-pubW.pdf, at 61-62.

[12] See, *e.g.*, House of Commons, *Debates* (Hansard), 39th Parl., 1st sess., No. 045, June 21, 2006 (Hon. Jim Prentice, Minister of Indian Affairs and Northern Development):

> [The draft UN Declaration] is inconsistent with our Constitution. It is inconsistent with the National Defence Act. It is inconsistent with our treaties. It is inconsistent with all of the policies under which we have negotiated land claims for 100 years.

[13] To date, the Canadian government has repeatedly raised these misleading and erroneous arguments in Canada and internationally. These include, *inter alia*: the UN Human Rights Council, the UN General Assembly, the Organization of American States, the Food and Agriculture Organization and the Convention on Biological Diversity.

[14] The Conservative government has made it a practice of encouraging States to voice their concerns on the *UN Declaration*. The government has then documented and emphasized such statements, in order to diminish the status, credibility and value of the *Declaration*. This is a highly indiscriminate and divisive strategy, where no consideration is given as to whether any given State is expressing a view consistent with international human rights law or related State obligations.

[15] Paul Joffe, "UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context", published in *Aboriginal Law Conference—2008*, Continuing Legal Education Society of British Columbia, Paper 2.2 (June 2008), at 2.2.19 - 2.2.20.

[16] Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), "Report of the Chair on the Meetings for Reflection on the Meetings of Negotiations in the Quest for Points of Consensus (Washington, D.C., United States – November 26-28, 2007)",OEA/Ser.K/XVI, GT/DADIN/doc.321/08, 14 January 2008, at 3.

[17] Canada, "Canada's Statement to the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples: April 14, 2008", in OAS, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Report of the Chair on the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington, D.C., April 14 to 18, 2008)*, OEA/Ser.K/XVI, GT/DADIN/doc. 339/08 (2008) at 35.

[18] Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Statements by the Government of Canada and Some Brief Responses", 16 October 2009, http://quakerservice.ca/wp-content/uploads/2011/05/UNDecl-Canada-OPPOSINGSTATEMENTS-BRIEFRESPONSESFINAL-Oct1609.pdf

[19] Mike Duffy Interview with Indian Affairs minister Jim Prentice, CTV, June 20, 2006.

[20] *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on December 16, 1966 and entered into force March 23, 1976; and *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46. Adopted by the U.N. General Assembly on December 16, 1966 and entered into force 3 January 1976, accession by Canada 19 May 1976, identical article 1.

[21] 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."

[22] See, *e.g.*, Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Chile*, U.N. Doc. CCPR/C/CHL/CO/5 (18 May 2007) at para. 19; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37.

See also Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, UN Doc. E/C.12/NZL/CO/3 (31 May 2012), para. 11; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Argentina*, UN Doc. E/C.12/ARG/CO/3 (14 December 2011), para. 9; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka*, UN Doc. E/C.12/1/LKA/CO/2-4 (9 December 2010), para. 11

[23] "*UN Declaration on the Rights of Indigenous Peoples*: Canada Needs to Implement This New Human Rights Instrument", Open Letter, May 1, 2008 (signed by more than 100 legal scholars and experts), http://cfsc.quaker.ca/pages/documents/UNDecl-Expertsign-onstatementMay1.pdf.

[24] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex, para. 96 (Conclusions and recommendations).

[25] Peter Hogg, *Constitutional Law of Canada*, Loose-leaf Edition (Toronto: Carswell, 2007), vol. 1, s. 28.5(e): "In 1982, the power to extinguish by legislation was removed by s. 35 of the Constitution Act, 1982."

[26] Canada, *Core Document Forming Part of the Reports of States Parties: Canada*, UN Doc. HRI/CORE/CAN/2013 (30 May 2013), para. 107. Similarly, see Canada, *Core Document Forming Part of the Reports of States Parties: Canada*, UN Doc. HRI/CORE/1/Add.91 (12 January 1998), para. 124.

[27] See, *e.g.*, BC Assembly of First Nations, First Nations Summit, Union of BC Indian Chiefs *et al.*, "Resource development in western Canada: Indigenous peoples' human rights must be respected", joint submission to Prime Minister Stephen Harper, March 26, 2014, http://quakerservice.ca/wp-content/uploads/2014/04/Western-Canada-resource-devt-Joint-Response-Apr-10-14.pdf. No response from the Prime Minister was ever received.

