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"Veto" and "Consent" – Significant Differences

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This document offers some analysis on veto and consent and highlights important differences. It addresses these issues in the context of proposed third party developments in or near Indigenous peoples' lands and territories.

Extreme statements[1] are made by the government of Canada in relation to the *UN Declaration on the Rights of Indigenous Peoples*, in particular addressing the principle of "free, prior and informed consent" (FPIC). It is important to provide a detailed analysis of the differences between "veto" and FPIC. The government's portrayal of the dangers of FPIC are designed to foster alarm. They run counter to Canada's endorsement of the *UN Declaration*.[2] Such extreme positions are the antithesis of reconciliation.

1. Problems with use of term "veto"

There are various reasons for avoiding use of the term "veto". These include:

i) The Supreme Court of Canada has not defined what "veto" means, in the context of Indigenous peoples' rights and related Crown obligations;

ii) in *Haida Nation*,[3] the SCC referred to "veto" solely in the context of asserted Aboriginal rights but yet unproven. Even such reference is questionable;[4]

iii) the *UN Declaration* uses the term "free, prior and informed consent".[5] The term "veto" is not used;

iv) some people may assume that "veto" is being used in its absolute sense, i.e. an Indigenous people could block a proposed development regardless of the facts and law in any given case; and

v) in regard to proposed projects – such as pipelines – that cross many Indigenous territories, no single Indigenous nation has a right to veto the whole project. Yet, in the face of very serious issues, many such nations may choose to assert a right to give or withhold consent in regard to their respective territories.

In international law, Aboriginal or Indigenous peoples'[6] rights are human rights. In *Delgamuukw*, the Supreme Court indicated: "The aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute."[7] Save for specific exceptions (*e.g.* right not to be subjected to torture or genocide), human rights are relative and not absolute.

In particular, the *UN Declaration* includes some of the most comprehensive balancing provisions in any international human rights instrument. Article 46(3) stipulates that all of the provisions set forth in this Declaration "shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith." These are core principles of both the Canadian and international legal systems. These are also the core principles that have been denied Indigenous peoples throughout history.

A central component of the Truth and Reconciliation Commission's Calls to Action is using the *UN Declaration* as the "framework for reconciliation",[8] which includes FPIC. Reconciliation is an essential process when addressing Indigenous peoples' Aboriginal and Treaty rights and related injustices. As the Supreme Court has emphasized, reconciliation is "a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*."[9]

2. "Consent" or FPIC

In contrast to "veto", the standard of "consent" is well-established in domestic and international law.

In *Tsilhqot'in Nation* v. *British Columbia*,[10] the Supreme Court of Canada highlighted Indigenous peoples' right to "consent" in 9 paragraphs; "right to control" the land in 11 paragraphs; and "right to determine" land uses in 2 paragraphs. The right to control the land conferred by Aboriginal title means that "governments and others seeking to use the land must obtain the consent of the Aboriginal title holders," unless stringent infringement tests are met.[11]

Indigenous peoples' consent is not limited to Indigenous title lands. In *Haida Nation*, the Court ruled in 2004 that the content of the duty to consult "varied with the circumstances" and required "full consent" on "very serious issues":

> … the content of the duty [to consult] varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.[12]

In 1997, the Court ruled in *Delgamuukw*:

> The nature and scope of the duty of consultation will vary with the circumstances. … In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.[13]

In its 2008 "Interim Guidelines for Federal Officials", the government of Canada had indicated: "An 'established' right or title may suggest a requirement for consent from the Aboriginal group(s)."[14] Its 2011 "Updated Guidelines" deleted any reference to Aboriginal "consent".[15]

In October 2014, at the Committee on World Food Security in Rome, 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".[16] Such a view contradicts the Supreme Court's rulings that explicitly refer to "consent".

On crucial issues of "consent", Canada cannot selectively ignore key aspects of the rulings of its highest court, as well as international human rights law,[17] to the detriment of Indigenous peoples. Such actions are inconsistent with the principles of justice, equality, rule of law and respect for human rights.

The term "full consent", as applied by the Supreme Court, has the elements of "free", "prior" and "informed" that is used in the *UN Declaration* and other international human rights law. In Canadian law, "consent" must be freely given or obtained in the absence of duress.

