Tribunal File No. T-1340/7008

CANADIAN HUMAN RIGHTS TRIBUNAL

BETWEEN:

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA and ASSEMBLY OF FIRST NATIONS

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

ATTORNEY GENERAL OF CANADA (representing the Minister of Indigenous Services)

Respondent

- and -

CHIEFS OF ONTARIO, AMNESTY INTERNATIONAL and NISHNAWBE ASK NATION

Interested Parties

FIRST NATIONS CHILD AND FAMILY CARING SOCIETY OF CANADA BOOK OF AUTHORITIES

October 14, 2022

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Tab Reference	Document Description
1.	**Borrows, John, 53 U.B.C. L. REV. 957 (2021)**
2.	**Canadian Human Rights Commission (2021),** ***Annual Report to Parliament*** **(excerpt)**
3.	**Carmen, Andrea, "The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress", in Joffe, Paul, Jackie Hartley and Jennifer Preston, eds,** ***Realizing the UN Declaration on the Rights of Indigenous Peoples*** **(2010)**
4.	**McKay, M. Celeste and Craig Benjamin, A Vision for Fulfilling the Indivisible Rights of Indigenous Women, in Joffe, Paul, Jackie Hartley and Jennifer Preston, eds,** ***Realizing the UN Declaration on the Rights of Indigenous Peoples*** **(2010) at p 160**
5.	**Metallic, Naiomi, Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments, in Constitutional Forum constitutionnel**
6.	**National Inquiry into Missing and Murdered Indigenous Women and Girls, Final Report, vol 1a (2019) (excerpt)**
7.	**Snyder, Emily; Val Napoleon; John Borrows, Gender and Violence: Drawing on Indigenous Legal Resources, 48 U.B.C. L. Rev. 593, 654 (2015)**
8.	**UN Expert Mechanism on the Rights of Indigenous Peoples (2018),** ***Free, prior and informed consent: a human rights-based approach***

ARTICLES

FOREWORD

JOHN BORROWS[†]

The government of British Columbia recently passed legislation called the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA).[1] This legislation aims to make the *United Nations Declaration on the Rights of Indigenous People*[2] (*UNDRIP* or the *Declaration*) part of provincial law. The essays in this Special Issue reveal some of the challenges and opportunities accompanying the *Declaration*'s implementation.

CHANGE IS HAPPENING, SLOWLY

When I arrived at the University of British Columbia (UBC) in 1992 as an Assistant Professor and Director of the Native Law Program, provincial policy related to Indigenous peoples was slowly starting to change. Professor Douglas Sanders was working with colleagues internationally to advance the *Declaration*'s development. At the same time, the province of British Columbia (BC) was on the verge of major policy changes for dealing with First Nations. After 120 years of refusing to negotiate with Indigenous peoples, the province was preparing to finally deal with First Nations on a collective basis. The past 28 years have shown some small

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1 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*]

2 GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [*UNDRIP*]

progress in the field, but much remains to be done. The 2014 Truth and Reconciliation Commission provided recent prompts for action. Such action is demonstrated by the commitment of BC's NDP government to adopting *UNDRIP*, which also formed a "foundational piece"[3] of its 2017 Confidence and Supply Agreement with the BC Green Party caucus. The new *Declaration on the Rights of Indigenous Peoples Act* appears as the province continues to struggle to overcome its denial of Indigenous governance, title, and resource rights.

During the last three decades I have seen a handful of treaties completed with the Nisga'a, Maa-nulth First Nations, Tla'amin Nation, Tsawwassen First Nation, and Yale First Nation. There are also approximately 25 Incremental Treaty Agreements between First Nations and the province. Furthermore, Indigenous led bodies like the First Nations Health Authority and First Nations Education Steering Committee have developed significant expertise in their respective fields with the province's support. We have also seen many high-profile Aboriginal rights and title cases with names like *Sparrow*,[4] *Van der Peet*,[5] *Gladstone*,[6] *Delgamuukw*,[7] *Haida Nation*[8] and *Tsilhqot'in*[9] which are changing resource use and land ownership in the province in slow yet steady ways. At the same time, failure to deal with these issues in a satisfactory manner has led to high profile Indigenous blockades and occupations from time to time. The drastic overrepresentation of Indigenous peoples in the child welfare and criminal justice systems has also captured media attention because of the profound crisis in these fields. This is added to the tragedy of missing and murdered

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3 BC NDP Caucus, 2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus" at 2, online (pdf): <bcndpcaucus.ca/wp-content/uploads/sites/5/2017/05/BC-Green-BC-NDP-Agreement_vf-May-29th-2017.pdf>.

4 *R v Sparrow*, [1990] 1 SCR 1075; 70 DLR (4th) 385.

5 *R v Van Der Peet*, [1996] 2 SCR 507; 137 DLR (4th) 289.

6 *R v Gladstone*, [1996] 2 SCR 723; 137 DLR (4th) 648.

7 *Delgamuukw v British Columbia*, 104 DLR (4th) 470; [1993] 5 WWR 97 (BC CA).

8 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

9 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44.

women and girls which has been a constant source of pain through the years too.

As each of the above examples illustrate, the search for effective legal processes to deal with Indigenous issues still eludes us. In the meantime, Indigenous peoples continue to suffer: life expectancy is 10 to 15 years shorter than for other people in Canada;[10] infant mortality rates are two to four times higher;[11] employment on reserve is over 25% below the national rate;[12] median income is approximately 50% less than non-Indigenous income;[13] approximately 57% of First Nations young adults on reserve have completed high school compared to 89.2% of non-Indigenous young adults off-reserve;[14] and over 40% of reserve homes require major repairs with problems in plumbing, water access and quality, as well as exposure to allergens and mould.[15]

In this context, British Columbia introduced the *Declaration on the Rights of Indigenous Peoples Act*. The question for this Special Issue is how *DRIPA* will operate given its relationship with other provincial, national, international and Indigenous laws, and whether its enactment will make a positive difference.

My view is that the *Declaration on the Rights of Indigenous Peoples Act* is a necessary step in facilitating the recognition of Indigenous law, implementing constitutional rights related to Indigenous peoples, and applying international law principles relative to Indigenous peoples. Such laws are necessary because Canada largely places legislative power—sometimes called positivism—at the heart of political action. The Supreme Court of Canada (SCC) made this clear when it wrote that "Parliamentary

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10 Joe Sawchuk, "Social Conditions of Indigenous Peoples in Canada" (27 May 2020), online: *The Canadian Encyclopedia* <thecanadianencyclopedia.ca/en/article/native-people-social-conditions>.

11 *Ibid.*

12 See Indigenous Services Canada, "Annual Report to Parliament 2020", online: *Government of Canada* <sac-isc.gc.ca/eng/1602010609492/1602010631711>.

13 See *ibid.*

14 See *ibid.*

15 See *ibid.*

sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority."[16] Parliamentary sovereignty is exercised legislatively to set standards which allows courts to hold governments accountable for the principles and processes they have adopted.[17]

At the same time, *DRIPA* is necessary but not sufficient because law does not equal legislation when it comes to Indigenous peoples. Indigenous peoples have their own laws. Indigenous sovereignty has legal implications for how the Crown exercises its powers, even if no legislation is present.[18] Constitutionally, if Aboriginal or treaty rights are effected, laws must recognize and affirm their existence. Furthermore, law is something that is interpreted and practiced by citizens as they operationalize; internalize; and resist constitutional, legislative, and customary law's obligations. Law must be lived, not just legislated, and its effectiveness can only be measured by its effects on the people and places it purports to address.

UNDRIP AND INDIGENOUS LEGAL TRADITIONS

In other spaces I have argued that Indigenous peoples must also take steps to implement *UNDRIP* in accordance with their own Indigenous legal traditions.[19] In addition to necessary state action, rights embedded within the *Declaration* will not be realized if Indigenous governments disregard or reject its provisions. Indigenous governments could facilitate the application and enhancement of protections found in the *Declaration*, or they could frustrate them. Law will fail to be meaningful for Indigenous

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16 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 36 [*Mikisew*].

17 See *ibid* at para 87. .

18 There is a "tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Aboriginal peoples creates a special relationship that requires that the Crown act honourably in its dealings with Aboriginal peoples.": *ibid* at para 21.

19 See John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, (Waterloo, ON: Centre for International Governance Innovation, 2019) [John Borrows et al, *Braiding Legal Orders*].

communities and individuals if they cannot exercise the *Declaration*'s following rights and freedoms within their communities, as well as in relation to the state: religion, spiritual beliefs, and practices;[20] speech and expression;[21] association;[22] life, liberty, and security;[23] property;[24] family togetherness;[25] a right not to be discriminated against by their governments;[26] the privileges and immunities of citizenship;[27] language;[28] education;[29] labour fairness;[30] administrative law (notice, fairness, hearing);[31] health care;[32] and gender equality[33] all in accordance with limitations imposed by law and in accordance with international law.[34]

If nation states begin to more seriously protect the rights of Indigenous individuals, and Indigenous governments do not, this could lead to charges of hypocrisy. We remember that while *UNDRIP* was drafted with the intent of affirming rights as against nation states, it can also be construed as recognizing the human rights of Indigenous individuals in their relations with their own governments. The Preamble leads: "*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination

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20 See *UNDRIP*, *supra* note 2, art 12(1), 25, 3.

21 See *ibid*, art 11, 31.

22 See *ibid*, art 5.

23 See *ibid*, art 5, 7(1).

24 See *ibid*, art 10, 26, 28–30.

25 See *ibid*, art 7(2).

26 See *ibid*, art 2, 15(2).

27 See *ibid*, art 9, 33.

28 See *ibid*, art 13, 16.

29 See *ibid*, art 14, 21.

30 See *ibid*, art 17.

31 See *ibid*, art 17–19, 21–23, 32.

32 See *ibid*, art 24.

33 See *ibid*, art 44.

34 See *ibid*, art 46.

to all human rights recognized in international law".[35] Article 1 of the *Declaration* also affirms that Indigenous individuals possess human rights.[36] It proclaims that "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."[37] Thus, the *Declaration* must be read in ways that affirm Indigenous government's obligations in relation to individuals within their jurisdictions.[38]

In this light, *UNDRIP*'s implementation by Canadian governments does not complete its implementation. Agreements with the province or nation state to implement the *Declaration*, accompanied by action plans and annual reviews (as contemplated in *DRIPA*), do not cover a broad enough field. First Nations, Métis, and Inuit legal communities must use their own values, norms, ethics, and laws to translate *UNDRIP* into their own self-determining decisions. The *United Nations Declaration on the Rights of Indigenous Peoples* proclaims that "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."[39] My strongest hope is that *UNDRIP* gains its greatest meaning through how Indigenous law guides self-determination—not just within provinces or the federal government—but within each legal tradition.

The country and world would be a richer place if rights to: religion; spirituality; speech and expression; association; life, liberty, and security;

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35 *Ibid*, Preamble.

36 See *ibid*, art 1.

37 *Ibid*.

38 In fact, the countries of the world proclaimed that "Indigenous peoples have the right to determine the responsibilities of individuals to their communities.": *UNDRIP*, *supra* note 2, art 35. While human rights are not necessarily equivalent to self-determination rights, such statements signal recognition of the importance of healthy international relationships within Indigenous governments.

39 *UNDRIP*, *supra* 2, art 3.

property; family togetherness; the privileges and immunities of citizenship; language; education; labour fairness; administrative law (notice, fairness, hearing); health care; gender equality; and others (in accordance with limitations imposed by law and in accordance with international law) were made more meaningful through transformation into laws which are Salish, Haida, Nisga'a, Tsimshian, Secwepmec, Sylix, Cree, Gitksan, Wet'suwet'en, Taltan, Tlingit, Ktunaxa, Nuu-chah-nulth, Kwakwaka'wakw, Nlaka'pamux, Tsilhqot'in, etc.

As Indigenous peoples interpret and apply international law, Indigenous law holds the potential to enrich international law. International law is currently state-centric. Its translation and transformation through Indigenous normative commitments could help reshape the field. The jurisgenerative potential of Indigenous international law could also assist in decolonizing state law by giving us new ways of reconceiving rights, relationships, and lifeways.

THE SPECIAL ISSUE: AUTHORS AND PAPERS

Each author featured in this Special Issue is well-placed to comment on *DRIPA*'s potential. They are all experts in the field of Indigenous legal issues through education, professional engagement, and life experience. I have had the honour of working with most of them through a series of publications facilitated by the Centre for International Governance Innovation over the past five years. These papers were designed to "explore and reconceive the relationship between international law, Indigenous peoples' own laws and Canada's constitutional narratives"[40] in order "to reflect on the past and envision what the future may hold for this country and its relationship with . . . Indigenous peoples."[41] This work eventually culminated in a publication entitled *Braiding Legal Orders: Implementing*

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[40] Brenda L Gunn et al, "UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws" (2017), online (pdf): *Centre for International Governance Innovation* <cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf> at 1.

[41] *Ibid* at 3.

the United Nations Declaration on the Rights of Indigenous Peoples.[42] I have learned more about *UNDRIP* from engaging with the authors over the past few years than I have from any other sources.

Professor Nigel Bankes has long experience in considering Indigenous legal issues from resource law, energy law, environmental law, international law, and property law perspectives. He is the Chair of Natural Resources Law at the University of Calgary Law School and his essay leads this Special Issue with an article entitled: "Implementing UNDRIP: An Analysis of British Columbia's *Declaration on the Rights of Indigenous Peoples Act*". His view is that *DRIPA* does not automatically bring *UNDRIP* into legal force and effect. While the Act may allow the courts to use *UNDRIP* as an interpretive aid where relevant to specific issues, Professor Bankes concludes they are not obligated to take this approach. He argues that the legislature has reserved to itself the supervision of *DRIPA*'s obligation to "take all measures necessary to ensure the laws of British Columbia are consistent with the *Declaration*." Professor Bankes observes that *DRIPA*'s duties to ensure consistency are meant to be met through government action plans and annual reports, which are largely non-justiciable. He argues that this strikes an appropriate balance between the courts' surgical use of *UNDRIP* as an interpretive aid and the legislature's substantive responsibility to ensure its laws are transformed over time to become consistent with the *Declaration*.

Ryan Beaton has the second article in this collection which is entitled "Performing Sovereignty in a Time of Ideological Instability: BC's Bill 41 and the Reception of *UNDRIP* into Canadian Law". I have long been impressed with Beaton's writing and accomplishments. He has a PhD in Philosophy from the University of Toronto, is completing his PhD in Law at the University of Victoria, graduated from Harvard Law School, is a Trudeau Scholar, and has a successful legal practice. The heart of Beaton's article explores the incongruous parallelisms and inconsistencies in the *Declaration* and the Supreme Court of Canada's jurisprudence. After highlighting *UNDRIP*'s repudiation of colonial ideologies while upholding

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[42] *Supra* note 19.

state sovereignty, he details how *DRIPA*'s provisions accomplish little in actually implementing the *Declaration*. Beaton show us how *DRIPA* skirts larger questions of sovereignty and focuses on future agreements with Indigenous peoples. In discussing how the SCC is positioned on these issues, Beaton examines the *Uashaunnuat*[43] and *Nevsun*[44] decisions. In both, the Court was split 5:4, disagreeing about the judiciary's proper role regarding non-state legal orders (Indigenous and international) which potentially impinge on state assertions of sovereignty. Beaton shows how *DRIPA*'s contradictions and the Supreme Court of Canada's disagreement hold significant implications for *UNDRIP*'s implementation.

The next contribution in this Special Issue comes from Professor Brenda Gunn at the University of Manitoba Law School. In my view she is the leading expert on international Indigenous legal issues in Canada, having focused her graduate education and life's work in the field, and teaching and publishing on these issues throughout her career. Professor Gunn's article, "Legislation and Beyond: Implementing and Interpreting the UN *Declaration on the Rights of Indigenous Peoples*", argues that *UNDRIP* already has legal effect in Canada through various legislative initiatives and judicial interpretations. As a result, she is keen to ensure the *Declaration*'s implementation does not take away from international standards currently applicable. Since Canada has affirmed that "most human rights treaties are ratified by Canada on the basis that existing domestic laws and programs already conform with a treaty's obligations and no new legislation is required", she argues that the following instruments already have effect in Canadian law: the *International Covenant on Civil and Political Rights*;[45] the *International Covenant on Economic, Social and Cultural Rights*;[46] the *International Convention on the Elimination of Discrimination Against*

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[43] *Newfoundland and Labrador (AG) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4.

[44] *Nevsun Resources Ltd v Araya*, 2020 SCC 5.

[45] 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[46] 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

Women;[47] *Convention on the Rights of the Child*;[48] and the *International Convention on the Elimination of All Forms of Racial Discrimination*.[49] As such, Professor Gunn contends that *UNDRIP* reflects and builds upon rights that are found in various human rights treaties and are therefore already recognized as part of Canadian law. Taking a different view from Professor Bankes, Professor Gunn considers *UNDRIP* to already have force and effect in Canada; she is concerned that *DRIPA* might erode the *Declaration*'s strength as law in Canada.

Robert Hamilton, Assistant Professor at the University of Calgary Law School, next discusses *DRIPA*'s implications for Canadian federalism in "The *United Nations Declaration on the Rights of Indigenous Peoples* and the Division of Powers: Considering Federal and Provincial Authority in Implementation". Professor Hamilton examines the necessity of federal and provincial action in the field because of the divided jurisdictional responsibilities assigned to each level of government within section 91(24) of the *Constitution Act, 1867*.[50] As a teacher of federalism, I appreciate Professor Hamilton's application of the pith and substance analysis, double aspect doctrine, paramountcy, and interjurisdictional immunity as they apply to education, labour, health, child and family services, and lands and resources as they relate to Indigenous peoples. In working through these issues, he observes that "[t]he form of decentralized implementation [the Constitution] envisions creates space for the inherent jurisdiction of Indigenous peoples to challenge the rigid interpretation of the division and distribution of powers in Canada that has historically excluded their decision-making authority." In my view, Professor Hamilton's paper highlights federalism's room for experimentation and innovation, and the asymmetry regarding *UNDRIP*'s application. In so doing, Professor Hamilton rightly worries about the lack of uniformity when dealing with Indigenous rights, particularly in light of divide and conquer tactics that

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47 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

48 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

49 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

50 (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC, Appendix II, No 5.

have long undermined Indigenous rights. At the same time, I anticipate positive developments from *DRIPA*'s laboratory-like negotiated possibilities to experiment with different Indigenous governance and land models flowing from self-determining First Nations communities. Of course, we will only see these outcomes if *UNDRIP* is truly integrated in all the government's operations.

UBC Political Scientist Sheryl Lightfoot's research follows Professor Gunn's work with an article entitled "A Leopard Cannot Hide Its Spots: Unmasking Veiled Opposition to the UN *Declaration on the Rights of Indigenous Peoples*". A fellow Anishinaabe scholar, Professor Lightfoot is the Canada Research Chair of Global Indigenous Rights and Politics at UBC. She has long experience working with foreign policy and international affairs in the context of Indigenous peoples. Her contribution to this Special Issue includes sharing her collection of qualitative data surrounding opposition to *UNDRIP*'s legislative implementation at the federal and provincial levels. Professor Lightfoot argues this opposition runs along thematic lines, such as: expense; redundancy; practicality; *UNDRIP*'s shortcomings; free, prior, and informed consent; global "first-ness" in passing *UNDRIP* implementing legislation; and the perceived negative effects on Indigenous peoples. She distills these concerns and focuses on the fears opponents express when it comes to costs, timing, and accountability for current inequities and injustices between Indigenous and non-Indigenous peoples in Canada and BC. While most opponents of the *Declaration*'s legislative implementation claim to be supportive of Indigenous peoples, Professor Lightfoot argues that such "support" hides a veiled opposition to the legislation. She writes that

> [t]his article aims to unmask this veiled opposition to the UN Declaration. It will argue that at both the federal and provincial levels, veiled opposition to the implementation of the UN Declaration has common themes and patterns. Those patterns are uniformly politically motivated and not based on any actual conflict with Canadian or international human rights law.

Joshua Nichols and Sarah Morales—who initiated and coordinated this Special Issue as co-editors—have also written their own contribution to this review in an article entitled "Finding Reconciliation in Dark Territory: *Coastal Gaslink*, *Coldwater*, and the Possible Futures of *DRIPA*." Professor

Nichols is an Assistant Professor at the University of Alberta and Professor Morales is an Associate Professor at the University of Victoria Law School. This article examines how "[r]ecent large-scale extractive industry approvals, and subsequent judicial decisions, have highlighted that there is still a tremendous amount of work to do to bridge the gap in understanding about the legal status of Indigenous laws and the role of consent [in Canadian Aboriginal rights jurisprudence]." While reviewing recent cases dealing with Indigenous peoples and pipeline opposition, the authors conclude that the future of reconciliation in British Columbia will remain deeply uncertain as long as decision makers fail to recognize Indigenous law or self-determination as a central feature of Canada's constitution.

The final essay in this collection is by Kerry Wilkins. Wilkins has enjoyed a distinguished career as a government lawyer and for almost two decades has taught law related to Indigenous peoples as an adjunct professor at the University of Toronto Law School. Wilkins's article, "So You Want to Implement *UNDRIP*. . ." is designed to give us pause and consider the many challenges involved in implementing *UNDRIP*. The obstacles he identifies are as follows. *UNDRIP* does not: provide access to international forums when Indigenous peoples require redress; define who is Indigenous; provide guidance in resolving overlapping claims; indicate how public lands relate to Indigenous lands; tell us how to deal with culture; provide guidance for how governments deal with Indigenous economic misfortune; and provide direction if Indigenous governments abuse individual citizen rights. The *Declaration* is also silent about implementation issues regarding treaties, adhesions, umbrella agreements, legislation, division of powers issues in a federal state, and questions of implied repeals. Wilkins writes that "[t]he *Declaration*'s usefulness to Indigenous peoples living in Canada is, beyond doubt, substantially at the mercy of domestic political will."

As the foregoing review demonstrates, the articles in this Special Issue represent the cutting-edge of analysis when it comes to the implementation of *UNDRIP* in Canada. Much has happened to address Indigenous legal issues since those first days when I arrived at UBC almost three decades ago. Change has been slow, and some would argue that things have gotten worse, since Indigenous social indicators continue to slide relative to the

general population. At the same time, I have witnessed positive change throughout the past decades, particularly through the students who have graduated in this period and assumed leadership roles in their professions and communities. There are also many communities that have taken inspiring steps to revitalize their laws and governances. The resurgence of Indigenous law is real, but it requires careful thought, scrutiny, analysis, and hard work. Since law is lived and *DRIPA* requires further action, the legislation will be more successful if communities and practitioners heed the ideas found in this Special Issue.

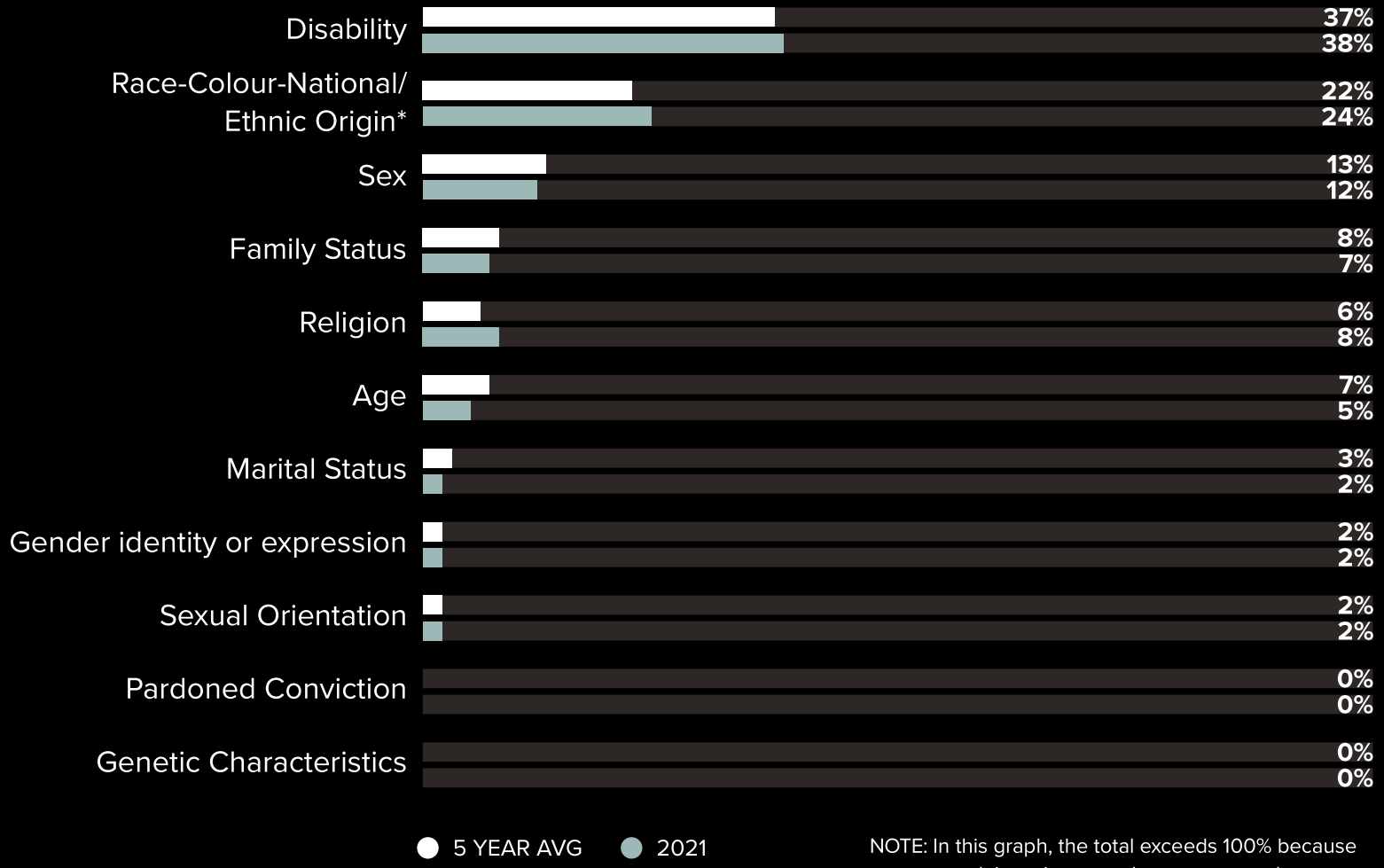
By the numbers

As a screening body, the Commission's role is to help parties resolve their matters in the quickest, most confidential, and fair way as possible. This can involve mediation, referral to another organization, or referral to the Canadian Human Rights Tribunal.

849 complaints

were accepted
by the Commission
in 2021

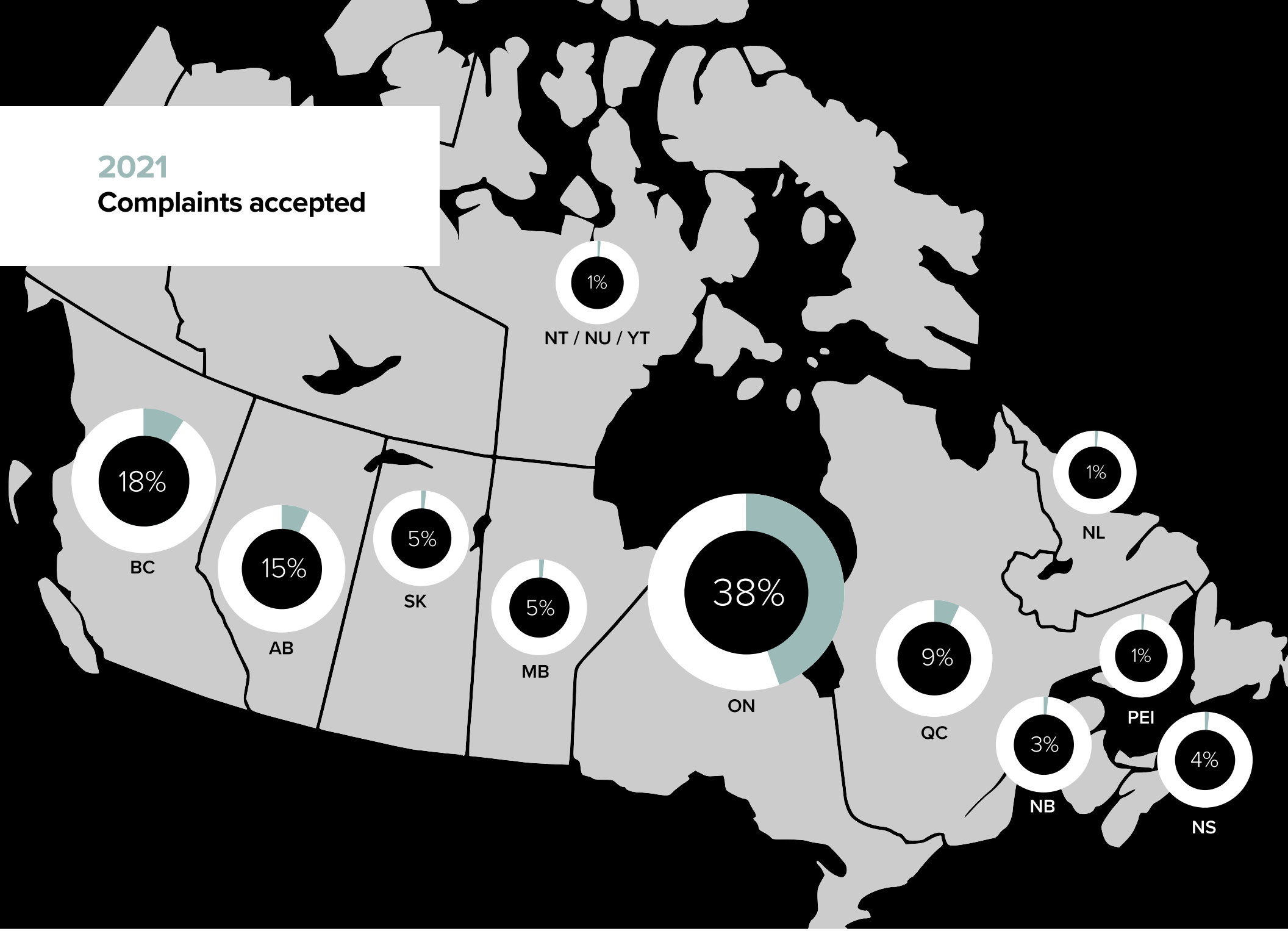
Proportion of complaints accepted by grounds of discrimination



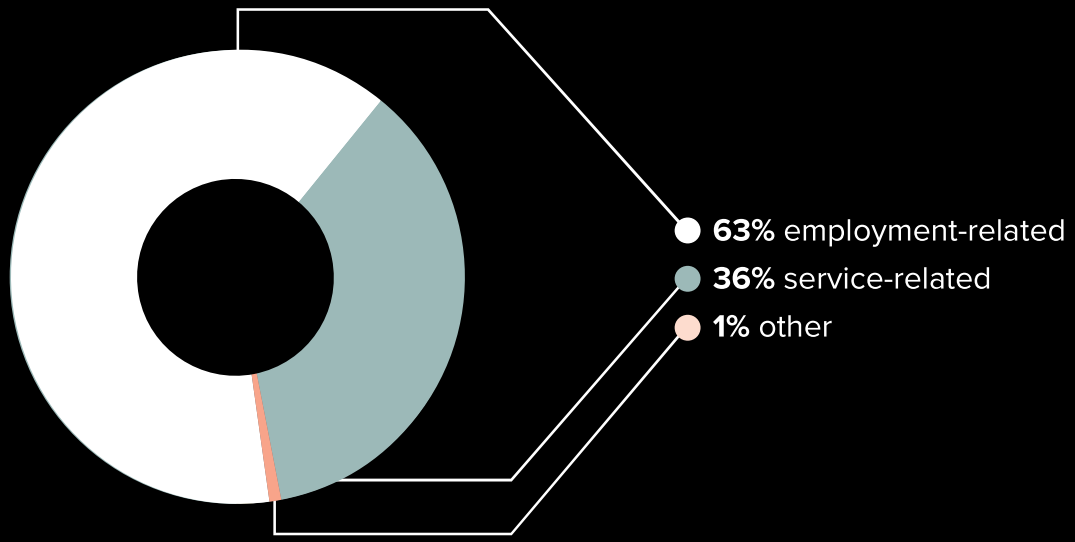
NOTE: In this graph, the total exceeds 100% because some complaints cite more than one ground.