[28] John Baird (Minister of Foreign Affairs and International Trade), "Canadian values 'the envy of the world,' says Baird", *Embassy*, Daily Update, 27 August 2012, http://www.embassymag.ca/dailyupdate/view/306.

[29] Canada (John Baird), "Address by Minister Baird to United Nations General Assembly", New York, October 1, 2012, http://www.international.gc.ca/media/aff/speeches-discours/2012/10/01a.aspx?lang=eng&view=d.

[30] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, UN Doc. A/HRC/15/37/Add.1 (15 September 2010), para. 112.

[31] Foreign Affairs, Trade and Development Canada, "Canada's International Human Rights Policy", online: http://www.international.gc.ca/rights-droits/policy-politique.aspx?view=d&lang=eng.

[32] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), at 594, where peremptory norms or *jus cogens* are described as "rules of customary law which cannot be set aside by treaty or acquiescence but only through the formation of a subsequent customary rule of the same character."

[33] Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121, http://quakerservice.ca/wp-content/uploads/2011/05/NJCLPJArticleUNDeclaration2010.pdf, at 205-207 and accompanying references. See also William A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3d ed. (Toronto: Carswell, 2007) at 80, where it is stated that the right of peoples to self-determination is part of the law of Canada and justiciable before our courts despite the fact that [it is] not incorporated . . . in specific legislation".

[34] International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), http://www.ila-hq.org/en/committees/index.cfm/cid/1024, at 43: "The relevant areas of indigenous peoples' rights with respect to which the discourse on customary international law arises are self-determination, autonomy or self-government, cultural rights and identity, land rights as well as reparation, redress and remedies." In regard to the right to reparation and redress, see also International Law Association, "Rights of Indigenous Peoples", Final report, Sofia Conference (2012), http://www.ila-hq.org/en/committees/index.cfm/cid/1024, (Conclusions and Recommendations), at 31, para. 11.

[35] *UN Declaration*, art. 43.

[36] Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, UN Doc. A/HRC/23/36 (11 March 2013), para. 60. And at para. 65: "Accountability is a critical feature of a human rights approach to participation. Participation understood as a right implies rights holders and duty bearers who can and must be held to account for failure to respect, protect and fulfil that right."

[37] In regard to the Convention on Biological Diversity (CBD), the government of Canada took positions against Indigenous peoples at the 12th session of the Conference of the Parties (COP) in Pyeongchang, Republic of Korea on 6-17 October 2014.

[38] See, *e.g.*, 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), http://sustainabledevelopment.un.org/futurewewant.html, endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote), para. 49, where States recognized 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."

[39] Independent Expert on human rights and environment, John Knox, "Protecting Environment is also a human right", official video transcript, OHCHR, http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx. See also Human Rights Council, *Human rights and the environment*, UN Doc. A/HRC/RES/19/10 (22 March 2012) (adopted without a vote), para. 2(a), where an Independent Expert was appointed to study "the human rights obligations, including non-discrimination obligations, relating to the enjoyment of a safe, clean, healthy and sustainable environment".

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

[41] 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).

[42] *Species at Risk Act*, S.C. 2002, c. 29, preamble: "Recognizing that … the traditional knowledge of the aboriginal peoples of Canada should be considered in the assessment of which species may be at risk and in developing and implementing recovery measures". *Mackenzie Valley Resource Management Act*, S.C. 1998, c. 25, s. 60.1: "In exercising its powers, a board shall consider (a) the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the Constitution Act, 1982 applies and who use an area of the Mackenzie Valley; and (b) any traditional knowledge and scientific information that is made available to it."

[43] *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c.19, section 52 (enactment), at s. 19(3): "The environmental assessment of a designated project may take into account community knowledge and Aboriginal traditional knowledge." See also *Species at Risk Act*, art. 15(2): "COSEWIC [Committee on the Status of Endangered Wildlife in Canada] must carry out its functions on the basis of the best available information on the biological status of a species, including scientific knowledge, community knowledge and aboriginal traditional knowledge."

[44] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc. E/C.12/CAN/CO/5/CRP.1 (19 May 2006), para. 34.

[45] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), article 31(3).

[46] 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.

[47] Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. l), para. 105, 18th session, 19 March – 14 April 1962 (quoting Office of Legal Affairs of the United Nations' 1962 clarification, requested by Commission on Human Rights). See generally Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Not Merely 'Aspirational'", 22 June 2013, http://quakerservice.ca/wp-content/uploads/2012/09/UN-Decl-Not-merely-aspirational-.pdf.