In order to ensure meaningful consultations, the Supreme Court has ruled that the Crown must provide "all necessary information in a timely way". This is to ensure that Indigenous concerns are "seriously considered" and "integrated" into a proposed plan of action:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information <u>in a timely way</u> so that they have an opportunity to express their interests and concerns, <u>and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action</u>.[18]

In international law, "free, prior and informed consent" (FPIC) is an essential standard that is an integral element of the right of self-determination.[19] Self-determining peoples have a right to choose.[20] In *Tsilhqot'in Nation*, the Supreme Court referred to Indigenous peoples' "right to choose".[21]

The Supreme Court has also ruled that the legislature is presumed to act in compliance with Canada's international obligations. Unless there is a clear, contrary legislative intent, domestic laws "will be presumed to conform to international law".[22] This rule is especially important in regard to the right of Indigenous peoples to self-determination, including self-government, which includes both rights and responsibilities. As affirmed in the *UN Declaration*, "Indigenous peoples are equal to all other peoples"[23] and "nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law".[24]

As affirmed in *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, Canada has an affirmative obligation to "promote the realization of the right of self-determination, and … respect that right, in conformity with the provisions of the Charter of the United Nations."[25] Since 2006, the government has failed to even discuss with Indigenous peoples its international obligations relating to their right of self-determination.

UN treaty bodies[26] and other diverse entities require or support the standard of FPIC. These include: UN General Assembly[27] and specialized agencies,[28] as well as regional human rights bodies.[29] In 2011, the International Finance Corporation announced: "For projects with potential significant

adverse impacts on indigenous peoples, IFC has adopted the principle of 'Free, Prior, and Informed Consent' informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples."[30]

The UN Development Programme (UNDP) "will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration".[31] UNDP adds: "FPIC will be ensured on any matters that may affect the rights and interests, lands, resources, territories (whether titled or untitled to the people in question) and traditional livelihoods of the indigenous peoples concerned."[32]

In July 2015, the UN Human Rights Committee urged Canada to "consult indigenous people … to seek their free, prior and informed consent whenever legislation and actions impact on their lands and rights".[33] Canada claims that UN treaty bodies issue non-binding recommendations. Yet the jurisprudence of such bodies, including the Human Rights Committee, has been ascribed "great weight" by the International Court of Justice (ICJ).[34]

The *Indigenous and Tribal Peoples Convention, 1989* requires Indigenous consent for a broad range of "special measures" by the State:

> 1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
>
> 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.[35]

Following his visit to Canada, former Special Rapporteur on the rights of indigenous peoples, James Anaya, concluded: "as a general rule resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned."[36] Anaya adds: "The general rule identified here derives from the character of free, prior and informed consent as a safeguard for the internationally recognized rights of indigenous peoples that are typically affected by extractive activities that occur within their territories."[37]

The *UN Declaration* includes a number of provisions that refer to FPIC. No specific provision should be interpreted in isolation, but rather in the context of the whole *Declaration* and other international human rights law. For example, such approach would apply to article 32(2):

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

In *Tsilhqot'in Nation*, the Supreme Court of Canada underlined the far-reaching significance of Indigenous peoples' consent in terms of cancelling projects and rendering legislation inapplicable:

> Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a

> project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing.[38]

In regard to legislation, the Court added: "Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title."[39]

3. Reference to "veto" by Supreme Court

In regard to "veto", the Supreme Court provides in para. 48 of *Haida Nation*:

> This process [of accommodation] does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim. The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.

It is critical to interpret para. 48 together with the rest of the Supreme Court's ruling. Para. 24 indicated that, at the high end of the scale, the duty to consult requires "the 'full consent of [the] aboriginal nation' on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims."

The Court adds that the process of balancing interests means that both the Crown and Aboriginal peoples may have some limits as to what they might do in relation to the proposed project "pending claims resolution".

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. The Crown is not rendered impotent. It may continue to manage the resource in question pending claims resolution. But, depending on the circumstances, ... the honour of the Crown may require it to consult with and reasonably accommodate Aboriginal interests pending resolution of the claim. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.[40]

Where Aboriginal peoples have a "strong prima facie case", the Court indicated that the objective is "aimed at finding a satisfactory interim solution". The issue of "veto" was not the focus.

