

Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress

Montreal, Québec

P-416

Indigenous Peoples in the Context of Canada and Québec: Significance of *UN Declaration* and Other International Human Rights Law

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February 19, 2018

... human rights constitute the common language of humanity.

World Conference on Human Rights, *Address by the Secretary-General of the United Nations at the Opening of the World Conference on Human Rights*, Vienna, UN Doc. A/CONF.157/22, (12 July 1993), at 3

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such ...

United Nations Declaration on the Rights of Indigenous Peoples, adopted by General Assembly resolution 61/295 (13 September 2007), 2nd preambular para.

*Recognizing the urgent need to respect and promote the **inherent rights** of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources*

UN Declaration, 7th preambular para.

From coast to coast to coast, Canadians are embarking on a **journey of reconciliation**. ... What is needed is fundamental and foundational change. ... It's about righting historical wrongs. ... **It's about shedding our colonial past**. ... I firmly believe that **once you know the truth, you can't unknow the truth**. ... We know the reality of our shared history with Indigenous peoples in Canada.

Minister of Indigenous and Northern Affairs (Carolyn Bennett), Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10, 2016. See also Céline Bellot & Marie-Eve Sylvestre, *La judiciarisation de l'itinérance à Val d'Or*, 8 décembre 2016, at 13

Topics

1. Role of international human rights law in Canada
2. Indigenous peoples' collective rights are human rights
3. Significance of *UN Declaration*
4. Framework for reconciliation

Topics, cont'd

5. Implementation of *UN Declaration*
6. Rights and obligations re health and well-being
7. Sustainable development, poverty and human rights
8. Consent in Canadian and international law

Introduction

- ▶ Indigenous peoples are international and domestic actors
- ▶ Growing number of international standards re Indigenous peoples

1. Role of international human rights law in Canada

We reaffirm that **human rights, the rule of law and democracy are interlinked and mutually reinforcing** and that they belong to the universal and indivisible core values and principles of the United Nations.

Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, GA Res. 67/1, 24 September 2012 (adopted without a vote), para. 5

1. Role of international human rights law in Canada

Aboriginal rights from the beginning have been **shaped by international concepts**. ... **Canada**, as a respected member of the international community, **cannot ignore ... new international norms** ... Whether we like it or not, **aboriginal rights are an international matter**.

Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada,
“Aboriginal Rights: International Perspectives”, Order of Canada Luncheon,
Canadian Club of Vancouver, Vancouver, British Columbia, February 8, 2002

1. Role of international human rights law in Canada

International instruments such as the [*UN Declaration on the Rights of Indigenous Peoples*] and the *Convention on the Rights of the Child* may ... **inform the contextual approach** to statutory interpretation ...

First Nations Child and Family Caring Society of Canada v. Canada (Attorney General), 2012 FC 445, para. 353. Affirmed 2013 FCA 75 (Federal Court of Appeal). See also *R. v. Sayers*, 2017 ONCJ 77 (Ontario Court of Justice), paras. 51 and 52.

Of particular significance especially in this case is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) ... (para. 72)

First Nations Child and Family Caring Society of Canada (FNCFCS) et al. v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada (INAC)), 2018 CHRT 4. See also paras. 69-82 and 191.

1. Role of international human rights law in Canada

The various sources of international human rights law - **declarations**, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms - must, in my opinion, be **relevant and persuasive sources for interpretation** of the Charter's provisions.

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

1. Role of international human rights law

It is a well-established principle of statutory interpretation that legislation will be **presumed to conform to international law**.

... [A]s a matter of law, courts will strive to **avoid constructions** of domestic law pursuant to which the state would be **in violation of its international obligations**, unless the wording of the statute clearly compels that result.

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

1. Role of international human rights law in Canada

... with the adoption of the *Charter*, the Canadian system of government was **transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy**.

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

2. Indigenous peoples' collective rights are human rights

Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

- Economic, social and cultural rights
- Civil and political rights
- **Rights of peoples**, and specific groups and individuals

Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1 (18 June 2007), Annex – Agenda and Framework for the Programme of Work, Item 3

2. Indigenous peoples' collective rights are human rights

All human rights are **universal, indivisible, interdependent and interrelated**. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of **national and regional particularities and various historical, cultural and religious backgrounds** must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, **to promote and protect all human rights** and freedoms.