*combining the data of three grounds.

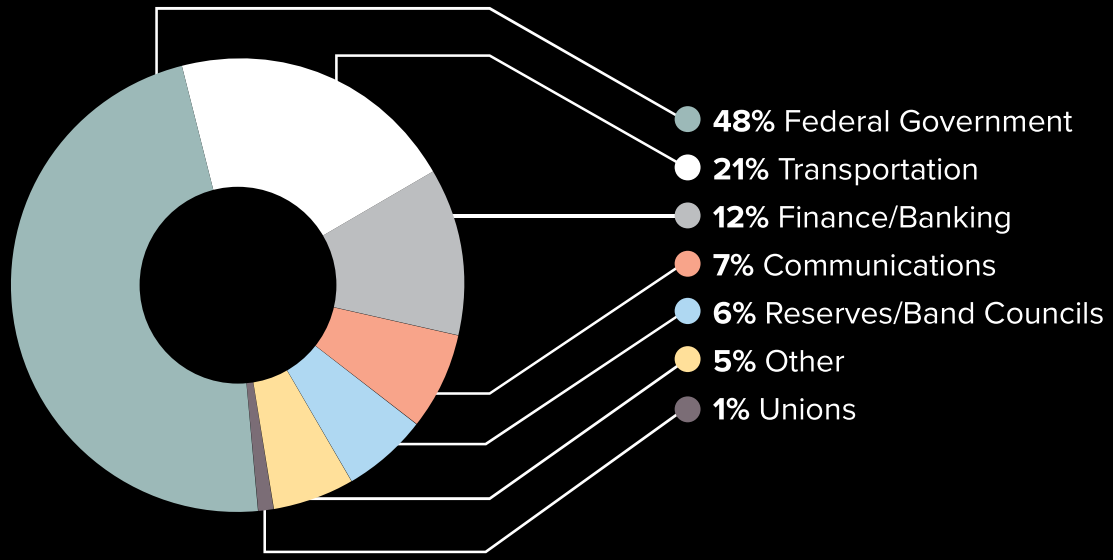
2021
Complaints accepted

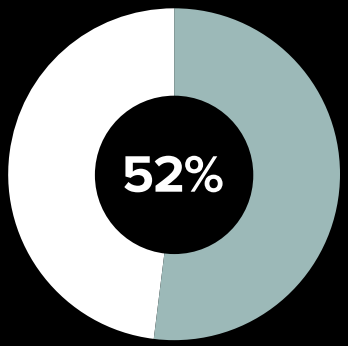


What are the 2021 complaints about?



Who are the 2021 complaints about?

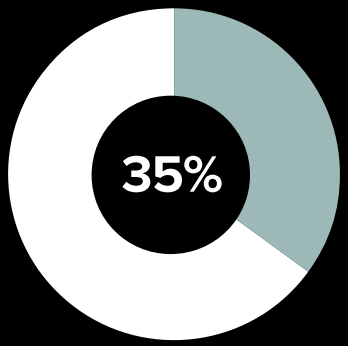




Mental health

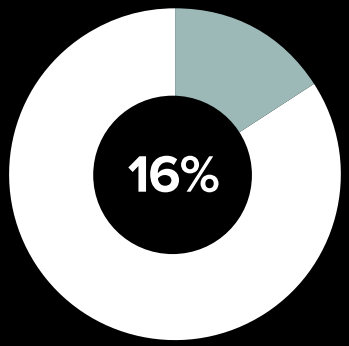
Over half (**52%**) of disability complaints were related to mental health.

This represents **29%** of complaints accepted by the Commission in 2021.



Intersectionality

35% of complaints accepted in 2021 cited more than one ground of discrimination.

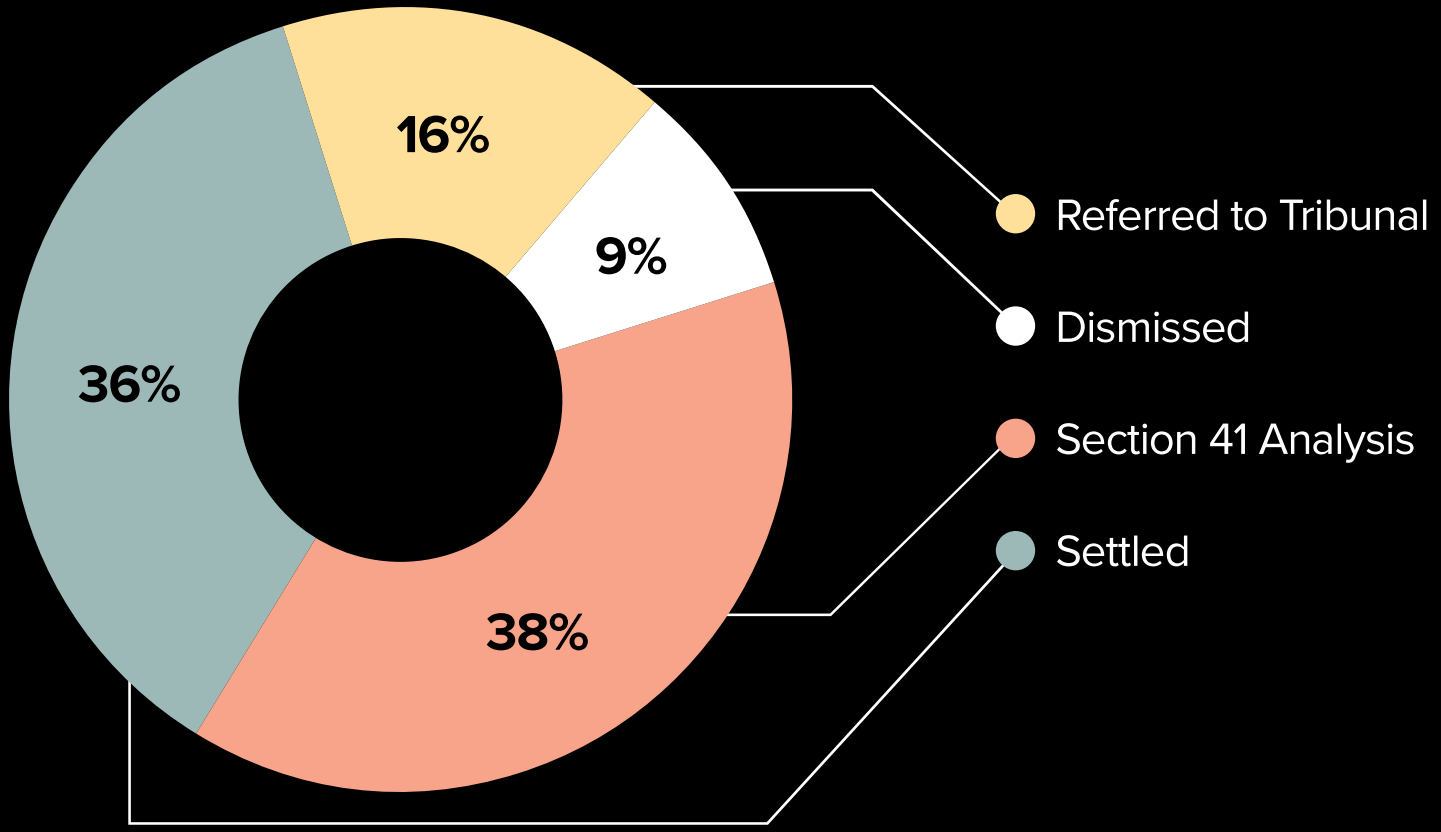


Harassment

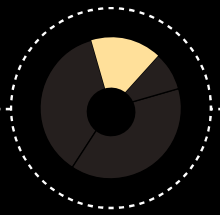
16% of complaints accepted in 2021 cited harassment.

Final Decisions

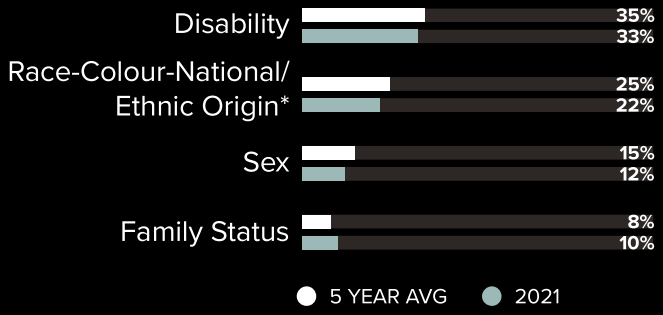
2021

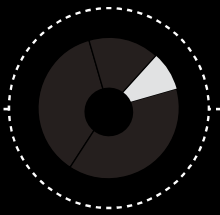


Final Decisions by Ground



Tribunal





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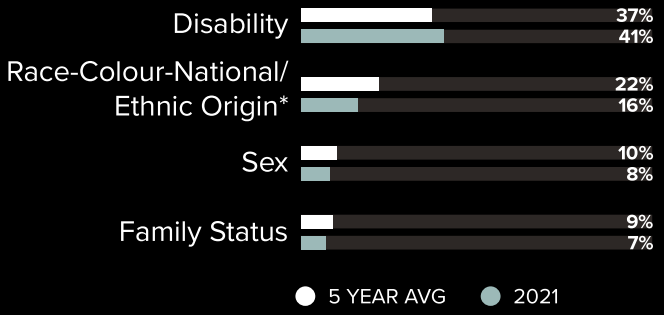

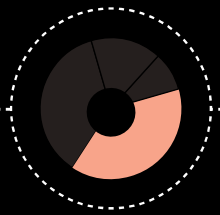

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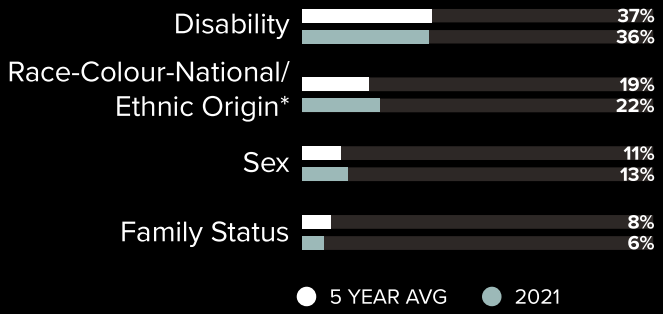

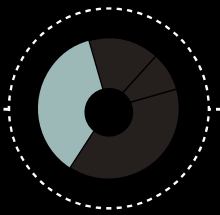

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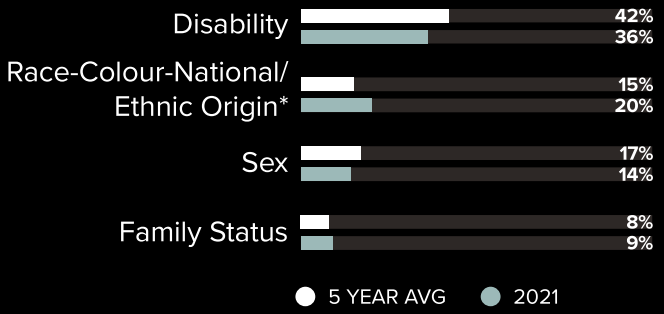

*combining the data of three grounds.

Doing more with our data

As part of our ongoing commitment to anti-racism action, we moved forward in 2021 with a project to help us better understand who is complaining to us, and what their experience has been in accessing and using our complaints process.

The first priority was to gather and analyze disaggregated, race-based data from past complaints. We sent an online survey to consenting complainants who between 2019 and 2020 had filed complaints based on any of the grounds of race, color, or national or ethnic origin. With great success on the first survey, we then expanded the project to survey additional consenting complainants who filed complaints in 2020 citing any of the 13 grounds of discrimination.

The following page outlines some of the highlights of what our data taught us in 2021 about the people who have come to us in recent years because they believe they have been treated unfairly.

Our plan is to make this data collection a permanent pillar of the Commission's online complaints process for all new incoming complaints. This is all part of our broader mission to improve the quality of information we have about who is experiencing discrimination in Canada — particularly with respect to systemic forms of racism and inequality.

Of those complainants who replied to our survey and who filed complaints alleging racism between 2019 and 2020, here is how they identified:

Indigenous: **25%** First Nations (**18%**), Métis (**5%**), and Inuk (Inuit) (**2%**)

Black: one-third (**32%**) (including of African-descent or Afro-Caribbean-descent)

South Asian: **12%**

Other races: **10%**

Having a disability: **25%** (equal distribution between mental and physical health-related disability)

Christian: One-third (**32%**)

No religion: **23%**

Indigenous spirituality: **13%**, Hindu: almost **6%**, Muslim: **5%**, Sikh: **3%**

Most have Canadian citizenship (**83%**) and almost half of those (**48%**) were born in Canada.

More than half (**56%**) have university degree, half of which are post-graduate degrees.

In management positions: **16%**

Work full-time: **90%**

More than half (**53%**) found it very difficult or difficult for their household to meet financial needs.

The Right to Free, Prior, and Informed Consent

A Framework for Harmonious Relations and New Processes for Redress

Andrea Carmen

1. Free, Prior, and Informed Consent: An Overview

For Indigenous peoples, the right of free, prior, and informed consent (FPIC) is a prerequisite for the exercise of their fundamental right to self-determination as defined in international law. It underpins their ability to exert sovereignty over their lands and natural resources, to redress violations, and to establish the criteria for negotiations with states on matters affecting them.

Respect for Indigenous peoples' consent is essential for the implementation and ongoing viability of treaties and agreements among Indigenous peoples and other parties. As affirmed by experts at a 2003 UN seminar on treaties, agreements, and other constructive agreements between states and Indigenous peoples, "treaties, agreements and other constructive arrangements constitute a means of promoting harmonious, just and more positive relations between States and indigenous peoples because of their consensual basis and because they provide benefits to both indigenous and non-indigenous peoples."[1]

The failure of state parties to respect the right of FPIC of Indigenous nations is a principal cause of treaty contraventions and abrogations, and results in a wide range of human rights violations. The continuing validity of treaties under both national and international law reaffirms the ongoing nature of the nation-to-nation relationship between treaty parties, based on equal standing, mutual recognition, respect, and the fundamental principle of consent.

The adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* by the General Assembly on 13 September 2007 was an historic step forward for Indigenous peoples. As article 43 states, the rights contained in the *Declaration* "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." The *Declaration* is applicable to all UN member states, even the four that voted against it. In its 2008 Concluding Observations on the United States, the Committee on the Elimination of Racial Discrimination recommended that the *Declaration* be used as a guide to interpret the obligations of the United States under the *International Convention on the Elimination of All Forms of Racial Discrimination*[2] relating to Indigenous peoples, notwithstanding that the US voted against the adoption of the *Declaration*.[3]

The *Declaration* includes numerous provisions affirming the right or principle of FPIC, as well as related state obligations. These provisions address such key issues as relocation of Indigenous peoples; redress (including restitution) for violations of Indigenous peoples' rights to lands, territories, and resources; development activities; environmental protection; redress pertaining to cultural, intellectual, religious, and spiritual property; and legislative or administrative measures that may affect Indigenous peoples.

The right of FPIC is an essential element for concluding nation-to-nation treaties, as well as for negotiations between Indigenous peoples and states pertaining to new agreements and constructive arrangements. It also provides a framework for Indigenous parties and states to establish, in partnership, the processes and criteria for settling disputes arising from the failure to respect and implement treaties.

2. Beyond the Failed Models of the Past

The desire of states and private interests to access Indigenous peoples' lands for mineral and other resource development has been a primary force behind the illegal acquisition and appropriation of many of the treaty lands in the United States and elsewhere. As underscored generally by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people,

> Wherever large-scale projects are executed in areas occupied by indigenous peoples, it is likely that their communities will undergo profound social and economic changes that the competent authorities are often incapable of understanding, much less anticipating. Sometimes the impact will be beneficial, very often it is devastating, but it is never negligible. . . . Indigenous peoples bear a disproportionate share of the social and human costs of resource-intensive and resource-extractive industries, large dams and other

infrastructure projects, logging and plantations, bio-prospecting, industrial fishing and farming, and also eco-tourism and imposed conservation projects.[4]

One example of such abuse was the confiscation of treaty lands in the Black Hills of South Dakota in response to the discovery of gold. This occurred less than a decade after the sacred Black Hills were recognized in the 1868 Fort Laramie Treaty between the United States and the Sioux Nation as belonging to the Lakota (Sioux) in perpetuity. In 1980, the US Supreme Court noted that the Court of Claims had concluded that "[a] more ripe and rank case of dishonorable dealing will never, in all probability, be found in our history."[5] The Court of Claims had also stated, "The duplicity of President Grant's course and the duress practiced on the starving Sioux, speak for themselves."[6] Despite clear acknowledgement of wrongdoing, these illegally-confiscated treaty lands have not been returned, and gold mining continues in the Black Hills.

Processes purporting to provide redress or to settle treaty violations, unilaterally established by states, frequently — and overwhelmingly — favoured state interests at the expense, and over the objections, of the Indigenous claimants. Even when Indigenous lands had been appropriated in direct violation of treaties, the rules governing claims processes almost never resulted in the return of any lands, although this was the primary or only form of acceptable redress called for by the Indigenous peoples concerned. Such processes clearly violated the rights of Indigenous peoples freely to withhold or give their consent either to the process for redress or its outcome. The Indian Claims Commission (ICC) in the United States is a key example of a failed settlement process.[7] Remedies for land and resources dispossessions were limited by Congress to monetary damages. As Professor Nell Jessup Newton emphasized, "The determination that money damages can be the only remedy for ancient wrongs inevitably shapes the kinds of wrongs that can be remedied. Ironically then, the worst crimes against tribes were the least remediable."[8]

Established by the US government in 1946 and active until it was dissolved in 1978, the ICC was a blatant example of a unilateral decision-making process by which the state party that had violated treaty rights was also the sole arbiter of the resulting claims. This had disastrous effects for Indigenous treaty nations in the US, whose rights were doubly violated by this process — first, through the confiscation of their traditional lands and resources, then through an imposed settlement process in which Indigenous treaty nations had little voice in decision-making. Their consent was not a factor in either the process or the result.

In the case of *Mary and Carrie Dann* v. *United States*,[9] submitted to the Inter-American Commission on Human Rights, Western Shoshone people contested

the propriety and validity of the decision by the ICC that Western Shoshone land and treaty rights had been "extinguished" through acts of "gradual encroachment" by settlers, miners, and other non-Indians.[10] In 1974, the ICC had authorized a monetary payment to the Western Shoshone claimants based on the estimated value of the land in July 1872, the date when the ICC decided the encroachment had occurred. This amounted to 15¢ an acre plus the estimated value of mineral rights and the gold and other resources extracted before 1872.[11] However, the land and minerals had never been offered for sale by the Western Shoshone. Because the ICC authorized this payment, which was then accepted unilaterally by the US government as "trustee" for the Western Shoshone, the United States has continued to claim that the case was settled — despite the fact that the funds have been refused by most Western Shoshones.[12]

The Inter-American Commission examined the Western Shoshone land title claims as well as the settlement process, and concluded that "these processes were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests."[13] The UN Committee on the Elimination of Racial Discrimination also expressed concern that the US's position was "made on the basis of processes before the Indian Claims Commission, 'which did not comply with contemporary international human rights norms'... as stressed by the Inter-American Commission on Human Rights."[14]

Self-serving policies and practices have been the norm in most countries that have concluded treaties with Indigenous peoples. New Zealand's Treaty of Waitangi Settlements Process, for example, established to redress violations of the 1840 Treaty of Waitangi, resulted mostly in monetary settlements rather than the return of lands appropriated from the Maori in violation of the treaty. Most Maori land claims remain outstanding, with Maori land ownership in 2008 totaling only five per cent of the country's land.[15]

In all these countries, including Canada, the state treaty parties or their successor states have continued to assert that they have sole jurisdiction to determine and control the process of redress for treaty violations. They unilaterally establish procedures and timelines, decide if any violations have occurred, and set the terms and parameters (referred to as "fiscal caps" in New Zealand) for compensation when and if violations are recognized.

Maori scholar Craig Coxhead writes:

When we think of negotiation, words such as compromise, bargaining, competition and cooperation come to mind. However, there is a lack of negotiation in the Direct Negotiations process. The Government has set the

procedures to be followed. . . . This is not negotiable and . . . was essentially imposed on Maori. The Government has set the total pool of money that it is prepared to spend. This means that, once the first claim is settled, other claims that follow are not negotiated on the basis of loss of land or loss of lives but on relativity to other claims.[16]

The right to FPIC of the concerned Indigenous treaty party is, once again, not a primary factor in these procedures. Yet "consent" and "good faith" of all parties are the two most essential elements in treaty-making.[17] Following the adoption of the *Declaration*, the call upon states and Indigenous peoples to work together to implement remedial processes consistent with international human rights standards is clear and compelling. This is especially crucial in relation to the international norm of FPIC.

3. Indigenous Peoples' Understanding of the Right to Free, Prior, and Informed Consent

Indigenous peoples have often been informed, after the fact, of someone else's decision about what will be done with their lands and resources, despite relevant existing treaty rights. In many cases, they have been forcibly moved off their lands, out of the way of so-called "progress." The term "consultation" is too often interpreted by states in a self-serving manner that involves an exchange of views, but excludes decision-making on the part of the Indigenous peoples concerned.

Free, prior, and informed consent, in contrast, may best be described as a broad and comprehensive right, with attendant state obligations:

1) "Free" necessarily includes the absence of coercion and outside pressure, including monetary inducements (unless they are mutually agreed on as part of a settlement process), and "divide and conquer" tactics. Indigenous peoples must be able to say "no," and not be threatened with or suffer retaliation if they do so.
2) "Prior" means that there must be sufficient lead time to allow information-gathering and sharing processes to take place, including translations into traditional languages and verbal dissemination as needed, according to the decision-making processes of the Indigenous peoples in question. This process must take place without time pressure or time constraints. A plan or project must not begin before this process is fully completed and an agreement with the Indigenous peoples concerned is reached.
3) "Informed" means that all relevant information reflecting all views and

positions must be available for consideration by the Indigenous peoples concerned. This includes the input of traditional elders, spiritual leaders, traditional subsistence practitioners, and traditional knowledge holders. The decision-making process must allow adequate time and resources for Indigenous peoples to find and consider impartial, balanced information as to the potential risks and benefits of the proposal under consideration. Consistent with the "precautionary principle," information regarding potential threats to health, environment or traditional means of subsistence must be available. This principle "advocates taking pro-active, anticipatory action to identify and prevent biological or cultural harms resulting from research activities and development, even if cause-and-effect relationships have not yet been scientifically proven."[18]

4) "Consent" involves the clear and compelling demonstration by the Indigenous peoples concerned of their agreement to the proposal under consideration. The mechanism used to reach agreement must itself be agreed to by the Indigenous peoples concerned, and must be consistent with their decision-making structures and criteria (for example, traditional consensus procedures). Agreements must be reached with the full and effective participation of the leaders, representatives, or decision-making institutions authorized by the Indigenous peoples themselves.

A process or activity which does not meet these or other criteria put forth by the affected Indigenous peoples as requirements for obtaining their FPIC must cease. From the perspective of Indigenous peoples, this consent is an essential prerequisite for the ongoing legality and validity of treaties, agreements, and other arrangements, whether concluded in the past or to be negotiated in the future.

When deciding whether to enter into treaties, agreements, and arrangements, Indigenous peoples must not be subjected to coercion, including threatened or actual starvation, small pox epidemics, cuts to or elimination of basic human services, forced removals, or annihilation under the gun. Further, any new agreement or process for settlement or redress cannot be carried out under an implied threat or with the stated denial of other options. For example, it is inconsistent with the right to FPIC for Indigenous peoples to be told by a state, "This is your only choice, you better take it or you'll be left with nothing at all," or, "We're going to do this on your land whether you like it or not, so you better agree so you can at least get a share of the jobs/cut of the profits/a little piece of your land back."

These considerations also apply to any changes in the terms, interpretations, or implementation of the original treaty provisions as understood by the Indigenous peoples when they were first agreed upon. The *Vienna Convention on the Law of*

Treaties states that termination of or withdrawal from a treaty requires the consent of all parties.[19] Indeed, the unilateral termination of a treaty or the non-fulfillment of obligations contained therein "has been and continues to be unacceptable behaviour according to both the Law of Nations and more modern international law."[20]

Many Indigenous peoples also apply what could be called the principle of FPIC to ask for permission from the animals, plants, minerals, and spirits living in places that they have traditionally used. The traditional peoples of Indigenous nations still practise this when they harvest plants to eat or water to drink, cut trees for building or making fires, hunt animals, catch fish, gather medicines for healing, or before digging into the earth for any reason.

Indigenous peoples are taught to ask for and obtain permission when they are contemplating any activity that might disrupt the equilibrium of a place where any of their natural world relations are living, including when they make agreements with outside parties about plans for development that may affect not only their lives but the lives and survival of other living things. Indigenous peoples have been instructed to defend them and be responsible for them, not just as resources to use but as living beings who themselves have rights to survive and prosper, and to give their consent.

4. The Declaration and the Right to Free, Prior, and Informed Consent

The *Declaration* was the product of over 20 years of negotiations and lobbying by Indigenous peoples and their supporters, working with UN member states and UN experts. The right to FPIC was one of the pivotal points of debate at meetings of the inter-sessional Working Group on the Draft United Nations Declaration on the Rights of Indigenous Peoples (WGDD).[21]

Indigenous peoples from around the world consistently reiterated that they could accept no less than the full recognition of this essential right in the *Declaration*. In the end, they prevailed. The *Declaration* is now the primary international instrument explicitly addressing the rights of Indigenous peoples. The *Declaration* affirms that Indigenous peoples are "peoples" with the right to self-determination[22] and 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."[23]

This full and unqualified recognition leaves no room for doubt. Although the *Declaration* is not legally binding in the same way as a convention, the standards set out in legally binding instruments such as the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),[24] the *International Covenant on Civil and Political Rights* (ICCPR),[25] and the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)[26] also apply to Indigenous peoples.

The *Declaration* affirms "that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States."[27] Many provisions of the *Declaration* directly refer to, imply, or underscore the importance of FPIC in the context of treaties, agreements, and other arrangements between states and Indigenous peoples.[28]

Article 10 affirms that Indigenous peoples shall not be forcibly removed from their lands or territories, and that "[n]o 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 32(2) specifically requires states to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources." These provisions are vitally important, as lands and resources are central issues in most situations involving violations of treaty rights in different regions of the world.

The *Declaration* also clearly sets out terms and criteria for redress, including restitution and compensation, when violations of rights to lands, territories, and resources occur. Article 27 requires that

> 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.

Where lands, territories, and resources traditionally owned or otherwise occupied or used by Indigenous peoples have been "confiscated, taken, occupied, used or damaged without their free, prior and informed consent," according to article 28(1), the Indigenous peoples in question "have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation." Article 28(2) states that such compensation is to "take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress" — "[u]nless otherwise freely agreed upon by the peoples concerned."

These provisions affirm the specific rights of Indigenous peoples and call upon states to respect the relationships with Indigenous peoples that are enshrined and recognized in treaties. They also highlight some of the most critical ways in which treaty rights as well as the related right to FPIC are systematically violated, both historically and in contemporary contexts. The *Declaration* therefore provides clear direction for the ongoing recognition and respect of treaty rights, consistent with the right to FPIC. It also provides impetus for the development of new processes to remedy violations of treaty rights.

5. Free, Prior, and Informed Consent as Recognized in Other International Instruments and Jurisprudence

The *Declaration* does not create any new rights. Craig Mokhiber of the New York Office of the High Commissioner for Human Rights calls it a "harvest" from existing "fruits," including "a number of treaties, and declarations, and guidelines, and bodies of principle, but, importantly, also from the jurisprudence of the Human Rights bodies that have been set up by the UN and charged with monitoring the implementation of the various treaties."[29] These additional sources serve to reinforce the inherent rights in the *Declaration*, as well as its overall significance.

The International Labour Organization's *Indigenous and Tribal Peoples Convention, 1989* (ILO Convention No. 169), provides that "[s]pecial measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment" of Indigenous and tribal peoples, and that "[s]uch special measures shall not be contrary to the freely-expressed wishes of the peoples concerned."[30]

In addition, ILO Convention No. 169 states that Indigenous and tribal peoples shall not be removed from the lands they occupy. Where the relocation of Indigenous or tribal peoples "is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent."[31]

ILO Convention No. 169 also recognizes that Indigenous peoples have the "right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use,"[32] and requires states to consult with Indigenous peoples and ensure their informed participation in decisions pertaining to development, national institutions and programs, cultural protections, and lands and resources.[33] Consultations carried out must be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent.[34]

The UN General Assembly's *Programme of Action for the Second International Decade of the World's Indigenous People* also highlights the importance of FPIC.[35] One of the five objectives of the Second Decade is "promoting full and effective

participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent."[36]

The committees of independent experts that monitor state implementation of international human rights treaties have also stressed the obligation on states to respect these rights of Indigenous peoples. In its General Recommendation XXIII on the Rights of Indigenous Peoples, the Committee on the Elimination of Racial Discrimination (CERD) called on states to "ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."[37]

Consistent with this General Recommendation, the CERD has examined state compliance with this right to FPIC in considering periodic reports submitted by parties to the ICERD. For example, in 2008 the Committee recommended that the United States "recognise the right of Native Americans to participate in decisions affecting them, and consult and cooperate in good faith with the indigenous peoples concerned before adopting and implementing any activity in areas of spiritual and cultural significance to Native Americans."[38] Further, the CERD recommended that the US "take all appropriate measures, in consultation with indigenous peoples concerned and their representatives chosen in accordance with their own procedure — to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention."[39]

The CERD had previously noted with concern that, in the United States, treaties made with Indigenous peoples "can be abrogated unilaterally by Congress," and the land possessed or used by Indigenous peoples "can be taken without compensation by a decision of the Government."[40] The CERD called on the US to "ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5(c) of the Convention." The CERD drew the attention of the US to General Recommendation XXIII, which stresses "the importance of securing the 'informed consent' of indigenous communities."[41]

The ICESCR and the ICCPR both affirm, in common article 1, the right of all peoples to self-determination. By virtue of this right, all peoples "freely determine their political status and freely pursue their economic, social and cultural development." In monitoring state compliance with the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) has highlighted the need for states to obtain Indigenous peoples' consent in matters of resource exploitation.

For instance, in its 2001 Concluding Observations on the periodic report of Colombia, the CESCR noted "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem."[42] The Committee recommended that Colombia ensure the participation of Indigenous peoples in decisions affecting their lives, and particularly urged the country "to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169 (1989)."[43] Likewise, in 2004 the CESCR stated in relation to Ecuador that it was "deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the communities concerned."[44]

In relation to "measures which substantially compromise or interfere with the culturally significant economic activities" of an Indigenous community, the Human Rights Committee has provided the following view:

> participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.[45]

The obligation on states to obtain the FPIC of Indigenous peoples prior to undertaking development, when designing measures to protect against and to redress rights violations, and when entering into agreements with Indigenous peoples, has been repeatedly recognized by UN studies, seminars, and processes.[46] For example, in its 2008 "Guidelines on Indigenous Peoples' Issues," the United Nations Development Group highlights that the "principle of free, prior and informed consent is an integral part of the human rights based approach" to development.[47] Also, Rodolfo Stavenhagen, then the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, concluded in his 2006 report that "[f]ree, prior and informed consent is essential for the human rights of indigenous peoples in relation to major development projects, and this should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes."[48]

Further, FPIC is the standard underlined in the 2000 *Report of the World Commission on Dams*:

> In a context of increasing recognition of the self-determination of indigenous peoples, the principle of free, prior, and informed consent to development plans and projects affecting these groups has emerged as the standard to be applied in protecting and promoting their rights in the development process.[49]

A similar standard is emphasized in the Final Report of the Extractive Industries Review (EIR): "The EIR concludes that indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free, prior and informed consent throughout each phase of a project cycle."[50]

The right to FPIC has also been recognized within the Inter-American human rights system. In *Case of the Saramaka People* v. *Suriname*, the Inter-American Court of Human Rights stated that it:

> considers that, in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.[51]

Further, the Inter-American Commission on Human Rights found that, pursuant to the "general international legal principles applicable in the context of indigenous human rights," the "permanent and inalienable title of indigenous peoples" with respect to historically occupied lands, territories, and resources can be "changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property."[52]

The Commission further stated that international human rights law requires

> special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.[53]

Respect for the right of Indigenous peoples to FPIC is already an important focus of UN and regional human rights bodies. Conventions or international trea-

ties are legally binding on state parties, and the recommendations of the various treaty monitoring bodies cannot be lightly ignored. The *Declaration* now provides the most comprehensive statements on FPIC. Human rights bodies will use its provisions to guide their interpretation of human rights treaties as they apply to Indigenous peoples.