> At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions

> for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. The government may wish to adopt dispute resolution procedures like mediation or administrative regimes with impartial decision-makers in complex or difficult cases.[41]

Where a strong prima facie case exists, the Supreme Court again focused on finding interim solutions "pending final resolution". Such solutions may require a process of accommodation that "may best be resolved by consultation and negotiation". Such negotiation raises consensual issues.

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong prima facie case exists for the claim ... and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. Accommodation is achieved through consultation, as this Court recognized in R. v. Marshall, [1999] 3 S.C.R. 533, at para. 22: "... the process of accommodation of the treaty right may best be resolved by consultation and negotiation".[42]

In the final resolution, the "consent" of an Aboriginal nation on "very serious issues" remains a critical factor.

Canada has declared that it opposes “free, prior and informed consent” when it could be interpreted as a “veto”.[43] Yet the government of Canada has never explained its position as to what constitutes “consent” and what constitutes a “veto”.[44] Is “veto” synonymous with “consent”?[45] Is “veto” absolute?[46] The government has refused for years to discuss or explain its positions with Indigenous peoples. In *Tsilhqot’in Nation*, there are many references to “consent” and no mention of “veto”.

In the context of resource development, the adverse impacts that may affect Indigenous peoples can be severe and far-reaching. Such situations reinforce the need to obtain the "free, prior and informed consent" of Indigenous peoples.[47]

4. "Valid legislative objectives" or "public purposes" do not preclude Indigenous consent

In *Delgamuukw* v. *British Columbia*, the Supreme Court described the general economic development in B.C. as "valid legislative objectives" that are "subject to accommodation of the aboriginal peoples' interests ... in accordance with the honour and good faith of the Crown":

> ... the general economic development of the interior of British Columbia, through agriculture, mining, forestry, and hydroelectric power, as well as the related building of infrastructure ... are valid legislative objectives ... these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown.[48]

More recently, in *Tsilhqot'in Nation*, the Supreme Court of Canada has elaborated on Crown duties in the context of Indigenous title to lands and territories. Any intrusions must be consistent with the Crown's fiduciary duty to the Aboriginal group.[49] Incursions on Aboriginal title "cannot be justified if they would substantially deprive future generations of the benefit of the land".[50] It is not sufficient that government projects be justified on the basis of a "compelling and substantial public interest".[51] They must also be consistent with the Crown's fiduciary duty to the Aboriginal group. Such obligations are especially crucial when proposed projects contribute to climate change.

Some climate change impacts are predicted to be irreversible[52] and would significantly affect present and future generations. In view of their inadequate responses,[53] federal and provincial governments may find it exceedingly difficult to satisfy the "minimal impairment"[54] and other criteria required of them as fiduciaries.

In this whole context, the Supreme Court has yet to explicitly consider the *UN Declaration*, which affirms key human rights relating to development.[55] Former Special Rapporteur Anaya has concluded: "Within established doctrine of international human rights law, and in accordance with explicit provisions of international human rights treaties, States may impose limitations on the exercise of certain human rights, such as the rights to property".[56] Anaya adds:

> In order to be valid, however, the limitations must comply with certain standards of necessity and proportionality with regard to a valid public purpose, defined within an overall framework of respect for human rights.[57]

Article 46(2) of the *UN Declaration* calls for a human rights-based approach: "In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected." It then sets out allowable limitations on the exercise of the rights of Indigenous peoples and individuals:

> The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.[58]

5. Business, human rights and FPIC

In regard to resource development, business enterprises have a responsibility to respect internationally recognized human rights.[59] This would include Indigenous peoples' rights affirmed in the *UN Declaration*.[60] Companies should "[e]xercise due diligence so as to avoid becoming complicit in human rights violations committed by host governments".[61]

As emphasized by Special Rapporteur Anaya, due diligence includes "ensuring that corporate behaviour does not infringe or contribute to the infringement of the rights of indigenous peoples ... regardless of the reach of domestic laws."[62]

In 2013, the United Nations Global Compact published a detailed "Business Reference Guide" on the *UN Declaration*.[63] The Guide highlights: "The concept of free, prior and informed consent … is fundamental to the UN Declaration as a measure to ensure that indigenous peoples' rights are protected."[64] The Guide adds:

> The concept of a State's FPIC obligation is well enshrined in international law.[65]
>
> The independent corporate responsibility to respect indigenous peoples' rights gives rise to opportunities for business to partner with governments and indigenous peoples to advance FPIC practices.[66]
>
> FPIC should be obtained whenever there is an impact on indigenous peoples' substantive rights (including rights to land, territories and resources, and rights to cultural, economic and political self-determination).[67]

Conclusions

In the Indigenous context, there are significant differences between "veto" and "consent". In contrast to "veto", the term "consent" has been extensively elaborated upon in Canadian and international human rights law.

