SUBMISSION TO THE NEW PROSPERITY GOLD-COPPER MINE PROJECT REVIEW

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AMNESTY INTERNATIONAL

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I. INTRODUCTION AND SUMMARY

> Aboriginal rights from the beginning have been shaped by international concepts.... More recently, emerging international norms have guided governments and courts grappling with aboriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms.... Whether we like it or not, aboriginal rights are an international matter.
>
> – *The Right Honourable Beverley McLachlin, Chief Justice of Canada, 8 February 2002*.[1]

The environmental assessment process is of vital importance to the protection of Indigenous peoples' rights in Canada. Environmental impact assessments, such as those under the *Canadian Environmental Assessment Act* (CEAA) *2012*, are one of the few formal mechanisms through which potential impacts on Aboriginal peoples' rights and interests can be publicly considered and where Indigenous peoples' own perspectives – including their knowledge and legal systems – can be given voice. This is particularly important where Indigenous land and title issues remain unresolved.

This submission will speak to both constitutional and international law respecting Indigenous peoples' human rights. Amnesty International submits that constitutional and international law must be read together, and that the consideration of the proposed New Prosperity Copper-Gold Mine project currently under review must be conducted and determined in manner that is consistent with both.[2]

The Panel for the New Prosperity Mine Review is mandated by CEAA 2012 to consider potential impacts on Aboriginal peoples' "health and socio-economic conditions," their "physical and cultural heritage," "the current use of lands and resources for traditional purposes," and impacts on "any structure, site or thing that is of historical, archaeological, paleontological or architectural significance."[3] In this assessment, the Panel is required to work in cooperation with the Tsilhqot'in and other affected Indigenous peoples[4] and take into consideration their traditional knowledge systems.[5]

The cultures, heritage and well-being of Indigenous peoples; their ownership of, rights in, and use of lands and territories; their knowledge systems; and their participation in decision-making are all aspects of internationally protected human

[1] Right Honourable Beverley McLachlin, Chief Justice of Canada, "Aboriginal Rights: International Perspectives." Order of Canada Luncheon, Canadian Club of Vancouver, Vancouver, British Columbia, February 8, 2002.
[2] In this submission, the term "Indigenous peoples", which is widely used in international human rights law, will be used as synonymous with the term "Aboriginal peoples." In other words, in a Canadian legal context, the term "Indigenous peoples" under international human rights law includes the same peoples to which s. 35 of the *Constitution Act, 1982* applies.
[3] *Canadian Environmental Assessment Act, 2012,* SC 2012, c. 19, s. 52. 5(1)(c).
[4] *Canadian Environmental Assessment Act, 2012*, SC 2012, c. 19, s. 52. 4(1)(c).
[5] *Canadian Environmental Assessment Act, 2012*, SC 2012, c. 19, s. 52. 19(3).

rights that are also affirmed in the Canadian Constitution and related jurisprudence. While federal legislation does not provide any explicit guidance on the weight or significance that environmental reviews should give to the protection of Indigenous peoples' rights, or the measures needed to protect those rights, such guidance is provided by the broader framework of Canadian constitutional law and international human rights law.

Canadian courts have already determined that the specific mandates of environmental review panels must be interpreted and applied in a manner consistent with the larger framework of relevant law.[6] Canadian courts have also determined that international human rights standards, including declarations and the expert interpretations of international human bodies, are "relevant and persuasive sources" for the interpretation of domestic law.[7] Furthermore, the Supreme Court has held that any interpretation of domestic law that would put Canada in violation of its international obligations must be strictly avoided.[8]

Consequently, human rights are an indispensable part of the framework of law which must guide the Review of the proposed New Prosperity Mine in assessing the significance of potential effects on the Indigenous peoples' culture, heritage, well-being and use of the land, and in determining appropriate means to address these risks. While the Review Panel does not have a mandate to make determinations regarding the validity of Aboriginal rights or title claims or assertions by Indigenous peoples, the Panel can and must consider the potential effects of the proposed Project on the rights of Indigenous peoples as articulated in Canadian jurisprudence and international human rights law. This is an integral part of drawing conclusions about potential environmental effects. Furthermore, as part of this determination, the Review Panel must carefully consider, and respond to, any submissions by the Indigenous peoples respecting potential impacts on their fundamental human rights as set out in domestic and international law. The findings of the previous Panel that the proposed Prosperity project would have significant, permanent, irreversible and immitigable impacts on Aboriginal culture, heritage, and traditional activities underscores the need to consider the human rights of Indigenous peoples as a necessary part of this Review Panel's analysis.

In this submission, Amnesty International draws the Panel's attention in particular to the following principles which we will demonstrate are well-established in international human rights law:

> *Principle 1)* Indigenous peoples' customary rights to lands and resources must be protected, with due consideration given to Indigenous peoples' own legal traditions and land tenure systems, even where the national or local

[6] The Supreme Court of Canada has said that all levels of decision-making are "required to respect legal and constitutional limits." *David Beckman, in his capacity as Director, Agriculture Branch, Department of Energy Mines and Resources et al. v. Little Salmon/Carmacks First Nation et al.* [2010] SCC 53. Para 48. In the *Halfway River* case, Honourable Madam Justice Huddart of the BC Court of Appeal reiterated that "provisions of a statute, regulation, or policy" must be interpreted in such a way as not "offend the Constitution." *Halfway River First Nation v. British Columbia (Ministry of Forests),* 1999 BCCA 470. Concurring Opinion. Paras. 171-177. See also *Quebec (Attorney General) v. Canada (National Energy Board),* [1994] 1 S.C.R. 159, [1994] S.C.J. No. 13 at Para. 40 and *Standing Buffalo Dakota First Nation v. Enbridge Pipelines Inc.*, 2009 FCA 308. Para 36.

[7] *Reference re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313. Para. 57.

[8] See *R v. Hape,* [2007] 2 S.C.R. 292 and *Canada (Human Rights Commission) v. Canada (Attorney General),* [2012] FC 445, both of which are discussed below.

governments have not yet agreed to formal legal recognition of these rights in domestic law;

Principle 2) The vital importance of lands, territories and resources to Indigenous peoples' culture, health, well-being and other rights protected in international law requires a very high standard of precaution in all decisions potentially affecting Indigenous peoples' ownership and use of their traditional lands;

Principle 3) Efforts to appropriately reconcile the rights of Indigenous peoples with other social imperatives must take into account the distinct contemporary situation of Indigenous peoples, including the unresolved legacy of past violations and heightened risk of further harm resulting from continued marginalization and discrimination;

Principle 4) To achieve the standard of protection necessitated by Indigenous peoples' distinct relationship to their land and their unique circumstances, international human rights law requires the meaningful involvement of Indigenous peoples in the decision-making process so that their experience, knowledge, expertise and values can inform the outcome; and

Principle 5) In instances where there is potential for significant harm, projects should proceed only with the free, prior and informed consent of the affected peoples.

In Amnesty International's view, these international standards, which also find expression in Canadian law, help clarify and bolster the domestic legal framework within which environmental assessments must take place. These human rights standards are both relevant and applicable to the interpretation and application of *CEAA 2012* wherever the rights and interests of Aboriginal peoples are in issue.