[48] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting on other grounds).

[49] Government of Canada, *A Canada for All: Canada's Action Plan Against Racism* (Ottawa: Department of Canadian Heritage, 2005), at 37.

[50] Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), para. 82.

[51] 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. 65.

[52] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc. CERD/C/USA/CO/6 (8 May 2008), para. 29.

[53] UN-Indigenous Peoples' Partnership (UNIPP), "For democratic governance, human rights and equality", Multi-Donor Trust Fund, Terms of Reference ILO, OHCHR, UNDP, Framework Document, 15 February 2010, at 4.

[54] Bill C-641, s. 2.

[55] For a similar reporting obligation by the Indian Affairs minister for 20 years, see *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-1977, c. 32, s. 10.

[56] For international standards pertaining to corporate engagement with Indigenous peoples, see, *e.g.*, Cathal Doyle & Jill Cariño "Making Free, Prior & Informed Consent a Reality: Indigenous Peoples and the Extractive Sector", May 2013, http://www.piplinks.org/system/files/Consortium+FPIC+report+-+May+2103+-+web+version.pdf, at 9-10.

[57] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 53.

[58] *Ibid.*, para. 56.

[59] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting on other grounds).

[60] 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).

[61] Permanent Mission of Canada to the United Nations, "Canada's Statement on the World Conference on Indigenous Peoples Outcome Document", New York, 22 September 2014, http://www.canadainternational.gc.ca/prmny-mponu/canada_un-canada_onu/statements-declarations/other-autres/2014-09-22_WCIPD-PADD.aspx?lang=eng.

[62] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 72.

[63] Canada, "Explanations of Position of Members Which Requested that They Be Included in the Final Report", Annex E in Committee on World Food Security, *Report of the 41st Session of the Committee on World Food Security (Rome, 13-18 October 2014)*, CFS 41 Final Report, November 2014, http://www.fao.org/fileadmin/templates/cfs/Docs1314/CFS41/CFS41_Final_Report_EN.pdf, at 39.

[64] *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44.

[65] *Ibid*., para. 76.

[66] *Ibid.*, para. 86.

[67] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24.

[68] Minister of the Department of Indian Affairs and Northern Development, *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011*, http://www.aadnc-aandc.gc.ca/eng/1100100014664.

[69] Inter-Parliamentary Union (IPU), *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians N° 23*, 2014, http://www.ipu.org/PDF/publications/indigenous-en.pdf, at 31.

[70] Australian Human Rights Commission, "Information concerning Australia and the Convention on the Rights of the Child", Submission to the Committee on the Rights of the Child, August 2011, http://www.humanrights.gov.au/information-concerning-australia-and-convention-rights-child-0#s3_2, at para. 21.

[71] Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 55 (e).

[72] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo),* Merits, Judgment, I.C.J. Reports 2010, p. 639 at 663-664.

[73] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, para. 116.

[74] Grand Council of the Crees (Eeyou Istchee), Letter, dated 7 November 2014, from Paul Joffe, Legal Counsel, to Robert S. McLean, Executive Director, Environmental Stewardship Branch, Environment Canada (re prejudicial positions by government of Canada at 12th session of the Conference of the Parties in Pyeongchang, Republic of Korea on 6-17 October 2014), http://www.quakerservice.ca/CanadaCOP12Letter, at 11:

> … the government of Canada's unilateral actions have far-reaching adverse implications for Indigenous peoples and their status and rights on a wide range of constitutional and international matters. These include, *inter alia*, the Crown's duty to uphold the honour of the Crown; duty to consult and accommodate; good governance; justice and reconciliation; Indigenous peoples' self-determination, including self-government; biodiversity; climate change; Indigenous cultural, environmental and food security; land and resource rights, including those of future generations; federal comprehensive claims policies; and proposed resource developments.

[75] *UN Declaration*, article 7(2): "Indigenous peoples have the right to live in freedom, peace and security as distinct peoples".

[76] "Special Rapporteur on the Human Rights of Indigenous People Urges Human Rights Council to Adopt the UN Draft Declaration on the Rights of Indigenous Peoples", UN Office at Geneva, Information Service, 26 June 2006, available at: http://www.unhchr.ch/huricane/huricane.nsf/view01/DCCFB11F886278F4C125719900564E51?opendocument.