6. The UN Declaration as a Framework for a "New Jurisdiction" for Redress

In 1989, the UN Economic and Social Council and the Commission on Human Rights appointed Miguel Alfonso Martínez as Special Rapporteur to conduct a study on treaties, agreements, and constructive arrangements between states and Indigenous populations. Special Rapporteur Martínez submitted his final report in 1999. One of his most important recommendations — and the least developed to date — was that, owing to the failures of existing mechanisms in resolving conflicts arising from treaty violations, "an entirely new, special jurisdiction" should be established within states "to deal exclusively with indigenous issues."[54] The Rapporteur affirmed that this "new jurisdiction" or mechanism for conflict resolution must be "independent of existing governmental . . . structures."[55]

The Special Rapporteur presented some of the criteria he believed necessary for this new jurisdiction to be a successful and viable tool to resolve disputes and redress violations, including "those related to treaty implementation." A key component would be a "body to draft, through negotiations with the indigenous peoples concerned . . . new juridical, bilateral, consensual, legal instruments with the indigenous peoples," as well as legislation "to create a new institutionalized legal order applicable to all indigenous issues and that accords with the needs of indigenous peoples."[56] To effectively replace the outmoded and ineffective processes for the redress of treaty violations, Indigenous peoples must participate fully and effectively.[57]

In 2007, the International Indian Treaty Council, the Confederacy of Treaty 6 First Nations, and the Aotearoa Indigenous Rights Trust co-sponsored a side event on "Treaty Rights and International Standards" during the sixth session of the UN Permanent Forum on Indigenous Issues. The event was attended by representatives of treaty nations from the United States, Canada, Hawaii, Aotearoa (New Zealand), Nicaragua, Chile, and Kenya. A consensus emerged among the participants that there was an urgent need to address the Special Rapporteur's call for the establishment of this new jurisdiction. Participants began to discuss what an effective and just new legal framework might look like, one in which both treaty parties have an equal role and decision-making authority based on FPIC. A central focus of the discussion, one on which all participants were agreed, was the

need to develop just, equitable, and transparent mechanisms with the equal participation and consent of all parties before the actual issues under dispute began to be adjudicated. Recommendations included equal participation by each treaty party in the selection of tribunal judges (i.e., one judge selected by each party and one more selected by agreement of the other two judges). Participants also agreed on the need to continue their discussions in the light of the *Declaration*, which was then awaiting adoption by the General Assembly.

The *Declaration*, as finally adopted, does in fact provide a minimum standard that can be used as the basis for transforming Special Rapporteur Martínez' recommendation into reality. There is now an historic opportunity to bring the procedures for redressing treaty violations in line with international human rights standards.

This "new jurisdiction" would serve as a bilateral mechanism for redress and restitution of the violation of treaty rights, conflict resolution, and the adjudication and recognition of land rights. To be consistent with the *Declaration*, a new mechanism must:

1) Be fair, independent, impartial, open, and transparent, providing a just and fair process for the resolution of conflicts and disputes among Indigenous peoples, states, and other parties;[58]
2) Be established and implemented in conjunction with the Indigenous peoples concerned;[59]
3) Recognize the right of Indigenous peoples to participate in, and have access to, this process;[60]
4) Give due recognition to Indigenous peoples' laws, traditions, customs and land tenure systems and/or give due consideration to the customs, traditions, rules and legal systems of the Indigenous peoples concerned and international human rights;[61]
5) Provide effective remedies for all infringements of the individual and collective rights of Indigenous peoples;[62]
6) Arrive at decisions promptly;[63] and
7) Provide redress for the confiscation, taking, occupation, use, or damage of Indigenous peoples' lands, territories, and resources, including those which they traditionally owned or otherwise occupied or used, without their free, prior, and informed consent.[64] Redress can include restitution of traditionally owned or otherwise occupied or used lands and resources. If this is not possible, compensation shall take the form of lands, terri-

tories, and resources equal in quality, size, and legal status, unless otherwise freely agreed to by the peoples concerned. Monetary compensation or other appropriate redress can also be provided, but only with the free agreement of the affected peoples. Compensation shall be just, fair and equitable.[65]

Any such process must be underpinned by respect for article 37 of the *Declaration*, which affirms the right of Indigenous peoples "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."

7. Conclusion

Now that the *Declaration* has been adopted by the General Assembly, processes developed by Indigenous peoples and states to redress the violation of treaty, land, and other rights must not fall below the basic, minimum standards elaborated in this universal human rights instrument.

The provisions of the *Declaration* are integral to any framework for implementing the objectives of the Second International Decade of the World's Indigenous People. The *Declaration* is an essential reference point and standard for developing just models for reaching agreements, upholding treaties, recognizing and implementing land and resource rights, settling disputes, and providing redress and restitution for rights violations.

Indigenous treaty nations are currently engaged in international dialogues to develop and expand on proposals for a new framework for dispute resolution and redress which can be applied and adjusted to various situations, countries, and areas. With the *Declaration*, we have an historic opportunity to step away from the injustices of the past and undertake a new way forward.

For all our relations.

The Significance of the UN Declaration to a Treaty Nation

A James Bay Cree Perspective

Romeo Saganash and Paul Joffe

1. Introduction

For thousands of years, the James Bay Cree have occupied their traditional territory, Eeyou Istchee, in what is now Quebec, Canada and the adjacent offshore area. We continue to do so. We are a distinct people and nation. We are also a treaty nation.

Since the early 1980s, the Grand Council of the Crees (Eeyou Istchee) has been actively involved in international issues. Our experiences with federal and provincial governments in Canada have convinced us of the need to protect and advance our status and human rights both domestically and internationally.

The legacy of colonial policies remains evident in all parts of the world. Indigenous peoples suffer from widespread discrimination, marginalization, exclusion, poverty largely resulting from dispossession of lands and resources, cultural genocide, and other human rights violations. It has been well-established that countries around the world have sought to exploit, dominate, assimilate, and dispossess Indigenous peoples on the basis of presumed racial and cultural inferiority. Under English and Canadian law, theories of dispossession were founded in doctrines of European superiority. Indigenous peoples were considered primitive, dismissed as heathens and infidels, and therefore disqualified from owning or controlling lands, territories, and resources.[1] Such racist rationales as the "doctrine of discovery" — which is still a part of the case law in Canada and other countries — purportedly provided European powers with a rationale for claiming jurisdiction and sovereignty over traditional Indigenous territories.[2] It is a legal fiction that inhabited land can be subject to discovery.[3]

A Vision for Fulfilling the Indivisible Rights of Indigenous Women

M. Celeste McKay and Craig Benjamin

1. Introduction

The adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (*Declaration*) was an historic achievement for the international human rights system. Victoria Tauli-Corpuz, chair of the United Nations Permanent Forum on Indigenous Issues, put it well when she said, "[t]his is a Declaration which makes the opening phrase of the UN Charter, 'We the Peoples . . .' meaningful for more than 370 million indigenous persons all over the world."[1]

The adoption of the *Declaration* was also a heroic accomplishment for the worldwide Indigenous movement and its allies, as well as for all the individuals who carried on the struggle in Geneva and New York for more than two decades. The knowledge and diplomatic skills Indigenous peoples brought to the negotiating table are amply demonstrated by the fact that the document that resulted from this process dramatically advances the international understanding and protection of the human rights of Indigenous peoples.

The *Declaration* covers an extraordinary range of rights and concerns, all of which reflect Indigenous peoples' lived experiences of colonization and genocide as well as their aspirations for a world in which future generations will be able live in dignity and safety. The *Declaration* affirms the right of self-determination. It affirms Indigenous peoples rights to lands, territories, and resources. It affirms the right to maintain and transmit languages, customs, and traditions that have long been under threat. It also affirms the right of Indigenous women to live free from discrimination and violence.[2]

These provisions of the *Declaration* complement and elaborate on human rights protections already available to Indigenous peoples through other international and regional human rights instruments of general applicability to Indigenous and

non-Indigenous peoples. The *Declaration* also builds on an important legacy of Indigenous peoples, pressing international and regional human rights bodies to interpret and apply these general instruments in a manner appropriate to Indigenous peoples' specific histories, needs, and aspirations. For example, complaints brought before the UN Human Rights Committee by Sandra Lovelace and the Native Women's Association of Canada[3] and by the Lubicon Cree[4] were each landmarks in the interpretation of the interaction of individual and collective rights under the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).[5] To these existing bodies of interpretation, the *Declaration* adds comprehensiveness, specificity, and broad international support.

In this chapter, we wish to highlight the interrelation among a number of the *Declaration*'s provisions on economic, social, and cultural rights as well as the closely related provisions on violence and discrimination. These are vitally important provisions, particularly for Indigenous women, who fought to ensure that protection from gender-based discrimination and violence were an explicit part of the *Declaration*. Using the example of the right to adequate housing, we argue that the economic, social, and cultural rights of Indigenous women are indivisible from their right to be free from violence and discrimination. This reality calls for a new, holistic approach to fulfilling the rights of Indigenous women in Canada.

2. Violence Against Indigenous Women in Canada

Although there are no comprehensive statistical data on violence against Indigenous women in Canada, available information clearly indicates that Indigenous women face a much higher risk of violence than all other women in Canada.[6] According to a 1996 Canadian government statistic, Indigenous women between the ages of 25 and 44 with status under the federal *Indian Act* are five times more likely than all other women of the same age to die as the result of violence.[7] In a 2004 survey, women who self-identified as Inuit, Métis, or First Nations reported rates of violence, including domestic violence and sexual assault, 3.5 times higher than non-Aboriginal women.[8] The Native Women's Association of Canada has compiled an extensive database of cases of missing and murdered Indigenous women in Canada. It has also documented the root causes and trends of violence that have led to the disappearances of more than 520 Indigenous women. This is the most comprehensive compilation of data on Indigenous women who have gone missing or been murdered in the past three decades.[9]

A detailed study of spousal violence in Canada found that that the higher rates of violence against Indigenous women could not be accounted for by differences between the Indigenous and non-Indigenous population such as age, education,

the employment status of the victim and the perpetrator, family size, or household alcohol consumption. This study found, further, that many of the social and economic factors commonly associated with increased violence against women in the general population have a significantly different, and sometimes inverse, bearing on Indigenous women's experience of domestic violence. Unlike non-Indigenous women, for example, the study found that the risk of violence for Indigenous women increases with income and higher educational attainment. The author concluded that the history of colonization was a critical factor shaping Indigenous women's experiences.[10]

Amnesty International reached a similar conclusion in 2004 in a report that documented patterns of murder and disappearance of Indigenous women in Canada cities (the *Stolen Sisters* report).[11] The organization argued that long-standing racial stereotypes and prejudices in Canadian society have fostered widespread and brutal acts of violence against Indigenous women by Indigenous and non-Indigenous men alike. The threat is compounded by the vulnerability of women, who, as a consequence of government policies and the dispossession of Indigenous peoples' lands, resources, and territories, have suffered impoverishment, the loss of ties to family and community, and the erosion of their cultural identity. The Amnesty International report also documented the failure of police and other Canadian institutions to respond either appropriately or effectively to this threat.[12]

In its November 2008 Concluding Observations on Canada, the UN Committee on the Elimination of Discrimination Against Women (CEDAW) called on the government of Canada to develop "a specific and integrated plan for addressing the particular conditions affecting aboriginal women, both on and off reserves, and of ethnic and minority women, including poverty, poor health, inadequate housing, low school-completion rates, low employment rates, low income and high rates of violence."[13]

During the February 2009 Universal Periodic Review of Canada at the UN Human Rights Council, a number of states called on Canada to work in collaboration with Indigenous women to institute a comprehensive national plan of action in keeping with the scale and severity of violence faced by Indigenous women.[14]

In September 2009, in a five-year follow-up to the *Stolen Sisters* report, Amnesty International criticized the failure of the government of Canada to establish a comprehensive national plan of action as recommended by Indigenous women and UN human rights bodies and mechanisms. The 2009 report concluded:

> The scale and severity of the human rights violations faced by Indigenous women requires a co-ordinated and comprehensive national response that addresses the social and economic factors that place Indigenous women at heightened risk of violence. Such a response needs to address the police response to violence against Indigenous women; the dramatic gap in standard of living and quality of life that increases the risks to Indigenous women; the continued disruption of Indigenous societies by the high proportion of children put into state care; and the disproportionate rate of imprisonment of Indigenous women.[15]

Amnesty International called for a public commitment to implement the standards contained in the *Declaration*.[16]

These findings and recommendations demonstrate the interconnections between the violation of Indigenous women's individual right to security of the person and the way the dominant society has viewed and treated Indigenous peoples as a whole. When the Native Women's Association of Canada worked alongside other Indigenous peoples and representative organizations, including members of the global Indigenous women's caucus, to ensure that explicit provisions on gender-based discrimination and violence were included in the *Declaration*, it was with an awareness that gender-based violence has been and remains a central theme of the relationship between Indigenous peoples and the colonizing state. It was also with an awareness that violations of the collective rights of Indigenous peoples — the imposition of decisions made by the state, the uprooting and dispossession of communities, the assaults on languages and cultures — are often critical factors in creating social strife within Indigenous communities and making Indigenous women vulnerable to violence in their homes and in the larger society. In short, the survival, dignity, and well-being of individuals within Indigenous society and the survival, dignity, and well-being of the society itself cannot be separated but must be protected and advanced together.

3. The Indivisibility of Human Rights

The example of violence against Indigenous women demonstrates the failings of a compartmentalized approach to human rights. It is commonplace to differentiate between rights protecting the security and liberty of the person (civil and political rights) and rights pertaining to identity and development (economic, social, and cultural rights). A similar distinction is often made between the rights of individuals and the collective rights of families, communities, and peoples. The challenge is to understand how these rights interact in the concrete experience of those whose rights are most frequently violated.

It is true that women from all backgrounds and all regions of the world have been subject to violations committed or justified in the name of culture and insti-

tutions. It is also true that institutions of diverse cultures and societies throughout the world have failed in their duty to respect and uphold women's rights and to bring to justice those who threaten their lives and safety. This does not mean, as is sometimes claimed, that the individual rights of Indigenous women are distinct from, and at odds with, respect for Indigenous peoples' collective rights of self-determination, culture, and tradition. Systematic violations of the collective rights of Indigenous peoples put the rights of individual Indigenous women at risk. Linkages need to be made between, for example, the sexual exploitation of individual Indigenous women in Vancouver's Downtown East Side and the long term socio-economic marginalization of Indigenous peoples as nations all but stripped of economic, social, cultural, and political power through the operation of the *Indian Act* and other forms of colonization.

This view is consistent with the basic concept of international law: that all human rights are universal, indivisible, interdependent, and interrelated.[17] Rights work together to create the conditions in which all rights can be enjoyed, and the violation of one right puts others in jeopardy. It is not up to governments or other institutions to pick and choose which rights they will respect. All the rights contained in the provisions of the *Declaration* are now part of this larger whole that must be respected and upheld by courts, non-governmental organizations, corporations, states, and the governments of Indigenous peoples themselves. The adoption of the *Declaration* affirms this.

Sadly, some governments appear not to understand or respect this fundamental principle of human rights protection. Four states — Canada, Australia, New Zealand, and the USA — were notorious for their efforts to block the final adoption of the *Declaration*. How many of their objections can be traced to an insistence on reading the provisions of the *Declaration* in isolation from one another other, as though each were absolute and subject to the most extreme and far-fetched interpretation? The Canadian government asserted, for example, that recognition of lands and territories in the *Declaration* would overturn existing treaties between Indigenous nations and the government of Canada,[18] even though article 37 specifically states that "[n]othing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties."

Now that the *Declaration* has been adopted, one of the critical challenges in moving forward with implementation is to ensure that we give life to the principle of indivisibility at each step of the way. Critical issues facing Indigenous peoples in Canada — poverty, inadequate housing, lack of access to clean water and a healthy environment, and violence against women — must be directly and specifically addressed. To be effective, and not create even

greater problems, efforts to address these specific rights violations must be undertaken in tandem with efforts to gain greater recognition of other rights, such as the right of self-determination and rights to lands, territories, and resources.

The interdependence and indivisibility of human rights is something Indigenous women have often remarked on in their own struggles to overcome the multiple forms of discrimination they face on a daily basis.[19] However, from a non-Indigenous perspective, women's equality and the right to live free from violence have often been viewed as priorities which are either best pursued independently of other rights or as directly contradicting collective rights such as the right of self-determination or rights to culture and identity. During the negotiation of the *Declaration*, some states, in fact, tried to argue that the protection of the individual rights of Indigenous women required a weakening of the *Declaration's* protection for collective rights, despite Indigenous women's own insistence that their rights as Indigenous women and the rights of their people needed to be advanced together as part of an inseparable whole.

4. The Rights of Women and the Declaration

The adoption of the *Declaration* affirms that all the rights contained in its provisions are part of the larger body of international human rights laws and standards that states, courts, corporations, non-government organizations, and Indigenous peoples' own governments and institutions must respect and uphold. This body of laws and standards includes:

- the affirmation of the right of self-determination and the right to culture set out in both the ICCPR and the ICESCR;
- the rejection of all discrimination on the basis of race and ethnicity contained in the *International Convention on the Elimination of All Forms of Racial Discrimination*,[20]
- the rejection of all forms of gender discrimination in the *Convention on the Elimination of All Forms of Discrimination against Women*,[21] and
- the concrete program to stop violence against women set out in the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women* (*Convention of Belem do Para*).[22]

The *Declaration* helps shape the interpretation of these existing norms and standards in relation to Indigenous peoples. In turn, the *Declaration* must be interpreted

in the light of these other instruments.

Article 7 of the *Declaration* states both that "Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of the person" and that "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." In article 44, the *Declaration* affirms the equal rights of Indigenous women and men. It also affirms the need for specific measures to protect the rights and interests of women, elders, people with disabilities, children, and youth. Articles 21 and 22 state:

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.

These two articles are preceded and followed by articles affirming the right of Indigenous peoples to have meaningful control over their lives and futures, including by taking part in decision-making, having the right to grant or refuse consent to measures affecting their lives and interests, and maintaining the institutions and practices necessary to their well-being. Articles 18 through 20 state:

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.

Articles 23 and 24 concern the right to development and the provision of health and social services.

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.

In this selection of seven of the 46 articles in the *Declaration*, protection of the specific rights and interests of Indigenous women is embedded in, and is an integral part of, a vision of how the basic rights of Indigenous peoples are to be fulfilled. This fulfillment is framed in accordance with Indigenous peoples' own values and ways of life, through their own institutions, and with their full participation and consent. These provisions recognize that, without promoting the collective rights of Indigenous peoples, we cannot adequately promote those rights often viewed as individual rights, such as the right to live free from violence.

5. Implementing a Vision of Indivisible Human Rights

To understand more clearly how such a vision of human rights might play out in the lives of Indigenous peoples in Canada, let us take the example of the right to housing. The ICESCR recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."[23] In his 2008 report to the Human Rights Council, the then UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, Miloon Kothari, defined the human right to adequate housing as "the right of every woman, man, youth and child to gain and sustain a safe and secure home and community in which to live in peace and dignity."[24] The Special Rapporteur adopted a holistic interpretation of the right to adequate housing, "stressing the indivisibility of human rights, without which the right to adequate housing loses its meaning."[25]

In 2007, the Special Rapporteur carried out an official mission to Canada. During the visit, many housing activists expressed concern that federal, provincial, and territorial governments in Canada are not prepared to treat access to housing as a right, either for Indigenous peoples or non-Indigenous people. A recent Statistics Canada study concluded that Aboriginal people in Canada are almost four times as likely as non-Aboriginal people to live in a crowded dwelling, and three times as likely to live in a dwelling in need of major repairs.[26] Clearly, governments in Canada are not fulfilling their obligations to ensure access to safe, quality, affordable housing for all without discrimination. This has serious consequences for the enjoyment of a wide range of rights in addition to the right to adequate housing. Poorly built government housing compromises the health of everyone living there. A lack of access to adequate housing has critical impacts on the ability of Indigenous women to enjoy other rights, particularly their right to be free from violence.

During the Special Rapporteur's visit to Canada, the Native Women's Association of Canada and Amnesty International Canada worked with the National

Aboriginal Health Organization to host a workshop and forum on Indigenous women's experience of housing in Canada. Participants included Inuit, Métis, and First Nations women from many regions. They expressed their concern over the chronic shortage of adequate housing accessible to Indigenous peoples on reserves, in remote communities, and in urban centres. The great difficulty in finding adequate, affordable housing may increase women's dependence on their male partners. Workshop participants described how overcrowded housing increases the vulnerability of women and girls to violence and other abuse while denying them opportunities to flee to the shelter of other people's homes. They also described how inadequate access to safe, quality housing leads to the removal of their children by the child welfare system.

Emergency and short-term shelter for women fleeing violence is rarely available to Indigenous women. Those in rural areas or the north may have no access to such shelter in their own communities. Those in urban areas have limited access owing to high demand by both Indigenous and non-Indigenous women. In addition, they are often unable to find shelters that offer culturally appropriate services.

The absence of matrimonial property provisions in the *Indian Act* has created a legislative gap whereby Indigenous men and women may be denied adequate legal protection in disputes arising over a couple's home or land that they have lived on or benefited from during their relationship. Without such protection, women experiencing the breakdown of their marital relationship, violence at home, or the death of a partner often lose their homes on reserve. In 2006, the government of Canada met with the Assembly of First Nations and the Native Women's Association of Canada about this inequality. In March 2008, the federal government unilaterally introduced Bill C-47, the *Family Homes on Reserve and Matrimonial Interests or Rights Act*.[27] It was re-introduced in February 2009,[28] and the 2010 throne speech mentioned the promise again. This legislation did not provide for the non-legislative measures identified as critical by the Native Women's Association of Canada. As the Native Women's Association of Canada observed in its submission to the UN Human Rights Council's Universal Periodic Review of Canada,

> Equality rights for Aboriginal women include both their individual equality rights and their rights as members of their nations. NWAC is concerned that inadequate protection of the collective dimensions of their equality rights could lead to the diminishment of Aboriginal women's rights. Furthermore, legislation alone will create the perception among Canadians that another step has been taken to secure equality for Aboriginal women when the reality will be that little has changed. Aboriginal women have learned through their own experiences . . . that this is a recipe for disaster. **Legal rights must**

be accessible and enforceable to be meaningful. NWAC is continuing to call for concrete measures to ensure that the non-legislative measures recommended by Aboriginal women are in fact implemented.[29]

Furthermore, at the meeting with the Special Rapporteur, Indigenous women from all regions and backgrounds described housing that is simply not appropriate to their cultures and ways of life. Inuit women described government-built housing that provided no place for butchering game. Other women described housing that could not accommodate extended families. In addition to the right to housing itself, the housing crisis facing Indigenous peoples in Canada violates a wide range of other rights, including the right to health, culture and tradition, self-determination, women's right to safety, and children's right to a safe and appropriate environment to grow up in.

In a preliminary note to the Human Rights Council on his mission to Canada, the Special Rapporteur recognized that "[o]vercrowded and inadequate housing conditions, as well as difficulties to access basic services, including water and sanitation, are major problems for Aboriginal peoples."[30] The Special Rapporteur was "disturbed" about the impact of the "unduly paternalistic" policies of the federal and provincial governments, which he believed "compromise the right to self-determination and have deeply affected housing and living conditions."[31] Despite Canada's erroneous claims that the *Declaration* "has no legal effect in Canada,"[32] the Special Rapporteur made it clear that implementation of the *Declaration* is one of the necessary components of fulfilling the right to housing for Indigenous peoples.[33]

If Canada were to live up to the vision of human rights found in the *Declaration*, it would have to approach Indigenous peoples' housing needs in a fundamentally different way. These needs would be met in a manner consistent with and supportive of Indigenous peoples' cultures and traditions, and with the specific needs of the most vulnerable members of Indigenous societies. Critical issues such as safe housing would be addressed in all regions of the country, whether in urban, rural, or remote locations. Perhaps most importantly, Indigenous peoples' housing rights would need to be understood as inseparable from the right to self-determination. In concrete terms, this would mean that Indigenous peoples would play a central role in all decisions over the design and delivery of housing solutions, and Indigenous women would need to be full participants in such processes.

This is one example of the holistic vision for the fulfillment of individual and collective rights promoted by the *Declaration*. But it is a long way from reality. Successive Canadian governments have demonstrated reluctance to apply a rights-based framework to ensuring the security of Indigenous women. Factors

that are critical to the quality of life and survival of peoples and cultures, such as housing, health care, and land rights, are enjoyed at the discretion of government and have a lower priority than other economic and political considerations.

In short, we are a long way from achieving a vision of the world in which Indigenous peoples and individuals are able to enjoy the full range of human rights.

6. Conclusion: Making Rights a Reality

Indigenous peoples and representative organizations and human rights groups need to continue to be vigilant in asserting and advancing these rights, and in identifying concrete ways in which systems, policies, programs, and laws must be restructured to give meaning to the holistic set of rights contained in the *Declaration*.

Indigenous peoples' own governments and institutions have a critical role to play in making the rights recognized by the *Declaration* a reality. Not only must they pressure states to implement the *Declaration*, they must set a positive example by ensuring that their own policies, programs, and laws reflect and incorporate the principles and provisions of the *Declaration*. The symposium hosted by the Assembly of First Nations, the British Columbia Assembly of First Nations, the First Nations Summit and the Union of British Columbia Indian Chiefs on "Implementing the *United Nations Declaration on the Rights of Indigenous Peoples*" held in February 2008 is one example of this proactive approach being taken by Indigenous nations and representative organizations to assume this responsibility.

The work of advancing the *Declaration* should not depend on Indigenous peoples alone. In the long struggle to advance the *Declaration*, alliances between Indigenous peoples and groups in civil society have played a critical role in building state understanding of its provisions and support for its adoption. These alliances need to be maintained and expanded to bring public pressure on governments to address the needs of Indigenous peoples on a comprehensive rights basis.

As Beverley Jacobs, past President of the Native Women's Association of Canada, stated:

> This Declaration holds the promise of a world in which our rights as peoples are viewed as equal to all others peoples. It is at this foundational level that we need to re-write history if we are to address the day-to-day inequalities and human rights violations facing Indigenous women as individuals.
>
> Our lives are witness to the international legal principle that all rights are inter-related, indivisible and interdependent. The fact is that there is a growing recognition of the need to recognize and respect the rights of Indigenous peoples in Canada — one that is supported by the UN Special

> Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen and the UN High Commissioner of Human Rights, Ms. Louise Arbour and many others. . . . It is this recognition that we call on all of you to help foster by taking concrete steps to implement the Declaration.[34]

The *Declaration* and other international human rights instruments affirm that the human rights of Indigenous women are indivisible, interrelated and interdependent – as are all human rights. It is everyone's responsibility to ensure that these rights are realized.

More than Words

Promoting and Protecting the Rights of Indigenous Children with International Human Rights Instruments

Mary Ellen Turpel-Lafond*

1. Introduction

> Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration. . . .
>
> Preamble, *Convention on the Rights of the Child*

Canada has a history of championing human rights in the international community. It signed and ratified the *Convention on the Rights of the Child* (*Convention*)[1] in 1991 and most recently signed the *Convention on the Rights of Persons with Disabilities*.[2] But Canada's national and international human rights commitment came into question when it voted against the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.

In 1994, I had the opportunity to comment on the first draft declaration on the rights of Indigenous peoples. I recommended that

> Canada must be seen, especially in light of its constitutional obligations to Aboriginal peoples, to behave honourably at the international level and in a fashion which ensures the broadest possible recognition of Indigenous peoples' rights and status for Indigenous peoples in Canada and around the world.[3]

Canada's refusal to accept international declarative principles to guide new national policies to assist in improving the well-being of Indigenous people, espe-

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Constitutional forum constitutionnel

Checking our Attachment to the Charter *and Respecting Indigenous Legal Orders: A Framework for* Charter *Application to Indigenous Governments*

Naiomi Metallic*

The *Canadian Charter of Rights and Freedom* looms large in our national identity. As a constitutional law professor at a Canadian law school, my experience is that most students and lawyers see the *Charter* as intrinsically tied to fundamental notions of justice and fairness in our country. Because of this, Canadian lawyers and judges, who believe the *Charter* to be inherently good, may find it hard to understand why Indigenous peoples resist application of the *Charter* to their own institutions. But Canadian jurists' attachment to the *Charter*, if not kept in check, can easily lead to dismissing important objections to its application to Indigenous peoples. I believe both the Yukon Supreme Court ("YKSC") and the Court of Appeal ("YKCA") fell prey to this trap in their reasons in *Dickson v Vuntut Gwitchin*.[1]

Ms. Dickson's *Charter* challenge has been summarized in the introduction to this special issue. What I wish to emphasize about the facts, however, is how the Vuntut Gwitchin First Nation ("VGFN") resisted Ms. Dickson's Canadian *Charter* challenge, maintaining they had painstakingly developed their own Constitution with individual rights protections and that recourse to the Canadian *Charter* was unnecessary.[2] While Ms. Dickson had been prepared to make alternative arguments under the VGFN Constitution, both the YKSC and YKCA did not consider this argument. Instead, the Yukon courts decided the case exclusively on

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1 *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 [*Dickson* SC]; *Dickson v Vuntut Gwitchin First Nation,* 2021 YKCA 5 [*Dickson* CA].

2 *Dickson* SC, *supra* note 1 at paras 61-68, 103-105; *Dickson* CA, *supra* note 1 at paras 17-32.

the Canadian *Charter,* ignoring VGFN's plea for respect and deference to their legal order. Both courts easily concluded that the *Charter* applied to Ms. Dickson, but that section 25 of the *Charter* operated to shield the residency requirement from *Charter* scrutiny to some extent.

To many, this case represents the opportunity to clarify, as between the 'shield' versus the 'interpretive' interpretation of section 25, which is the correct approach. However, both approaches take *Charter* application as their starting point.[3] Instead of simply tinkering with the details of the 'shield' and 'interpretive' approaches to section 25, we need to step back and interrogate our impulse to impose the *Charter* on Indigenous governments and then ask what constitutional principles should inform our discussion on this issue. Imposing the *Charter* upon the VGFN without their consent and impervious to their Indigenous legal order in fact runs afoul of several *Charter* values and other constitutional principles. Developing a principled framework for considering the *Charter*'s application to Indigenous governments not only allows Canadian lawyers and judges to keep their attachment to the *Charter* in check but presents a more just and flexible approach to considering *Charter* application to Indigenous governments that is truer to our constitutional aspirations than an approach that blindly imposes the *Charter* on Indigenous governments.