Amnesty International recognizes that the Panel has a limited, albeit important, role in the overall decision-making process for this proposed project. In our view, however, the international human rights of the Tsilhqot'in peoples should directly inform the Panel's assessment of the "significance" of the impacts on Tsilhqot'in culture and heritage,[9] and is information that is critically relevant to the "justification" (or the lack thereof) for the Project in the face of such impacts.[10] Such consideration is especially important for a project that poses potentially significant impacts to an area of profound cultural, economic and spiritual importance to the Tsilhqot'in people.

About Amnesty International

Amnesty International is a global movement promoting the full enjoyment and implementation of universal human rights instruments that governments around the world have committed to uphold, including the *United Nations Declaration on the Rights of Indigenous Peoples*. Amnesty International is strictly non-partisan and does not accept money from any government. Our work is made possible through

[9] See the Panel's Amended Terms of Reference, sections 2.4, 3.8 – 3.10, 3.13, 6.1.
[10] See the Panel's Amended Terms of Reference, sections 6.2, 6.4.

the active involvement and support of a broad base of members around the world and across Canada, including the longstanding involvement of Amnesty International members in central British Columbia.

Amnesty International takes no position either for or against mining or other forms of resource development *per se.* However, our research has repeatedly highlighted the need for rigorous safeguards to ensure that resource development projects do not lead to serious violations of human rights, including the land and resource rights of Indigenous peoples.[11] Furthermore, we believe that effective safeguards in the review and licensing of resource development projects are crucial not only for the health and well-being of Indigenous peoples in Canada, but also for the safety and survival of Indigenous peoples globally.

Canadian companies are at the leading edge of extractive projects around the globe.[12] United Nations human rights bodies have repeatedly urged Canada to ensure that Canadian companies respect the rights of Indigenous peoples who may be affected by their overseas operations.[13] The central place of Canadian resource companies in global extractive industries gives Canada unparalleled influence. Many countries look to Canada for models of legislation and regulation. Consequently, decisions about the terms and conditions under which resource development project may proceed in Canada can raise or lower the bar for human rights protection internationally.

Amnesty International has a particular interest in the Tsilhqot'in situation. The trial court decision on the Tsilhqot'in title claim is significant for its substantial inquiry into the Tsilhqot'in peoples' right to own and manage their traditional lands, matters that necessarily invoke international human rights standards.[14] Because of its significance, Amnesty International is currently seeking leave to intervene in this case when it comes before the Supreme Court in November 2013.

[11] For example, Amnesty International. "Americas: Governments must stop imposing development projects on Indigenous peoples' territories." 8 August 2012. AMR 01/005/2012. www.amnesty.org/en/library/info/AMR01/005/2012/en

[12] According to the federal government, three-quarters of the world's exploration and mining companies are headquartered in Canada. These corporations are active in more than 100 countries. Foreign Affairs and International Trade Canada. *Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector.* March 2009.

[13] In 2007, the UN Committee on the Elimination of Racial Discrimination called on Canada to "take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada." *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada.* UN Doc. CERD/C/CAN/CO/18. (25 May 2007). Para. 17. In 2012, the Committee expressed its concern that Canada had yet to adopt such measures. *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada.* UN Doc. CERD/C/CAN/CO/19-20. (9 March 2012). Para. 14.

[14] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700.

II. LEGAL FRAMEWORK

1. Protection of Indigenous Peoples' Rights is an Imperative of Canadian Domestic Law

The rights of Indigenous peoples are part of the foundation of Canadian law. The *Canadian Constitution* (1982) explicitly recognizes the rights of Indigenous peoples, and the treaties negotiated with them, as part of the highest framework of domestic law.[15] Canadian courts subsequently have called the protection of Indigenous rights "an underlying constitutional value,"[16] "a national commitment"[17] and a matter of "public interest."[18] Anticipating that other parties will address the constitutional protection of Aboriginal rights in Canada, this submission will touch only briefly on a number of key principles and themes of Canadian domestic law, which underline the relevance and significance of international human rights standards.

Canadian courts have recognized that the Aboriginal rights affirmed in the Constitution were not created by Canadian legislation, but predate the formation of the Canadian state. As a consequence of their constitutional status, the Aboriginal and Treaty rights protected by section 35 of the *Constitution Act*, 1982 constitute both constraints on the power of the state – governments cannot simply impose their will on Indigenous peoples – and impose positive obligations on the Crown to resolve claims and disputes respecting rights assertions through a process of good faith and negotiation intended to reach mutual agreement. In the *Haida Nation* decision, the Supreme Court said:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation.[19]

Canadian courts have also been clear that the rights of Indigenous peoples must be protected even while negotiations or litigation remain unresolved. In a landmark 1997 decision, *Delgamuukw v. British Columbia*, concerning logging on land subject to unresolved treaty negotiations, the Supreme Court of Canada ruled that the "honour of the Crown" necessitates "the involvement of aboriginal peoples in decisions taken with respect to their lands."[20] The Court went on to specify that Indigenous peoples' involvement in decision making must be meaningful, requiring

[15] Article 35 of the *Canadian Constitution 1982* states: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, 'aboriginal peoples of Canada' includes the Indian, Inuit and Métis peoples of Canada."
[16] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217. Paras. 32, 82 and 96.
[17] *R. v. Marshall* (No. 2), [1999] 3 S.C.R. 533. Para. 45.
[18] *Musqueam First Nation v. Canada*, [2007] FC 1027. Para. 32.
[19] *Haida Nation v. British Columbia (Minister of Forests),* [2004] SCC 73. Para. 25.
[20] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. Para. 168.

consultation "in good faith, and *with the intention of substantially addressing the concerns* of the aboriginal peoples whose lands are at issue [emphasis added]."[21]

The protective, precautionary purpose of consultation was affirmed in the *Haida Nation* decision, which stated:

> 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*.... 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 [emphasis added].[22]

While project proponents sometimes take issue with, or try to minimize, procedural aspects of the consultation obligations delegated to them by the Crown, Canadian courts have been clear that any cost or inconvenience created for proponents does not offset or lessen the responsibility of governments to respect the rights of Indigenous peoples. In a 2012 ruling concerning this Proponent's exploration activities on Tsilhqot'in lands, the BC Superior Court stated, "that process is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation."[23]

Furthermore, an extensive body of court decisions has made it clear that consultation cannot simple be *pro forma*: good faith consultation requires a genuine attempt to accommodate the concerns of Indigenous peoples. The Supreme Court has held that "[c]onsultation that excludes from the outset any form of accommodation would be meaningless."[24] In the *Halfway River* decision, the BC Court of Appeal concluded that Indigenous peoples' concerns must be "seriously considered and, wherever possible, *demonstrably integrated into the proposed plan of action* [emphasis added]."[25]