World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), para. 5

2. Indigenous peoples' collective rights are human rights

The United Nations system's work on indigenous peoples' issues is guided by ... the **human rights-based approach**; gender equality; environmental sustainability; results-based management; and capacity development.

Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of **rights and corresponding obligations** established by international law ...

Permanent Forum on Indigenous Issues, “System-wide action plan for ensuring a coherent approach to achieving the ends of the United Nations Declaration on the Rights of Indigenous Peoples”, UN Doc. E/C.19/2016/5 (19 February 2016), paras. 13 and 14

2. Indigenous peoples' collective rights are human rights

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.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, para. 142

Indigenous peoples have the right to the full enjoyment, **as a collective or as individuals**, of **all human rights** and fundamental freedoms as recognized in the Charter of the United Nations ... and international human rights law.

UN Declaration, article 1

2. Indigenous peoples' collective rights are human rights

... the *Charter* should be presumed to provide **at least as great a level of protection as is found in the international human rights documents** that Canada has ratified. (para. 70)

... the *Charter*, as a living document, grows with society and speaks to the current situations and needs of Canadians. Thus Canada's *current* international law commitments and the **current state of international thought on human rights provide a persuasive source** for interpreting the scope of the *Charter*. (para. 78)

Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27

2. Indigenous peoples' collective rights are human rights

... human rights have a dual nature. Both **collective and individual human rights** must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure **respect for both types of rights** without diminishing either.

Canadian Human Rights Commission, “Still A Matter of Rights”, A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act (January 2008), at 8

2. Indigenous peoples' collective rights are human rights

III General framework for the promotion and protection of human rights

B. Legal framework for protecting human rights at the domestic level

Constitutional and legal rights of Aboriginal peoples

Article 35 of the Constitution Act, 1982 recognizes and affirms, that is to say protects, two kinds of special rights. These rights, which are collective in nature, are called Aboriginal and treaty rights. All levels of government—federal, provincial, territorial, municipal and Aboriginal—are obliged to respect Aboriginal and treaty rights.

Canada, *Core Document Forming Part of the Reports of States Parties: Canada*, UN Doc. HRI/CORE/CAN/2013 (30 May 2013), III, B, para. 109 [underline added]

3. Significance of *UN Declaration*

- ▶ **More than two decades** of negotiations
- ▶ Role of Indigenous peoples' representatives
- ▶ Adoption by UN Human Rights Council
- ▶ **Amended version adopted** by UN General Assembly

3. Significance of *UN Declaration*

- ▶ **Most comprehensive international instrument** on Indigenous peoples' rights
- ▶ Affirms collective and individual human rights
- ▶ Urgency
- ▶ **Reaffirmed eight times** by the UN General Assembly by consensus



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1 INFORMATION	1 COLORADO	1 HAITI
2 ALASKA	2 CONNECTICUT	2 HONDURAS
3 ALABAMA	3 CALIFORNIA	3 HUNGARY
4 MONTANA	4 COLORADO	4 ICELAND
5 ARKANSAS	5 COLO. REPUBLIC	5 INDONESIA
6 NEW MEXICO	6 CROATIA	6 IRAN
7 MASSACHUSETTS	7 DAIRY	7 JAPAN
8 ARIZONA	8 FLORIDA	8 KENYA
9 NEVADA	9 GEORGIA	9 LATVIA
10 VICTORIA	10 HAWAII	10 LIBERIA

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BENIN      BURKINA FASO    CHAD
BOLIVIA    BURUNDI    COTE D'IVOIRE
BOSNIA-HERZEGOVINA  CAMEROON  DEMOCRATIC REPUBLIC OF CONGO
BOTSWANA   CHAD        EQUATORIAL GUINEA
BRAZIL     CHINA      EGYPT
BULGARIA   CHINA      EL SALVADOR
CABO VERDE  CHINA      ERITREA
CHAD       CHINA      ESTONIA
CHINA      CHINA      ETHIOPIA
CHINA      CHINA      FINLAND
CHINA      CHINA      FRANCE
CHINA      CHINA      GERMANY
CHINA      CHINA      GREECE
CHINA      CHINA      HUNGARY
CHINA      CHINA      INDIA
CHINA      CHINA      IRAN
CHINA      CHINA      ISRAEL
CHINA      CHINA      JAPAN
CHINA      CHINA      KAZAKHSTAN
CHINA      CHINA      KOREA, SOUTH
CHINA      CHINA      LATVIA
CHINA      CHINA      LIBERIA
CHINA      CHINA      LITHUANIA
CHINA      CHINA      MOLDOVA
CHINA      CHINA      MOROCCO
CHINA      CHINA      NEPAL
CHINA      CHINA      NIGERIA
CHINA      CHINA      ROMANIA
CHINA      CHINA      RUSSIA
CHINA      CHINA      SINGAPORE
CHINA      CHINA      TURKEY
CHINA      CHINA      UGANDA
CHINA      CHINA      VIETNAM
CHINA      CHINA      YEMEN