The leading problem with automatic *Charter* application: assimilation

The Final Report of the Truth and Reconciliation Commission ("TRC") underscored the importance of the revitalization of Indigenous legal orders for meaningful reconciliation. According to the TRC, for Canadian law to cease being a means to subjugate Indigenous people to an absolute sovereign Crown, it is critical for Indigenous people "to recover, learn, and practice their own, distinct, legal traditions."[4]

From the perspective of reconciliation between Canadian and Indigenous legal orders, the fundamental question at the heart of this case is: why should the Canadian *Charter* apply in this case in the face of VGFN's objections and their own legal order that includes an individual rights protection regime? Unfortunately, neither the YKSC nor YKCA made any real attempt to grapple with this question. Neither seemed to seriously entertain the idea that they could use the provisions in the VGFN's Constitution to resolve Ms. Dickson's complaint, even though this prospect was clearly contemplated within the VGFN Constitution.[5]

Both courts' reasons on whether the *Charter* applied to VGFN's residency requirement were brief and based on the proposition that 'to exist within the Canadian constitutional order is to accept application of the *Charter*.'[6] Accordingly, ambiguous provisions in the VGFN

3 The 'shield' approach does not necessitate automatic *Charter* application, but the approach to it, applied in the courts below, does. For more on this, see Amy Swiffen's article in this special issue.

4 *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015) at 203, 206, 213 [*TRC Report*].

5 *Dickson* SC, *supra* note 1 at paras 63, 112-113 (this is Article IV s 7 of the VFGN Constitution); *Dickson* CA, *supra* note 1 at paras 156-157; *Vuntut Gwitchin First Nation Constitution,* (2019), online (pdf): <http://www.vgfn.ca/pdf/constitution%202019.pdf#> [perma.cc/5393-HC6Q].

6 *Dickson* SC, *supra* note 1 at paras 110-120, 131; *Dickson* CA, *supra* note 1 at paras 88, 97.

Self-Government Agreement ("SGA") that were capable of conflicting interpretations on the point, were read as plainly implying *Charter* application.[7] For example, references in the SGA about VGFN self-governance respecting and co-existing within the Canadian constitutional order were circularly taken as implied acceptance of automatic *Charter* application.[8] As I will develop further below, automatic Charter application does not necessarily flow from VGFN's self-governance co-existing within the Canadian constitutional order. Moreover, VGFN's refusal to consent to the *Charter* was viewed as irrelevant; instead, the fact that VGFN did not explicitly oust the *Charter* in the SGA was deemed tacit acceptance.[9] Next, Supreme Court of Canada ("SCC") case law on section 32 of the *Charter,* taking a broad approach to "government," was easily extended to include VGFN even though those precedents had never previously been applied to a self-governing First Nation.[10] There was no questioning of whether the context of an Indigenous government exercising inherent self-government, with their own legal order, changed anything.

Both lower courts approached the *Charter* application analysis purely as an interpretive exercise (can/does the *Charter* apply?) instead of as a normative one (should the *Charter* apply?). I believe they did so because their attachment to the *Charter* prevented them from seeing the problems with applying it to Indigenous governments.

There is no getting around the fact that applying the *Charter* to the VGFN without their consent and heedless of their established legal order,[11] is a form of assimilation. While the lower courts may not have intended it as such, the decision to automatically impose the *Charter* on VGFN in the circumstances is reminiscent of darker chapters of our history where Canadian decision-makers forced Euro-Canadian ideas, processes, and institutions on Indigenous peoples.[12] While some of the law-makers who imposed these policies might have done so out of hatred towards Indigenous peoples, the vast majority likely did so out of paternalistic and misguided beliefs that they were 'helping' Indigenous peoples. While well-intentioned, what lies behind such intentions, nonetheless, are racist assumptions that Indigenous ideas, processes, and institutions are somehow backwards or inferior and incapable of sustaining the well-being of Indigenous communities. Reports like that of the TRC and many others teach us that such beliefs couldn't have been more wrong. The imposition of Western ideas, processes and institutions on Indigenous peoples has had disastrous consequences for Indigenous identities, cultures and well-being.[13] To avoid repeating the mistakes of the past, Canadian judges must be alive to the fact that forcing Canadian ideas on Indigenous peoples cannot continue, even those in our beloved *Charter*.

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7 *Dickson* SC, *supra* note 1 at paras 110-113.

8 *Ibid*.

9 *Ibid* at paras 118-119.

10 *Ibid* at paras 121-128; *Dickson* CA, *supra* note 1 at para 98.

11 *Dickson* SC, *supra* note 1 at paras 112, 131 (YKSC does hold that VGFN Constitution remains in effect and concurrent, however, the court's approach is to effectively give the *Charter* paramountcy in the circumstances with little explanation or justification).

12 There are too many examples to list, but among the more notorious are the imposition of the *Indian Act*, residential schools, and Canadian child welfare laws on Indigenous peoples.

13 See, in general, *TRC Report*, *supra* note 4.

Learning from past mistakes

Discussions about how imposing the *Charter* on Indigenous government is assimilative are not new. The question of whether the *Charter* ought to automatically apply to exercises of Indigenous self-government was a major source of contention during the Charlottetown negotiations. In her article on events surrounding the Charlottetown Accord, Mary-Ellen Turpel effectively summarizes the reasons for Indigenous opposition to the *Charter*:

> Aboriginal organizations, and especially First Nations leaders, had argued for some time that the *Charter* does not represent their value systems because it does not embrace social and economic justice, nor does the litigation style of rights redress suit their history and traditions. The *Charter*, with its preface recognizing the supremacy of God and its emphasis on individual rights instead of individual responsibilities (a First Nations approach) was always rejected by First Nations. It was developed without First Nations input in 1981 and over objections to concepts and principles that were either too limited for Aboriginal communities or just outside their traditions and cultures (for instance, the model of taking human-rights disputes to court instead of to Elders or using other dispute-resolution processes that are traditional part of an Aboriginal community.)[14]

Turpel describes the various problematic threads of public reaction to Indigenous resistance to the *Charter*. Some reflected paternalistic beliefs that "they knew what was best for Aboriginal peoples."[15] Some were affronted at the very idea that Indigenous people rejected ideas they saw to be of universal appeal. Others rejected the proposition that Indigenous people should be allowed to operate under standards different from other Canadians.

As recounted by Turpel, during the Charlottetown negotiations, some (but not all) Indigenous women's organizations raised alarms that having Indigenous governments operating outside the *Charter* would be licence to undermine the rights of Indigenous women.[16] While recognizing the legitimacy of this concern, due in no small part to gender discrimination imposed on First Nations by the *Indian Act*, Turpel also explains how the issue was oversimplified as a basis to resist Indigenous self-government:

> Gender-equality concerns are legitimate, but they are interwoven with cultural and racial oppression that has been imposed upon Aboriginal people. To see only the gender aspect is, unfortunately, to miss the bigger picture of how we get out of this oppression that has been the legacy of Canadian dominance of Aboriginal peoples. Also, to insist on the same ideas of gender equality in Aboriginal society as may pertain in Canadian society is another form of dominance, in my view, when many Aboriginal systems demand a much more central role for women than in the mainstream government.[17]

Turpel further explains how some non-Indigenous groups seemed to used gender discrimination concerns as a pretext to mask racist beliefs about Indigenous inferiority and double standards in relation to Indigenous governments:

> … the extent to which gender-equality concerns were focused upon by non-Aboriginal people during the campaign raises a different point for me. The level of scrutiny of Aboriginal governments and the expectations of perfection by non-Aboriginals in all aspects of governance is so outrageous that no

14 Mary-Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change," in Kenneth McRoberts & Patrick J Monahan, eds, *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 117 at 135 [*Turpel*].

15 *Ibid*.

16 *Ibid* at 132-135.

17 *Ibid* at 134.

> Aboriginal government would ever satisfy these expectations … This is a clear double standard, since Canadian governments govern despite the fact that the ideals of gender equality, *Charter* protection, and social justice for all are far from realized in dominant society. Underlying this opposition to self-government is an expectation that Aboriginal peoples must perfect their societies before they will be 'permitted' to govern and that, prior to that point, the far-from-perfect dominant society is entitled to control Aboriginal communities.[18]

Ultimately, the conflict over the *Charter* led the Indigenous negotiators to compromise by accepting *Charter* application to self-government within the Charlottetown Accord, but this came with some concessions from First Ministers as well. The *Charter* would be amended to "apply immediately to governments of Aboriginal people," but section 25 would be strengthened to state that "nothing in the *Charter* abrogates or derogates from Aboriginal, treaty or other rights of Aboriginal peoples, and in particular any rights or freedoms relating to the exercise or protection of their languages, cultures or traditions." Finally, section 33 would be amended to clarify that Aboriginal governments could also invoke the notwithstanding clause.[19]

Returning now to the Yukon courts' decisions, having just revisited the controversy and trade-offs negotiated around *Charter* application in the Charlottetown Accord negotiations, it is difficult not to dwell on the lack of discussion around this controversy in the courts' reasons, or what to do in the absence of the negotiated trade-offs (*e.g., if finding the VGFN is within section 32, do we read them into section 33 as well?*). Some thirty years since, this history ought to inspire circumspection over *Charter* application to Indigenous governments, yet the courts below reached their conclusion readily.

Why the Yukon courts' approach to section 25 is a problem

I could be accused of overstating my point about assimilation, given that both lower courts used section 25 of the *Charter* as the means to attempt to resolve VGFN's concerns about the *Charter's* impact on their culture and governance system.[20] While I believe the courts were well-intentioned in this regard, the way section 25 was applied in the case did little to demonstrate genuine respect for VGFN as a government. In fact, this approach risks perpetuating exactly the kinds of stereotypes and double standards about Indigenous governments identified by Turpel.

With minor variations, the approach of both the YKSC and YKCA seemed to be premised on the *Charter* applying to Indigenous governments in all cases, but, for certain exercises of Indigenous jurisdiction, at some point in the *Charter* analysis, section 25 will shield the exercise of Indigenous jurisdiction from further *Charter* scrutiny. Both courts held that section 25 was triggered because the residency requirement had a 'constitutional character' (although both questioned whether 'constitutional character' was an appropriate or even binding threshold[21]). Despite finding that section 25 shielded the residency requirement, the

18 *Ibid* at 134-135.

19 Canada, Privy Council, *Consensus Report on the Constitution: Final Text,* Catalogue No CP22-45/1992E (Charlottetown: PC, 28 August 1992).

20 *Dickson* SC, *supra* note 1 at paras 114, 176, 193, 199; *Dickson* CA, *supra* note 1 at paras 143-161.

21 *Dickson* SC, *supra* note 1 at paras at 191, 194, 207; *Dickson* CA, *supra* note 1 at para 147.

YKSC nonetheless conducted a full section 15 *Charter* analysis (finding the residency requirement was not a *prima facie* violation of Ms. Dickson's equality rights except for the 14-day time period to move), followed by an *Oakes* inquiry and "reading down" the 14-day residency requirement.[22] Likewise, despite finding that section 25 shielded the residency requirement, the YKCA engaged in a deep *Charter* analysis, concluding, contrary to the YKSC, that the residency requirement constituted a *prima facie* infringement of Ms. Dickson's equality rights.[23] Further, while stating that an *Oakes* analysis was unnecessary because of the finding that the residency requirement was 'shielded' the YKCA nonetheless hinted that, but for the shield, the infringement might not pass *Oakes*.[24]

On both approaches to section 25, VGFN was subjected to having its legal order intensely scrutinized by standards foreign to it. Imagine the laws of Canada scrutinized under the legal standards of Bahrain or vice versa. This does not happen to other governments. In customary international law, sovereign states are immune from the jurisdiction of foreign courts, except where the state consents to jurisdiction or has breached international law.[25] Alongside this, Canadian courts have adopted an interpretive principle known as 'comity' and it has been described as "the deference and respect due by other states to the actions of a state legitimately taken within its territory."[26] In *R v Hape*, a majority of the SCC was unwilling to undertake *Charter* scrutiny of the activities of RCMP officers conducting an investigation of a Canadian in the Turks and Caicos Islands as this would indirectly entail scrutinizing that country's laws and processes under Canadian *Charter* standards, which would run afoul of the principle of comity. Unless there was evidence that the investigation violated international law, Canadian courts "must respect the way in which the other state chooses to provide the assistance within its borders."[27]

While Indigenous governments are not seen as foreign sovereigns in Canada,[28] nor are they simply subordinate, or even analogous, to Canadian governments. They are *sui generis* governments and, as such, entitled to respect and deference in the exercise of their jurisdiction.[29] In the United States, the status of tribes as 'domestic dependent sovereigns,' with their jurisdiction predating the formation of the country, has resulted in court rulings that tribal governments are outside the scope of the American Constitution and its individual rights protections provisions.[30] However, the Yukon courts gave little consideration how the nature of VGFN, as a formally self-governing nation, influenced the level of respect shown to its legal order.[31]

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22 *Dickson* SC, *supra* note 1 at paras 132-171.

23 *Dickson* CA, *supra* note 1 at paras 107-113.

24 *Ibid* at para 116.

25 *R v Hape,* 2007 SCC 26 at paras 41, 43 [*Hape*].

26 *Morguard Investments Ltd v De Savoye,* [1990] 3 SCR 1077 at 1095, 52 BCLR (2d) 160.

27 *Hape, supra* note 25 at para 52.

28 See *Beaver v Hill*, 2018 ONCA 816 at para 17.

29 *Canadian Pacific Ltd v Matsqui Indian Band*, [2000] 1 FC 325 at paras 29, 44, 176 DLR (4th) 35 [*Canadian Pacific Ltd*]; *Taypotat v Taypotat*, 2013 FCA 192 at para 36 [*Taypotat*]; *Pastion v. Dene Tha' First Nation,* 2018 FC 648 at paras 21-29 [*Pastion*]; *Ontario Lottery and Gaming Corporation v Mississaugas of Scugog Island First Nation*, 2019 FC 813 at paras 49-51 [*Ontario Lottery and Gaming*]; *Anderson v Alberta*, 2022 SCC 6 at para 28 [*Anderson*].

30 See Kent McNeil, "Aboriginal Governments and the Charter: Lessons from the United States" (2002) 17:2 CJLS 73.

31 For more on this see Kate Gunn, *"Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority"* (2022) 31.2 Const Forum Const 17.

Further, and most damagingly, the intense *Charter* scrutiny to which the VGFN residency requirement was subjected unwittingly feeds into the stereotypes of Indigenous governments as backwards, prone to violate human rights and unable to govern themselves. But this is an unfair comparison; different nations can have different norms. Our courts realize that it is both misleading and disrespectful to subject other governments to such scrutiny under Canadian norms and so refrain from doing so as much as possible through the doctrine of sovereign immunity and the principle of comity (barring breaches of international law). Yet we don't question the propriety of doing this when it comes to Indigenous governments, which suggest a double-standard.

Automatic *Charter* imposition as an infringement of Aboriginal rights

An alternative lens that also underscores the problem here is analyzing the issue under section 35 of the *Constitution Act, 1982*, through the *Sparrow* framework.[32] Under this framework, a government action or law infringes an Aboriginal right where it imposes an unreasonable limitation upon the right, imposes undue hardship on the Indigenous group or denies them of their preferred means of exercising the right.[33] In a recent reference decision, the Quebec Court of Appeal suggested that federal legislation subjecting the inherent Aboriginal right to self-government to automatic *Charter* applications is a clear infringement, which would have to be justified on the *Sparrow* framework in future challenges in specific cases.[34]

To justify an infringement of an Aboriginal right, in addition to consulting, a government must demonstrate that it pursued a valid objective that reconciles the Aboriginal group's interests with society's broader interest, and that it tried to achieve this objective respectful of the fiduciary obligations of the Crown. To prove the latter, governments must satisfy an *Oakes*-like proportionality framework that is also imbued with specific considerations for the Indigenous context, including not only proving as little infringement as possible, but having given priority to the Aboriginal right and not adopting unstructured regulatory regimes.[35]

I believe this a helpful framework for considering *Charter* application to the VGFN in a more principled way than how it was approached in the lower courts. First and foremost, this requires seeing the automatic imposition of the *Charter* on the VGFN as an infringement of their inherent right to self-government. VGFN steadfastly resisted agreeing to *Charter* application in their negotiations, thus automatic *Charter* imposition denied them their preferred means of exercising their right. Forcing the *Charter* on the VGFN, even with section 25 operating as a shield, imposes undue hardship on VGFN as its application is assimilative, dismissive of VGFN's individual rights protection regime within its Constitution. It also subjects VGFN's legal order to unfair comparisons to the Canadian legal order that feed into stereotypes about Indigenous inferiority and inability to govern themselves. For all of these reasons, automatic

32 See *R v Sparrow,* [1990] 1 SCR 1075, 46 BCLR (2d) 1.

33 *Ibid* at 1111-1113.

34 *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 at paras 518, 520, 528-529.

35 For a summary of the law here, see Peter W Hogg & Daniel Styler, "Statutory Limitation of Aboriginal or Treaty Rights: What Counts as Justification" (2015) 1:1 Lakehead LJ 3. On unstructured discretionary regimes, see *R v Adams,* [1996] 3 SCR 101 at para 51, 138 DLR (4th) 657 [*Adams*]; *R v Marshall,* [1999] 3 SCR 456 at paras 62-64, 177 DLR (4th) 513 [*Marshall*].

Charter application is an unreasonable limitation on VGFN's right to self-government. Thus, justification becomes necessary.

Here we are dealing with judge-made law rather than legislation or executive action. Nonetheless, since the Yukon courts' decisions infringe an Aboriginal right, the judges' (discretionary) decisions here ought not to be left unstructured — a framework for exercising such discretion is needed.[36] In the administrative law context, *Baker* holds that discretionary decisions ought to be exercised considering, among other things, the fundamental values of Canadian society, the principles of the *Charter,* and international law.[37] In the *Charter* context, judge-made decisions must account for '*Charter* values.' This calls on courts to identify the objectives or underlying values behind a potentially *Charter*-infringing decision and then engage in a proportionate weighing of these objectives and values against the *Charter* protections at play.[38] This has been called the *'Charter* values' or *Doré* framework. The SCC has emphasized that this analysis is a "robust one" and "works the same justificatory muscles" as the *Oakes* test.[39]

I am proposing the development of a similar analytical framework to be used here but adapted to the *Sparrow* framework. This requires judges faced with imposing the *Charter* on Indigenous governments to identify the objectives or values in favour of applying the *Charter* and weighing them against competing objectives and values at play.[40] Consistent with *Baker*, these objectives can also be based on fundamental values of Canadian society, the principles of the *Charter* and section 35*,* and international law. These competing objectives would have to be weighed with an eye to proportionality as well the fiduciary nature of the relationship between Canada and Indigenous peoples.

Applying the adapted *Sparrow* framework to the VGFN

I will start by identifying the principles in favour of applying the *Charter*. From my reading of the Yukon cases, as well as the concerns canvassed by Turpel, these are: 1) section 52 of the *Constitution Act, 1982* necessitates *Charter* application; 2) fear of a legal vacuum; and 3) specific equality concerns. I will discuss each in turn and simultaneously identify and weigh the competing objectives and principles at play.

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36 *Ibid*.

37 *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817, 174 DLR (4th) 193.

38 See discussion in *Doré v Barreau du Québec*, 2012 SCC 12 at paras 25-58 [*Doré*].

39 *Ibid* at para 5; *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at para 40.

40 While I am proposing this analysis for the VGFN, a formally self-governing First Nation, this framework could apply to all Indigenous governments. Across the board, this provides a more just and flexible approach than imposing the *Charter* automatically. Distinctions between inherent and delegated jurisdiction, for these purposes, are arbitrary. Our courts have been clear that exercises of self-government, including both delegated or inherent are worthy of respect and deference: see *Canadian Pacific Ltd, supra* note 29 at paras 29, 44; *Taypotat, supra* note 29 at para 36; *Pastion, supra* note 29 at 21-29; *Ontario Lottery and Gaming, supra* note 29 at paras 49-51; *Anderson, supra* note 29 at para 38. Under a reconciliation lens, it must be recalled that 'delegated' forms of jurisdiction have, for much of our history, been the only type of self-government on offer from governments and the courts, with Indigenous governments having little say in the matter. To limit this framework to inherent exercises of jurisdiction, would operate to stifle the exercise and development of Indigenous legal orders.

1) Section 52 of the Constitution Act, 1982 necessitates Charter application

Section 52 of the *Constitution Act, 1982* says that the Constitution is the supreme law of Canada. Ms. Dickson emphasized this provision in her submissions,[41] and the Yukon courts emphasized section 52 in finding that the *Charter* applied to VGFN.[42] While not expressly explained in the cases below, I assume the reasoning to be that because the Constitution is the supreme law of Canada, this necessitates *Charter* application to VGFN.

In interpreting section 52, it bears recalling that our written Constitutional documents are drafted at the level of principle, not as prescriptive rules. Further, the various principles in the Constitution can sometimes be in tension with each other and the role of the courts is to attempt to harmonize these tensions so that each provision can be interpreted to the fullest extent possible while coexisting with the rest of the Constitution. Interpretations that privilege one constitutional provision (or even an entire section of the Constitution) while disregarding another are suspect.[43] Section 52 does not prescribe that the *Charter* (Part 1 of the *Constitution Act, 1982*) must apply in full force; that is only a possible interpretation — and one that is suspect. To read it as such, in the case of a self-governing Indigenous nation with a legal order that includes an individual rights protection mechanism, privileges the *Charter* over Part II of the *Constitution Act* (Aboriginal rights), disregards the plain wording of section 25 of the *Charter*, and is in tension with section 15 of the *Charter*, as well as several unwritten constitutional principles, including the rule of law, federalism and protection of minorities, as I will discuss below.

A variant of this first argument is the 'equality-for-all argument' — that the *Charter* ought to apply to everyone in Canada equally. This was an argument that some members of the public found persuasive at the time of the referendum on the Charlottetown Accord in 1992.[44] The problem with this argument, however, is that it relies on an outdated notion of equality — formal equality — which has long been discarded in favour of substantive equality.[45] The principle of substantive equality respects and celebrates difference, recognizing that all human beings are equally deserving of concern, respect and consideration. In cases involving services provided to Anglophone and Francophone communities, the SCC has affirmed that substantive equality can mean distinctive content in the provision of similar services, depending on the nature and purpose of the services in issue, and the population served.[46] In *Ewert v. Canada*, about corrections services to Indigenous peoples, the SCC held that it is a "long-standing principle of Canadian law that substantive equality requires more than simply equal treatment."[47]

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41 *Dickson* SC, *supra* note 1 at para 52.

42 *Ibid* at para 131; *Dickson* CA, *supra* note 1 at para 98 (reasoning adopted by YKCA).

43 This is known as the doctrine of mutual modification: see *Citizens Insurance Company v Parsons* (1881), 7 AC 96 (PC), aff'g (1880), 4 SCR 215. See Peter W Hogg & Wade Wright, *Constitutional Law of Canada,* 5th ed (Canada: Carswell, 2007) at 36-23.

44 *Turpel*, *supra* note 14 at 138.

45 See *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 166, 56 DLR (4th) 1; *R v Kapp*, 2008 SCC 41 at paras 15-16; *Fraser v Canada (Attorney General),* 2020 SCC 28 at paras 25-50.

46 See *DesRochers v Canada (Industry)*, 2009 SCC 8; *Association des parents de l'école Rose-des-vents v British Columbia (Education)*, 2015 SCC 21.

47 *Ewert v Canada,* 2018 SCC 30 at para 54.

In a human rights decision about the chronic underfunding of child and family services provided to First Nations by Canada, the Canadian Human Rights Tribunal maintained that substantive equality means that First Nations children and families are not simply entitled to funding and services mirroring provincial standards, but are entitled to funding and services that "consider the distinct needs and circumstances of First Nations children and families … including their cultural, historical and geographical needs and circumstances."[48] The Tribunal also made findings about the imposition of laws on First Nations as assimilative. Commenting on how the federal government imposed provincial child welfare laws upon First Nations people, the Tribunal compared Canada's approach to child welfare to its approach to residential schools: "[s]imilar to the Residential Schools era, today, *the fate and future of many First Nations children is still being determined by the government. . . .*"[49] The Tribunal made it clear that systems that perpetuate historic disadvantage and assimilation endured by Indigenous peoples, including the imposition of laws and standards that do not meet their needs and circumstances, are discriminatory and have no place in Canada. I have argued that, without going so far as explicitly saying so, the Tribunal suggested a strong connection between First Nations' substantive equality rights and their right to self-government.[50] Stated otherwise, "autonomy means the right of being different."[51]

The above discussion reveals that appeals to formal equality to support the imposition of the *Charter* on VGFN are unpersuasive and outdated. Respecting Indigenous peoples' right to substantive equality means respecting their governments' right to be different from the rest of Canada, including to have different laws and institutions from the Canadian legal system if they so choose.

Likewise, appeals to the 'rule of law' as meaning 'identical rules for everyone' suffers similar problems. 'Rule of law' has many varied, textured meanings.[52] However, one interpretation our courts have cautioned against is construing it to mean that the Canadian legal order is the *only* legal order in the country, excluding or minimizing the existence of Indigenous legal orders.[53] Canada is a legally pluralistic nation, recognizing both common and civil law with the growing resurgence of Indigenous legal orders. As argued by John Borrows, "[t]he culture of law is weakened in the country as a whole if Indigenous peoples' legal traditions are excluded from its matrix."[54]

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48 *First Nations Child and Family Caring Society of Canada v Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada*, [2016] 2 CNLR 270 at para 465, 83 CHRR 207 (CHRT).

49 *Ibid* at para 426 [emphasis added].

50 Naiomi Metallic, "A Human Right to Self-Government over First Nations Child and Family Services and Beyond: Implications of the Caring Society Case" (2018) 28:2 J L Soc Pol'y 4 at 30-34.

51 Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) McGill LJ 308 at 341 citing Louis-Phillippe Pigeon, "The Meaning of Provincial Autonomy" (1951) 29:10 Can Bar Rev 1126 at 1133.

52 *Reference re Secession of Quebec,* [1998] 2 SCR 217 at paras 70-78, 161 DLR (4th) 385 [*Reference re Secession*].

53 See *Henco Industries Limited v Haudenosaunee Six Nations Confederacy Council*, (2006) 277 DLR (4th) 274 at paras 140-142, 2006 CarswellOnt 7812 (Ont CA); *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534 at paras 41-47.

54 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 122. See also Kent McNeil, "Indigenous Law, the Common Law, and the Pipelines," (8 April 2021), online (blog): ABlawg <https://ablawg.ca/2021/04/08/indigenous-law-the-common-law-and-pipelines/> [perma.cc/54M5-FPT9].

Further, interpretation of the rule of law as privileging one legal order to the exclusion of another is in tension with our constitutional principles of federalism. In *Reference re Secession of Quebec*, the SCC linked the principle of federalism with respect to the protection of distinct cultural and political traditions. While the Court's discussion was specifically in relation to our common and civil law traditions, scholars have argued that Indigenous groups have a similar claim that federalism supports their autonomy in governance given the important goal of protecting their distinctive cultural and political traditions.[55] In support of this, the federal government recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism.[56] Moreover, the rights to Indigenous self-determination and self-government are also recognized in the *United Nations Declaration on the Rights of Indigenous Peoples*, which has now been affirmed "as a universal international human rights instrument with application in Canadian law."[57]

Finally, interpretation of the rule of law as privileging one legal order also runs afoul of the constitutional principle of respect for minorities. Building on their findings in relation to federalism, the SCC in *Ref re Secession* observed that the protection of minority rights was an essential consideration in the constitutional structure at the time of Confederation, and that principle was further reflected in provisions in the *Constitution Act, 1982,* including section 25 and section 35.[58] Thus, in interpreting the meaning of section 52, these provisions must be taken seriously. Respecting them, and balancing them with the provisions in the *Charter*, may mean not applying provisions in the *Charter* to an Indigenous government.

From the foregoing, it is easy to see that this first principle supporting *Charter* application to the VGFN is outweighed by a lengthy list of competing objectives and values.

2) Fear of a legal vacuum

Another objective that may weigh in favour of imposing the *Charter* over an Indigenous government is the fear that failing to do so would create a legal vacuum. There is SCC precedent for the desire not to create a legal vacuum being a judicial objective.[59] Further, in a case about a First Nation exercising jurisdiction under the *Indian Act,* the Federal Court of Appeal cited concerns about creating "jurisdictional ghetto[s]" if the *Charter* was not applied.[60] This reasoning is a problem, however, if it simply assumes Indigenous groups are lawless. Each Indigenous nation has its own legal traditions.[61] However, owing to the impacts of colonialism, different groups are at different stages of revitalizing and implementing their legal orders. Thus, the fear of a 'legal vacuum' is valid only if the group in question is not currently drawing on its own legal order. Further, evidence of an Indigenous legal order does not consist merely of statutes or regulations. Indigenous laws can take forms with which Canadian judges may

55 Ryder, *supra* note 51 at 319-230; Borrows, supra note 54 at 125-128.

56 Canada, Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (monograph), Catalogue No J2-476/2018E-PDF (Ottawa: Department of Justice, 2018)., principle 4.

57 *United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14, s 4(a).

58 *Reference re Secession, supra* note 52 at paras 79-82.

59 See, for example, *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 44.

60 *Taypotat, supra* note 29 at para 39; *Dickson* CA, *supra* note 1 at para 86 (this was cited with approval by the CA).

61 See, in general, Borrows, *supra* note 54.

not be familiar. Mistaking these for 'legal vacuums' would be privileging those Indigenous legal orders that resemble the Canadian legal order, which once again risks imposing Euro-Canadian legal norms on Indigenous peoples.[62]

Judges in Canada are becoming increasingly attuned to the fact that they have a 'duty to learn' and a 'duty to act' in relation to Indigenous legal orders, and this should aid in preventing such mistakes.[63] Moreover, there are a variety of different ways that information and evidence about Indigenous legal orders can be brought before a court to aid their understanding.[64] Of course, where an Indigenous group has designated a court, tribunal or other alternative dispute resolution process that can hear an individual's complaint, adjudication through these bodies ought to be prioritized over hearings in Canadian courts congruent with the priority/minimality impairment considerations pursuant under the *Doré*-adapted *Sparrow* framework.[65]

In the case of the VGFN, there is no issue of a legal vacuum since the nation is clearly drawing on its own legal order. Therefore, this is not a legitimate basis for imposing the *Charter* in the circumstances.

3) Individual equality concerns

Like other governments in Canada, Indigenous governments can discriminate against their citizens. Much of that discrimination can be linked to the imposition of the *Indian Act*, however, and the resource-scarcity brought on by the provision of inadequate land bases and chronic underfunding of essential services to First Nations by the Canadian government. Given the patriarchal and racist roots of the *Indian Act*, this has often manifested as intersectional discrimination against Indigenous women.[66] While this issue bubbled to the surface in the early 1990s due to amendments to the *Indian Act* in 1985 to address long-standing gender-discrimination in the *Act*, problems of discrimination within Indigenous communities remains today.[67]

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62 See Borrows, *ibid* at 142-149, 178-179.

63 Former CJC McLachlin has called for "all members of the judiciary" to have access to education and materials about Indigenous legal traditions: see Former CJC Beverley McLachlin, Address (delivered at the CIAJ Annual Conference: Aboriginal Peoples and Law: "We Are All Here to Stay", Saskatoon, 16 October 2015), online: CIAJ <https://ciaj-icaj.ca/wp-content/uploads/documents/2015/10/916.pdf?id=472&1642525341> [perma.cc/9246-AKML]; see also Lance Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (2012) online: *CLE BC Materials* <https://www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Documents_deposes_a_la_Commission/P-253.pdf>, [perma.cc/E7KV-69XH]; see also Robert J Bauman, "A Duty to Act" (delivered at CIAJ Annual Conference: Indigenous Peoples and the Law, 17 November 2021), online: *Court of Appeal for British Columbia* <https://1juibf12bq823l3a7515u1i5-wpengine.netdna-ssl.com/wp-content/uploads/2021/11/A_Duty_to_Act_-CJ-BAUMAN-_-Indigenous_Peoples_and_the_Law.pdf> [http://perma.cc/H6H9-U5WC].

64 Naiomi Metallic, "Six Examples Applying the Meta-Principle Linguistic Method: Lessons for Indigenous Law Implementation," (2021) UNBLJ Working Paper.

65 See *Linklater v Thunderchild First Nation*, 2020 FC 1065 at paras 48-55.

66 Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa, 2019) (Chief Commissioner: Marion Buller) ["MMIWG Final Report"].