In the landmark 2014 *Tsilhqot'in Nation* decision that addressed in detail Indigenous peoples' consent, the term "veto" was not raised by the Supreme Court of Canada. The term "veto" is not used in the *UN Declaration on the Rights of Indigenous Peoples*. "Veto" implies an absolute power, with no balancing of rights. This is neither the intent nor interpretation of the *UN Declaration*, which includes some of the most comprehensive balancing provisions in any international human rights instrument.

The *UN Declaration* is a consensus international human rights instrument, which has been reaffirmed by consensus by the UN General Assembly.[68] At the same time, the principle of free, prior and informed consent (FPIC) has also been explicitly reaffirmed.

In regard to federal, provincial and territorial governments, a most effective approach to implement the *UN Declaration*, including FPIC, is in conjunction with First Nations, Inuit and Métis peoples.[69] Such an approach would foster stronger relationships with Indigenous peoples, safeguard their human rights and promote reconciliation across Canada.[70]

Endnotes

[1] See, *e.g.*, House of Commons Debates, Hansard, 41st Parl., 2nd sess., vol. 147, no. 18, at 12084 (quoting Mark Strahl (Parliamentary Secretary to the Minister of Aboriginal Affairs and Northern Development, CPC)): "According to the language in [Bill C-641], aboriginal Canadians would have a veto over any piece of legislation brought forward by a Canadian government."

See Private Member's 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*, House of Commons, 2nd sess., 41st Parl., First reading (defeated by Conservative government). The Bill requires that the government of Canada, "in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that all laws of Canada are consistent with the United Nations Declaration" (s. 2). 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.

[2] Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010, http://www.aadnc-aandc.gc.ca/eng/1309374239861: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."

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

[4] This issue is discussed in detail below. The term "veto" is also raised in *Beckman* v. *Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 14: "The First Nation does not have a veto over the approval process." However, a veto over the approval process is a different issue from a veto over a proposed development.

[5] See also Paul Joffe, "*United Nations Declaration on the Rights of Indigenous Peoples*: Provisions Relevant to 'Consent'", 14 June 2013, http://quakerservice.ca/news/un-declaration-on-the-rights-of-indigenous-peoples-consent/.

[6] The terms "Aboriginal peoples" and "Indigenous peoples" are used synonymously. See, *e.g.*, *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44, para. 4.

[7] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 161. In regard to rights in the *Canadian Charter of Rights and Freedoms* and constitutionally guaranteed Aboriginal rights, see *R.* v. *Nikal*, [1996] 1 S.C.R. 1013, at 1057-58 (*per* Cory J.).

[8] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf, at 4, para. 43. At para. 44, the Commission calls upon the Government of Canada "to develop a national action plan, strategies, and other concrete measures to achieve the goals" of the *UN Declaration*.

See also UN Secretary-General (Ban Ki-moon), "Secretary-General Praises Canada's Truth, Reconciliation Commission for Setting Example by Addressing Systemic Rights Violations against Indigenous Peoples", SG/SM/16812, 1 June 2015, http://www.un.org/press/en/2015/sgsm16812.doc.htm, where the Secretary-General encouraged follow-up of the TRC's recommendations using the *UN Declaration* as a "roadmap".

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): "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."

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

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

[11] *Tsilhqot'in Nation*, *supra*, para. 76.

[12] *Haida Nation*, *supra*, para. 24 (emphasis added, quotes from *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 168).

[13] *Delgamuukw*, *supra*, para. 168. [emphasis added]

[14] Government of Canada, *Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult* (February 2008) at 53.

[15] Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675.

[16] 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.

[17] *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), Part I, para. 32: "The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues." [emphasis added]

[18] *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C.C.A.), at para. 160. This paragraph was cited with approval in *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 64 [emphasis added by Supreme Court of Canada].