The federal government has identified environmental impact assessments as being part of the consultation process.[26] In fact, the requirement that assessments carried out under federal jurisdiction consider a wide range of potential and cumulative impacts on Indigenous peoples has led some environmental review panels to identify substantial accommodations necessary to protect Indigenous peoples' rights. For example, a joint federal-provincial review panel examining an application to open a nickel mine in Northern Labrador concluded that Inuit and Innu land claims in the affected area needed to be settled, or "equivalent measures are put in place" before the project went ahead in order to avoid undermining land claims negotiations.[27] In its final report, the panel recommended that approval of the project be conditional on the federal and provincial governments at least reaching

[21] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010. Para. 168.
[22] *Haida Nation v. British Columbia (Minister of Forests),* [2004] SCC 73. Para. 27.
[23] *Taseko Mines Limited v. Phillips*, [2011] BCSC 1675. Para. 60.
[24] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage),* 2005 SCC 69 [2005] 3 SCR 388. Para 54.
[25] *Halfway River First Nation v. British Columbia (Ministry of Forests),* [1999] BCCA 470. Para. 160.
[26] For example, Aboriginal Affairs and Northern Development Canada. *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011.*
[27] Canadian Environmental Impact Assessment Agency. *Voisey's Bay Mine and Mill Environmental Assessment Panel Report.* 2005.

agreements in principle with the Inuit and Innu peoples on their respective land claims and that these agreements include "binding and enforceable interim measures" to protect Indigenous rights and interests.[28] The conclusions of this environment review contributed to the conclusion, a short time afterwards, of land claims agreements with the affected Indigenous peoples.

The extent of accommodation required to protect the rights of Indigenous peoples is an area where domestic law continues to develop. A recent case in British Columbia concluded that in order for any consultation to be carried out in good faith, the government must be open to the possibility that the project will not go ahead. In the *West Moberly* case, the court found that a mining company's plans were "irreconcilable" with the environmental protection sought by the First Nation. The Court ruled that the consultation that had been carried out over the planned mineral development "was not sufficiently meaningful, and the accommodation put in place was not reasonable" because provincial officials never considered the possibility that the project should be rejected, as the affected First Nation wished. [29] Instead, the province "based its concept of consultation on the premise that the exploration projects should proceed and that some sort of mitigation plan would suffice."[30] The *West Moberly* decision was upheld on appeal[31] and the Supreme Court subsequently denied leave to further appeal the decision.[32] The decision now stands as a powerful reminder that any good faith process of consultation must at least give serious and meaningful consideration to the possibility that Indigenous peoples' rejection of a project may be the preferred and necessary outcome.

The two foundational cases on the duty to consult and accommodate, *Delgamuukw* and *Haida Nation*, both set out a spectrum of possible accommodations which, depending on the importance of the rights at stake and the potential for serious harm, could include an obligation to proceed only with the consent of the affected Indigenous peoples. In *Delgamuukw*, the Court said that "[s]ome cases may even require the *full consent of an aboriginal nation*, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands [emphasis added]."[33] In the *Haida Nation*, the Court affirmed and clarified the potential obligation to obtain consent, stating:

> The Court's seminal decision in *Delgamuukw*, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty 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*

[28] Canadian Environmental Impact Assessment Agency. *Voisey's Bay Mine and Mill Environmental Assessment Panel Report*. The Labrador Inuit Association and the Innu Nation both entered into Impact Benefit Agreements with the mine developer in 2002.
[29] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* [2010] BCSC 359. Para. 144.
[30] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* [2010] BCSC 359. Para. 144.
[31] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines),* [2011] BCCA 247.
[32] *Her Majesty the Queen in Right of British Columbia as represented by Al Hoffman, Chief Inspector of Mines et al. v. Chief Roland Willson on his Own Behalf and on Behalf of all the Members of West Moberly First Nations et al.*, [2012] CanLII 8361 (SCC).
[33] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. Para. 168.

> *unresolved claims as to intrusions on settled claims* [emphasis added].[34]

On this point, the *Haida Nation* decision is seemingly contradictory. In apparent contradiction of the passage quoted above, the decision also held that the "'consent' spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case."[35] The *Haida Nation* decision also states that the duty of consultation "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim."[36]

It's important to note that the Court's principal concern in the *Haida Nation* decision, as in other decisions, is the reconciliation of pre-existing rights of Indigenous peoples with the power and the de facto authority now exercised by the state over Indigenous peoples' lands and resources.[37] The Court stated that "what is required is a process of balancing interests, of give and take. This flows from the meaning of 'accommodate.'"[38] The Court rejected the notion of consent as a veto, which by definition would be arbitrary, unilateral and absolute. However the Court also strongly endorsed the treaty-making process and other negotiated resolution of land and title claims – which have an implicit goal and requirement of obtaining the consent of Indigenous peoples – as the preferred means of achieving reconciliation.

In this context, Amnesty International submits that international human rights standards are particularly relevant in clarifying the domestic legal standards applicable to resource development decision-making and in resolving any ambiguities or uncertainty about the interpretation of Canadian environmental assessment law where the rights and interests of indigenous peoples are to be determined. This submission focuses on five themes: the need to ensure that customary land rights are effectively protected, regardless of whether governments have yet provided formal legal recognition of these rights; the inherent significance of any impacts on Indigenous peoples' land use; the need for a precautionary approach to land and resource decisions as a consequence of the importance of land to Indigenous peoples and the vulnerability to further violations; the importance of Indigenous peoples' meaningful participation in decision-making as a precautionary measure; and the necessity in many instances of obtaining Indigenous peoples' free, prior and informed consent, not as a veto, but as a just and appropriate means to achieve reconciliation with Indigenous peoples.

2. International Human Rights Must Inform the Interpretation and Application of Canadian Law

As a signatory of international human rights treaties, and an active leader in the development of related human rights instruments and mechanisms, Canada has made a clear commitment to the defense and implementation of human rights both at home and abroad. Successive governments have affirmed Canada's commitment to international human rights standards and to the mechanisms that interpret and

[34] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 [2004] 3 SCR 511. Para. 24. This spectrum, including consent, is restated at Paras. 30 and 40.
[35] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [2004] 3 SCR 511. Para. 48.
[36] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [2004] 3 SCR 511. Para. 48.
[37] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [2004] 3 SCR 511. Para. 32.
[38] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 [2004] 3 SCR 511. Paras. 48-9.

apply them. For example, in 2009, the federal government told the United Nations Human Rights Council, "Canada agrees that all human rights are universal, indivisible, interdependent and interrelated and strives to give the same importance to all rights."[39]

Canada's commitment to uphold international human rights law is not merely symbolic or aspirational. As will be demonstrated below, international human rights can be used to interpret domestic law and, in almost every instance, the interpretation of domestic law is required to conform to relevant standards of international law.