67 *Ibid*.

This concern is likely the strongest argument for the application of the *Charter* to Indigenous governments, and it rests in the principle of protection of individual *Charter* equality rights, which is a legitimate objective. However, this objective faces the same competing objectives and principles discussed in previous sections, not least of which is the competing substantive equality rights of Indigenous peoples to be different and not have another government's legal order imposed on them. But it is misleading and unhelpful (and treading into dangerous stereotypes about Indigenous governments), to assume the protection of individual rights is necessarily in conflict with the protection of Indigenous peoples' collective equality right to self-govern through their own legal orders. As highlighted in Chapter 2 of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Indigenous legal orders have always had concepts of both individual and collective rights, roles and responsibilities.[68] The Report emphasizes that the revitalization of Indigenous legal orders informed by these concepts will go a long way towards rebuilding and strengthening conditions of peace, safety, dignity and justice in Indigenous communities.[69]

In the case of VGFN, there is no evidence to suggest Ms. Dickson's individual rights complaint could not be effectively addressed within the VGFN's legal order. Indeed, the evidence was quite the opposite: through extensive community discussion, VGFN had painstakingly created an individual rights protection regime that aimed to balance individual protections with communal rights. However, for reasons unsaid in the judgements, the Yukon courts were unwilling to give priority to the VGFN's legal order. Returning to the *Doré*-adapted *Sparrow* framework, there is a proportionality problem here. The fiduciary relationship between Indigenous peoples and the Crown mandates that priority be given to the Aboriginal right in issue. As here, when there is no credible evidence to suggest that the Indigenous nation is not capable of addressing individual rights complaints within its legal order, its legal order ought to be privileged over the *Charter*. We can alternatively frame this in minimal impairment terms: privileging the *Charter* over the VGFN Constitution when VGFN have an established individual rights protection regime within their legal order is not minimally impairing.

Conclusion

In this article, I have proposed an alternative framework for considering the application of the *Charter* to VGFN. I propose this because the approach of the Yukon courts, which quickly accepted *Charter* application to VGFN but sought to attenuate this through reading section 25 as partly 'shielding' the VGFN's residency requirement from full section 15(1) *Charter* scrutiny, is problematic. It unnecessarily subjected the VFGN's legal order to *Charter* scrutiny, which is assimilative because it imposes the *Charter* on the VGFN without their consent and feeds into dangerous stereotypes about Indigenous governments. A more rigorous framework is needed to assess questions of *Charter* application to Indigenous governments, particularly because Canadian jurists tend to privilege the *Charter* given that many see it as a prized part of our legal system.

My proposal draws on the section 35 *Sparrow* framework, first identifying the imposition of the *Charter* on VGFN as a *prima facie* infringement of their right to self-government.

68 *Ibid* at 129.
69 *Ibid* at 139-180.

Next, adapting the *Sparrow* framework to apply to judge-made decisions, I propose that a court would need to identify the objectives or principles in favour of applying the *Charter* and engage in a proportional weighing of these against the competing objectives and principles at play.

In the circumstances, the competing reasons for not applying the *Charter* outweigh the reasons for applying the *Charter*. It is not necessary to apply the *Charter* to VGFN to respect section 52 of the *Constitution Act*. Far from contravening section 52, privileging VGFN's legal order in the circumstances aligns with substantive equality, the principles of federalism, the protection of minorities, the rule of law and the *United Nations Declaration on the Rights of Indigenous Peoples*. Concerns of creating a 'legal vacuum' here, or that VGFN's legal order cannot address human rights complaints are equally unsupported. As VGFN has an established individual rights protection regime within their Constitution, this should be given priority. Practically speaking, respecting the VGFN Constitution here would see the Yukon courts applying Part IV of the VGFN Constitution to Ms. Dickson's complaint instead of the *Charter*. While this prospect might feel strange or perhaps even uncomfortable to Canadian judges, this is part of reconciliation. This is part of Canadian judges' duty to learn and duty to act.

Self-Determined and Decolonized Systems

For many who testified before the National Inquiry, access to cultural safety is an important part of reclaiming power and place. It is also linked to the patriarchal systems that have been imposed, and reified, within legislation and in some Indigenous governance structures. They have resulted in an overwhelmingly male-dominated leadership today, in communities across the country. As Shelley J. explained:

> Because of the *Indian Act* and Indian residential schools, the patriarchal system that comes with that, women are seen as and treated as less than. Our roles were diminished, if not completely erased. And I think all of that has brought us to why we're here, you know, why so many of our women and girls are missing and murdered.[81]

In explaining power imbalances within communities, witness Viola Thomas remarked that "many of our people are silenced to … take action because of that imbalance of power within our communities and how sexism is really played out. And we need to look at strategies that can … remind our men that they were born from Mother, they were born from Mother Earth."[82]

Gina G. similarly explained: "I walk into my community, into my band office and it's not very welcoming sometimes. There's some very negative people there and still yet, I go in, I hold my head high, I work with them, very respectful and professional to them."[83]

Recalling the sexism in her own family, Gail C. remembered:

> When it came to gender equality or equity in the house, there was no such thing. The boys got everything and I got – you know, I got the peanuts, I got the little scraps in the end. So there's a lot of inequity in what was happening. It didn't matter how old or how young. I was right in the middle. I did not [get] the bikes, not this, second-hand clothes, clothes so big that when she [her mother] sewed them in at the waist to try and sort of just pass by, I had a ballooning, all this ballooning material on a pair of pants over my hips and my bum and everything. So – and, of course, it was a total embarrassment. My sister-in-law took me to – my dad's brother's wife, who did a lot of sewing. She sewed in clothes for me so that I would feel that I could actually walk in a school without being mortified, embarrassed and wanting to die.[84]

"WE NEED TO GO BACK TO HAVING OUR CULTURE AND WE NEED TO GO BACK TO SPEAKING OUR LANGUAGE, AND WE NEED TO GO BACK TO WALKING GENTLY ON THIS EARTH AND NOT TAKING THINGS LIKE RESOURCES, DISRESPECTING THAT. THAT'S REALLY IMPORTANT BECAUSE WE NEED FRESH WATER. WE NEED OUR TRADITIONAL MEDICINES. WE NEED THAT CONNECTION TO THE LAND BECAUSE IT MAKES US STRONGER. WE NEED THAT CONNECTION TO OUR LANGUAGE BECAUSE IT MAKES US STRONGER. WE NEED THOSE CONNECTIONS TO OUR FAMILIES BECAUSE IT DOES MAKE US STRONGER. WE NEED OUR WOMEN TO BE VALUED. WE NEED OUR CHILDREN TO KNOW THAT THEY ARE VALUED, THAT THEY MATTER."

Rhonda M.

But, as many witnesses pointed out, the keys still exist in communities and in individuals. As Ann M. R. explained, "We are Dena. We have a lot. Our culture is encoded in each of us. It's something we will never forget. You just provide the environment, it will come to life.… You can never forget. That's why we can never be assimilated because our culture is encoded in our DNA."[85]

Rhonda M. advocated:

> We need to go back to having our culture and we need to go back to speaking our language, and we need to go back to walking gently on this earth and not taking things like resources, disrespecting that. That's really important because we need fresh water. We need our traditional medicines. We need that connection to the land because it makes us stronger. We need that connection to our language because it makes us stronger. We need those connections to our families because it does make us stronger. We need our women to be valued. We need our children to know that they are valued, that they matter.[86]

At the most basic level, respecting cultural rights means, as Viola said, "renewing our honour of our mothers and our grandmothers because they are the centre of our being."[87] It means celebrating and embracing women, girls, and 2SLGBTQQIA people as sacred and as valuable, and teaching and communicating those values to individuals, to communities, and to the non-Indigenous world.

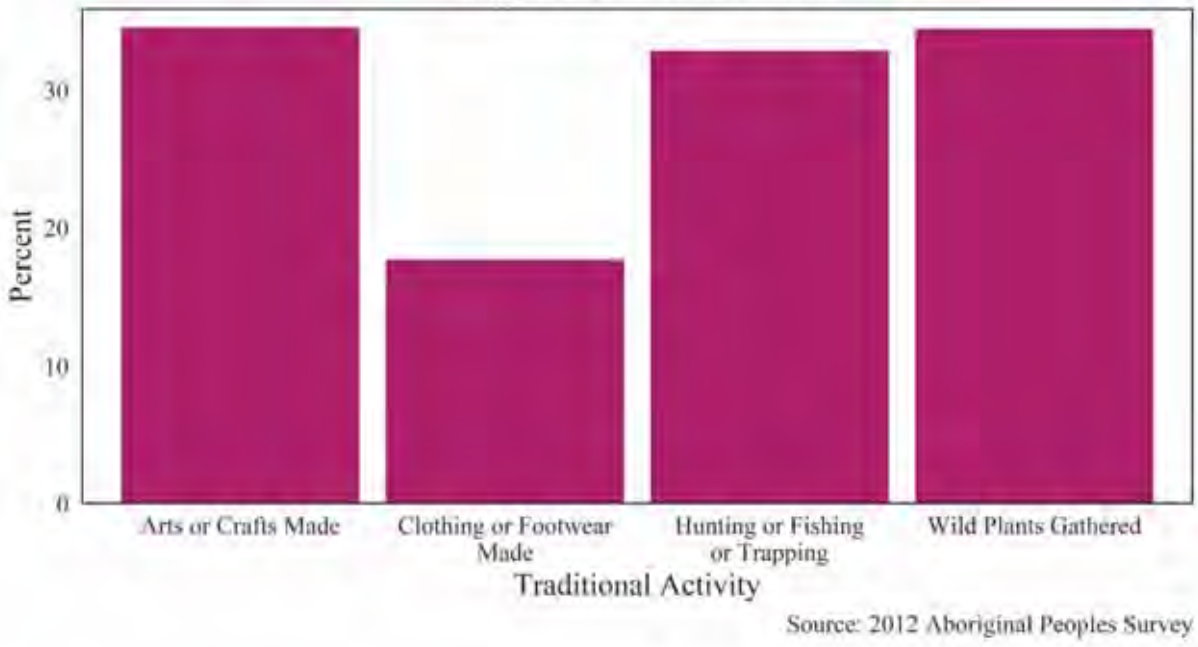
The pursuit of cultural rights and cultural safety is an important part of what many witnesses suggested can support healing. In many cases, witnesses focused on the importance of revitalizing language and tradition as a way of grounding what the right to culture might look like in certain communities or First Nations. Shara L. said:

> I want our future generations to acknowledge their history. Of all the things that have happened to our parents, our ancestors. I want my language back. I fought to keep my language. Now, I have – I can speak my language…. I want my kids to speak my language fluently. I want my homeland back. On the river where my grandparents raised me. I want to go home. I don't want to be in the community. I want to be out on the land. I want to be where I should be. Close to my father – my dad's buried out there. I want a home there. I want my kids to have roots. Yes. This is where my mom and dad live and my grandparents. This is where I belong. I want them to be strong. I don't want them to be murdered. I don't want them to be missing.[88]

"MANY OF OUR PEOPLE ARE SILENCED TO … TAKE ACTION BECAUSE OF THAT IMBALANCE OF POWER WITHIN OUR COMMUNITIES AND HOW SEXISM IS REALLY PLAYED OUT. AND WE NEED TO LOOK AT STRATEGIES THAT CAN REMIND … OUR MEN THAT THEY WERE BORN FROM MOTHER, THEY WERE BORN FROM MOTHER EARTH."

Viola Thomas

Reconnecting with culture as a way to belong and, ultimately, as a way to decrease violence was a key truth that we heard. As Darla-Jean L. explained, "We need more of our language. We need to focus on … the wheel of life, birth to death ceremonies, coming of age ceremonies, which my family has practised, learning our songs and our legends."[89]



Of the traditional activities Indigenous women engage in, they were most likely to be involved in cultural arts or crafts (34.6%) or gathering wild plants (34.5%) followed by hunting and fishing (32.9%) and making clothing or footwear (17.7%).

A key idea emerging from these testimonies is that of making or reclaiming space; the idea that cultural ideas, stories, and principles, such as those we explored in Chapter 2, can also provide a foundation for the creation of empowering spaces for women. At the Heiltsuk Women Community Perspective Panel, panellist Chief Marilyn Slett asserted:

> We need some space for women – women that are in leadership roles to come together and talk. You know, because we – we were doing it, you know … in caucus rooms, you know, having these conversations during lunch, you know, during some regional sessions or you know, over breaks, in very informal, but organic ways. But … we knew that we had to create that space.[90]

As Bryan J., and many others, expressed, Indigenous women, girls, and 2SLGBTQQIA people have a key role to play in reclaiming place and reasserting power: "When we talk about our women, we talk about our land. When we talk about our land, we talk about our spirits. We talk about our traditions, our people, our Elders, our children."[91]

In some cases, this is also a process of learning to love oneself. Carol M. recalled:

> I went to sweat lodge with this Elder, these two Elders. One has gone to the spirit world, and my grandmother used to always say she was waiting for me to come home. And I went to the sweat lodge. And of course, you know, Elders, they want to go eat, so we went to the restaurant. And I went to reach for something. And I noticed my hands and I said, "Wow." I said, look at – and they were both sitting there, and I said, "Wow, look at my hands. They're so brown. Look at them." And I heard the Elder whisper to the other one. He says, "It sounds like she's come home." And right then and there, I knew what my grandmother was talking about. I'm still there looking at my hands. I realize I was a brown person. It looks so beautiful and so nice. So now, I know what my grandmother meant, you know, when she said she was waiting for me to come home.[92]

As these examples illustrate, and as the link between culture and international human rights instruments will show, understanding the need to protect and promote culture in a self-determined way is key to addressing a number of the issues connected to trauma, marginalization, maintaining the status quo and ignoring the agency of Indigenous women, girls, and 2SLGBTQQIA people.

Linking Culture to International Human Rights Instruments

Witnesses who testified before the National Inquiry highlighted important moments and situations where their rights to culture and to the associated protections for families have been jeopardized. These encounters often engage government institutions and service providers bound by provincial, territorial, and domestic human rights legislation. In addition, the violation of cultural rights specifically ties to a number of public and international obligations that Canada has with respect to its commitment to human rights. These international human rights instruments address many of the ways in which witnesses told us their rights to culture were placed in jeopardy, through the disruption of relationships with land, the separation of families, the impoverishment of communities, and the lack of access to traditional knowledge, language, and practices that would have contributed to a sense of cultural safety.

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) calls upon governments to "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of elimination of racial discrimination in all its forms" (Article 2). This right also includes the idea that governments should not themselves engage in acts of racial discrimination against persons, groups of persons, or institutions – or any

aspect of their cultural identity. Article 2 further declares that governments should take measures to review all policies and to eliminate laws that are racially discriminatory, and that governments must work to prohibit any racial discrimination espoused by other people or groups.

In Canada, this could be interpreted to include policies such as those in the *Indian Act*, as well as the contemporary forms of these policies that continue to have a direct impact on Indigenous identity and community affiliation. Interpreted broadly, the wording also suggests that governments should work to prevent racial discrimination in all of its forms, including in its own systems and those it funds, such as child welfare.

The ICERD is not the only instrument to affirm cultural rights, or to link cultural rights to identity. As Expert Witness Brenda Gunn pointed out, "But now, today, we really talk about the interdependency and interrelatedness and you can't exercise your civil and political rights if you don't have economic, social and cultural rights. They all work together."[93] *The International Covenant on Civil and Political Rights* (ICCPR), which deals with civil and political rights, affirms the rights of parents "to ensure the religious and moral education of their children in conformity with their own convictions," including political and civil convictions (Article 18). It also identifies the family as the "natural and fundamental group unit of society," due to its importance in transmitting education, morals, and values. On the issue of groups operating within larger nation-states, the ICCPR is clear: all communities have the right to "enjoy their own culture, to profess and practice their own religion, or to use their own language" (Article 27).

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) specifically cites cultural rights, and also notes, "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (Article 1). Further, the ICESCR guarantees the access of these rights to men and women equally (Article 3) and emphasizes the importance of family to the education of children, in conjunction with the exercise of economic, political, and cultural rights (Article 10). Signatories to this covenant also agree that everyone has the right to take part in cultural life, and that steps should be taken by States Parties "to achieve the full realization of this right," including "those necessary for the conservation, the development and the diffusion of science and culture."

"WE NEED CANADA TO LISTEN AND TO START RESPECTING … THE ORIGINAL PEOPLE OF THIS LAND, THE INDIGENOUS PEOPLE. WE'RE NOT THE STEREOTYPE THAT YOU WATCHED ON TV, THAT – YOU KNOW, WE'RE SCALPING PEOPLE AND GOING AROUND WITH – WITH BOWS AND ARROWS AND SETTING WAGONS ON FIRE. THAT'S HOLLYWOOD, PEOPLE. THAT'S NOT REAL LIFE. WE WERE THE ONES THAT HAD OUR CHILDREN TAKEN AWAY. WE WERE THE ONES THAT HAD OUR CULTURE ALMOST DESTROYED. WE WERE THE ONES THAT HAD OUR CEREMONIES BANNED. WE WERE THE ONES THAT WERE HARMED. WE DIDN'T HARM YOU. WE MADE AN AGREEMENT FOR YOU TO SHARE THIS LAND WITH US. ALL WE'RE ASKING FOR IS FOR YOU TO HOLD UP YOUR PART OF THE BARGAIN."

Blu W.

As Brenda Gunn said, the committee that oversees the ICCPR has pointed out the interaction between access to economic, social, and cultural rights and gender-based violence, and has noted that "gender-based violence is a form of discrimination that inhibits the ability to enjoy rights and freedoms, including economic, social and cultural rights on the basis of equality."[94]

The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), which condemns discrimination against women, also has important implications for the protection of the cultural rights of Indigenous women, girls, and 2SLGBTQQIA people. For instance, CEDAW signatory states "agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women" (Article 2). This includes taking measures to *prevent* violence against Indigenous women, girls, and 2SLGBTQQIA people, to the extent necessary and in all of the areas necessary to effect change.

The *United Nations Convention on the Rights of the Child* (UNCRC) also has a number of articles that deal with rights to culture and to identity. Specifically, it explains that all actions involving children undertaken in the context of social welfare, law courts, or other administrative or legislative bodies should be in the best interests of the child (Article 3). Within these contexts, States Parties are committed to protecting the right of the child to "preserve his or her identity, including nationality, name and family relations" (Article 8). Article 9 mentions that children should not be separated from their parents against their will, unless that separation is determined by the courts to be in the best interest of the child – which, in many cases involving determinations made against Indigenous families, is arguable. Finally, in relationship to Indigenous groups, UNCRC asserts that a child belonging to such a group can't be denied the right "to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language" (Article 30).

Interpreted broadly, these protections require states to look, first, at how culture and identity are transmitted, and then, to take steps to preserve these measures and to strengthen them. Recognizing the importance of oral traditions and of learning within Indigenous families and communities, this right could also be interpreted as a right that can be enabled only through sound economic, political, and cultural policies designed to respect and to support self-determination, alongside policies intended to keep families and communities united.

KEY CONVENTIONS: RIGHT TO CULTURE

The National Inquiry considers as foundational to all human and Indigenous rights violations the conventions associated with genocide. In the area of culture, these relate specifically to causing serious mental harm, and forcibly transferring children from the rights-bearing group.

For reference, Article II of the *Convention on the Prevention and Punishment of the Crime of Genocide*, which provides a definition of genocide, includes "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group; and

(e) Forcibly transferring children of the group to another group."

IESCR:
- right to self-determination
- equal rights to men and women
- widest possible protection to the family
- right to education
- right to cultural life

ICCPR:
- respect for parents' liberty to ensure religious and moral education of their children
- family is the natural and fundamental group unit of society
- every child has right to protection, without discrimination

CEDAW:
- condemns discrmination in all forms
- embraces equality under legislation
- creates political, social, economic and cultural state obligations toward women

ICERD:
- condemns racial discrimination
- pledges to prevent and prohibit all forms of apartheid and discimination

CRC:
- best interest of the child is most important
- child has the right to preserve natonality, name and family relations without unlawful interference
- child shall not be denied right to enjoy their own culture or use their own language

IESCR: International Covenant on Economic, Social and Cultural Rights

ICCPR: International Covenant on Civil and Political Rights

CEDAW: Convention on the Elimination of all Forms of Discrimination Against Women

ICERD: International Covenant on the Elimination of All Forms of Racial Discrimination

CRC: Convention on the Rights of the Child

KEY DECLARATIONS: RIGHT TO CULTURE

The following international human rights instruments hold States accountable in the area of culture.

DEVAW:

- women entitled to equal enjoyment and protection of all human rights

UNDRIP:

- Indigenous Peoples have the right to maintain distinct institutions
- right to transmit languages, histories, and other forms of knowledge to future generations
- right to estabish educational systems and institutions to provide education that is culturally appropriate
- includes the right not to be subjected to assimilation
- all freedoms in UNDRIP guaranteed equally to men and women

VIENNA PROGRAMME:

- right to self-determination and economic, social and cultural development
- the rights of women and the girl-child are inalienable, integral and indivisible from universal human rights

BEIJING:

- women's empowerment is fundamental to equality, development and peace
- women's rights are human rights
- need for good partnerships and relationships between women and men
- need to prevent violence
- need to eradicate poverty

DEVAW: Declaration on the Elimination of Violence Against Women

UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

Vienna Programme: The Vienna Declaration and Programme of Action

Beijing: The Beijing Declaration

Conclusion: "Stop making an industry out of me"

This chapter has addressed how the four pathways that maintain colonial violence prevent Indigenous women, girls, and 2SLGBTQQIA people from accessing and enjoying their cultural rights, conceived broadly as "way of life" rights, as well as rights related to families, language, health, and many other aspects of cultural safety. These rights have the potential to improve outcomes for Indigenous women, girls, and 2SLGBTQQIA people, as applied in self-determined ways, to improve services and programs so that they actually do help people, rather than perpetuate harm. Specifically, this chapter has addressed cultural rights violations and their

GENDER AND VIOLENCE: DRAWING ON INDIGENOUS LEGAL RESOURCES

EMILY SNYDER,[†] VAL NAPOLEON[‡] & JOHN BORROWS[*]

"Custom"
misapplied
bastardised
murdered
a frankenstein
corpse
conveniently
recalled
to intimidate
women.[1]

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1 Grace Mera Molisa, "Custom" in *Black Stone* (Suva: Mana Publications, 1983) at 24.

INTRODUCTION

In a recently published report by the Ontario Federation of Indian Friendship Centres, an action plan was proposed for addressing violence against Indigenous women.[2] This report was a response to the high rates of sexual violence that Indigenous women face from both Indigenous and non-Indigenous men.[3] The report articulates several "working assumptions" such as "[s]exual violence is rooted in the legacy of residential schools, colonization and systemic discrimination that resulted in the loss of culture, roles, family and community structure."[4] The report's assumptions are partially premised on the notion that Indigenous societies are historically non-violent and that "[c]ulture provided the guidance for relationships and described what was proper with one another. Violence was not a common element of our lives."[5]

The efforts by organizations such as these, as well as work done by other Indigenous people and collectives, are an important part of building an ongoing dialogue concerning gendered violence. Generalizations about violence, culture, and gender permeate many proposals about how to deal with this issue. While there is much value in this work, one is often faced with romanticized views about the past and culture. What we consider here are some shifts in focus and some different perspectives to determine what can be added to the present discussions about violence against Indigenous women.

We do acknowledge that addressing culture in a general way can be an important starting point when seeking change within any nation, society or group. Humans are broadly motivated to lead better lives when supported by shared aspirations, world views, beliefs, values, practices,

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2 Ontario Federation of Indian Friendship Centres, *Aboriginal Sexual Violence Action Plan* (Toronto: Ontario Federation of Indian Friendship Centres, 2011), in partnership with the Métis Nation of Ontario and the Ontario Native Women's Association, online: <www.ofifc.org>.

3 *Ibid* at 2.

4 *Ibid*.

5 *Ibid* at 3.

customs, technologies, heritage, art, and symbols. When people feel a commitment to nurture, refine, cultivate, and transmit their best teachings, practices, and traditions through the generations this can often—though not always—be beneficial to the group and those who surround them. Since these and other aspects of human behavior—which may be called "culture"—cannot always be effectively identified and captured by any one label, class, or categorization, it is perhaps necessary to talk in generalities when initiating a discussion about what can be done to change any particular society for the better. However, as most commentators would no doubt acknowledge, proposals to positively change societies must eventually move beyond generalities. We must move from focusing on general claims of culture to considering which specific aspects of Indigenous legal traditions can be deployed to more effectively address this problem.[6]

This shift to specificity is especially important in dealing with gendered violence because culture can be used in ways that are harmful to societies as a whole and to women in particular. Culture is a concept that is always deployed in the real world, where the forces of power, privilege, and hierarchy mingle and compete. In these circumstances culture can be "hijacked" by those in authority to create or replicate a male-dominated status quo. In other words, culture can foster conditions that reproduce individual and institutional violence against women. With this in mind, we believe that discussions of culture should never be disconnected from concerns about power; culture can be a source for the abuse of power, as much as it can be a force for liberation when examined in real world terms.

We believe that a different analysis is necessary when discussing violence against Indigenous women. Further questions must be asked about how legal traditions will be deployed, by whom, and for what purposes. In any discussion about culture, we must ensure that we highlight and defend those cultural practices that allow hard questions

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[6] Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding and Applying Indigenous Laws" (2012) 11:1 Indigenous LJ 1 at 29 [Friedland, "Reflective Frameworks"].

to form part of our conversations, while also resisting those conventions that are limiting. We believe this takes us into the realm of law.

Of course, Indigenous culture is not disconnected from Indigenous law. Indigenous laws flow from Indigenous cultures as a contextually specific set of ideas and practices aimed at generating the conditions for greater peace and order. What we are interested in doing here involves shifting from broad questions such as "[w]hat are the cultural values?" and "[w]hat are the 'culturally appropriate'" responses, to questions about legal reasoning and principles within Indigenous legal traditions and decision-making processes.[7] We ask: How might we begin thinking about violence against Indigenous women through the frame of Indigenous law? Can Indigenous legal traditions—including stories as precedent—and legal processes help us advance this work? What can a critical gendered approach to Indigenous laws offer to this discussion?

Indigenous peoples have long applied their laws to issues concerning gendered violence. In saying this we do not suggest that gendered violence is practised and experienced in exactly the same way today as it was in the past or at the same levels. Furthermore, we do not suggest that Indigenous laws are timeless and that their theories and applications never change.[8] In fact, we believe that laws in all societies change over time and there is a need to be contextually specific in how they are theorized, taught, and practised.

We are writing this paper because there is a danger in viewing the "Indigenous" past as being non-violent and non-sexist. We are critical of

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7 *Ibid* at 29. See also the important work of Bruce Miller, *The Problem of Justice: Tradition and Law in the Coast Salish World* (Lincoln: University of Nebraska Press, 2001). Miller argues that the work of Indigenous peoples to establish and re-establish their own justice systems is hampered by an "Edenic" view of the past in which primordial harmony and healing are emphasized at the cost of ignoring and denying internal power relations and conflict: *ibid* at 5–6, 12.

8 See Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, and Legal Theory* (PhD Thesis, University of Victoria Faculty of Law, 2009) [unpublished] at 91 [Napoleon, *Ayook*]; John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 60 [Borrows, *Canada's Indigenous Constitution*].

this perspective because it overlooks the lessons Indigenous peoples can learn and have learned through time when they confronted gendered violence in their societies. There are significant intellectual legal resources that exist within Indigenous communities for thinking about and challenging social problems. Unfortunately, these resources will become invisible if we narrate the past as if it were free from violence. There was gendered violence in Indigenous societies historically and sometimes it was very significant. The historic accounts of and responses to such violence provide Indigenous peoples with legal resources for dealing with similar issues of violence today. These resources can be accessed, *inter alia*, through precedent in the form of Indigenous stories, songs, dances, teachings, practices, customs, and kinship relationships. These resources can be used to reason collaboratively within Indigenous communities (and beyond) to discover and create standards and criteria for discussion, debate, and judgment when addressing violence against women.

This is not to say that we believe Indigenous laws are perfect or that they will provide easy solutions. We acknowledge that the authority of these laws flow from many sources and are subject to many interpretations.[9] Likewise, we recognize that Indigenous law, like all law, has its limits. Law should never be the only system discussed or applied in dealing with violence against women. We believe in process pluralism, which encourages many different systems to operate in harmony and in competition with one another to deal with violence against women as long as they are attentive to the issues of power and gender.[10] Yet even such diversity and careful attention to gendered violence within each system would not lead to a perfect world. Any living system, with humans as its agents, is subject to all the limitations human reason and

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[9] Even among the authors, while we share some similarities in our approach, differences also exist. We consider the tensions between our perspectives to be useful openings for contemplation and discussion.

[10] For a discussion of process pluralism from a feminist perspective, see Carrie Menkel-Meadow, "Peace and Justice: Notes on the Evolution and Purposes of Legal Processes" (2006) 94:2 Geo LJ 553.

action possess. This includes Indigenous legal processes and practice, despite the significant promise and strength law offers.

At the same time, our approach—which draws attention to instances of historically internalized gendered violence—should not be interpreted as saying that we believe the past was one of unremitting violence. Indigenous histories are filled with many inspiring examples and eras of significant peace, friendship, kindness, love, harmony, goodwill, and positive social experiences. Nevertheless, the past also includes significant periods and instances of hostility, aggression, cruelty, abuse, and violence, particularly against women. Indigenous peoples, like all peoples of the world, experienced and are capable of expressing boundless goodness, as well as tolerating and encouraging every form of socially dysfunctional and malevolent human action. This is why we believe law is necessary when discussing culture; it helps ensure that we examine the past and apply its lessons in the light of our complex circumstances, and to ensure that we do not thoughtlessly generate the conditions that allowed or allow the worst within and among us to dominate.

In drawing on the resources of Indigenous law, we emphasize that any approach to dealing with violence against women can be significantly hindered when communities and groups overly romanticize their own historic experiences or fail to take account of their past weaknesses. We take the position that violence against women must matter to Indigenous law and Indigenous law must matter to violence against women. We contend that it is through critically constructive discussions about gender and power which resist romanticizing gender, law, and the past, that Indigenous law will be useful for thinking about today's legal challenges.

As a caveat, it should be noted that responding to these challenges with Indigenous law does not mean the same thing as responding with restorative justice. In her work on sexual violence, Sarah Deer notes that "[m]any scholars of indigenous law, mostly men, have suggested that one of the solutions to violent crime in Indian country is to develop 'peacemaking' sessions . . . [that would] include talking circles, family

meetings, and restorative principles."[11] While there is value in using restorative justice principles in certain contexts, we are mindful of the important critiques of using restorative justice processes to respond to violence against women.[12] While restorative justice may have value in certain times and places, those concepts are not the focus of our article. Indigenous law and restorative justice should not be conflated.[13]

This article is divided into two parts. In Part One, we discuss the necessity of recognizing the prevalence of violence against women as well as gendered legal realities of Indigenous law. We discuss how rhetoric about gender, often deployed in the name of Indigenous law and empowerment, can also be interpreted and experienced as damaging to legal processes and harmful to Indigenous women. We consider different ways that Indigenous people have attempted to address violence against women using state law and modern Indigenous law, and we suggest here that an additional way for thinking about gendered violence is to draw law from stories.

In Part Two, we take up two different approaches for critically engaging with stories. First, we apply an adapted case method analysis to a story. Second, we use Indigenous feminist legal methodology to think through another story. By working with these methodologies and stories, we aim to provide examples of different ways for critically engaging with Indigenous law as a means to address violence against women. We do not

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11 Sarah Deer, "Decolonizing Rape Law: A Native Feminist Synthesis of Safety and Sovereignty" (2009) 24:2 Wicazo Sa Rev 149 at 155 [Deer, "Decolonizing"].