[19] Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex - Expert Mechanism Advice No. 2 (2011), para. 20: "... the right to free, prior and informed consent is embedded in the right to self-determination. ... [T]he right of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is an integral element of that right." [emphasis added]

[20] Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 118: "It has been clear from the outset that self-determination was not tied only to independence. The peoples of an independent territory have always had the right to choose the form of their political and economic future." [emphasis added]

[21] *Tsilhqot'in Nation*, *supra*, paras. 67 and 75.

[22] *R. v. Hape* [2007] 2 S.C.R. 292, para 53.

[23] *UN Declaration*, 2nd preambular para.

[24] *Ibid.*, 17th preambular para.

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

[26] See, *e.g.*, Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11: "In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources".

Human Rights Committee, *Poma v. Peru*, Case No. 1457/2006, *Report of the Human Rights Committee*, GAOR, 64th Sess., Supp. No. 40, Vol. I, UN Doc. A/64/40 (2008-09), para. 202: "Participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."

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. 5, indicating that a "core obligation applicable with immediate effect"

includes the following: "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."

[27] General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (adopted without a vote), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2. The Outcome Document not only reaffirms support for the *UN Declaration* by consensus, but also reaffirms the principle of free, prior and informed consent (paras. 3 and 20).

General Assembly, *Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/67/273 (8 August 2012), para. 64(e) (Recommendations):

> In view of the challenges identified at the national and international levels, the following areas demand attention and urgent action before the end of the Second International Decade of the World's Indigenous People [in 2015]:
> ...
> (e) Requesting Member States and the United Nations system to operationalize the principle of free, prior and informed consent.

[28] See, *e.g.*, *Food and Agriculture Organization, FAO Policy on Indigenous and Tribal Peoples (Rome, Italy: FAO, 2010)*, at 5: "The principle and right of 'free, prior and informed consent' demands that states and organizations of all kinds and at all levels obtain indigenous peoples' authorization before adopting and implementing projects, programmes or legislative and administrative measures that may affect them." [emphasis added]

IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 13 (Principles of engagement): "When appraising such projects proposed by Member States, in particular those that may affect the land and resources of indigenous peoples, the Fund shall examine whether the borrower or grant recipient consulted with the indigenous peoples to obtain their free, prior and informed consent."

Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: United Nations Children's Fund*, UN Doc. E/C.19/2011/7 (25 February 2011), para. 52: "While the free, prior and informed consent approach is considered by UNICEF to be inherent in its human rights-based approach to programming, it is also used as a specific methodology to conduct projects and studies."

[29] See, *e.g.*, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v *Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, para. 226: "In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property." [emphasis added]

Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs), I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 134: "... the Court considers 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 Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions." [emphasis added]

[30] International Finance Corporation (member of the World Bank Group), "IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency", 12 May 2011, http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=0ADE5C1923DC4CF48525788E0071FAAA.

[31] United Nations Development Programme, *UNDP Social and Environmental Standards*, 14 July 2014, http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP%20Social%20and%20Environmental%20Standards-14%20July%202014.pdf, "Standard 6:

Indigenous Peoples", para. 4 (Respect for domestic and international law). In regard to "Applicable Law", see the "Overarching Policy and Principles" at 5, para. 9: "UNDP will not support activities that do not comply with national law and obligations under international law, whichever is the higher standard …" [emphasis added]

[32] *Ibid.*, at 34, para. 9 (Full, effective and meaningful participation).

[33] Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, adopted by the Committee at its 114th session (29 June–24 July 2015) (advance unedited version), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en, para. 16.

[34] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010*, p. 639 at 663, para. 66.

[35] *Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, International Labour Organization, Convention No. 169, I.L.O. 76th Sess., art. 4. [emphasis added] Although Canada has not ratified this human rights instrument, it may be used to interpret Indigenous peoples' rights in the domestic context: see *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348, *per* Dickson C.J. (dissenting on other grounds).

[36] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex (Conclusions), para. 98.