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WURZBURG	WURZBURG
FRANKFURT	FRANKFURT
DUISBURG	DUISBURG
MÜNCHEN	MÜNCHEN
BERLIN	BERLIN
STUTTGART	STUTTGART
KÖLN	KÖLN
ESSEN	ESSEN
DUISBURG	DUISBURG
FRANKFURT	FRANKFURT
WÜRZBURG	WÜRZBURG
DUISBURG	DUISBURG

DRAFT RESOLUTION

1. SLOVAKIA	1. POLAND	1. SWEDEN
2. TURKEY	2. GERMANY	2. FINLAND
3. SLOVENIA	3. PHILIPPINES	3. CZECH-REPUBLIC
4. LATVIA	4. POLAND	4. YUGOSLAVIA
5. MONGOLIA	5. PORTUGAL	5. TUNISIA
6. CYPRUS	6. BURKINA FASO	6. GREECE
7. MALTA	7. REP. OF AFRICA	7. TAIWAN
8. TAIWAN	8. NORWAY	8. URGENTI
9. ALBANIA	9. RUSSIAN FED.	9. TURKMENISTAN

3. Significance of *UN Declaration*

The Declaration is a visionary step towards addressing the **human rights** of indigenous peoples. It sets out a framework on which States can **build or rebuild their relationships** with indigenous peoples. ... [I]t provides a momentous opportunity for States and indigenous peoples to **strengthen their relationships, promote reconciliation and ensure that the past is not repeated.**

UN Secretary-General (Ban Ki-moon), “Protect, Promote, Endangered Languages, Secretary-General Urges in Message for International Day of World’s Indigenous People”, SG/SM/11715, HR/4957, OBV/711 (23 July 2008)

3. Significance of *UN Declaration*

The United Nations Declaration on the Rights of Indigenous Peoples constitutes a principled framework for **justice, reconciliation, healing and peace.**

Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex – Expert Mechanism Advice No. 6 (2014), para. 1

UN Declaration, article 43

The rights recognized herein constitute the **minimum standards** for the survival, dignity and well-being of the indigenous peoples of the world.

3. Significance of *UN Declaration*

UN Declaration, art. 46, para. 3

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.

The true test of "**good**" **governance** is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights.

Office of the High Commissioner for Human Rights, "Good Governance and Human Rights",

<http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx>

3. Significance of *UN Declaration*

We reaffirm our solemn commitment to **respect, promote and advance and in no way diminish the rights** of indigenous peoples and to uphold the principles of the Declaration [on the Rights of Indigenous Peoples].

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), para. 4

3. Significance of *UN Declaration*

... the significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character. ...
[I]mplementation of the Declaration should be regarded as **political, moral and, yes, legal imperative without qualification.**

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

3. Significance of *UN Declaration*

... in light of the authoritativeness and legitimacy that the Declaration has acquired in the international legal system, **States are not in a position to dismiss it as a mere aspirational text.**

... In particular ... the UNDRIP can be used as **an authoritative instrument to clarify, interpret and expand the meaning and scope of regional and domestic laws.** ...

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

3. Significance of *UN Declaration*

... even though the Declaration itself is not legally binding in the same way that a treaty is, the **Declaration reflects legal commitments that are related to the [United Nations] Charter, other treaty commitments and customary international law**. The Declaration ... is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity ...

General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 62

3. Significance of *UN Declaration*

Even when resolutions are framed as general principles, they can provide a basis for the progressive development of the law ... Examples of important '**law-making**' resolutions include ... the **UN Declaration** on the Rights of Indigenous Peoples ...