12 See e.g. Deer, "Decolonizing", *ibid.* For additional discussions about restorative justice, see also Andrea Smith, "Beyond Restorative Justice: Radical Organizing Against Violence" in James Ptacek, ed, *Restorative Justice and Violence Against Women* (New York: Oxford University Press, 2010) 255; Angela Cameron, "Sentencing Circles and Intimate Violence: A Canadian Feminist Perspective" (2006) 18:2 CJWL 479 [Cameron, "Sentencing"].

13 See Val Napoleon et al, "Where is the Law in Restorative Justice?" in Yale D Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues*, 3rd ed (Saskatoon: Purich, 2008) 348 [Napoleon et al, "Where is the Law"]; Angela Cameron, "Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence" (2006) 10:1 Theoretical Criminology 49.

say that stories are the only source for reasoning with Indigenous law, but we do believe they provide rich legal resources and information regarding legal principles, processes, reasoning, and precedent.[14]

PART ONE: THE IMPORTANCE OF CONTEXT: GENDERED LEGAL REALITIES

1.1. WHY VIOLENCE AGAINST WOMEN HAS TO MATTER TO INDIGENOUS LAW

1.1.1. Gendered Legal Realities

Indigenous women are beaten, sexually assaulted, and killed in shockingly high numbers.[15] They experience violence at rates three times higher than the general population of women.[16] This violence is also

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[14] See John Borrows, *Drawing Out Law: A Spirit's Guide* (Toronto: University of Toronto Press, 2010) [Borrows, *Drawing Out Law*]; Val Napoleon & Hadley Friedland, "An Inside Job: Developing Scholarship from an Internal Perspective of Indigenous Legal Traditions", in José Antonio Lucero, Dale Turner & Donna Lee Van Cott, eds, *Oxford Handbook of Indigenous Peoples' Politics* [forthcoming] [Napoleon & Friedland, "Inside Job"].

[15] See Statistics Canada, "Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009", by Shannon Brennan, in *Juristat*, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2011) at 5 ("In 2009, close to 67,000 Aboriginal women aged 15 or older living in the Canadian provinces reported being the victim of violence in the previous 12 months. Overall, the rate of self-reported violent victimization among Aboriginal women was almost three times higher than the rate of violent victimization reported by non-Aboriginal women. Close to two-thirds (63%) of Aboriginal female victims were aged 15 to 34. This age group accounted for just under half (47%) of the female Aboriginal population (aged 15 or older) living in the ten provinces"). For commentary related to this violence, see Anita Olsen Harper, "Is Canada Peaceful and Safe for Aboriginal Women?" (2006) 25:1-2 Canadian Woman Studies 33.

[16] Statistics Canada, *supra* note 15 at 7. For a more general discussion of Aboriginal women and the law, see Patricia Monture-Angus, "Standing Against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack, ed, *Locating Law: Race/Class/Gender/Sexuality Connections*, 2nd ed (Halifax, NS: Fernwood, 2006) 73 [Monture-Angus, "Standing Against"].

> extremely brutal in comparison to that in the general population.[17] Indigenous women are five times more likely to be killed or to disappear as compared to non-Indigenous women.[18] Indigenous women also face higher rates of incarceration than the general population of women, due in part to their response to this violence against them.[19]

Violence against women is sustained and perpetuated in this climate, in which Indigenous women are devalued and violence is normalized. Indigenous women face marginalization both formally (through state and modern Indigenous policies, laws, and institutional practices) and informally (through gendered norms and destructive stereotypes).[20] Although much of the discussion in this article might appear to be focused on more commonplace conceptualizations of violence against women (domestic violence, sexual violence, and physical violence),

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17 See generally Aboriginal Justice Implementation Commission, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Queen's Printer, 1991) (Chairs: AC Hamilton & CM Sinclair) at 475–87.

18 See Amnesty International, *No More Stolen Sisters: The Need for a Comprehensive Response to Discrimination and Violence Against Indigenous Women in Canada* (London: Amnesty International Publications, 2009) at 1, online: <www.amnesty.ca>.

19 Patricia Monture-Angus, "Women and Risk: Aboriginal Women, Colonialism, and Correctional Practice" (1999) 19:1–2 Can Woman Studies 24; Fran Sugar & Lana Fox, "Nistum Peyako Seht'wawin Iskwewak: Breaking Chains" (1990) 3:2 CJWL 465. This paragraph is quoted from Borrows, "Aboriginal and Treaty Rights", *supra* note * at 700.

20 See Joyce Green, "Taking Account of Aboriginal Feminism" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 20 [Green, "Taking Account"]; Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart, 2009) 233 [Napoleon, "Aboriginal Discourse"]; Joanne Barker, "Gender, Sovereignty, Rights: Native Women's Activism against Social Inequality and Violence in Canada" (2008) 60:2 American Quarterly 259; Mishuana R Goeman & Jennifer Nez Denetdale, "Native Feminisms: Legacies, Interventions, and Indigenous Sovereignties" (2009) 24:2 Wicazo Sa Rev 9 [Goeman & Denetdale, "Native Feminisms"].

Indigenous women also experience economic violence, emotional violence, spiritual violence, and symbolic violence. When we talk about violence against Indigenous women, this includes acknowledging and thinking about the complex ways in which violence manifests both socially and personally in ways that are seen, unseen, heard, unheard, felt, anticipated, and feared. In thinking about Indigenous legal orders today, Indigenous laws need to be able to challenge violence against Indigenous women in all its forms—from physical violence to degrading stereotypes.

In practicing and theorizing Indigenous laws, the prevalence of violence against women needs to be fully comprehended. Too often in discussions about Indigenous law, women are overlooked or gender is talked about in limiting ways (this is discussed below). It would be remiss to talk about Indigenous laws (which are to be practised by and for an entire citizenry) without understanding that Indigenous legal subjects have different lived realities because of their gender.[21] There are similarities in the experiences of Indigenous women and men; however, Indigenous women have different lived realities, especially in relation to violence.[22] Indigenous scholars and activists who write about gender have illustrated the need for an intersectional analysis.[23] Race, gender, sexuality, class, ability—these are all connected constructs that impact

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21 Emily Snyder, "Indigenous Feminist Legal Theory" (2014) 26:2 CJWL 365 [Snyder, "Indigenous Feminist Legal Theory"].

22 See generally notes 17–22.

23 See e.g. Green, "Taking Account", *supra* note 20; Monture-Angus, "Standing Against", *supra* note 16; Verna St Denis, "Feminism is for Everybody: Aboriginal Women, Feminism and Diversity" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 33; Andrea Smith, "Native American Feminism, Sovereignty and Social Change" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 93 [Smith, "Native American"]; Emma LaRocque, "Métis and Feminist: Ethical Reflections on Feminism, Human Rights and Decolonization" in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 53 [LaRocque, "Métis and Feminist"]; MA Jaimes-Guerrero, "'Patriarchal Colonialism' and Indigenism: Implications for Native Feminist Spirituality and Native Womanism" (2003) 18:2 Hypatia 58.

one's life. Indigenous feminist theory makes it clear that racism, colonialism, sexism, and patriarchy, for example, are all interconnected forms of violence that support one another.[24] Thus, in decolonization efforts, systemic sexism must be explicitly acknowledged and challenged.[25]

Sexism is a major social problem in Indigenous communities today (as with other communities) and violence against Indigenous women does not only come from settler violence, but is also perpetuated internally.[26] Indigenous women will continue to be marginalized within their communities (and in Canada) if Indigenous communities are not recognized as having responsibilities in relation to overturning the male dominance and privilege that exists on too many reserves.[27] Indigenous women can face economic oppression in part because Indigenous men are more likely to be in leadership positions in communities and are

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24 Green, "Taking Account", *supra* note 20; St Denis, *supra* note 23; Smith, "Native American", *supra* note 23; LaRocque, "Métis and Feminist", *supra* note 23; Jaimes-Guerrero, *supra* note 23.

25 See Napoleon, "Aboriginal Discourse", *supra* note 20 at 234; Green, "Taking Account", *supra* note 20 at 23; Luana Ross, "From the 'F' Word to Indigenous/Feminisms" (2009) 24:2 Wicazo Sa Rev 39 at 50; Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* (Cambridge, Mass: South End Press, 2005) at 137–39 [Smith, *Conquest*]; Goeman & Denetdale, "Native Feminisms", *supra* note 20; Lisa Kahaleole Hall, "Navigating Our Own 'Sea of Islands': Remapping a Theoretical Space for Hawaiian Women and Indigenous Feminism" (2009) 24:2 Wicazo Sa Rev 15 at 28–31.

26 See Kiera L Ladner, "Gendering Decolonisation, Decolonising Gender" (2009) 13:1 Austl Indigenous L Rev 62 at 66.

27 Though in saying this, we do not suggest that settler Canadians are exempt from responsibilities in relation to the overall problem of violence against Indigenous women (and violence against women generally). Given that patriarchy and colonialism are intimately connected, and the devaluation of Indigenous women is perpetuated by mainstream Canadian society and institutions, non-Indigenous Canadians, especially those in positions of social privilege, have much work to do in challenging destructive ideologies and practices that sustain a culture of violence towards Indigenous women.

more likely to be able to control resources.[28] Further, Indigenous women face political marginalization,[29] which no doubt contributes to the overall problems being discussed here, as their voices and knowledge are seldom deemed authoritative in the political sphere. Addressing the high levels of violence perpetrated by men must be a part of theorizing and practicing Indigenous law, since "[v]iolence against women is one of the key means through which male control over women's agency and sexuality is maintained."[30] Violence against women, though often experienced in interpersonal relationships, is connected to larger social structures of inequality within any society.[31] Violence against women is therefore intimately linked with the broader colonial context, which must be accounted for when engaging with Indigenous law.[32]

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28 See Green, "Taking Account", *supra* note 20 at 24.

29 See Joyce Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4:4 Const Forum Const 110; Jo-Anne Fiske, "The Womb Is to the Nation as the Heart Is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51 Studies in Political Economy 65.

30 UN, *Ending Violence Against Women: From Words to Action – Study of the Secretary General* (New York: UN, 2006) at 1. This sentence, as well as the next two sentences are drawn directly from Borrows, "Aboriginal and Treaty Rights", *supra* note * at 708–09. See also *In-Depth Study on All Forms of Violence Against Women: Report of the Secretary General*, UNGAOR, 61st Sess, UN Doc A/61/122/Add.1 (2006).

31 *Ibid.* See also Hillary N Weaver, "The Colonial Context of Violence: Reflections on Violence in the Lives of Native American Women" (2009) 24:9 J Interpersonal Violence 1552; Ladner, *supra* note 26.

32 For a discussion of how colonization is linked with violence against women see generally Smith, *Conquest*, *supra* note 25; Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6:1 CJWL 174; Ladner, *supra* note 26. For a discussion of how section 35(1) of the *Constitution Act, 1982* is designed to address colonialism, see *R v Sparrow*, [1990] 1 SCR 1075 at 1101–06, 70 DLR (4th) 385; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 141, 153 DLR (4th) 193; *R v Côté*, [1996] 3 SCR 139 at para 53, 138 DLR (4th) 385:

> [A] static and retrospective interpretation of s. 35(1) cannot be reconciled with the noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in

Not only do Indigenous laws need to reflect the gendered realities and prevalence of violence against women, those who practise and theorize Indigenous laws need to also recognize how systemic sexism shapes law. As Emily Snyder has argued elsewhere, Indigenous laws need to be understood as gendered.[33] Indigenous law, like all other forms of law, is not neutral; rather, it is heavily influenced by dominant social norms. Countless legal scholars, including Indigenous legal scholars, have shown how systemic racism plays out in state law.[34] Scholars have also shown that state law perpetuates and relies on sexist ideologies (and classist, heterosexist ideologies),[35] and feminist legal scholars, as well as Indigenous legal scholars, have written on state law's discriminatory and oppressive practices against Indigenous women.[36] Given the prevalence of sexism in Indigenous communities, Indigenous laws can perceive and treat Indigenous women and men differently.[37] In other words, Indigenous law can be influenced by sexist ideologies and can be a site for reproducing power dynamics in ways that discipline gendered legal subjects.[38]

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the *Constitution Act, 1982*. Indeed, the respondent's proposed interpretation risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.

33 Snyder, "Indigenous Feminist Legal Theory", *supra* note 21.

34 See e.g. Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2:1 Indigenous LJ 67.

35 See e.g. Margaret Davies & Kathy Mack, "Legal Feminism – Now and Then" (2004) 20:1 Austl Feminist LJ 1; Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) [Smart, *Feminism*].

36 See e.g. Monture-Angus, "Standing Against", *supra* note 16; Joyce Green, "Balancing Strategies: Aboriginal Women and Constitutional Rights", in Joyce Green, ed, *Making Space for Indigenous Feminism* (Black Point, NS: Fernwood, 2007) 140; Sherene H Razack, "Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George" (2000) 15:2 CJLS 91.

37 See Snyder, "Indigenous Feminist Legal Theory", *supra* note 21.

38 See *ibid*.

Power dynamics play out in legal practices and processes. They also play out in interpretations of the present and the past. While many Indigenous societies have principles about gender relations (e.g. respecting women), there is a widespread disjuncture between these ideals and everyday gender norms and practices.[39] Given the prevalence of violence against women—and, more generally, sexism in Indigenous communities—gender norms, or dominant patterns of behaviour, are not congruent with principles of respect. "To characterize Indigenous law as gendered does not mean seeking out what the different 'legal rules' are for Indigenous women and men (if these exist in a given Indigenous legal order)"; rather, it is about considering the "intellectual processes and the various discourses that sustain dominant truths about Indigenous laws and legal subjects."[40] Some of these gendered discourses might be read as "traditional" and some might be read as colonial. This is discussed in further detail below; however, *all* gendered discourses should be engaged with, discussed, and re-evaluated if they are oppressive. Further, while our focus in this article is on violence against women, this is not just a "woman's problem", and speaking of law as gendered goes far beyond "women's issues".[41] We are all gendered (albeit in different ways and in relation to a multitude of intersections such as class, race, and sexuality) and thinking about law as gendered includes thinking about all genders and considering the complex ways that gendered subjects are privileged, disempowered, enabled, and restricted via law. By focusing on predominate patterns pertaining to violence against Indigenous women, our discussion is overwhelmingly focused on violence as it falls along the gender binary—largely between cisgendered women and men. As such, our discussion is only one part of a much larger discussion that needs to be had. It is crucial that Indigenous laws be understood as resources that are accountable to, and useful for, challenging this very binary and for understanding all forms of violence as it occurs between variously sexed and gendered people.

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39 See *ibid*; St Denis, *supra* note 23 at 39–40.

40 Snyder, "Indigenous Feminist Legal Theory", *supra* note 21 at 391.

41 *Ibid*.

We draw on Indigenous feminist legal theory for a critical gendered analysis of violence against women and Indigenous laws.[42] Indigenous feminist legal theory encourages analysis that is attentive to power not only in terms of constraints that exist and are reproduced, but also in terms of recognizing agency and resistance.[43] In moving forward with our discussion on how we can begin thinking about violence against women through the frame of Indigenous law, we emphasize the deliberative aspect of Indigenous legal processes. Discussion, debate, and revision are necessary for Indigenous laws to remain pertinent and useful to Indigenous peoples (as is the case with all law).[44] Retrospectively anchored "originalist" interpretations of law should be resisted in an Indigenous context because of their tendency to freeze and romanticize the past.[45] Though Snyder is writing about Indigenous law and gender generally, her questions are pertinent to our discussion here. "[W]hose experiences and knowledge are valued" and shape legal practices and interpretations?[46] Also,

> [a]re men benefitting from particular legal practices, processes, and principles, while women are being marginalized by them? What resources are available in Indigenous legal traditions to address gendered oppressions? What would it take to draw on these resources in practice? What space exists for dissent?[47]

Law, as Carol Smart has emphasized, is a site of gender struggle.[48] Law is about conflict.[49] As we have been emphasizing, Indigenous laws

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42 See generally *ibid.*

43 See *ibid* at 395.

44 See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at 7–10.

45 John Borrows, "(Ab)originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351 at 360–61.

46 Snyder, "Indigenous Feminist Legal Theory", *supra* note 21 at 391.

47 *Ibid.*

48 See generally Smart, *Feminism*, *supra* note 35; Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London, UK: Sage, 1995).

can be used in ways that perpetuate systemic sexism if they are not contextually deliberated with power dynamics in mind. Indigenous feminist legal theory "is an important analytic tool that is intersectional, attentive to power, anti-colonial, anti-essentialist, multi-juridical, and embraces a spirit of critique that challenges static notions of tradition, identity, gender, sex, and sexuality."[50] With this in mind, we now turn to a discussion on rhetoric that often negates or denies the breadth of gendered conflict and violence. We engage in this discussion before turning to our analysis of stories because much of this rhetoric is commonly deployed in ways that halt the critical discussions so vital for maintaining healthy legal orders.

1.1.2. "Intellectual Black Holes"[51]: Oppressive Conceptualizations and Uses of Gender and Tradition

We encounter idealistic rhetoric throughout our work on Indigenous law. This rhetoric is widespread in academic texts,[52] in discussions at conferences and workshops, in classrooms, in universities, at meetings, in the media, and in everyday conversations. Both Indigenous men and women take it up. In discussing this rhetoric we ask after who and what these discourses serve. What do they tell us about gender? What do they tell us about law? How can we engage productively with this rhetoric? In identifying and critiquing this rhetoric, we ask readers to consider how it contributes to systemic oppression by erasing social context and silencing critical discourses. This is difficult and contentious work; it is also urgent. The binaries of authentic/inauthentic and traditional/colonized,

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[49] Jeremy Webber, "Naturalism and Agency in the Living Law" in Marc Hertogh, ed, *Living Law: Reconsidering Eugen Ehrlich*, (Portland: Hart, 2008) 201 at 202. See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at 10–11.

[50] Snyder, "Indigenous Feminist Legal Theory", *supra* note 21 at 401.

[51] See Napoleon, "Aboriginal Discourse", *supra* note 20 at 235.

[52] See Emily Snyder, *Representations of Women in Cree Legal Educational Materials: An Indigenous Feminist Legal Theoretical Analysis* (PhD Thesis, University of Alberta Department of Sociology, 2013) [unpublished] [Snyder, Representations].

which are firmly rooted in this rhetoric, create intellectual black holes that have lived consequences for Indigenous peoples, especially women.

As noted, one of the more powerful discourses that is deployed in conversations about gender is the assertion that Indigenous societies had (and some argue, still have[53]) perfectly balanced gender roles prior to contact.[54] The notion here is that Indigenous women and men each had their roles, and that these were equally valued, and they were complementary. In this discourse, Indigenous women are talked about as being respected and highly regarded participatory members of society. Here, colonialism brought gendered violence and imposed European gender roles that devalued Indigenous women. However, life has always been more complicated for Indigenous women and for Indigenous communities. While there are some limited oral traditions and written accounts that describe how historic Indigenous societies did not deploy power in ways that were damaging to gendered relations, there are also extensive contrary oral and written sources.[55] There is also no doubt that colonialism severely and negatively affected how Indigenous men and women related to one another—Indigenous people are dealing with distinctly high levels of violence today that need to be understood in relation to contemporary contexts and challenges. There were significant impacts via colonial patriarchal and patrilineal policies, residential schools, and colonial economic practices more generally. These forces have had exceedingly negative impacts on Indigenous gender ethics and

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53 For a discussion on this, see St Denis, *supra* note 23 at 37–40.

54 For a short discussion on "balance" rhetoric, see LaRocque, "Métis and Feminist", *supra* note 23 at 55.

55 See e.g. Mary-Ellen Kelm & Lorna Townsend, eds, *In the Days of Our Grandmothers: A Reader in Aboriginal Women's History in Canada* (Toronto: University of Toronto Press, 2006); Sarah Carter & Patricia Alice McCormack, eds, *Recollecting: Lives of Aboriginal Women of the Canadian Northwest and Borderlands* (Edmonton: Athabasca University Press, 2011); Brenda J Child, *Holding Our World Together: Ojibwe Women and the Survival of Community* (New York: Viking, 2012); Laura F Klein & Lillian A Ackerman, *Women and Power in Native North America* (Norman: University of Oklahoma Press, 1995).

roles.[56] Furthermore, matrilineal societies, and societies that strived to embrace gender fluidity, were condemned and forced to take up structures based on the male/female binary wherein the male side received privileges and were recognized as having the most valued attributes.[57] Colonialism was, and still is, reliant on patriarchal, heterosexist violence.[58] On this point, Kiera Ladner has observed that "gender must be decolonised and decolonisation must be gendered".[59]

Given these insights, we contend that it is possible to work with the idea that colonialism has negatively impacted gender norms and is reliant on gendered violence without necessarily having to also claim that gender relations prior to contact were perfect. Joanne Barker explains that "[t]he important conceptual challenge in understanding the impact of these [patriarchal, heterosexist, and homophobic] ideologies on Indian peoples is refusing a social evolutionary framework in which pristine, utopian Indian societies degenerate into tragically contaminated ones."[60] The past ought not to be seen as only perfect and the present ought not to be seen as beyond repair. Further, Emma LaRocque

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56 See generally Ladner, *supra* note 26; Val Napoleon, "Raven's Garden: A Discussion about Aboriginal Sexual Orientation and Transgender Issues" (2002) 17:2 CJLS 149.

57 See *ibid.*

58 See generally Smith, *Conquest*, *supra* note 25; Ladner, *supra* note 26 at 63. The scholarship of other Indigenous scholars, notably Taiaiaki Alfred and Patricia Monture-Angus, has addressed colonization and decolonization extensively. However, since their critiques of law as a colonizing force obscures the potential of Indigenous law for rebuilding citizenries as part of the decolonizing project, we do not engage with their work here. See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999); Patricia A Monture-Angus, *Journeying Forward: Dreaming First Nations Independence* (Halifax, NS: Fernwood, 1999).

59 Ladner, *supra* note 26 at 63.

60 Barker, *supra* note 20 at 262.

emphasizes that even in matrilineal societies, gendered violence (targeting women) can be imagined.[61]

We are particularly concerned about how conceptions of gender balance are used to deny sexism in Indigenous communities today.[62] The "traditional" gender roles that Indigenous women are encouraged to practise are often framed in ways that are restrictive and at odds with today's social context. This is similar to the rhetoric of motherhood raised in discussions on Indigenous women's gender roles. This motherhood rhetoric ultimately obscures, mischaracterizes, and too narrowly frames Indigenous women's options, choices, and contributions within their societies. This is particularly problematic when women's responsibilities and contributions as citizens are only framed in relation to nurturing and caring for the nation. While "mothering the nation" is espoused as something to take pride in as a highly respected role, this discourse too often forecloses a multitude of other functions and roles that Indigenous women assume in their societies.

While, for some, the responsibility of Indigenous women to mother is not necessarily an obligation to have children, for others physically and literally birthing the next generation is said to give women particular spiritual connections and specific knowledge of how to relate to others.[63] In her work on tribal governance responses to sexual violence in the US, Sarah Deer claims that "[p]rotecting women—the *life-bearers* and

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61 See Emma LaRocque, "The Colonization of a Native Woman Scholar," in Christine Miller & Patricia Chuchryk, eds, *Women of the First Nations: Power, Wisdom, and Strength* (Winnipeg: University of Manitoba Press, 1996) 11 at 14 [LaRocque, "The Colonization"]. LaRocque, citing historical observations and indigenous stories, notes that "[i]t should not be assumed, even in those original societies that were structured along matriarchal lines, that matriarchies necessarily prevented men from oppressing women. There are indications of male violence and sexism in some Aboriginal societies prior to European contact and certainly after contact": *ibid* at 14.

62 St Denis, *supra* note 23 at 37–40.

63 See Kim Anderson, "Affirmations of an Indigenous Feminist" in Cheryl Suzack et al, eds, *Indigenous Women and Feminism: Politics, Activism, Culture* (Vancouver: UBC Press, 2010) 81 at 86–88.

life-givers of nations—is central to the *well-being* of nations."[64] We agree that Indigenous women's well-being is vital to the overall well-being of a nation; however, we also believe that probing questions need to be asked when the rhetoric of motherhood is framed in the language of culture and tradition. The need for such questions extends to instances of evoking "the sacred", particularly when the sacred is placed beyond human challenge and understanding. While we believe much can be considered sacred in the world, we do not believe this label should shield justifications for gendered violence and the subordination of women against human inquiry and interrogation. In relation to the rhetoric of motherhood, we ask: Who and what do these discourses serve? Motherhood is no doubt powerful and meaningful to many Indigenous women, and can be imagined in non-essentializing, non-oppressive ways. While we can also imagine work and responsibilities occasionally being allocated along gendered lines for limited tasks and periods of time, in ways which are tentative, provisional, contingent, and non-essentializing, and which do not lead to violence and subordination, we still need to interrogate the rationale and motivation for such arrangements. So what happens when motherhood is rhetorically evoked in fundamental ways which treat motherhood as a compulsory aspect of being an Indigenous woman?

What this rhetoric tells us about gender is that Indigenous women are valued and defined largely in relationship to their bodies. An anti-essentialist approach would ask how this limits what we imagine Indigenous women's being, capabilities, and contributions to be.[65] In challenging violence against women, we assert that Indigenous women deserve the right to safety and bodily integrity simply because they are humans. Rhetoric about sacred bodies, special roles, and special gifts may have a place if such language could be interrogated, and if it were applied in non-essentialized ways with respect for the dignity and agency of all genders. However, in its present form, such rhetoric does not generate

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64 Deer, "Decolonizing", *supra* note 11 at 152 [emphasis added]. Deer says this in response to sexism—not as a way to deny its prevalence.

65 See Snyder, *Representations*, *supra* note 52.

effective grounds upon which to fight against violence. Indigenous women, regardless of their enactment of gender, have the right to safety on the grounds of their humanity.

Motherhood rhetoric also limits Indigenous women in that it insists on a lens that relies heavily on heterosexuality. Further, the insistence that Indigenous women are to nurture the nation creates substantial burdens for women. As noted above, Indigenous girls and women are limited when they are imagined first and foremost (and sometimes only) as mothers or future mothers. Motherhood rhetoric also creates burdens in that women who are economically, politically, and socially disadvantaged, as well as at risk of high rates of violence, are being pressured to somehow find their way to nurture and take care of everyone. Kim Anderson notes that strong kinship and support systems are not in place, and remarks, "[w]hat, we may ask, are the fathers of the nation doing for children"?[66] Further, she asks people to consider what it means to insist on valuing and taking up motherhood in a patriarchal context.[67]

Reflecting on "tradition", Anderson suggests that

> [a]s we fervently recover our spiritual traditions, we must also bear in mind that regulating the role of women is one of the hallmarks of fundamentalism. This regulation is accomplished through prescriptive teachings related to how women should behave, how they should dress and, of course, how well they symbolize and uphold the moral order.[68]

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66 Anderson, *supra* note 63 at 87.

67 *Ibid.* LaRocque discusses how "motherhood" is often touted in a way that treats women's domestic roles as empowering and having "cultural" status. She considers that this concept of "balance"—between women's roles and men's roles—might just be "a new buzzword for keeping women to domestic and nurturing roles": LaRocque, "Métis and Feminist", *supra* note 23 at 55. She further explains that "it does remain that for many, idealization of nurturing/motherhood has been reified and has gained political currency within nationalist and cultural difference discourses": *ibid* at 55. For an in-depth study of poverty and federal policy on reserves, see Hugh Shewell, *"Enough to Keep Them Alive": Indian Welfare in Canada, 1873–1965* (Toronto: University of Toronto Press, 2004).

68 Anderson, *supra* note 63 at 88.

While the rhetoric of motherhood is advanced as empowering to Indigenous women (and is likely also felt and experienced as such for some Indigenous women), we question how well this rhetoric actually serves Indigenous women, how it mitigates violent realities, and how it silences other ways of being. Emma LaRocque urges that

> as women we must be circumspect in our recall of tradition. We must ask ourselves whether and to what extent tradition is liberating to us as women. We must ask ourselves wherein lies (lie) our source(s) of empowerment. We know enough about human history that we cannot assume that all Aboriginal traditions universally respected and honoured women. (And is "respect" and "honour" all that we can ask for?)[69]

Throughout this article, we advocate against understanding Indigenous legal traditions and Indigenous peoples as being frozen in history. It is unjust to claim that Indigenous peoples cannot change (like everyone else does, and all other cultures and societies do). So too must we resist treating historic gender roles as frozen and static. Indigenous women in particular have paid a high price for having to conform to so-called traditional gender roles and will continue to do so if we cannot see past the rhetoric.[70]

This is why we are concerned about assertions of perfect and balanced gender roles prior to contact; these views can lead to a romanticization of the past wherein gendered conflict and violence are erased. In her work on sexual assault laws and Indigenous sovereignty,

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[69] LaRocque, "The Colonization", *supra* note 61 at 14. Green also notes that "[r]ejecting the rhetoric and institutions of the colonizer by embracing the symbols of one's culture and traditions is a strategy for reclaiming the primacy of one's own context in the world, against the imposition of colonialism. But, in the absence of an analysis of the power relations embedded in tradition, it is not necessarily a libratory strategy": Green, "Taking Account", *supra* note 20 at 27.

[70] See Jennifer Nez Denetdale, "Chairmen, Presidents, and Princesses: The Navajo Nation, Gender, and the Politics of Tradition" (2006) 21:1 Wicazo Sa Rev 9 [Denetdale, "Chairmen"]. Denetdale's work on power and tradition is important. A reading of her work should include, however, an approach that asks after how all assertions of tradition should be discussed, not just assertions of tradition in which colonial ideals seem to exist.

Deer quotes an elder who describes that "'violence was virtually nonexistent in traditional Indian families and communities. The traditional spiritual world views . . . prohibited harm by individuals against other beings.'"[71] With respect, we believe that as a historical statement this elder's view is simply wrong; it is both overbroad and does not generally accord with Indigenous societies' pre-colonial experiences. However, as a legal resource this passage is very significant because it shows that sexual violence was (and is) not acceptable to this respected leader, and we may understand this as a normative commitment and an aspiration of law. This requires re-emphasis: just because something is prohibited by law does not mean that it never happens. Laws exist to respond to conflicts and counternarratives should inform any analysis. Deer asserts that "[r]esisting rape means resisting colonization."[72] Her perspective importantly points to the use of sexual violence as a tool of colonization; however, if taken out of context, it also dangerously implies that gendered violence is *only* colonial and that Indigenous histories are pure and non-violent. Professor Deer does not generally take this point of view in her work.[73]

Again, when Indigenous (and non-Indigenous) people claim perfect histories with perfect laws (laws that worked for everyone and that were miraculously followed by every single person), too much is lost. In

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71 Deer, "Decolonizing", *supra* note 11 at 152.

72 *Ibid.*

73 See e.g. Sarah Deer et al, *Tribal Legal Code Resource: Domestic Violence Laws*, rev ed (Tribal Law and Policy Institute, 2012), online: <www.tribal-institute.org>; Sarah Deer, "Relocation Revisited: Sex Trafficking of Native Women in the United States" (2010) 36:2 Wm Mitchell L Rev 621; Deer, "Decolonizing", *supra* note 11; Sarah Deer et al, eds, *Sharing Our Stories of Survival: Native Women Surviving Violence* (Lanham, Md: AltaMira, 2008); Sarah Deer & Carrie A Martell, "Heeding the Voice of Native Women: Toward an Ethic of Decolonization" (2005) 81:4 NDL Rev 807; Sarah Deer, "Sovereignty of the Soul: Exploring the Intersection of Rape Law Reform and Federal Indian Law" (2005) 38:2 Suffolk U L Rev 455; Sarah Deer, "Expanding the Network of Safety: Tribal Protection Orders for Survivors of Sexual Assault" (2004) 4:3 Tribal LJ; Sarah Deer, "Toward an Indigenous Jurisprudence of Rape" (2004) 14:1 Kan JL & Pub Pol'y 121.

particular, we lose precious resources for intellectual deliberation in relation to dealing with violence, safety, conflict resolution, societal regulation, and legal procedures that enabled Indigenous peoples to manage challenges and changes within differing social contexts. These resources are concealed if the past is regarded as perfect and the future is theorized as a return to such perfection through unmediated, spontaneous spiritual living. Verna St. Denis argues that "solutions" to violence against women that rely on romanticized "returns" to the past are misguided and perpetuate further oppression. She explains,

> some Aboriginal women regard it as unnecessary to appeal for the attainment of the same rights as men; rather they appeal for the restoration and reclaiming of cultural traditions and self-government that would allow Aboriginal women to be restored to their once and continuing revered position. They insist that the solution to current problems of gender inequality and violence against Aboriginal women is to assert and reclaim cultural traditions. Part of what this call to tradition accomplishes is the erasure of the larger socio-political context in which Aboriginal women live, including being murdered with impunity.[74]

This idea of women taking up historic gender roles as a solution to violence is also often stated in ways that overlook the ethical and legal responsibilities of Indigenous men. While this is problematic for many reasons, one significant flaw is that it can cause Indigenous women to feel primarily responsible for the violence they experience.