[37] *Ibid.* [*Report of the Special Rapporteur*], para. 27. [emphasis added] See also African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v *Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, at para. 291: "... any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions." [emphasis added]

[38] *Tsilhqot'in Nation*, *supra*, para. 92. [emphasis added]

[39] *Ibid.* [emphasis added]

[40] *Haida Nation*, *supra*, para. 27. [emphasis added] Further, it is also wrong to assume that no reasonable causes of action exist until Aboriginal title and other Aboriginal rights are proven or accepted by the Crown. See *Saik'uz First Nation* v. *Rio Tinto Alcan Inc.*, 2015 BCCA 154, para. 79, where the BC Court of Appeal concluded:

> … it is not plain and obvious, assuming the facts pleaded to be true, that the notice of civil claim discloses no reasonable cause of action in respect of the claims of private nuisance, public nuisance and interference with riparian rights, to the extent they are based on Aboriginal title and other Aboriginal rights. The chambers judge erred in holding that no reasonable causes of action existed until Aboriginal title and other Aboriginal rights were proven (or accepted by the Crown).

[41] *Haida Nation*, para. 44. [emphasis added]

[42] *Ibid.*, para. 47. [emphasis added]

[43] 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.

[44] See also Craig Benjamin, "Free, Prior and Informed Consent: Defending Indigenous Rights in the Global Rush for Resources" in Joyce Green, ed., *Indivisible: Indigenous Human Rights* (Winnipeg, Manitoba: Fernwood Publishing, 2014) 168 at 169-170: "… the Canadian government's characterization of FPIC as a 'veto' is demonstrably at odds with the how the standard has been interpreted and applied by international human rights bodies. Rather than being in

conflict with the principles of 'equality, partnership, good faith respect,' which the government claims to have embraced, FPIC is a crucial and necessary tool for realizing these ideals, as well as the protection of enjoyment of human rights."

[45] Ryan Beaton, "Aboriginal Title in Recent Supreme Court of Canada Jurisprudence: What Remains of Radical Crown Title?", 33 N.J.C.L. 61 at 78: "the Court has already recognized that such a "veto" is *constitutionally guaranteed* in certain circumstances, if by "veto" we mean simply the right to stop (through recourse to the courts) the Crown from acting unilaterally in cases where the Crown's proposed action is unconstitutional, e.g. where the full consent of the Aboriginal group(s) is constitutionally required but not obtained."

[46] *Ibid.* at 79: "no one is claiming any *arbitrary* veto power".

[47] See, *e.g.*, Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc. E/C.12/COL/CO/5 (21 May 2010), para. 9: "The Committee is concerned that infrastructure, development and mining mega-projects are being carried out in the State party without the free, prior and informed consent of the affected indigenous and afro-colombian communities." [emphasis added]

Committee on the Elimination of Racial Discrimination, Letter from Chair Anwar Kemel to H.E. M. Manuel B. Dengo, Ambassador, Permanent Representative, Permanent Mission of Costa Rica to the United Nations, Early-Warning Measures and Urgent Procedures, 27 August 2010 at 2: "The Committee … asks that the State party provide information on the measures taken to assure the effective participation of the Térraba people and other indigenous peoples whose decision making referring to all the aspects and stages of the plan of the dam of Diquís have been affected, and to obtain its free, prior and informed consent with respect to this project." [emphasis added, unofficial translation]

[48] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, *per* La Forest and L'Heureux-Dubé JJ., paras. 202-203.

[49] *Tsilhqot'in Nation*, *supra*, paras. 2 and 88.

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

[51] *Ibid.*, para. 88.

[52] Matthew Collins et al., "2013: Long-term Climate Change: Projections, Commitments and Irreversibility", ch. 12 in T.F. Stocker et al., eds.., Climate Change 2013: The Physical Science Basis, Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, Cambridge, United Kingdom and New York, http://www.ipcc.ch/pdf/assessmentreport/ar5/wg1/WG1AR5_Chapter12_FINAL.pdf, at 1033: "A large fraction of climate change is largely irreversible on human time scales, unless net anthropogenic CO2 emissions were strongly negative over a sustained period." [bold in original, underline added]

[53] Office of the Auditor General of Canada, Report of the Commissioner of the Environment and Sustainable Development – Fall 2014 (Ottawa: Minister of Public Works and Government Services, 2014), ch. 1 "Mitigating Climate Change", at 32 "Conclusions", para. 1.80: "We are concerned that Canada will not meet its 2020 emission reduction target and that the federal government does not yet have a plan for how it will work toward the greater reductions required beyond 2020."