James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), at 42

In 1962, the Office of Legal Affairs of the United Nations, upon request by the Commission on Human Rights, clarified that “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**”. **UND RIP is such a declaration deserving of utmost respect.**

International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), at 5 [quoting Economic and Social Council, Report of the Commission on Human Rights (E/3616/Rev. 1), para. 105, 18th session, 19 March – 14 April 1962]

3. Significance of *UN Declaration*

The term ‘**declaration**’ ... is used by the GA for resolutions which claim to express **political or legal principles of particular importance** ... Examples of the **most important declarations** which have attained a **quasi-legislative function** are: the Universal Declaration of Human Rights of 10 December 1948 ... and the **United Nations Declaration on the Rights of Indigenous Peoples** of 13 September 2007 ...

Eckhart Klein & Stefanie Schmahl, “Functions and Powers: Article 10” in Bruno Simma *et al.*, eds., *The Charter of the United Nations: A Commentary*, 3rd ed. (New York: Oxford University Press, 2012) 461 at 478-479

3. Significance of *UN Declaration*

A constitution ... is drafted with an eye to the future ... It must, therefore, be capable of growth and development over time to meet **new social, political and historical realities often unimagined by its framers.**

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

The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that **our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.**

Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 22

3. Significance of *UN Declaration*

- ▶ Interpret Indigenous rights and State obligations internationally and domestically, including s. 35 of *Constitution Act, 1982*
- ▶ Fill in the gaps in treaties and other agreements between Indigenous peoples and States
- ▶ Guide policy development, negotiations and litigation
- ▶ Transcend the “box” of domestic law
- ▶ Guide Nation-building and strengthen communities

4. Framework for reconciliation

What is at stake is **nothing less than justice for the Aboriginal group and its descendants**, and the **reconciliation** between the group and broader society.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, para. 23

The United Nations Declaration on the Rights of Indigenous Peoples constitutes a principled framework for **justice, reconciliation, healing and peace**.

Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex – Expert Mechanism Advice No. 6 (2014), para. 1

Pour l'enfant déraciné
Pour le parent oublié



4. Framework for reconciliation

We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the **framework** for reconciliation. (Call to Action 43)

We call upon the Government of Canada to develop a **national action plan**, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*. (Call to Action 44)

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

4. Framework for reconciliation

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.

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

... indigenous peoples have suffered from **historic injustices** as a result of, inter alia, their **colonization and dispossession of their lands, territories and resources**, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests ...

UN Declaration, 6th preambular para.

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

4. Framework for reconciliation

... colonialism has led to racism, racial discrimination, xenophobia and related intolerance ... and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented.

World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Durban Declaration and Programme of Action*, adopted in Durban, South Africa (8 September 2001), art. 14

4. Framework for reconciliation

... 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.

R. v. Ipeelee, 2012 SCC 13, para. 60

4. Framework for reconciliation

Reconciliation requires putting colonialism into the past, including beyond the *Indian Act*. It demands **rebuilding Indigenous government and communities and in closing the socio-cultural gap between Indigenous and non-Indigenous peoples. It involves **recognizing the Indigenous relationship with the land, respecting treaties, Aboriginal title and rights** and building new structures and making decisions in new ways. It is the politics of nation building.**

Minister of Justice and Attorney General of Canada (Hon. Jody Wilson-Raybould),
“Notes for an address: 2016 Aboriginal Law Conference – Continuing Legal Education Society of British Columbia”, Vancouver, BC, November 25, 2016

4. Framework for reconciliation

«Que l'Assemblée nationale reconnaisse que les pensionnats autochtones étaient **un outil de génocide culturel à l'égard des nations autochtones** du Québec.

«Que l'Assemblée nationale demande au gouvernement du Québec et au gouvernement du Canada de **mettre en oeuvre les recommandations de la Commission de vérité et [de] réconciliation du Canada**.

Journal des débats de l'Assemblée nationale, 41^e législature, 1^{re} session, 11 juin 2015 - Vol. 44 N° 102, «Reconnaitre que les pensionnats autochtones étaient un outil de génocide culturel et demander la mise en oeuvre des recommandations de la Commission de vérité et réconciliation du Canada » [vote unanime sur la motion 97-0-0]

5. Implementation of *UN Declaration*

CASHRA

The Canadian Association of Statutory Human Rights Agencies (CASHRA) is calling on **all levels of government across Canada** to implement the UN Declaration on the Rights of Indigenous Peoples.