Indigenous feminists (and other Indigenous scholars) insist that decolonization must be gendered; otherwise, "sovereignty" will simply be another way to "naturalize" male privilege and oppress women.[75] Indigenous feminist legal theory, along with Indigenous legal theories in general, should further encourage the revitalization of Indigenous laws while ensuring that gendered contexts and realities are explicitly

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[74] St Denis, *supra* note 23 at 39–40.

[75] See generally Ladner, *supra* note 26.

included so as to not simply reproduce past or current patriarchal power dynamics.[76]

Gendered violence will not effortlessly disappear if colonialism is fully addressed. Indigenous men do not harm Indigenous women just because of colonialism. Things cannot be so simple. In her work on Indigenous feminism and Aboriginal rights, Emily Luther remarks that "[t]he subordination inflicted on Aboriginal men due to colonialism makes it hardly surprising that they would then turn this subordination on their own culture's women."[77] This passage is important for asking questions about power—for inquiring into how those who abuse others attempt to exert control through their violence. However, this passage seems to imply that Indigenous men abuse Indigenous women solely because of colonialism. It seems to suggest that when Indigenous peoples are decolonized, the abuse will stop. There are many myths about violence, and one of these myths is that people abuse others because of stress.[78] Indigenous women face as much if not more exploitation than Indigenous men, yet Indigenous women are primarily the ones who are subjected to violence by men rather than being its perpetrators.[79] There are complicated reasons for the high rates of violence in Indigenous

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76 See Snyder, "Indigenous Feminist Legal Theory", *supra* note 21.

77 Emily Luther, "Whose 'Distinctive Culture'? Aboriginal Feminism and *R. v. Van der Peet*" (2010) 8:1 Indigenous LJ 27 at 52. Overall, Luther's article is quite critical in approach and draws on Indigenous feminism to critique how aboriginal rights (particularly in *R v Van der Peet*) work for Indigenous men but not for Indigenous women. However, her discussion about the relationship between gendered violence and colonialism requires further consideration.

78 See Brisbane Domestic Violence Service, "Myths & Facts", online: <www.bdvs.org.au/information/myths--facts>. For a broader discussion on violence against women, see Holly Johnson & Myrna Dawson, *Violence Against Women in Canada: Research and Policy Perspectives* (Oxford: Oxford University Press, 2011). The analysis of Indigenous social and legal issues presented here should be read alongside this text so as to reflect on the inclusion of critical Indigenous feminist analyses and critical Indigenous legal theories in relation to violence against women.

79 This is not to say that Indigenous women are never violent or that they never cause harm to others. Rather, the point here is that overall, men are more likely to be perpetrators of violence and women are more likely to be victims of violence.

communities, and we have to move beyond rhetoric and myths so as to recognize and work with this complexity. Violence and conflict should not be conflated; violence is a learned response to conflict and relates to power.[80]

Having observed that addressing colonialism alone will not adequately deal with the complex forces related to violence against Indigenous women, we must also restate that Indigenous laws have not remained undamaged. While Indigenous law has been, and continues to be practised, it has been undermined and in some cases distorted, or it is incomplete. Given this, we are careful to neither romanticize nor dismiss Indigenous laws as a resource for dealing with such violence. They are imperfect (as all law is) but nevertheless they are a vitally important mode of governance.[81]

"Tradition" is not neutral and it can be purposefully deployed in ways so as to discipline and morally police women. Women can be subjugated through the use of tradition at the very moments in which the actions and inactions of men require the most scrutiny.[82] When deployed at this level of generality, evocations of culture and tradition can corrosively inhibit nuanced, non-essentialized views and practices of Indigenous law, and actually prevent communities from being able to usefully apply it to violence against women. Used in this way, tradition denies the complexity of gendered legal realities and refuses room for examining how today's sexism influences interpretations of past and present Indigenous legal practices. The rhetoric, masked in overgeneralized shields of sacredness and unassailable truths, is used to silence others and to deflect questions and critical thinking. This rhetoric can be used to assert that there is only one way to be Indigenous and any consequent engagement with law is idealized and non-critical.

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80 See Alan Edwards & Jennifer Haslet, "Violence is Not Conflict: Why It Matters in Restorative Justice Practice" (2012) 48:4 Alta L Rev 893.

81 See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution*, *supra* note 8.

82 See generally Denetdale, "Chairmen", *supra* note 70; Kirsten Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart, 2012) at 99.

Deliberation, debate, and dissent (as well as the inclusion of different perspectives relating to gendered violence) validate law,[83] and are key to approaching Indigenous laws as living public intellectual resources. Such legitimacy would mean that agreement, acquiescence, and accord would follow the implementation of laws in specific contemporary contexts. In the next section, we consider the importance of Indigenous laws to the issue of violence against women.

1.2. Why Indigenous Law Has to Matter to the Issue of Violence Against Women

Here we consider the role of Indigenous legislation in addressing this issue. In the United States, Indigenous legal powers and principles have been officially recognized and activated by both tribal and national governments in an attempt to respond to internal and external violence against Indigenous women. Unfortunately, in the Canadian context, the state does not formally recognize Indigenous peoples as having this level of jurisdictional power.[84] Nevertheless, Indigenous law contains rich intellectual resources that continue to exist within Indigenous communities regardless of what state law dictates. We believe there are important alternatives in the development of Indigenous laws that are attentive to gendered violence and we see these here, in another North American context, where Indigenous processes and principles are more explicit.

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[83] Jeremy Webber makes the important point that agreement is a necessary part of legality, even in the face of substantial disagreement and discord. See Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44:1 Osgoode Hall LJ 167.

[84] See Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at 239–70.

1.2.1. The US Context[85]

In the United States, there is one special area of legislative activity dealing with violence against women on reservations: domestic violence codes.[86] In addition to their considerable detail, these ordinances often

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[85] The words and citations in this section are reproduced from John Borrows, "Aboriginal and Treaty Rights", *supra* note * at 717–22.

[86] See e.g. *Makah Tribal Law and Order Code*, Title 11, c 1, § 4 (defining domestic violence as a criminal matter in general terms) & Title 11, c 4, § 9(h) (banishment for domestic violence), online: <www.narf.org/nill/codes/makahcode/index.html>; *Colville Tribal Law and Order Code*, Title 5, c 5, § 3, online: <www.colvilletribes.com> (definitions of domestic violence framed in broad terms); *Siletz Tribal Code Domestic and Family Violence Ordinance*, § 8.105, online: <www.ctsi.nsn.us> (mandatory arrest for offenses involving domestic or family violence), § 12.504 (consequences for violation of protection order)); *Kickapoo Tribe in Kansas Domestic Violence Code*, §§ 205(3), 205(7) (mandatory arrest for predominant aggressor in violence); *Saginaw Chippewa Tribal Law Domestic Abuse Protection Code*, Title 1, c 24 § 12, online: <www.sagchip.org> (mandatory reporting requirements for investigating peace officers), § 2 (first offender counseling for mental health, substance abuse, and sexual offences, as well as victim reimbursement for items including but not limited to relocation expenses, property damage, medical expenses, counseling expenses, and emergency shelter expenses); *Oglala Sioux Tribe Domestic Violence Code* (§ 99.2 of *Oglala Sioux Tribe Law and Order Code*, c 9), c 2, § 218 (duty of tribal court prosecutor to notify victim), c 2, § 214 (tribal court procedures involving pre-trial release), c 3, § 315 (tribal registry for orders for protection to secure full faith and credit state enforcement), c 5 (education for police, court personnel, schools, and tribal employees, as well as prevention and intervention programs); *Yakama Nation Domestic Violence Code*, c 2, § 2.8 (victim's statements admissibility in tribal court); *Sault Ste Marie Tribe of Chippewa Indians Tribal Code*, c 75, online: <www.saulttribe.com> (crime victim's rights include notice of medical services, victim compensation, contact information for a crime victim advocate within a 24-hour period, special provisions for a speedy trial, and separate physical court waiting areas for victims of violence); *Jicarilla Apache Nation Tribal Code*, Title 3, c 5, § 3 (sanctions, including confinement, fines, and mandatory participation in domestic violence programs); *White Mountain Apache Criminal Code*, c 6, § 6.3, online: <www.wmat.nsn.us> (confinement, fines, and participation in domestic violence counseling with levels of increasing sanctions for first, second, and third offences); *Omaha Tribal Code (2013)*, Title 11, c 3, § 8,

contain important contextual statements outlining their purposes. As such, they set the tone for domestic violence discussions and action within Native American communities. For example, the *Fort Mohave Law and Order Code* expresses faith in the importance of law in reducing and deterring domestic violence.[87] The *Hopi Family Relations Ordinance* identifies the scope and tragic consequences of domestic violence for individuals, clans, and communities and specifically mentions the fact that domestic violence is not just a "family" matter.[88] The *Northern*

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online: <Omaha-nsn.gov> (5-year ineligibility of perpetrator for child foster care and guardianship, rebuttable presumption against child custody, firearms prohibition, and ineligibility for Omaha tribe employment); *Muscogee (Creek) Nation Code*, Title 6, c 3.4, online: <www.creeksupremecourt.com> (perpetrator restraining orders); *Hopi Family Relations Ordinance*, c 2, § 6.01, online: <www.narf.org/nill/codes/hopicode/family.html> (victim protection orders); *Salt River Pima-Maricopa Indian Community Code of Ordinances,* c 10, art VII, § 256, online: <www.srpmic-nsn.gov> (orders of protection); *Nez Perce Tribal Code*, Title 7, c 3, § 4, online: <www.nezperce.org> (*ex parte* temporary domestic protection order); *Ninilchik Village Domestic Violence Ordinance*, § 11 (violation of a protective order as civil contempt); *Turtle Mountain Band of Chippewa Indians Tribal Code*, Title 37 (Domestic Violence), c 3, § 6, online: <www.tm.edu> (child custody and visitation).

87 *Fort Mojave Law and Order Code*, art XIII, c A, § 1301:

> The Fort Mojave Tribal Council finds that:
>
> (a) All persons have the right to live free from domestic violence;
>
> (b) Domestic violence in all its forms poses a major health and law enforcement problem on the Fort Mojave Indian Reservation;
>
> (c) Domestic violence can be reduced and deterred through the intervention of law; and
>
> (d) There is a need to provide the victims of domestic violence with the protection which the law can provide.

88 *Hopi Family Relations Ordinance*, c 1, § 3.01:

> The Hopi Tribal Council finds that:
>
> (a) Many persons are subjected to abuse and violence within the family and clan setting;
>
> (b) Family members are at risk to be killed or suffer serious physical injury as a result of abuse and violence within the family and clan setting;
>
> (c) Children suffer lasting emotional damage as direct targets of abuse and violence, and by witnessing the infliction of abuse and violence on other family and clan members;

Cheyenne Tribe Law and Order Code contains strong provisions criminalizing domestic violence,[89] while the *Oglala Sioux Tribe Domestic Violence Code* contains a bold declaration of purpose that underlines the cultural inappropriateness of violence against women and the importance of safety, protection, prosecution, and education in dealing with this issue.[90] While there is a tension between some of these measures

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> (d) The elderly Hopi residents are at risk for abuse and violence, the lack of services available for these citizens and the changing family structure indicates that laws are necessary to insure the protection of elders within the family and clan setting, and in their caretaking settings;
>
> (e) All persons have the right to live free from violence, abuse, or harassment;
>
> (f) Abuse and violence in all its forms poses a major health and law enforcement problem to the Hopi Tribe;
>
> (g) Abuse and violence can be prevented, reduced, and deterred through the intervention of law;
>
> (h) The legal system's efforts to prevent abuse and violence in the family and clan setting will result in a reduction of negative behavior outside the family and clan setting;
>
> (i) Abuse and violence among family and clan members is not just a "family matter," which justified inaction by law enforcement personnel, prosecutors, or courts, but an illegal encounter which requires full application of protective laws and remedies;
>
> (j) An increased awareness of abuse and violence, and a need for its prevention, gives rise to the legislative intent to provide maximum protection to victims of abuse and violence in the family and clan setting; and
>
> (k) The integrity of the family and clan. Hopi culture and society can be maintained by legislative efforts to remedy abuse and violence.

89 *Northern Cheyenne Tribe Law and Order Code*, Title 7, c 5, § 10, online: <www.narf.org>.

90 *Oglala Sioux Tribe Domestic Violence Code* (§ 99.2 of *Oglala Sioux Law and Order Code*, c 9), § 101:

> The OST Domestic Violence Code is construed to promote the following:
>
> 1. That violence against family members is not in keeping with traditional Lakota values. It is the expectation that the criminal justice system respond to victims of domestic violence with fairness, compassion, and in a prompt and effective manner. The goal of this code is to provide victims of domestic violence with safety and protection.
>
> 2. It is also the goal to utilize the criminal justice system in setting standards of behavior within the family that are consistent with traditional Lakota values and, as such, the criminal justice system will be utilized to impose consequences upon offenders for behaviors that violate traditional Lakota values that hold women and children as sacred. These consequences are meant as responses that will allow offenders the opportunity to make positive changes in their behavior and understand "wolakota".

and our earlier arguments, these detailed statutes, along with tribal court cases that interpret them, are evidence of the pressure tribes face within their communities to effectively deal with domestic violence.[91] Though progress is slow, they demonstrate that even communities facing high levels of trauma are capable of responding to this crisis.

Title 9 of the *Violence Against Women Act* was designed to allow Native American Nations jurisdiction over non-Indians (authority over Indians already existed) who commit crimes on Indian lands, to improve the Native programs for dealing with gendered violence, and to improve data gathering programs to better understand and respond to sex trafficking of Native American women.[92] When the *Act* was introduced, its sponsor, Senator Akaka, said:

> According to a study by the Department of Justice, two-in-five women in Native communities will suffer domestic violence, and one-in-three will be sexually assaulted in their lifetime. To make matters worse, four out of five perpetrators of these crimes are non-Indian, and cannot be prosecuted by tribal governments. This has contributed to a growing sense of lawlessness on Indian reservations and a perpetuation of victimization of Native women.[93]

The above measures are important, and it is necessary to critically engage with both the language in the domestic violence codes and to

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> 3. The prevention of future violence in all families through prevention and public education programs that promote cultural teachings and traditional Lakota values so as to nurture nonviolence within Lakota families and respect for Lakota women.

91 See Donna Coker, "Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking" (1999) 47:1 UCLA L Rev 1. For a discussion problematizing the portrayal of "battered women" in the wider literature, see Elizabeth Schneider, *Battered Women and Feminist Lawmaking* (New Haven, Conn: Yale University Press, 2000).

92 See *Violence Against Women Reauthorization Act*, USC 42, Title 9, § 901 (2013), amending 42 USC 13925 (1994).

93 Senator Daniel K Akaka, quoted in United States Senate Committee on Indian Affairs, Press Release, "Senator Daniel K Akaka Introduces Bill to Protect Native Women Against Domestic Violence and Sexual Assault" (31 October 2011), online: <www.indian.senate.gov/news/press-release>.

consider the contexts in which the codes will be practised. These codes challenge systemic sexism and the work that nations face in their implementation must address male privilege and sexism as they play out in the legal process itself. Interestingly, Senator Akaka also acknowledged lawlessness (though not its root colonial cause—that is, the dismantling of Indigenous legal orders) and how this creates the conditions for unmitigated abuse of male power and violence. US tribal court judges are faced with the very real challenge of how to practically access and use Indigenous laws generally, but also in the specific context of using these laws in tribal court systems (which largely reflect Anglo-American court systems).[94] Although a thorough analysis of tribal courts and codes is beyond the scope of our paper, Indigenous feminist legal theory provides a critical and useful framework for asking questions about power in relation to these (and other) legal mechanisms via its approach to understanding all aspects of law as gendered.

1.2.2. The Canadian Context[95]

Indigenous peoples in the United States have different jurisdictional boundaries as compared to Canada. The crisis of violence against Indigenous women is a major problem in both countries, however, this crisis is exacerbated in Canada where Indigenous peoples have fewer jurisdictional options (as recognized by the state, that is). Despite this problem, there has been no significant constitutional response.[96] While Canadian federal legislative action has directed judges to consider the

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94 See Friedland, "Reflective Frameworks", *supra* note 6.

95 The ideas in the next three paragraphs are drawn directly from Borrows, "Aboriginal and Treaty Rights", *supra* note * at 700–03.

96 *R v Gladue*, [1999] 1 SCR 688 at para 64, 171 DLR (4th) 385 [*Gladue*] ("The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem").

special circumstances of Indigenous peoples in some instances,[97] these efforts are woefully inadequate in addressing broader issues of violence within Indigenous communities.[98] There has been no sustained constitutional innovation dealing with Indigenous justice issues despite numerous reports recommending greater Indigenous control of justice under section 35(1) of the *Constitution Act, 1982*.[99]

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[97] Section 718.2(e) of the *Criminal Code*, RSC 1985, c C-46 was designed "to respond to the problem of overincarceration in Canada, and to respond, in particular, to the more acute problem of the disproportionate incarceration of aboriginal peoples": *Gladue*, *ibid* at para 50. That section reads as follows: "A court that imposes a sentence shall also take into consideration the following principles: ... (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." For further discussion of this issue, see Elizabeth Adjin-Tettey, "Sentencing Aboriginal Offenders: Balancing Offenders' Needs, the Interests of Victims and Society, and the Decolonization of Aboriginal Peoples" (2007) 19:1 CJWL 179.

[98] There is "a near-fatal lack of resources" dealing with violence against women on reserves: Anne McGillivray & Brenda Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 79–80. For an analysis of the context and limits of *Gladue* for Aboriginal women, see Angela Cameron, "*R. v. Gladue*: Sentencing and the Gendered Impacts of Colonialism" in John D Whyte, ed, *Moving Toward Justice* (Saskatoon: Purich, 2008) 160; Cameron, "Sentencing", *supra* note 12; James Ptacek, ed, *Restorative Justice and Violence Against Women* (Oxford: Oxford University Press, 2009).

[99] Government reports dealing with Aboriginal justice issues include: Royal Commission on the Donald Marshall, Jr, Prosecution, *Digest of Findings and Recommendations* (Halifax, NS: Government of Nova Scotia, 1989); *Report of the Osnaburgh/Windigo Tribal Council Justice Review Committee* (Toronto: Government of Ontario, 1990); Law Reform Commission of Canada, *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (Ottawa: Law Reform Commission of Canada, 1991); *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol 1 (Winnipeg: Aboriginal Justice Inquiry of Manitoba, 1991); *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta: Main Report*, vol 1 (Edmonton: Attorney General and Solicitor General of Alberta, 1991); *Report of the Saskatchewan Indian Justice Review Committee* (Regina:

At the same time, Indigenous women have demonstrated great resilience and leadership in bringing issues of violence more fully into the public spotlight.[100] They have set up shelters, arranged counseling, organized vigils, volunteered in clinics, coordinated media campaigns, appeared before parliamentary committees, cultivated the arts, worked in the civil service, and have been elected as chiefs and councilors—all with a firm public resolve to end violence against women.[101] The Native Women's Association of Canada has long been at the forefront of these efforts[102] and their advocacy, research, and on-the-ground efforts have made a difference for thousands of people.[103] In fact, Indigenous women

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Government of Saskatchewan, 1992); *Report on the Cariboo-Chilcotin Justice Inquiry* (Victoria, BC: Attorney General of British Columbia, 1993); Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996); *Report of the Royal Commission on Aboriginal Peoples: Gathering Strength*, vol 3 (Ottawa: Supply and Services, 1996) at 54–65; Commission on First Nations and Métis Peoples and Justice Reform, *Legacy of Hope: An Agenda for Change*, vol 1 (Saskatoon: Saskatchewan Department of Justice, 2003); Ontario, *Report of the Ipperwash Inquiry*, vols 1–4 (Toronto: Attorney General of Ontario, 2007).

100 See Neil Andersson et al, "Rebuilding from Resilience: Research Framework for a Randomized Controlled Trial of Community-Led Interventions to Prevent Domestic Violence in Aboriginal Communities" (2010) 8:2 Pimatisiwin 61.

101 See the media archives of the Native Women's Association of Canada for examples of the broad array of activities undertaken by Indigenous women to deal with the violence against women. Native Women's Association of Canada, "Media Archives", online: <www.nwac.ca>. See also National Aboriginal Circle Against Family Violence, *Ending Violence in Aboriginal Communities: Best Practices in Aboriginal Shelters and Communities* (Ottawa: National Aboriginal Circle Against Family Violence, 2005).

102 Recently, the Assembly of First Nations has also become more active in addressing violence against women. See Assembly of First Nations, *Demanding Justice and Fulfilling Rights: A Strategy to End Violence Against Indigenous Women and Girls: Draft—For Discussion & Input* (2012), online: <www.afn.ca>.

103 The work of the Native Women's Association of Canada was very significant in securing Indian status for hundreds of thousands of people who were disenfranchised on a sexually discriminatory basis. Loss of Indian status caused many

across the country have creatively developed detailed policy proposals and practical models for dealing with violence against women.[104] Their work includes support for Indigenous self-determination that recognizes and affirms women's rights.[105] This knowledge and experience, and in particular their poignant calls for structural change, must be heeded.[106]

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harms. See Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 1987). One of these injuries was that the loss of status made Aboriginal women more vulnerable to violence because of the precarious position in which they were placed, relative to Indian men. Indian women's inability to reside or own property on reserve, participate in the political life of the community, and access the support of extended family and kin exposed them to greater challenges in confronting and fleeing abuse. The work of the Native Women's Association of Canada and their allies helped address some of these challenges. See *McIvor v The Registrar, Indian and Northern Affairs Canada*, 2007 BCSC 827, [2007] 3 CNLR 72, var'd 2009 BCCA 153, 306 DLR (4th) 193, leave to appeal to SCC refused, 33201 (5 November 2009). Gender and status issues are ongoing. Additionally, further analysis on how the Native Women's Association of Canada has attempted to frame their politics in relation to gender roles, norms, and notions of tradition requires ongoing consideration. For a discussion on this, see Fiske, *supra* note 29.

[104] For examples of advocacy, see Native Women's Association of Canada, *What Their Stories Tell Us: Research Findings From the Sisters in Spirit Initiative* (Ohsweken, Ont: Native Women's Association of Canada, 2010), online: <www.nwac.ca>; Jeannette Corbiere Lavell, "Statement of the Native Women's Association of Canada; Assembly of First Nations; Chiefs of Ontario; National Association of Friendship Centres; Canadian Feminist Alliance for International Action; Canadian Association of Elizabeth Fry Societies; Canadian Friends Service Committee (Quakers); Grand Council of the Crees (Eeyou Istchee); and Amnesty International: Combating Violence Against Indigenous Women and Girls, Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples" (speech delivered at the Eleventh Session of the Permanent Forum on Indigenous Issues, New York, NY, 7–18 May 2012), online: <www.nwac.ca>. Models dealing with sexual violence in Aboriginal communities are discussed in Jarem Sawatsky, *The Ethic of Traditional Communities and the Spirit of Healing Justice: Studies from Hollow Water, the Iona Community, and Plum Village* (London, UK: Jessica Kingsley, 2009).

[105] Sharon McIvor, "Aboriginal Women's Rights as Existing Rights" (1995) 15 Canadian Woman Studies 34.

[106] See e.g. Native Women's Association of Canada, *Arrest the Legacy: From Residential Schools to Prisons* (Ottawa: Native Women's Association of Canada, 2012), online: <www.nwac.ca>. For commentary on Native women's advocacy involving violence

Despite these efforts, section 35(1) does not specifically deal with violence against Indigenous women because, thus far, legislatures and courts do not regard these powers as falling within Indigenous peoples' jurisdiction.[107] Yet Indigenous peoples have their own laws that could be referenced to address this issue, and they could be recognized and affirmed within Canada's constitution. We now shift to discussing how Indigenous peoples' own law could provide important resources for developing better approaches to reducing gendered violence within Indigenous communities.

PART TWO: DRAWING ON STORIES, THINKING WITH INDIGENOUS LAW

We turn to stories for thinking about Indigenous laws for confronting gendered violence. Violence against women has been a concern of Indigenous peoples for thousands of years, as is evident in many ancient stories. Val Napoleon and Hadley Friedland note that "some indigenous stories are about law", "contain law", and "are a deliberate form of precedent".[108] While we address only two stories in this article, many stories must be cross-referenced for a deeper understanding of law and its operation. One story does not show the complexity and breadth of a given legal tradition any more than one legal case (arguably another form

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against women, see Wendee Kubik, Carrie Bourassa & Mary Hampton, "Stolen Sisters, Second Class Citizens, Poor Health: The Legacy of Colonization in Canada" (2009) 33:1-2 Humanity & Society 18.

[107] For a discussion of Aboriginal women and constitutional law, see Patricia Monture, "The Right of Inclusion: Aboriginal Rights and/or Aboriginal Women" in Kerry Wilkins, ed, *Advancing Aboriginal Claims* (Saskatoon: Purich, 2004) 39. For an early article on this issue, see Thomas Isaac & Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21:2 Man LJ 453. It should be noted that Aboriginal women possess rights outside of section 35 too. See Jennifer Koshan, "Aboriginal Women, Justice and the Charter: Bridging the Divide?" (1998) 32:1 UBC L Rev 23. See also *R v Ewanchuk*, [1999] 1 SCR 330 at paras 28, 68–70, 169 DLR (4th) 193.

[108] Napoleon & Friedland, "Inside Job", *supra* note 14 at 7.

of story) can represent Canadian law. However, stories can contain important information about legal reasoning.[109] Stories "are structured to record relationships and obligations, decision-making and resolutions, legal norms, authorities and legal processes. Still others record violations and abuses of power, and responses to these breaches of law."[110] Importantly, engaging with stories also opens up space for various interpretations and for deliberation that is essential to understanding Indigenous legal traditions and engaging in its practice.[111] Stories are tools for thinking and problem solving.[112]

When reading the stories below, we kept in mind the following questions: What kind of conversations can we have within and about this story? What are some of the hard edges of this conversation? How can the law from this story, and others, help us to think about violence against women? How can law help us to consider questions about activism and social change? To move away from general discussions about Indigenous law and violence against women, we focus on the two stories and analyze each using a different methodology. We show that there are different ways into discussions about Indigenous law and that a critical reading of gender can be taken up with various methodologies. First, we discuss a Nisga'a story, entitled "Origin of the Wolf Crest".[113] We analyze this story using an adapted case method. Second, we discuss

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[109] *Ibid* at 4.

[110] *Ibid* at 8.

[111] Deliberative law is one source of law found in Indigenous legal traditions. See Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at c 2.

[112] See Napoleon & Friedland, "Inside Job", *supra* note 14 at 8.

[113] This is drawn from Interview of Arthur Wellington by William Beynan (1915) in Port Simpson, "The Origin of the Wolf Crest". The story is edited and retold in the words of Val Napoleon. See George F MacDonald & John J Cove, *Tsimshian Narratives 1: Tricksters, Shamans, and Heroes* (Ottawa: Canadian Museum of Civilization, 1987) at 295–304. Friedland and Napoleon parallel story analysis with the development of a broader context within which to make the analysis. This way, the structure of the legal and political order and the law logic and aspirations of law can inform the legal analysis. See Hadley Friedland & Val Napoleon, "Gathering the Threads: Indigenous Legal Methodology" Lakehead LJ [forthcoming in 2015].

an Anishinaabek story, entitled, "The Rolling Skull"[114] to which we apply an Indigenous feminist legal analysis.

1.1. Origin of the Wolf Crest

There was a Chief who would not let his daughter marry because no one could live up to his expectations, no one was good enough.

One morning, a group of men, including a young prince, arrived. They began gambling games with the villagers. Later that night, when everyone was asleep, the young prince woke the chief's daughter and asked her to elope with him. She agreed even though she did not know who he was or where he came from. The prince told her to cover her face, and then he and his men changed into wolves.

He put her on his back and they headed for the mountains. After a very long time, they came to a village. The prince and his men took off their wolf shapes and became human again. The young prince uncovered her face and took her to his father's house, the chief. The chief married the young couple.

Later the young woman looked around and saw many women, old and young, some very beautiful. But their legs were covered in sores from the extreme cold and burns from the fire. One of the slaves took pity on the young woman, "Don't you know the man you are married to is a wolf? All these women are his former wives, now they are slaves. They were all the daughters of chiefs that were too choosy about their daughters' marriages. So these wolves were able to lure them away. The prince once loved us just as he loves you now, but he discarded us and now we are slaves. When he hears of some other woman, he will throw you away too."

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[114] The text of this story is found in William Jones, *Ojibwa Texts*, vol 7, part 2, ed by Truman Michelson (New York: Arbor Press, 1919) 405, online: <www.archive.org/details/ojibwatextscoll00unkngoog>. This story is retold in the words of John Borrows.

Now the wolf people hated the smell of human blood. The young woman started to worry because her period was almost due. If the wolves smelled her human blood, they would devour her. She told the prince that she was sick. He pushed her away and called out a warning to the wolves to cover their noses.

The young prince sent his wife and the slave woman that had taken pity on her to a small cedar shelter up the mountain. Together, the women made plans to escape but they only had one pair of snowshoes. The slave woman put snowshoes on and placed the young woman on the snowshoes behind her. They managed to get to the top of the mountain by nightfall. In the morning, they climbed down the other side of the mountain.

The slave woman knew that they would soon be missed. If they were caught, it would mean death. When they reached the top of the next mountain, they could hear a whistling and they knew it was the wolves. The slave travelled as fast as she could, but it was very hard. The wolves were getting closer.

They came to a tall hemlock tree. The slave threw the young woman up into the tree and then she began to climb, but she was so tired that the wolves caught her and dragged her down. They tore her to pieces and devoured her. The wolves surrounded the tree and assumed their human shapes. The young man called his wife, but she refused to listen to any of his promises. The wolves assumed their animal shapes and tried to uproot the tree. They tried everything but they could not fell it.

Night came and the wolves waited. When morning came, the young woman had a plan. She knew that they would hide from the smell of blood so she made her nose bleed and let the drops of blood fall. Seeing the human blood, the wolves hid their heads. At this point, the prince's father ordered the wolves back to their village.

The young woman escaped. She travelled for months. Her moccasins were worn out and her clothes were ragged, but the weather got warmer. She stopped caring what happened to her. An old woman found her. This was Loon Woman, the loon spirit. Loon Woman fed and healed her and clothed her. Finally, Loon Woman said, "I will send you back to your own people." First she painted the young woman's face red with an image of the sun with smaller suns inside it. Loon Woman told her that her new name would be Yalek and she was to wear the sun crest. The sun crest and its songs would belong to her and her children, generation after generation.

The young woman traveled on and finally found her people and her family, and she described everything that happened to her. Her father held a great feast to show his daughter to the world and to name her. The young woman painted her face exactly as loon woman taught her and she became Yalek. The young woman was pregnant and she gave birth to a child that resembled a wolf—he had a pointed nose and a small tail.