The Supreme Court of Canada has repeatedly affirmed "the important role of international human rights law as an aid in interpreting domestic law."[40] In a landmark decision, then Supreme Court Chief Justice Brian Dickson characterized "[t]he various sources of international human rights law – declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms" as "relevant and persuasive sources" for the interpretation of domestic law.[41]

Furthermore, when governments in Canada pass laws and regulations, Canadian legal tradition assumes that legislators intend for these laws and regulations to comply with "the values and principles of customary and conventional international law" and with "Canada's obligations as a signatory of international treaties and as a member of the international community."[42] As a consequence, the Supreme Court has held that any interpretation of domestic law that would put the government in violation of its international obligations must be strictly avoided.[43]

The importance and relevance of international human rights standards has been acknowledged by the federal government. In 2009, Canadian representatives told the UN Human Rights Council that Canada did not necessarily need to directly incorporate international human rights law into its own legislation because "[v]arious administrative and judicial bodies" provide protection for economic, social and cultural rights and that "strong equality rights protection ensure their non-discriminatory application."[44] In 2012, in discussing Canada's endorsement of the *UN Declaration on the Rights of Indigenous Peoples*, Canadian representatives told the UN Committee on the Elimination of Racial Discrimination that "Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution."[45]

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[39] Canadian Heritage. *Canada's Universal Periodic Review Response to the Recommendations*. 2009. http://www.pch.gc.ca/pgm/pdp-hrp/inter/101-eng.cfm

[40] *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, Para. 70.

[41] *Reference re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313. Para. 57.

[42] *R v. Hape,* [2007] 2 S.C.R. 292. Para 53.

[43] The only possible exception allowed in Canadian law is when there is "an unequivocal legislative intent to default on an international obligation." *R v. Hape,* [2007] 2 S.C.R. 292. Para. 53.

[44] Canadian Heritage. *Canada's Universal Periodic Review Response to the Recommendations*. 2009. http://www.pch.gc.ca/pgm/pdp-hrp/inter/101-eng.cfm.

[45] Committee on the Elimination of Racial Discrimination. *Summary record of the 2142nd meeting – 19th and 20th periodic reports of Canada* (March 2012), Para. 39.

3. Environmental Impact Assessments Must Uphold International Human Rights Standards

The importance of environmental impact assessments to the protection of human rights is well established in international law. This is reflected in a substantial body of international standards and interpretive statements calling on states to conduct environmental impact assessments, and setting out principles for how such assessments should be conducted.[46]

International human rights bodies have specifically emphasized the importance of environmental impact assessments with respect to resource development activities that may affect the lands of Indigenous peoples. The Inter-American Court of Human Rights, for example, has said that the social and environmental impact assessment of resource development projects on the lands of Indigenous peoples "must conform to the relevant international standards and best practices."[47] The UN Special Rapporteur on the rights of Indigenous peoples has called on states to make international human rights standards "operational through the various components of State administration that govern land tenure, mining, oil, gas and other natural resource extraction or development."[48]

The responsibility to use international law in the interpretation of Canadian domestic law, set out in the previous section of this submission, necessarily also includes the procedures of quasi-judicial bodies, including environmental review panels. In 2012, in a case concerning allegations of discrimination against First Nations children, the Federal Court ruled that the Canadian Human Rights Tribunal had erred when it failed to adequately consider international human rights standards in interpreting and applying the *Canadian Human Rights Act*. Like regulatory agencies and environmental review panels, the Canadian Human Rights Tribunal is a quasi-judicial body whose mandate is defined by specific legislation. The decision stated:

> The Supreme Court has recognized the relevance of international human rights law in interpreting domestic legislation.... The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations.
>
> International instruments such as the *UNDRIP* [*UN Declaration on the Rights of Indigenous Peoples]* and the *Convention of the Rights of the Child* may also inform the contextual approach to statutory interpretation.

[46] cf. Neil Craik. *The International Law of Environmental Impact Assessment: Process, Substance and Integration.* Cambridge University Press, 2008. Pages 283-293.
[47] IACrtHR. *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185. Para. 41.
[48] 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. 57.

> As a result, insofar as may be possible, an interpretation that reflects these values and principles is preferred.[49]

This decision has been subsequently upheld by the Federal Court of Appeal and has not been further appealed.[50]

The federal government has affirmed the importance and relevance of human rights to all stages of regulatory activity in Canada. The Cabinet Directive on Regulatory Management, the most recent version of which came into effect in April 2012, states that all federal "[d]epartments and agencies are to respect Canada's international obligations in areas such as human rights, health, safety, security, international trade, and the environment. They are also to implement provisions related to these obligations *at all stages of regulatory activity*, including consultation and notification, as applicable [emphasis added]."[51]

4. The Significance of the *United Nations Declaration on the Rights of Indigenous Peoples*

On 13 September 2007, the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* as a body of "minimum standards for the survival, dignity and well-being of the world's Indigenous peoples."[52] The Canadian government formally endorsed the Declaration in November 2010, expressing confidence that the "principles expressed in the Declaration" are "consistent with our Constitution and legal framework."[53] At the same time, the federal government has wrongly asserted that the Declaration has no legal effect in Canada.[54] As demonstrated above, this assertion is incorrect and flies in the face of how Canadian courts use international instruments - including declarations - to interpret Canadian law.[55] The federal government's claim was also expressly refuted in the Federal Court decision cited above.[56]

Critically, the 46 articles of the *UN Declaration* do not create new rights for Indigenous peoples. Rather, the *Declaration* consolidated more than three decades of progressive development in the way that regional and international human rights bodies have interpreted the established human rights responsibilities of states, including obligations set out in binding treaties and conventions, and how these obligations should be applied to the specific situation and context of Indigenous peoples. Many of the human rights standards set out in the *UN Declaration on the Rights of Indigenous Peoples* reflect legal principles such as non-discrimination and the prohibition of genocide, whose status as binding customary international law is already well-established and which, in some cases, have reached the level of *jus*

[49] *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445. Paras. 351-354.
[50] *Canada (Attorney General) v. Canadian Human Rights Commission,* 2013 FCA 75.
[51] Treasury Board of Canada. *Cabinet Directive on Regulatory Management.* 1 April 2012.
[52] *United Nations Declaration on the Rights of Indigenous Peoples,* UNGA Res. 61/295, 13 September 2007. Art. 43.
[53] 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. http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142
[54] Aboriginal Affairs and Northern Development Canada. *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011.* Page 9.
[55] See, for example, *Reference re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313. Para. 57.
[56] *Canada (Human Rights Commission) v. Canada (Attorney General),* 2012 FC 445. Paras. 351-354.

cogens norms – norms from which no derogation is ever permissible.[57] Furthermore, the *Declaration* reaffirms many obligations either directly set out in binding international treaties or elaborated in the authoritative interpretations of these treaties by regional and international human rights bodies such as the Committee on the Elimination of Racial Discrimination.[58] The UN Special Rapporteur on the rights of Indigenous peoples has said that the *UN Declaration*:

> represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.... [T]he *Declaration* reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies.[59]

Specifically responding to the Canadian government's claim that the *Declaration* has no legal effect, the Special Rapporteur has said:

> [T]he 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. Implementation of the Declaration should be regarded as a political, moral and, yes, legal imperative without qualification.[60]

The analysis presented in this paper draws not only on the *UN Declaration*, but also on the established interpretation of other international human rights instruments, including treaties such as the *Convention on the Elimination of Racial Discrimination* and the *Convention on the Rights of the Child*, the jurisprudence of international and regional human rights bodies such as the UN Human Rights Committee and the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights,[61] and the analysis of authoritative independent experts such as UN Special Rapporteurs.