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

5. Implementation of *UN Declaration*

Government of Canada

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.

Aboriginal Affairs and Northern Development Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010

... Trudeau ... announced the review of laws and policies related to Indigenous Peoples ... to help ensure the Crown is **meeting its constitutional obligations** with respect to Aboriginal and treaty rights; **adhering to international human rights standards**, including the United Nations Declaration ... and supporting the **implementation of the [TRC's] Calls to Action**.

"Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples", February 22, 2017 (PM website)

5. Implementation of *UN Declaration*

I'm here to announce, on behalf of Canada, that **we are now a full supporter of the Declaration without qualification.**

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

... many of our **current realities do not align with the standards of UNDRIP** and, as such, they must be systematically and coherently dismantled.

Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), “Notes for an address: B.C. Cabinet and First Nations Leaders’ Gathering”, Vancouver, BC, September 7, 2016

5. Implementation of *UN Declaration*

Government of British Columbia

... our government will be fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the Calls to Action of the Truth and Reconciliation Commission. As minister, you are responsible for moving forward on the calls to action and reviewing policies, programs, and legislation to determine how to bring the principles of the declaration into action in British Columbia.

Premier John Horgan, Mandate letter to the Honourable Scott Fraser, Minister of Indigenous Relations and Reconciliation, July 18, 2017, at 2

5. Implementation of *UN Declaration*

BC Human Rights Commission (not yet created)

The Human Rights Commission should, as soon as practically possible, collaborate with and consult Indigenous groups to **develop commission policies and practices that honour the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).**

British Columbia, A Human Rights Commission for the 21st Century: British Columbians Talk About Human Rights: A report and recommendations to the Attorney General of British Columbia, December 2017, at 27

5. Implementation of *UN Declaration*

Manitoba

The minister responsible for reconciliation must guide the development of a strategy for reconciliation that

- (a) is to be guided by the **calls to action of the Truth and Reconciliation Commission and the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples;**

...

The Path to Reconciliation Act, Statutes of Manitoba 2016, c. 5 (assented to March 15, 2016), s. 4

5. Implementation of *UN Declaration*

Ville de Montréal

Attendu que la Déclaration reconnaît aux peuples autochtones des droits individuels et collectifs inscrits dans **divers instruments internationaux des droits de la personne** ...

...

Et résolu :

...

2. que la Ville de Montréal **endosse** la Déclaration des Nations Unies sur les droits des peuples autochtones;
3. que la Déclaration **guidera la Ville de Montréal dans ses relations avec les peuples autochtones.**

Ville de Montréal, Extrait authentique du procès-verbale d'une assemblée du conseil municipal, Assemblée ordinaire du 21 août 2017, Résolution CM17 0918

5. Implementation of *UN Declaration*

The United Nations Declaration on the Rights of Indigenous Peoples ... that is set out in the schedule, is hereby affirmed as a universal international human rights instrument with **application in Canadian law.** (s. 3)

The Government of Canada must, in consultation and cooperation with indigenous peoples, develop and implement a **national action plan** to achieve the objectives of the United Nations Declaration on the Rights of Indigenous Peoples. (s.5)

An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples (Private Member's Bill C-262), House of Commons, 1st sess., 42nd Parl. (tabled by Romeo Saganash, April 21, 2016)

5. Implementation of *UN Declaration*

Canada is fully in support of the UN Declaration on the Rights of indigenous Peoples. As has been stated by our ministers and the Prime Minister, we are **committed to its adoption and implementation in Canada.** ...

...

We ... are proud to **support this private member's bill and give him our guarantee** that we are on this path together ... we will ... bring forward the right legislation and standards to **ensure that self-determination and the inherent rights of indigenous people are respected** ...

House of Commons, *Debates (Hansard)*, No. 245, 42nd Parl., 1st sess., December 5, 2017, at 1805-1815 (Ms. Yvonne Jones, Parliamentary Secretary to the Minister of Indigenous and Northern Affairs)

6. Rights and obligations re health and well-being

In the last decade, the number of homeless persons in Val d'Or has increased. This was caused by multiple factors including an **increase in poverty**, a **housing crisis** as well as **multiple health (both physical and mental)** and **social problems** in the city of Val d'Or and in the Indigenous communities located in Northern Quebec. **Homelessness** is particularly important among Indigenous people as well as among women and youth.