See also "No more excuses on climate", The [Montreal] Gazette, editorial (14 November 2014) A18: "Canada … increasingly finds itself isolated on environmental issues. The governing Conservatives' record on climate change is one of the worst in the world. … Canada has not implemented emission rules for the oilpatch, has not committed itself to even monitor emissions from the oilsands sector after 2015, has no plan to meet its Copenhagen target of reducing emissions by 17 per cent compared to 2005 levels by 2020 …"

[54] *Tsilhqot'in Nation*, *supra*, para. 87.

[55] See especially arts. 3 (right to self-determination); 20 "(right to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities"); and 23 ("right to determine and develop priorities and strategies for exercising their right to development"). [emphasis added] All of these provisions entail the consent of Indigenous peoples.

[56] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*, UN Doc. A/ HRC/24/41 (1 July 2013), para. 32.

[57] *Ibid.* In the same paragraph, Anaya highlights the allowable limitations in the *UN Declaration*, article 46(2).

[58] See also *Tsilhqot'in Nation*, *supra*, para. 142, where the Supreme Court indicated: "The guarantee of Aboriginal rights in s. 35 of the *Constitution Act, 1982*, like the *Canadian Charter of Rights and Freedoms*, operates as a limit on federal and provincial legislative powers. The *Charter* forms Part I of the *Constitution Act, 1982*, and the guarantee of Aboriginal rights forms Part II. Parts I and II are sister provisions, both operating to limit governmental powers, whether federal or provincial." Significantly, the Supreme Court did not apply the same limitations to Indigenous peoples' rights as exists in s. 1 of the *Canadian Charter of Rights and Freedoms*.

In regard to Indigenous peoples, the allowable limitations on their human rights are much narrower than in the *Canadian Charter*. Reasons include, *inter alia*: Indigenous peoples are peoples with the right of self-determination, including self-government. They are still suffering the debilitating effects of colonization, land and resource dispossession; racial discrimination; marginalization – and the resulting effects of severe impoverishment. The *UN Declaration* and the *Indigenous and Tribal Peoples Convention, 1989* affirm that Indigenous peoples have a distinctive relationship with their lands, territories, resources and environment that must receive full consideration and respect.

See also *R. v. Ipeelee*, 2012 SCC 13, para. 60: "To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." [emphasis added]

[59] See, *e.g.*, "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework" in Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Doc. A/HRC/17/31 (21 March 2011), Annex, Principle 12 and Commentary.

[60] Human Rights Council, *Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises*, UN Doc. A/HRC/23/32 (14 March 2013), para. 53:

> The Working Group identified as priorities the need:
>
> (a) To encourage the use of the Guiding Principles in promoting the corporate responsibility to respect human rights in relation to indigenous peoples and business activities in alignment with other relevant standards, including the United Nations Declaration on the Rights of Indigenous Peoples ...

[61] Human Rights Council, *Report of the Special Rapporteur on the human rights obligations related to environmentally sound management and disposal of hazardous substances and waste, Calin Georgescu*, UN Doc. A/HRC/21/48 (2 July 2012), para. 70(d).

[62] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 61.

[63] UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (New York: UN Global Compact, 2013), http://www.unglobalcompact.org/docs/issues_doc/human_rights/IndigenousPeoples/BusinessGuide.pdf. The UN Global

Compact describes itself as the large corporate responsibility initiative in the world, with 8,000 business signatories from 140 countries.

[64] *Ibid*., at 25.

[65] *Ibid*.

[66] *Ibid*.

[67] *Ibid*., at 26.

[68] See note 27 *supra*.

[69] See, *e.g.* Permanent Forum on Indigenous Issues, *Report on the fourteenth session (April 20 – 1 May 2015)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2015/43-E/C.19/2015/10, http://www.un.org/ga/search/view_doc.asp?symbol=E/2015/43, para. 35: "In accordance with … the United Nations Declaration, States, in conjunction with indigenous peoples, should develop legislation and mechanisms at the national level to ensure that laws are consistent with the United Nations Declaration."

[70] For a similar perspective, see Canadian Association of Statutory Human Rights Agencies (CASHRA), "Canada's Human Rights Agencies call on all levels of Government to endorse the UN Declaration on the Rights of Indigenous Peoples", July 2012, http://www.cashra.ca/news.html.