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[57] Paul Joffe. "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation." *National Journal of Constitutional Law*. 26 N.J.C.L. 121. PP. 121-229.

[58] For example: Human Rights Committee. *General Comment No. 23: The Rights of Minorities (Art. 27).* 1994. CCPR/C/21/Rev.1/Add.5, Para. 7 (1994). Committee on the Elimination of Racial Discrimination. *General Recommendation XXIII concerning Indigenous Peoples.* CERD/C/51/Misc.13/Rev.4, (1997).

[59] UN Human Rights Council. *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya.* U.N. Doc. A/HRC/9/9. (11 August 2008).Paras. 85, 86.

[60] *Report to the United Nations General Assembly by the Special rapporteur on the rights of Indigenous peoples, James Anaya.* UN Doc. A/65/264. (9 August 2010). Para 63.

[61] Although Canada has yet to ratify *the Inter-American Convention*, which is the primary basis of the Court's jurisprudence, the Court's decisions are nonetheless relevant. Canada is a member of the Organization of American States, is a party to its *Charter*, and has explicitly undertaken obligations under the *American Declaration of the Rights and Duties of Man,* all of which help inform the Court's jurisprudence. The Inter-American Commission on Human Rights has confirmed the relevance of the Court's jurisprudence as an "authoritative" source of interpretation of Canada's human rights obligations. IACHR, *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System,* Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000). Para. 38. In October 2012, the federal government made this explicit statement of support for the Inter-American human rights system: "Canada remains dedicated to the system and supportive of the central role played by both the Inter-American Commission for Human Rights and Inter-American Court of Human Rights. Canada intends to continue vigorously defending the integrity, independence and credibility of these human rights institutions…." *Government Response to the Third Report of the Standing Committee on Foreign Affairs and International Development entitled 'The Situation of Human Rights in Venezuela."* 18 October 2012.

III: ANALYSIS

1. Failure to Protect Customary Land Rights is a Form of Discrimination

For the Tsilhqot'in people and many Indigenous peoples around the world, land rights are typically grounded in pre-colonial legal traditions and land tenure systems. While many states acknowledge such customary land rights in principle, formal domestic recognition and protection of these rights in practice has often depended on the negotiation of treaties or other agreements with the state, or the successful conclusion of litigation.

Critically, under international law, the fact that a state has not yet provided formal legal recognition to pre-existing Indigenous rights and title does not negate the existence of these rights or justify their violation.[62] In fact, the Inter-American Commission on Human Rights has characterized the failure to protect Indigenous peoples' customary forms of possession and use of the land as "one of the greatest manifestations" of racial discrimination.[63]

The Inter-American Commission on Human Rights and the Inter-American Court have repeatedly called on states to fulfill their positive obligation to define, delimit and demarcate Indigenous territories based on customary land use and tenure.[64] Similarly, the *UN Declaration* sets out a state obligation to provide legal recognition and protection of Indigenous peoples' lands, territories and resources "with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."[65]

2. Threats to Indigenous Land Rights are Inherently Serious and Require a Precautionary Approach

The Inter-American Commission has concluded that the duty to respect Indigenous peoples' lands rights is a "norm of customary international law"[66] – a human rights standard so widely and consistently accepted that it can be considered a binding legal obligation on all states. International human rights bodies have also consistently recognized that, for Indigenous peoples, secure access to, and use of, their traditional lands, territories and resources is also an essential precondition for the enjoyment of other internationally protected human rights. These rights include the right to culture, the right to life, the right to health, the right to subsistence, the

[62] cf. IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States),* December 27, 2002. Para. 130.
[63] IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize),* October 12, 2004. Para. 167.
[64] Cf. IACHR, Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize),* October 12, 2004. IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005.
[65] *United Nations Declaration on the Rights of Indigenous Peoples,* UNGA Res. 61/295, 13 September 2007. Art. 26.
[66] IACtHR. *Case of the Mayagna (Sumo) Awas Tingni community v. Nicaragua, Merits, Reparations and Costs.* Judgment of August 31, 2001. Series C No. 79. Para. 140(d).

right to livelihood, the right to a healthy environment, the right to property, and the right to water.[67]

The Inter-American Court of Human Rights has stated that "the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations."[68] In fact, the Court has gone on to say that "due to the inextricable connection members of indigenous and tribal peoples have with their territory, the protection of their right to property over such territory… is necessary to guarantee their very survival."[69]

A recent report on the rights of the child by the UN Secretary General highlights the wide-ranging consequences of discrimination against Indigenous peoples, including the denial of their land rights. The report states that "[f]orceful removal from ancestral land, restrictions on access to other natural resources, severe impacts of climate change, lack of jobs and insecure working conditions combine to impact negatively on indigenous children."[70] The report notes that efforts to reduce poverty, which are essential to the fulfillment of the rights of indigenous children, are hindered where development projects such as the "construction of dams, mining, oil exploration, plantation developments and logging, including those managed by the private sector" are "undertaken without the free, prior and informed consent of indigenous peoples and without regard to appropriate compensation."[71]

The importance of Indigenous land rights to a wide range of other human rights – and ultimately to the very survival of Indigenous peoples – gives added weight and urgency to the responsibility to uphold these rights. As suggested by the previous examples, international human rights standards require a high degree of diligence in any decision that could affect Indigenous peoples' land and resource rights. Given the importance of land rights to the survival and well-being of Indigenous peoples, the UN Special Rapporteur on the rights of Indigenous peoples said that a "precautionary approach… should guide decision-making about any measure that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples."[72]

A precautionary approach is particularly important in decisions about resource extraction. Rodolfo Stavenhagen, who was the first UN Special Rapporteur on the rights of Indigenous peoples, stated that when large-scale economic activities are carried out on the lands of Indigenous peoples, "it is likely that their communities will undergo profound social and economic changes *that are frequently not well*

[67] Cf. UN 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. IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay,* Final Decision. Judgment of June 17, 2005. *Inter-American Court of Human Rights. Case of the Saramaka People v. Suriname.* Judgment of November 28, 2007. United Nations Human Rights Committee Communication No. 167/1984: *Canada*. 10/05/90. CCPR/C/38/D/167/1984.

[68] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay*, Final Decision. Judgment of June 17, 2005. Para. 131.

[69] IACtHR. *Case of the Saramaka People v. Suriname.* Judgment of November 28, 2007. Paras. 120-2.

[70] UN General Assembly. *Status of the Convention on the Rights of the Child: Report of the Secretary-General.* UN Doc. A/67/225. (3 August 2012). Para. 21.

[71] UN General Assembly. *Status of the Convention on the Rights of the Child: Report of the Secretary-General.* UN Doc. A/67/225. (3 August 2012). Para. 21.