Céline Bellot and Marie-Eve Sylvestre, *The Judiciarization of Homelessness in Val d'Or*, Executive Summary, December 2016, at 1, para. 1

6. Rights and obligations re health and well-being

... in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, ... development-related activities that lead to the displacement of indigenous peoples against their will ... denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4 (11 May 2000), para. 27

6. Rights and obligations re health and well-being

It is recognized that **self-determination** in social, political and economic life **improves the health** of Aboriginal peoples and their communities. Therefore, the CMA encourages and supports the Aboriginal peoples in their quest for resolution of self-determination and land use.

Canadian Medical Association, *Bridging the Gap: Promoting Health and Healing for Aboriginal Peoples in Canada* (Ottawa: Canadian Medical Association, 1994) at 14

UN Declaration, 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.

6. Rights and obligations re health and well-being

UN Declaration

Indigenous peoples and individuals have the right not to be subjected to **forced assimilation or destruction of their culture.** (art. 8(1))

States shall provide effective mechanisms for **prevention of, and redress for:**

- (a) Any action which has the aim or effect of depriving them of their **integrity as distinct peoples**, or of their **cultural values** or ethnic identities;
- (b) Any action which has the aim or effect of **dispossessing** them of their **lands, territories or resources** (art. 8(2))

6. Rights and obligations re health and well-being

UN Declaration, article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in **freedom, peace and security** as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

6. Rights and obligations re health and well-being

UN Declaration, article 21

1. Indigenous peoples have the right, without discrimination, to the **improvement of their economic and social conditions**, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, **health** and social security.

2. States shall take effective measures and, where appropriate, **special measures** to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of **indigenous elders, women, youth, children and persons with disabilities**.

6. Rights and obligations re health and well-being

UN Declaration, article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, **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.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their **right to development**. In particular, indigenous peoples have the right to be actively involved in developing and determining **health**, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

6. Rights and obligations re health and well-being

... **indigenous women** continue to suffer from multiple forms of discrimination, in particular with regard to their access to employment, housing, education and health care, and continue to live in **poverty** in the State party ... The Committee notes the State party's commitment to **fully implementing the United Nations Declaration** on the Rights of Indigenous Peoples (2007). Nevertheless, it remains concerned about the **lack of a coherent plan or strategy** to improve the socioeconomic conditions of indigenous communities, in particular indigenous women ...

Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, UN Doc. CEDAW/C/CAN/CO/8-9 (18 November 2016), para. 28

7. Sustainable development, poverty and human rights

We resolve, between now and 2030, to **end poverty and hunger everywhere**; ... to **protect human rights** and promote gender equality and the empowerment of women and girls; and to **ensure the lasting protection of the planet and its natural resources**.

... we pledge that **no one will be left behind**. ... we wish to see the Goals and targets met **for all nations and peoples** and for all segments of society. And we will endeavour to **reach the furthest behind first**.

General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1 (25 September 2015) (adopted without a vote), at 3 (Declaration), paras. 3 and 4

7. Sustainable development, poverty and human rights

"sustainable development" means development that **meets the needs of the present without compromising the ability of future generations to meet their own needs**

World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987), at 43

Federal Sustainable Development Act, S.C. 2008, c. 33, s. 2

Sustainable Development Act, S.Q. 2006, c. 3, s. 2

American Declaration, article XIX

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

7. Sustainable development, poverty and human rights

Eradicating poverty is the greatest global challenge facing the world today and an **indispensable** requirement for sustainable development. In this regard we are committed to freeing humanity from poverty and hunger as a matter of urgency. (para. 2)

We ... recognize the **importance of the United Nations Declaration** on the Rights of Indigenous Peoples in the context of global, regional, national and subnational **implementation of sustainable development strategies**. (para. 49)

Rio+20 United Nations Commission on Sustainable Development, *The future we want*, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), para. 49. Endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote)

7. Sustainable development, poverty and human rights

Poverty is a denial of human rights and human dignity.