[72] 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).

understood, much less foreseen, by the authorities in charge of promoting them [emphasis added]."[73]

The importance of a precautionary approach has also been acknowledged by industry bodies as part of the practice of due diligence required by business ethics and the corporate obligation to respect human rights. For example, IPIECA, an international oil and gas industry organization on environmental and social issues, has said,

> Indigenous Peoples are distinct social groups that warrant special consideration....Indigenous Peoples typically have cultures and ways of life that are distinct from the wider societies in which they live: they are often reliant on the land and its natural resources for their livelihoods; they may also have strong cultural, spiritual and economic ties to their land; and in some parts of the world, Indigenous Peoples have suffered from a history of discrimination and exclusion that has left them on the margins of the larger societies in which they live. These characteristics can expose Indigenous Peoples to different types of development challenges and impacts as oil and gas projects are developed in their territories, as compared to other social communities.[74]

3. Appropriate Reconciliation of Rights Often Requires Special Protection for Indigenous Peoples' Rights

Few rights are absolute. The *UN Declaration* expressly sets out the intention of achieving a balancing of rights, among Indigenous peoples and between Indigenous and non-Indigenous peoples. In all instances, however, the balance that is struck must be principled and consistent with strict criteria for the protection of human rights. The *UN Declaration* states,

> In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. 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. [75]

International human rights bodies have been clear that an appropriate balancing of rights does not mean treating all claims as equivalent or requiring the same forms of protection and remedy. Where more than one party has a legitimate claim to particular lands, territories and resources, the resolution of a dispute inevitably requires some limitation or infringement of the rights of one or more of the

[73] UN Economic and Social Council. *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen.* UN Doc. E/CN.4/2003/90. (21 January 2003).
[74] IPIECA. *Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice.* 2012.
[75] *United Nations Declaration on the Rights of Indigenous Peoples,* UNGA Res. 61/295, 13 September 2007. Art. 46.

claimants. Such limitations, however, must be reasonable and justifiable in light of the human rights obligations of the state and the specific circumstances of the case.

In a case concerning a dispute within an Indigenous nation in New Zealand, the UN Human Rights Committee ruled that any balancing of the rights must be based "reasonable and objective justification."[76] The Inter-American Court has similarly noted that any infringement of human rights must be based in law, be strictly necessary, serve "a legitimate goal in a democratic society," and be proportionate to that goal. This requires an assessment, "on a case by case basis, of the consequences that would result from recognizing one right over the other."[77]

Critically, in the kind of case-specific, purposeful balancing of rights required by international law, the unresolved legacy past violations and current inequalities faced by Indigenous peoples must be addressed. Otherwise, as the Inter-American Court has stated, the rights of Indigenous peoples "become meaningless."[78] This means that, the history of dispossession and continued discrimination experienced by Indigenous peoples and historic patterns of decision-making that have excluded Indigenous legal traditions creates special obligations on the State and must be considered in any balancing of rights. In the case of *Mary and Carrie Dann v. United States*, the Inter-American Commission on Human Rights concluded that

> ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience. In most instances, this has included identification of the need for special measures by states to compensate for the exploitation and discrimination to which these societies have been subjected at the hands of the non-indigenous.[79]

In such a context, assertions of national economic interests cannot be assumed to trump the land rights of Indigenous peoples. In fact, in attempting to balance competing rights, international human rights bodies have generally given priority to protecting the relationship of Indigenous peoples to their lands, even if this is in conflict with other societal interests. For example, in the *Yakye Axe* case, the Inter-American Court provided the following example of considerations that must be taken into account in resolving conflicts between Indigenous peoples and other parties:

> …States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life

[76] UN Human Rights Committee. *Apirana Mahuika et al. v. New Zealand.* Communication No 547/1993, CCPR/C/70/D/547/1993 (2000). Para. 9.6.

[77] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Paras. 144, 146.

[78] IACtHR. *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs.* Judgment of March 29, 2006. Para. 138.

[79] IACHR. Report No. 75/02, Case 11.140, *Mary and Carrie Dann (United States).* December 27, 2002. Para. 125.

> aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.
>
> Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.
>
> On the other hand, restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society.[80]

It's important to note, as well, that respect for human rights and cultural diversity is not only in the interest of Indigenous peoples, but is itself recognized as a broader societal imperative. The preamble to the *UN Declaration on the Rights to Indigenous Peoples* states that "all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind" and that "the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith."

In July 2012, Amnesty International joined Indigenous peoples' organizations and other human rights groups in a joint statement to the UN Expert Mechanism on the Rights of Indigenous Peoples that read in part:

> There is a disturbing tendency of states to assert vague and ill-defined "national" and "public" interests as a justification for ignoring the rights of Indigenous peoples in respect to their lands, territories and resources. "National" or "public" interest cannot simply exclude or override human rights. Respect, protection, fulfillment and promotion of human rights constitute state obligations under international law, including the Charter of the United Nations. In virtually all states, human rights are a national commitment.[81]

4. Indigenous Peoples' Rights are Best Protected Through Their Effective Participation in Decision-Making

The full and effective participation of Indigenous peoples in decision-making is a crucial measure to ensure that all the potential impacts are properly understand and that the rights of all members of Indigenous communities and the Indigenous society as a whole are properly protected. Furthermore, the right of Indigenous

[80] IACtHR. *Case of the Indigenous Community Yakye Axa v. Paraguay, Final Decision.* Judgment of June 17, 2005. Paras. 146-148.

[81] Grand Council of the Crees (Eeyou Istchee) et al. "Free, prior and informed consent and extractive industries." United Nations Expert Mechanism on the Rights of Indigenous Peoples Fifth Session, 9-13 July 2012. http://www.amnesty.ca/news/news-item/free-prior-and-informed-consent-and-extractive-industries-joint-statement-to-un-exper

peoples to participate in decision-making is itself well-established in international law.

The *United Nations Charter* and the two human rights Covenants, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, state that "all peoples" or nations have the right to self-determination. In language mirroring the two Covenants, the *UN Declaration on the Rights of Indigenous Peoples* affirms that the right of self-determination also applies to Indigenous peoples:

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

The right to self-determination is multi-faceted. Broadly, it describes the right of the members of distinct societies to make decisions about their own lives and futures. More specifically, Indigenous peoples' right of self-determination imposes an obligation on states and other bodies to work with Indigenous peoples' own governance institutions and respect Indigenous peoples' exercise of their own independent jurisdictions. For example, the *UN Declaration* states:

> Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions [Article 18]...
>
> 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 [Article 23].

As expressed in the two *Covenants* and in the *UN Declaration*, the right to self-determination is inseparable from the right of all peoples both to control their own natural resources and to be secure in their means of subsistence. The common self-determination article of the two *Covenants* states, "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 [Article 1 of both Covenants]." This is reflected in Article 20 of the *UN Declaration* which states,

> 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.
>
> 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

International human rights bodies have reminded the Government of Canada of its obligation to respect Indigenous peoples' right of self-determination, and with it their right to be secure in their means of subsistence. In its 1999 review of Canada's compliance with the *International Covenant on Civil and Political Rights*, the UN Human Rights Committee cited the Royal Commission on Aboriginal Peoples (RCAP) and linked the Commission's concerns about a diminishing land base to a violation of the right of self-determination:

> With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia,* that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.[82]

International human rights bodies have long been concerned with the right of Indigenous peoples to participate in decisions that could affect their ability to maintain their way of life, including their relationship with their lands, territories and resources. In a series of rulings on complaints about resource extraction on the lands of Indigenous peoples, the UN Human Rights Committee has identified the adequacy of consultation, and its outcomes, as crucial tests of whether resource extraction should be allowed to proceed on the lands of Indigenous peoples:

> [T]he acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy.[83]

In the *Saramaka* decision, the Inter-American Court ruled that as a safeguard "to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people," the State "must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan… within Saramaka territory."[84]

In a 2012 decision concerning the state's granting of oil concessions on the traditional lands of Indigenous peoples in Ecuador, the Inter-American Court ruled that the obligation to consult Indigenous peoples has been so widely and repeatedly recognized that it now constitutes a general principle of international law: that is, a

[82] Human Rights Committee. *Concluding observations of the Human Rights Committee: Canada*. UN Doc. CCPR/C/79/Add.105 (7 April 1999). Para. 8.

[83] UN Human Rights Committee. *Apirana Mahuika et al. v. New Zealand*. Communication No 547/1993, CCPR/C/70/D/547/1993 (2000). Para. 9.5; UN Human Rights Committee. *Lansmann et al. v. Finland*. Communication No 411/1992. UN Doc. CCPR/C/52/D/511/1992 (1994); UN Human Rights Committee. *Ángela Poma Poma v. Peru*. Communication No. 1457/2006. UN Doc. CCPR/C/95/D/1457/2006 (27 Mar. 2009).

[84] IACtHR. *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185. Para. 129.

binding legal duty that applies to all states regardless of whether or not they have ratified specific instruments.[85]

This duty of consultation as recognized in international human rights law requires something more substantial than merely the collection and consideration of the views of Indigenous peoples. In a 1997 report on the human rights impacts of petroleum development on Indigenous territories in Ecuador, the Inter-American Commission concluded that "The quest to guard against environmental conditions which threaten human health requires that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse."[86] In a 2012 case also concerning petroleum development in Ecuador, the Inter-American Court stated that consultation must be "a true instrument"[87] of Indigenous peoples' participation in decision-making, ensuring that Indigenous peoples "can truly… influence the decision-making process, in accordance with the relevant international standards"[88] and requires "genuine dialogue… aimed at reaching an agreement."[89]

In a recent report related to his ongoing study of Indigenous peoples, decision-making and extractive industries, the UN Special rapporteur on the rights of Indigenous peoples acknowledged the importance of consultation mechanisms in allowing "prior assessment of all potential impacts of the proposed activity, including whether and to what extent their substantive human rights and interests may be affected" and whether any negative effects can be avoided or appropriately mitigated. The Special rapporteur noted, however, that consultation is not an end in itself and ideally any decision-making process should enable Indigenous peoples "to set their own priorities and strategies for development and advance the enjoyment of their human rights."[91]

5. Large-scale Resource Development Projects Generally Require the Free, Prior and Informed Consent of Indigenous Peoples

As elaborated in international jurisprudence, the well-established duty to consult with Indigenous peoples also requires a genuine effort to reach a mutual agreement. The UN Special rapporteur on the rights of Indigenous peoples has stated that:

> The specific characteristics of the required consultation procedures will vary depending on the nature of the proposed measure, the scope of its impact on indigenous peoples, and the nature of the indigenous interests or rights at stake. Yet, in all cases in which the duty to consult applies, the objective of the consultation should be

[85] IACtHR. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Final Decision.* Judgment of June 27, 2012. Para. 164.
[86] IACHR. *Report on the Situation of Human Rights in Ecuador.* Doc. OEA/Ser.L/V/II.96, Doc. 10 rev.1, April 24, 1997.
[87] IACtHR. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Final Decision.* Judgment of June 27, 2012. Para. 186.
[88] IACtHR. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Final Decision.* Judgment of June 27, 2012. Para. 167.
[89] IACtHR. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Final Decision.* Judgment of June 27, 2012. Para. 200.
[91] 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. 66.

> to obtain the consent or agreement of the indigenous peoples concerned." [92]

The standard of free, prior and informed consent has long been long recognized in the international human rights system. For example, in 1997, ten years before the adoption of the *UN Declaration*, the independent Committee responsible for overseeing compliance with the *UN Convention on the Elimination of Racial Discrimination* (CERD) called on states to ensure that "no decisions directly relating" to the rights and interests of Indigenous peoples be taken without their informed consent.[93] Human rights bodies have repeatedly applied the standard of free, prior and informed consent in assessing whether state actions are consistent with their binding obligations. For example, in 2008 the CERD Committee wrote to the Government of Canada to express concern over the construction of a natural gas pipeline being built across the land of the Lubicon Cree in northern Alberta. The Committee questioned whether the provincial government "may legitimately authorize the construction of a pipeline across Lubicon Territory without prior Lubicon consent."[94] In its 2012 review of Canada's compliance with CERD, the Committee called on Canada to "implement in good faith the right to consultation and to free, prior and informed consent of Aboriginal peoples."[95]

In the *Saramaka* decision, the Inter-American Court explicitly linked the duty to obtain consent to the environmental impact assessment process. The purpose of such assessments, the Court stated, "is not only to have some objective measure of such possible impact on the land and the people, but also… to 'ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily'."[96]

As previously noted, international human rights standards are rarely absolute. International human bodies have been clear that FPIC, like virtually all other international human rights standards, is necessarily subject to a purposive, case by case assessment and balancing in which the standard of protection is applied in proportion to the rights at stake and the potential for harm. As a standard of law, FPIC is subject to review by courts and similar bodies where disputes over the appropriateness of this standard of protection can be considered and the interests of the state and third parties addressed.

The Inter American Commission has said that decision-making around resource development must always comply with human rights protections.[97] Any process of good faith consultation must from the outset be open to the possibility that a project should be rejected in order to comply with human rights standards. The Commission has also said that the final determination of whether free, prior and

[92] 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). Paras.63, 65.
[93] UN Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII concerning Indigenous Peoples,* CERD/C/51/Misc.13/Rev.4, (adopted by the Committee on August 18, 1997).
[94] http://www2.ohchr.org/english/bodies/cerd/docs/Canada_letter150808.pdf
[95] Committee on the Elimination of Racial Discrimination, *Concluding Observations: Canada* (March 2012), CERD/C/CAN/CO/19-20. Pp. 6-7.
[96] IACrtHR, *Case of the Saramaka People v. Suriname. Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 12, 2008. Series C No. 185. Para. 40.
[97] IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010. 224-7.

informed consent is required must be based on the circumstances of the affected peoples and the potential for serious harm to their rights.[98] Critically, such a determination must always be in proportion to the rights at stake and the potential for harm.[99]

Given the historical circumstances of Indigenous peoples, and the importance of lands, territories and resources to the fulfillment of their rights, the Inter-American human rights system has concluded that there are actions or interventions which, by their very nature, make the free, prior and informed consent of the affected peoples mandatory. The Commission has identified these circumstances as including permanent relocation of Indigenous peoples from their traditional lands; storage or disposal of hazardous materials in Indigenous peoples' lands or territories; and activities that would deprive Indigenous peoples of "the capacity to use and enjoy their lands and other natural resources necessary for their subsistence." [100]