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

For indigenous peoples ... and others who rely directly on the products of forests, rivers, lakes and oceans for their food, fuel and medicine, environmental harm can and often does have **disastrous consequences**.

Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Note by the Secretariat*, UN Doc. A/HRC/34/49 (19 January 2017), para. 22

7. Sustainable development, poverty and human rights

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

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

7. Sustainable development, poverty and human rights

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

Ginger Gibson *et al.* with Lake Babine Nation and Nak'azdli Whut'en, *Indigenous Communities and Industrial Camps: Promoting healthy communities in settings of industrial change* (Victoria, B.C.: The Firelight Group, 2017), Introduction, at 7-8

7. Sustainable development, poverty and human rights

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

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

8. Consent in Canadian and international law

FPIC	Consent in Canadian law
“ <i>free</i> ”	no coercion or manipulation
“ <i>prior</i> ”	obtained in advance of activity being approved
“ <i>informed</i> ”	information must not be misleading or inadequate

8. Consent in Canadian and international law

- FPIC not same as “veto” (not used in *UN Declaration*)
- “Veto” implies an absolute power, regardless of facts and law in any given case

... the Committee is deeply concerned that:

(a) Violations of the land rights of indigenous peoples continue in the State party; in particular, environmentally destructive decisions for resource development which affect their lives and territories **continue to be undertaken without the free, prior and informed consent** of the indigenous peoples, **resulting in breaches of treaty obligations and international human rights law.**

Committee on the Elimination of Racial Discrimination, *Concluding observations on the twenty-first to twenty-third periodic reports of Canada*, UN Doc. CERD/C/CAN/CO/21-23 (13 September 2017), para. 19(a)

8. Consent in Canadian and international law

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

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

... lack of development may not be invoked to justify the abridgement of internationally recognized human rights.

Vienna Declaration and Programme of Action, adopted by consensus at World Conference on Human Rights, 25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), para. 10. Endorsed by General Assembly, *World Conference on Human Rights*, UN Doc. A/RES/48/121 (20 December 1993) (without vote)

8. Consent in Canadian and international law

1. All peoples have the right of self-determination. By virtue of that right they **freely determine their political status and freely pursue their economic, social and cultural development.**
2. All peoples may, for their own ends, **freely dispose of their natural wealth and resources** ... In no case may a people be deprived of its **own means of subsistence.**
3. The States Parties to the present Covenant ... **shall promote the realization of the right of self-determination**, and **shall respect that right**, in conformity with the provisions of the Charter of the United Nations.

International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, identical article 1

8. Consent in Canadian and international law

UN Declaration, article 32:

1. Indigenous peoples have the right to determine and develop **priorities and strategies for the development or use** of their lands or territories and other resources.
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.

See also Arts. 10; 11(2); 19; 28(1); and 29(2).

8. Consent in Canadian and international law

The concept of **free, prior and informed consent** (“FPIC”) is fundamental to the UN Declaration as a measure to ensure that indigenous peoples’ rights are protected. (p. 25)

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**). (p. 26)

UN Global Compact, *A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples* (New York: UN Global Compact, 2013)

8. Consent in Canadian and international law

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. If the Aboriginal group does **not consent** to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*.

Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, para. 76

8. Consent in Canadian and international law

... 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**.

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, para. 24 (quotes from *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 168).

Conclusions

- Public Inquiry Commission should adopt a human rights-based approach – that includes the ***UN Declaration as an essential framework*** and other international human rights law – in carrying out its crucial mandate
- Rights of Indigenous peoples and individuals constitute **human rights** and must be treated as such by all governments in Canada
- **Colonialism must be rejected** in favour of contemporary international human rights
- Ongoing discrimination and violence against Indigenous peoples and individuals are exacerbated by severe and ongoing **systemic discrimination** underlying current laws and policies relating to them

Conclusions

- In view of past and present discrimination and dispossession, Indigenous peoples in Québec are highly **vulnerable**
- **Special measures** are urgently required, not only in relation to Indigenous peoples but also Indigenous women, children, youth and persons with disabilities
- **Situation in Val d'Or** provides a critical opportunity to address systemic discrimination, ongoing impoverishment and ensure the well-being of all Indigenous peoples and individuals affected
- At the same time, Public Inquiry Commission can provide a **principled approach** that serves as a key example for other situations relating to Indigenous peoples in Québec and other regions of Canada