More generally, the UN Special rapporteur has said that, in addition to the examples provided by the Commission, free, prior and informed consent is more broadly a "presumptive" requirement

> for those aspects of any extractive operation that takes place within the officially recognized or customary land use areas of indigenous peoples, or that has a direct bearing on areas of cultural significance, in particular sacred places, or on natural resources that are traditionally used by indigenous peoples in ways that are important to their survival.[101]

It should be noted that, as in the Lubicon case, regional and international human rights bodies have identified free, prior and informed consent as the appropriate standard of protection for Indigenous rights even when the exact scope of these rights is still the subject of unresolved court cases or negotiations with the state. The Inter-American Commission has described the requirement of consent "as *a heightened safeguard* for the rights of indigenous peoples… in relation to the execution of development or investment plans that affect the basic content of said rights [emphasis added]."[102]

Particularly since the adoption of the *UN Declaration on the Rights of Indigenous Peoples*, the global recognition and application of the standard of free, prior and informed consent or FPIC are becoming increasingly widespread, in both the public private sectors. Free, prior and informed consent is increasingly recognized as a vital tool to meet the corporate obligation of due diligence. While noting that many companies have concerns about "the practicalities of applying and enforcing" free, prior and informed consent, IPIECA, an international oil and gas industry association, encourages "good faith negotiation and decision-making with the

[98] IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010.
[99] 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. 64.
[100] IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010. Para. 334.
[101] 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. 65.
[102] IACHR. *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System.* OEA/Ser.L/V/II. Doc. 59/06. 2010. Para. 333.

objective of achieving agreements, seeking consent or broad community support," and characterizes such processes as "emerging good practice" for corporate relations with Indigenous peoples.[103]

A recent legal study commissioned by the Canadian oil and gas company Talisman noted that the FPIC standard "is rapidly gaining momentum."[104] The study concluded that it would be "timely and wise" for the company to consider adopting an FPIC policy, noting that "in the long-term, the benefits for oil and gas companies of obtaining community agreement based on FPIC principles, and thereby both supporting their social license to operate and reducing legal and reputational risks, may outweigh the substantial challenges of securing consent."[105] Talisman adopted an FPIC standard in 2010.[106]

In 2012, the International Finance Corporation (IFC), part of the World Bank, adopted a new lending policy requiring the negotiation of mutual agreements with Indigenous peoples whose use of the land may be affected by development and to obtain their free, prior and informed consent where serious, unavoidable impacts are identified. Previous Performance Standards adopted by the IFC "are considered to be key social performance standards for the private sector and have been used as the basis for most other financial institutions' policies and internal company policies."[107]

The International Council on Mining and Metals has similarly endorsed the principle of free, prior and informed consent. In a position statement issued in May 2013, the international industry association acknowledged that "Indigenous Peoples often have profound and special connections to, and identification with, lands and waters and these are tied to their physical, spiritual, cultural and economic well-being."[108] The ICMM committed its members to "work to obtain the consent of Indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts…."[109]

In light of these developments, the positions that the Government of Canada has taken on FPIC are both regressive and regrettable. Although Canada officially endorsed the *UN Declaration on the Rights of Indigenous Peoples* in November 2010, the Canadian government has continued to object to the *Declaration*'s FPIC provisions, claiming that they would grant Indigenous peoples an unacceptable power of veto.[110] This characterization of FPIC as a veto implies that the right is absolute and can be arbitrarily and unilaterally imposed. Such a characterization is belied by the text of the *Declaration* itself which contains extensive balancing

[103] IPIECA. *Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice.* 2012.
[104] Amy K. Lehr and Gare A. Smith. *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges.* Foley Hoag LLP. July 2010. P. 6.
[105] Amy K. Lehr and Gare A. Smith. *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges.* Foley Hoag LLP. July 2010. P. 8.
[106] Talisman Energy Inc. *Global Community Relations Policy.* December 9, 2010.
[107] IPIECA. *Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice.* 2012. P. 9.
[108] International Council on Mining and Metals. *Indigenous Peoples and Mining Position Statement.* May 2013. Recognition Statement 1. http://www.icmm.com/document/5433
[109] International Council on Mining and Metals. *Indigenous Peoples and Mining Position Statement.* May 2013. Commitment 4.
[110] For example, *Aboriginal Affairs and Northern Development Canada. Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult - March 2011.* P. 39.

provisions and by the fact, previously noted, that FPIC, like almost all other international human rights standards, is necessarily subject to a purposive, case by case assessment and balancing. Where international human rights bodies have identified free, prior and informed consent as a presumptive or mandatory requirement, it has not been because of the absolute nature of the right but because of the well-established threat of serious harm and the need to ensure protections that are in proportion to the potential risks.

IV. CONCLUSION AND RECOMMENDATIONS

Federal legislation currently does not provide environmental assessment panels with any explicit guidance on the weight or significance that should be given to the protection of Indigenous peoples' rights or the measures necessary to protect those rights. However, as shown in this submission, important and helpful guidance can be found in Canadian Constitutional law and international human rights standards. Amnesty International submits that all environmental assessments in Canada must apply these standards to the interpretation of their mandates. Consequently, we offer the following recommendations to the New Prosperity Review, based on the legal standards reviewed in this submission:

> *Recommendation 1)* Consistent with international human rights standards, the Panel should apply the highest standard of precaution in considering the potential impact of proposed resource extraction projects on the Tsilhqot'in peoples' culture, heritage, well-being and use of the land.
>
> *Recommendation 2)* In its assessment, the Panel should pay careful attention to the potential for cumulative social, cultural and environmental harm, especially in the context of unresolved harms that the Tsilhqot'in have already experienced as a consequence of discriminatory government acts and policies and the current situation of disadvantage and vulnerability experienced by the Tsilhqot'in people.
>
> *Recommendation 3)* If the Panel concludes that there is potential for significant adverse impact on the Tsilhqot'in people's culture, heritage, well-being and use of the land, the project not proceed unless the Tsilhqot'in have given their free, prior and informed consent, as required by international human rights law.

APPENDIX

THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

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,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that 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,

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,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international

concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the *Charter of the United Nations*, the *International Covenant on Economic, Social and Cultural Rights* and the I*nternational Covenant on Civil and Political Rights*, as well as the *Vienna Declaration and Programme of Action*, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,
Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,
Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1
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*, the *Universal Declaration of Human Rights* and international human rights law.

Article 2
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

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

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

Article 5
Indigenous peoples have the right to maintain and strengthen their distinct

political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6
Every indigenous individual has the right to a nationality.

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.

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

2. 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;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11
1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

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

Article 12
1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13
1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14
1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15
1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16
1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17
1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

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

Article 19
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 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.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

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.

Article 22
1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

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.

Article 24
1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26
1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28
1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

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

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

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

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

Article 31
1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

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.

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

Article 33
1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals

to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35
Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36
1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38
States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39
Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this 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.

Article 44
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46
1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. 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.

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.

Submitted 15 July 2013 by
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