2.1.1. The Case Method

The case method analysis is a tool that is used in law schools to draw out the specifics of law in common law cases. It is often used in conjunction with legal analysis and synthesis in which individual analyses of cases are brought together to show a larger picture of legal principles, processes, and reasoning. The case method as conventionally used in common law settings has its limitations. Common law legal synthesis can strip stories of their context. By way of contrast we use a modified case method to do the exact opposite—we seek to re-embed stories (i.e. cases) in a fuller context. Thus, here, we will use this modified case method to "case brief" the details of the above story.[115] Napoleon and Friedland reflect on their

[115] An early version of this methodology is found in John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 17, 47 [Borrows, *Recovering Canada*]. For a discussion of the legal methodologies employed by Borrows, Napoleon, and Fletcher, see generally Friedland, "Reflective Frameworks", *supra* note 6.

usage of this methodology elsewhere and note, "we hope to move from philosophy or theory, to the practices, and legalities of Indigenous legal traditions".[116] This method helps to "mak[e] legal reasoning explicit".[117] Instead of understanding this method as necessarily at odds with Indigenous law, because of its origin in common law, we believe that Indigenous peoples have always practised adaptive management to draw on a variety of skills and tools, and that these can be worked with internally through Indigenous intellectual traditions.[118] Napoleon and Friedland describe that in working with the case method analysis, their intention is not to do away with or undermine existing Indigenous legal methodologies; rather, this method can be considered as an additional methodological tool.[119] While we (the authors) do not all use the case method in our own work, we can still engage with this method as one way into a dialogue about law. Our space is limited here, but there are many more methods—existing as well as yet to be articulated—that we hope to continue to discuss in the future.[120] What is important for the

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[116] Napoleon & Friedland, "Inside Job", *supra* note 14 at 3.

[117] *Ibid* at 17.

[118] *Ibid* at 9. Hadley Friedland describes that an internal viewpoint can "enable us to access, understand and apply laws": Friedland, "Reflective Frameworks", *supra* note 6 at 30. Importantly, she describes that engaging with legal scholarship and methodologies "from an internal viewpoint does *not* refer to the legal scholar's Indigenous descent or membership in a specific Indigenous community . . . [r]ather, it refers to a specific *type* of legal scholarship": *ibid* at 29. This is similar to Snyder's approach to Indigenous feminist legal theory and methodology, which treats them as analytic tools, rather than markers of identity *per se*. See Snyder, *Representations*, *supra* note 52 at c 3. Snyder, as well as Friedland, contend however that Indigenous people will take up these tools in ways that work for them if they deem them applicable. See Snyder, "Indigenous Feminist Legal Theory", *supra* note 21 at 28; Friedland, "Reflective Frameworks", *supra* note 6 at 38.

[119] Napoleon & Friedland, "Inside Job", *supra* note 14 at 13.

[120] For example, Friedland notes that she has taken up legal analysis and synthesis in her earlier work. See Friedland, "Reflective Frameworks", *supra* note 6 at 35. She also discusses the linguistic method advanced by Mathew Fletcher; "the source of law method" and "the single-case analysis method" taken up by John Borrows; as well as the "multiple case method' employed by Napoleon. *Ibid* at 18.

operation of law in this methodology is transparency of reasoning and interpretation, and the citation of all sources (e.g., stories and interviews) so that others can go to those same sources and develop their own interpretations and arguments.

The analysis of the stories is determined by the questions one poses. Since we are focusing on violence against women, our case brief analysis reflects this focus. The main elements of the case brief are: (1) What are the relevant facts of the story? (2) What is the main human problem that the story focuses on? (3) What is decided about the problem or how is this problem resolved? (4) What is the reason behind the decision (said and/or unsaid)—is there an explanation in the story? There might also be parts of the story that one needs to "bracket"—aspects that are of interest but not necessarily relevant to the case brief. Often the bracketed content can inform other important questions and generate additional discussion.

Case Brief of "Origin of the Wolf Crest"

The facts of the story are:

- A chief refuses to let his daughter marry. No suitor was acceptable to him.
- A group of men, including a beautiful prince, arrives to gamble. The prince entices the chief's daughter to elope with him even though she knows nothing about him.[121]
- The young woman arrives at the prince's village and finds many abused slave women who were former wives of the prince. She learns that it is likely that she will be made a slave herself once her prince husband hears of another vulnerable and available woman.
- The young woman escapes with one of the enslaved women. The slave woman is killed by the wolves, but the young woman

[121] It is not our intention here to victim-blame; rather, we are looking closely at vulnerability.

manages to escape by using their fear and dislike of human blood against them.

- The young woman is assisted and healed by Loon Woman who gives her the name Yalek, and the crest and songs that go with the name.
- After several months, the young woman finds her way home. There, she gives birth to a baby with a small pointed nose and small tail.
- This story is the origin of the wolf clan. The story and clan continue today.

Problem (Issue): What is the main human problem that the story focuses on?

The main problem focused on in this case brief is the circumstances of the women being vulnerable and enslaved, and facing oppression and violence.

(1) What are the consequences of creating vulnerable people—in this case, women?
(2) How does one respond when facing certain dangerous oppression and perhaps death?

Decision/Resolution: What is decided about the problem or how is this problem resolved?

(1) Once the young woman realizes her fate, she decides to escape. She is helped first by the slave woman and then by Loon Woman who gives her the name Yalek.
(2) The enslaved woman also had hopes of escaping and surviving. She was incredibly vulnerable and lacked power in comparison to the young woman. Ultimately, this extreme vulnerability, which caused her to have to make many sacrifices, led to her death.

Reason (Ratio/Ground): What is the reason behind the decision? Is there an explanation in the story?
Unsaid:

(1) The young woman was vulnerable, in part because her father was controlling.
(2) The enslaved woman knew that she had no real life continuing as a slave so she might as well try to escape with the young woman.
(3) The name Yalek and the associated crests and songs will be performed at all the pole-raising feasts and so will always be a reminder about vulnerability and abusing power to control others.
(4) There will continue to be those that take advantage of those who are vulnerable.

Said:

- The young woman's experience and the birth of her wolf child are recognized as the origin of the wolf crest.

Bracket [What do you need to bracket for yourself in the cases? Some things will be beyond your terms of reference but are not necessary to the case analysis.]

- Where was the young woman's mother? Was she in a position to act on the legal responsibilities that she had to her daughter?
- How will the wolf baby be accepted or not?

2.1.2. Discussion

Law is about creating conditions for healthy, peaceful, and productive living against a backdrop of conflict about why, how, and by whom these conditions should be created. Given this, the theory and practice of law must account for and include differing viewpoints. So even when taking the first step in applying the case brief methodology, something as seemingly simple as stating the facts of the story can be revealing in terms of how stories are interpreted and how "facts" are selected. If we (the

authors and the readers) were in a room together, we might have some debate over the facts. Power dynamics are present in all contexts, and some of our voices and perspectives might be heard over others.

The case brief above is read through a lens of vulnerability. Taking this approach raises questions about the social circumstances that led to the women being in such vulnerable positions. It also highlights the spaces they have for exercising agency in response to their circumstances. Highlighting vulnerability allows us to ask questions about why these women were denied freedom from bodily harm and to live as they wished in conditions that should secure their dignity and safety. The story encourages discussion about power, gendered violence, class, heteronormativity, and gender roles. As noted above, social structure and context can be found in stories. Thus, in identifying the human problems in the story we are encouraged to think about these contexts rather than treating the story as though it is about personal and individual decisions alone. This story is particularly complex because it shows the vulnerability of the young woman and the former wives as a group, while also underscoring the power dynamics between the young woman and the even more vulnerable enslaved women.

In the naming of Yalek, which includes accompanying crests and songs that are publicly performed at pole-raising feasts, there is a response to her vulnerability and agency. Furthermore, the story of the origin of the wolf clan serves as an important reminder about the consequences of vulnerability and violence. One can find law implicitly in this story, through issues concerning responsibility, expectations, obligations, authority, and legal processes. Further, there are explicit ways to see law in the story by looking at kinship systems, ceremonies, and the meanings and processes behind these.[122] The crests, songs, and origin of the wolf clan include legal processes and serve to encourage discussion about legal reasoning and legal responses. While the story shows concern

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[122] See Val Napoleon & Richard Overstall, "Indigenous Laws: Some Issues, Considerations and Experiences" (Opinion paper prepared for the Centre for Indigenous Environmental Resources, 2007) at 3, online: <www.caid.ca>. See generally Napoleon, *Ayook*, *supra* note 8.

about vulnerability and violence (of which the origin of the wolf clan serves as an ongoing reminder), there is no reason to insinuate that violence ceased to exist hereinafter. Not everyone heeds what is stated in the law. The same thing occurs when state laws dictate that violence is unacceptable within Canadian society—even in these circumstance violence does not cease to exist. What the story above demonstrates is that responses to violence are never complete. Indigenous laws, like state laws, are always imperfect in bringing about safety and lasting peace. Legal processes must be perpetually re-inscribed within any community's life, which means that the law can never be completely disentangled from wider social problems and broader power dynamics.

The story above can also (connectedly) be read and briefed through a lens of violence. This would shift our identification of the human problems to ask: What are the consequences of normalizing violence and enabling violent people (which in this case is the men)? How can a collective respond to violent people? How can violent people be held accountable for their behaviour? The prince was preying on vulnerable women, and while the story of the origin of the wolf clan serves to show that vulnerability and violence are unacceptable, what we do not know from the story is if the men were punished or what the response was to their actions. While the story does not tell us what happened to the men (or the other enslaved women), this question can nevertheless be opened up for discussion. We could draw on other stories that focus on responses to those who are violent and who commit gendered violence. We could also collectively discuss what some possible responses could be today. We could ask: Who should have the authority to implement these responses? What might be the challenges in prompting a response? What processes are in place for this? If we are unsatisfied, what space is there for dissent?

What the case brief method allows is a discussion about lived problems, and how they might be addressed through the identification of legal principles, processes, and responses. Even if another case brief looks different from the one above, the method does prompt a consideration about its lived implications and moves us beyond generalities related to Indigenous culture and traditions. Perhaps even more importantly, the above exercise also generally discourages claims

that Indigenous gender relations were perfect in the distant past. The events described herein occurred within a social context in which women were vulnerable and faced violence from many of the men around them, such as: being controlled by one's father, being persuaded into marriage, being a slave, facing the fate of being a slave, the violent death of the woman who was enslaved, and the escape and despair of the young woman who became Yalek. It would have been dangerous for Indigenous women during this earlier time to challenge gender roles and violence against women. The same insight should apply now when invoking rhetoric about historic gender roles in today's social context.

For these reasons the story of the origin of the Wolf Crest is unsettling. It is unsettling because of the violence. It is also challenging because there is no straightforward solution to that violence. Engaging with stories as a way to examine legal practice and theory prevents us from solely looking for rules (or the broad "moral" of the story) and easy solutions to violence. Legal responses to gendered violence are complex and ongoing. This story, as well as the next story, when read through a critical gendered lens, unsettles prevailing rhetoric and asks us to think more deeply about Indigenous legal responses to violence.

The Wolf Crest story reveals issues related to male privilege, male violence, the exploitation of women, the scope of women's agency, as well as activism and social change in light of community, family, and social pressures concerning marriage. We can take up internal legal perspectives when working within the story, but this takes us far beyond simply repeating the story. Napoleon and Friedland maintain that "if people cannot think and reason within [Indigenous law] and apply it to the messy and mundane, then it will continue to be talked about in an idealized way or as rhetorical critiques of Canadian law."[123] Borrows has likewise written:

> If an overexalted view of a tradition is applied, it could limit ordinary people from connecting to it when faced with their messy and often mundane circumstances. Legal traditions must have an air of reality about their application present-day applications. People will have

[123] Napoleon & Friedland, "Inside Job", *supra* note 14 at 9.

> trouble making their laws work for them if a hard-edged realism is not combined with the necessary idealism that underlies most legal systems.[124]

2.2. THE ROLLING SKULL

A family was living on the shores of a shining lake. As the fall season approached they began to prepare for the snows. Usually the father, mother and their son would pitch in to ensure they had enough to survive the winter. This year, something was different. The man and his son worked hard to gather wood and put down a store of meat and furs, but the mother was mostly absent.

After this went on for some time the father became suspicious. One day, instead of following the animals on his preparatory hunts, the man stayed close to the camp. He wanted to see what his wife did as he was gone.

After some time the man saw his wife leave the camp, thinking that she was alone. After travelling some distance behind her, he saw that she boldly approached a big tree. She took an axe from her pack and she struck the tree, saying, "Your friend has come."

It was a serpent-tree; and immediately, snakes began to flow from the tree, and there were so many that they couldn't be counted.

The man, who had followed his wife, could not conceal himself any longer. He took out his gun and began shooting the snakes, to try to ensure that they would not harm his wife, and the land around them. The snakes recoiled and reversed their flow and rushed back into the tree.

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[124] Borrows, *Canada's Indigenous Constitution*, *supra* note 8 at 105.

As the man started shooting, the woman tried to protect the snakes as they were slithering back into the tree. The man was furious at his wife's actions; he took his axe, and cut her. He severed her head.

The woman's head fell at the man's feet. He felt the guilt of the moment. Wondering what to do, he reached down, thinking he would tie her head to the tree.

The head rolled away from him. But with some persistence he was eventually able to pick it up. He said to himself, "I wonder what I shall do." He looked at the serpent tree she was visiting and decided to securely tie her head to a tree. After doing this, he ran back home. He wanted to get cloth to wrap her and bring her home for a proper burial.

As he returned he saw the woman's head lying on the forest floor; it was no longer tied to the tree. He tried to grab it but the head eluded his grasp; instead, it rolled into the cloth he had laid beside the tree.

The man next turned his attention to the serpent tree. He began chopping it down and, as he did so, the snakes once again flowed from the tree. He then lashed out at the snakes. The man started swinging his axe, cutting each snake in pieces until they were all killed.

When the man returned home he met his son. The son asked him where he had been. The son asked his father what animal he had killed today, and he wondered why it was wrapped in a cloth.

The father replied, "Don't be afraid, my dear son; don't run away. But I must tell you your mother is dead. I didn't kill her. But we have to flee; we have to get a long way from here."

So the father lifted his son on his shoulders and they started running. They left the head behind, still wrapped in the cloth. They ran all that day

and through the night and only stopped when the glow of the morning sky broke before them.

They stopped by a large rock to rest and waited for the sound of the morning birds.

In the still-dawn silence they heard a voice from deep in the woods behind them.

"There is no place in the whole length and breadth of this earth where you can flee from me."

The man and his son looked back. On the path on which they had run, came rolling the head of the man's wife. It bumped against the trees and jostled over the roots, yet it came straight towards them.

The man was shocked, but his instinct took over and he tried shooting the head with his gun. It was of no avail.

The head rolled forward. Snakes rolled out from the women's skull and attacked the father, poisoning him to death.

With his father stricken dead, and seeing the snakes flowing from his mother's still rolling head—the son fled.

As he ran, he cried for his mother, and mourned her death. As he kept running he remembered his father, and mourned him too.

The young boy eventually came to a clearing where he saw an old man. He could not hold his tongue. He said to the old one, "My father has been slain" The young boy then broke into uncontrolled sobbing. He couldn't stop himself. So the old man picked up the boy and with all speed they started out to his village.

As they were travelling they came to a place where ice was on a large lake, in a place where it narrowed. On the narrows they saw someone standing there; he had one leg.

The old man who was carrying the young boy addressed the person with one leg. He said, "O our grandfather! We are followed by a restless spirit. Can you help us?"

At this point, the man with one leg answered "My grandchildren. Do not be afraid, I myself am a spirit. Pass through me and you will be well."

The old man and the young boy did as they were directed, and passed through the Manitou.

The one-legged figure then spoke to them and said, "Now go in peace. Continue on your way till you arrive at a place where our people are strong, where we live together. When the rolling head comes to that place, keep it occupied and you will be helped."

They did as they were directed.

"Be off! It is on the morrow, before it is yet noon, you shall come to a place where the people are. O my grandchildren! Therefore now do you depart hence."

The boy went on his way, with the old man, up from the lake.

As the old man with the one leg, the Manitou, looked towards the place from where they came out upon the lake, he saw the rolling head of the woman. When it came over to where he was, the Manitou was addressed by the rolling head saying: "Where has the boy gone?"

"What do you want with them?" the Manitou said.

"I wish to kill them."

"If you can (pass), you may kill them. They passed by way of the space here between my legs."

As the head went past the old man, he hurled his spear at it, and the head was broken in pieces. Then he spoke, saying: "And may this have been the manitou? It is not a manitou being."

In time the boy and his older companion, in running, saw a town, and they wept when he saw the people. And all at once (the people heard) the child (as he) came crying; some ran to him, when all the more he cried. And some of (the people) too wept.

"For what reason do you cry?" the townspeople asked.

"My mother wishes to kill me, and in a little while she will be here. Yet we did see our grandfather on our way here."

"Come, let us follow back their trail!" they said. The men that were very fleet of foot started off running together when they followed back the trail. They saw a lake; when they looked, (they saw) the old man with one leg, standing (there). When they were come at where he was, they asked of him: "Has not that woman arrived yet?" They were addressed by him saying: "I have slain that rolling head."

The people then went back and in a while they arrived at home. The boy was very happy.[125]

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[125] Jones, *supra* note 114. Other versions of this story are found in Henry Rowe Schoolcraft, *Schoolcraft's Indian Legends* (Lansing, Mich: Michigan State University Press, 1991) at 213; William Berens, A Irving Hallowell & Jennifer Brown, *Memories, Myths, and Dreams of an Ojibwe Leader* (Montreal: McGill-Queen's Press, 1991) at 164.

2.2.1. Indigenous Feminist Legal Methodology

Here we apply Indigenous feminist legal methodology for engaging with the story. We draw on this methodology because it encourages analysis that is attentive to gendered power dynamics as they play out in Indigenous legal contexts.[126] This is not a methodology that all of the authors employ in their work, but as with the case brief, we hope to show that there are various methods for engaging with Indigenous law and that we see the need for an Indigenous legal pluralism. Snyder articulates one approach to Indigenous feminist legal methodology in her work on gendered representations in Cree legal educational materials.[127] Although her focus is on Cree law, the methodology itself is meant to be more broadly applicable and can applied here to think about the violence against women in the above story.[128]

Indigenous feminist legal methodology[129] is expressly political and activist in its orientation, maintaining that there is no such thing as neutrality in how we approach and interpret materials, and all methods have their politics.[130] Given the present concerns about sexism and the marginalization that Indigenous women face within and beyond their communities, Indigenous feminism is explicitly taken up in this methodology so as to encourage anti-oppressive engagement with law.[131]

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[126] Though this methodology could also be taken up to discuss and analyze state law, as well as external relations with other nations and Indigenous legal orders. See Snyder, "Indigenous Feminist Legal Theory", *supra* note 21.

[127] Snyder, *Representations*, *supra* note 52 at c 3.

[128] This does not mean that Indigenous feminist legal methodology is intended to be a pan-Indigenous approach; rather, when applied to various legal traditions, the social specificities of that legal tradition should be taken into consideration, and should shape the methodology accordingly.

[129] Indigenous feminist legal methodology is influenced by the tenets of Indigenous feminist legal theory, as well as by critical discourse analysis, feminist critical discourse analysis, and Indigenous methodologies. See Snyder, *Representations*, *supra* note 52 at c 3.

[130] *Ibid* at 113.

[131] *Ibid.*

The above story is very uncomfortable, and the methodology in this section "is not meant to be comfortable—it works with difficult tensions and conflicts",[132] including distressing internal conflicts. Not only is the application of Indigenous feminist legal methodology uncomfortable, the story itself is purposely framed to make us uncomfortable. It is designed to raise hard questions, within an Anishinaabe pedagogy.[133] However, focusing on Indigenous feminist legal methodology, Snyder explains this approach can examine not only how Indigenous women and men are treated similarly or differently in and by Indigenous laws, but also how Indigenous laws are shaped by gendered norms and power dynamics. She emphasizes the importance of "examining discourses that sustain certain ideas about subjectivity, particularly gendered, sexed, and racialized subjectivities as they circulate in and are disciplined by" Indigenous laws.[134] Indigenous feminist legal methodology can examine materials that are explicitly about gender; however, this methodology is not meant to be used just when "women's issues" are apparent. Indigenous feminist legal methodology provides an analytic framework for drawing out discussion about gender and power where it may have otherwise remained hidden, naturalized, or framed by rhetoric.[135]

The analytic framework that Snyder employs in her work on Cree law is quite large, and we do not have the space to include it all here. Below, we adapt some parts of the framework as an example, and begin to fill it in as a way into a discussion about gender and power.[136] The first part of the framework is a revision of Friedland's legal synthesis

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[132] *Ibid.*

[133] For a discussion of this, see Basil Johnston, *Ojibway Heritage* (Lincoln, Neb: University of Nebraska Press, 1990) at 3–6.

[134] Snyder, *Representations*, *supra* note 52 at 117.

[135] *Ibid* at 113.

[136] Because Snyder is looking at an assortment of contemporary materials about Cree law (including videos, a comic, and a game), not all of the questions in her analysis guide would be applicable to an analysis of stories. It is important that frameworks are revised and properly suited for the materials being engaged with. The framework has been revised here accordingly.

method[137] and questions about gender are written into the synthesis.[138] These questions move to a necessary level of specificity and away from the generalities.[139] The remaining part of the framework asks directed questions about citizenship, gendered representations, how gender and sex are imagined, and how law is imagined. Here is part of one approach to an Indigenous feminist legal methodology, applied to the story of 'The Rolling Skull':

Legal processes: What are the characteristics of legitimate decision-making processes? Who is included? Is this gendered? Who are the authoritative decision makers?

- Decisions (concerning what the son was to do in his circumstances of his parents' deaths and his dead mother's head following him) were made in consultation with an elder, and the help of the Manitou—both of whom are recognized as authoritative decision makers, though arguably the Manitou's decisions are conveyed through human interpretation.
- Both of the authoritative decision makers in this story are male.

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[137] It should be noted that Friedland's usage of legal synthesis is employed in a way in which she draws on a multitude of case briefs to fill in the framework for the synthesis. See Friedland, "Reflective Frameworks", *supra* note 6. Snyder does not start with case briefs; rather, she uses the questions in the synthesis to begin discussions about materials. See Snyder, *Representations*, *supra* note 52 at c 3.

[138] *Ibid* at 20–21.

[139] See Friedland, "Reflective Frameworks", *supra* note 6 at 29, for examples of how to shift from general questions about law, to specific questions about legal processes and reasoning. For Snyder's purposes, this section of the framework also helps to identify law in materials, as many of the materials that she examines are not easily recognized as being about law. See Snyder, *Representations*, *supra* note 52 at 17–20.

Legal responses and resolutions: What are the responses? Do these responses have different implications for women and men?

- Did the spirits punish the husband with death because of his reckless response and denial about his behaviour towards his wife and the snakes?
- The elder decides to help the young child. The Manitou decides to protect them from the mother's head, which is trying to kill them.
- The decision to stop the rolling head certainly has implications for this specific woman in the story though the response is intended to protect others generally.

Legal rights: What should people and other beings be able to expect from others? Are any of these expectations gendered? Are certain rights overlooked?

- Did the woman have a right to privacy and agency that was overlooked?
- What of her right to bodily integrity and safety?
- Children have a right to protection and to be taken care of.
- Do animals and other beings and spirits, such as the snakes, have a right to physical and spiritual integrity?

Are both women and men present in the material? What are they doing or saying? In what contexts do women and men appear?

- Both women and men are present though the majority of people in the story are males, and the majority of dialogue is from the males' perspectives.
- The husband and the son "worked hard to gather wood and put down a store of meat and furs."
- The husband spies on his wife, causes harm to her, denies this harm, and flees with his son. Later, the husband shoots at his wife's head and he is killed by the snakes that come from her skull.
- The snakes are not gendered in this account. What

implications might this fact have for understanding Anishinaabe law?

- The wife is depicted as a secretive person and when harmed is depicted as vengeful and violent. She tends to appear in the story only in relation to men, and only in relation to scenes of violence against her. Ultimately, her head is speared and she ceases to exist.

2.2.2. Discussion

Anishinaabe law has long considered issues related to violence against women. These laws record and comment on the unacceptability of violence and what can be done to address it. While this story must be cross-referenced with other stories to provide a fuller picture of Anishinaabe law,[140] it does illustrate that there are resources for reasoning in Anishinaabe stories that record past acts of violence. "The Rolling Skull" raises much discussion about what is both said and unsaid in the story, as well as about what is unknown/missing. The violent imagery of the wife being decapitated, and her head then rolling around, is disturbing. Likewise, it is troubling to see how the man killed the snakes and hid the truth of his actions from his son. Also troubling are the additional acts of violence against the woman's head as she seeks to harm others. What does this part of the story open up for discussion? In John Borrows' view, as a student of Anishinaabe law, he sees the story as purposely highlighting the unacceptability of violence within Anishinaabe law. He believes the story has been told through time to cause people to struggle with their community's and individuals' grossest defects, as well as partially suggesting how these offenses might be addressed. As in the case within many interpretative traditions, Anishinaabe peoples tell and create, and recreate stories to highlight and learn from their negative as well as their positive experiences. As a legal resource the story demonstrates the complexities found in the interpretations of Anishinaabe legal traditions.

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[140] See Borrows, *Recovering Canada*, *supra* note 115 at 13–26.

Since this story shows legal processes along with legal principles that exist for responding to conflicts, we can make these connections more explicit. In responding to the harms in this story, we learn that an elder is consulted, and a Manitou (or spirit helper) is encountered which helps the young child along to a safer place. We also learn that the community had the responsibility to protect the child and to collectively respond to violence. When read with a lens of gender and power in mind, we can engage in a discussion about these processes and principles.

Upon thinking carefully about the gender of the authoritative decision makers in the story, the responses, and the broad social implications of these responses on women and men, what does this story open up? What does it foreclose? All of the decision makers in the story are men. Is it possible that the men's responses to the woman shut down her experiences, agency, and response to the violence against her? What might this story look like if told from the perspective of the woman? Why did she not want to be around her husband and son? What did the tree and snakes represent to her? How do we interpret these symbols without unreflectively replicating "western" conceptual meanings? How might the woman interpret her husband secretly following her? How might she interpret the violence against her and the legal responses to that violence? How might we understand her following of the husband and son after her death? How might we make sense of her intent to kill her son, later in the story? What are we to make of the continued bodily harm towards the woman? How do we read the gruesome imagery of a decapitated woman's head?

There are other Anishinaabe stories that show that men are not always the authoritative decision makers and there are stories that are told from the perspectives of women. There are also stories where women are violent and harm other women, men, and children in their communities. Again, we could cross-reference other stories to think further about the gender dynamics between the people in this story, and within the legal process itself.

In working with the questions from Snyder's analysis guide, we are able to get into a discussion about violence against women. After we ask how this story is about violence against women and how it is responded to, we can begin to ask questions about the power dynamics present in

the account. Similar to the "Origin of the Wolf Crest" story, our work involves asking questions about male privilege, women's agency, and social change. In asking questions about the story, it is not our intention to say that Anishinaabe law is misguided, that it is incapable, or that it is violent. Rather, we aim to treat Anishinaabe law as law—as a response to conflict that is socially embedded and that requires ongoing consideration and discussion.

While, as we have stated early on in the paper, it is contentious to talk about gendered violence that historically existed within Indigenous societies, stories open significant space for thinking about power and gender, and for using Indigenous law as a resource for reasoning in through these issues. Stories contain clues about social norms and social structures within historic communities. Stories also encode beliefs and interpretations of those who are telling the story. Furthermore, our interpretations contain within them ideas and practices that stem from our own positionalities, partialities, and limitations. Analyzing law is a complex task that requires sustained critical thinking, debate, and revision.

Again, we see stories as resources, but they are also valuable for many other purposes including entertainment, edification, artist appreciation, spiritual guidance, psychological insight, and other forms of education. Stories should never be pinned down in one forum; they should be open for use and interpretation in many different contexts, for many different purposes, and within many different fields. Nevertheless, in a legal context, we believe that stories cannot be left in the past tense. They need to be analyzed to understand how they relate to today's challenges. We must ask: Who would authoritative decision makers be today? What would a legitimate process look like within Indigenous laws today for responding to violence against women? Are women a part of articulating these processes? Are these processes practical and can they work with women (and men) as complex, gendered legal subjects? If responses to violence are not working, how can we imagine violence and gendered conflict differently?

Indigenous feminist legal methodology "maintains that multiple, competing, and even contradictory discourses exist in, and shape, indigenous laws".[141] Some discourses are more powerful than others.[142] In this article, we have talked about these discourses and about rhetoric as gendered and as deeply entangled in power dynamics. By talking about Indigenous feminist legal analysis, we do not suggest that everyone must take up feminism. Not everyone will agree with Indigenous feminist legal analysis and there is no one approach to Indigenous feminist theorizing or practice.

In fact, as co-authors of this paper, we individually and collectively draw upon theoretical insights from other traditions (including Indigenous traditions) in our work. We are not arguing that any particular or exclusive theory can explain and/or reveal the entirety of what must be taken into account when working with Indigenous law, including Indigenous feminist legal theory. The world is complicated and no one theory can capture the full range of insights needed to promote clear thinking and best practices related to violence against women or any other challenge which Indigenous peoples encounter. So even Indigenous feminism, with its demonstrated potential for providing profoundly significant and key insights, must be regarded as partial, limited, and open to manipulation if it is used to conceal or eclipse other fields of inquiry. Nevertheless, what we have illustrated in this paper is that when talking about law, a multitude of voices need to be included in the discussions that are so important to the well-being of Indigenous legal orders and the well-being of all citizens.

CONCLUSION

Indigenous laws are valuable living intellectual resources that can be drawn on for thinking about violence against women. As we have demonstrated here, engaging with Indigenous laws does not mean taking law from the past and dropping it into the present—rather, law requires

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[141] Snyder, *Representations*, *supra* note 52 at 118.

[142] *Ibid* at 118–19.

ongoing dialogue, evaluation, and debate. To this end we have argued that gendered legal realities exist within and outside Indigenous communities. This means that the violence which Indigenous women face must be a focal part of the application of Indigenous laws. We believe this approach will better help us understand how systemic sexism shapes legal processes, practices, and interpretations. Indigenous laws, legal theories, and methodologies will fail in practice if theorists and practitioners are not realistic about gendered power dynamics. Indigenous laws must not be allowed to become irrelevant through neglect and underestimation.

In critically evaluating some of the existing rhetoric about gender, culture, tradition, and law, we have expressed concern that such rhetoric has been used to silence the voices demanding open spaces for dissent or calling for change. This rhetoric is damaging to Indigenous legal traditions because it denies the complexity of conflict by inappropriately romanticizing the past and projecting these views into an impractical and unrealistically idealized future. This view also denies the complexity of Indigenous women and men as legal agents and subjects. As such, it ignores the lessons of the trickster within Indigenous traditions which teaches us that people can be simultaneously kind and mean, charming and cunning, selfless and selfish, helpful and the cause of great harm.[143] We wrote this article to open spaces for deeper conversations about these issues. We hope we have done this through considering topics like tradition, culture, motherhood, and gender roles in a different light alongside our discussions of legal processes, decisions, hierarchy, and power.

In the end, stories provide a way for thinking about Indigenous laws. Indigenous law has many sources and it can be examined and practiced using many different methodologies.[144] Nevertheless, in focusing on stories as a legal resource, the heart of our discussion has been on stories that discuss violence against women. They demonstrate the challenges

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[143] See Borrows, *Recovering Canada*, *supra* note 115 at 56, 66, 79.

[144] See generally Napoleon, *Ayook*, *supra* note 8; Borrows, *Canada's Indigenous Constitution*, *supra* note 8.

and opportunities that exist when engaging across legal traditions and orders. While stories are always partial and imperfect, we believe they provide significant insight for dealing with internal and externalized oppressions faced by Indigenous communities today.

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Human rights bodies and mechanisms

Free, prior and informed consent: a human rights-based approach

Study of the Expert Mechanism on the Rights of Indigenous Peoples

Summary

The Expert Mechanism on the Rights of Indigenous Peoples carried out the present study on a human rights-based approach to free, prior and informed consent in accordance with its mandate under Human Rights Council resolution 33/25.

The study concludes with Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent.

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I. Introduction

1. In accordance with its mandate under Human Rights Council resolution 33/25, at its tenth session, held in July 2017, the Expert Mechanism on the Rights of Indigenous Peoples decided to produce a study on free, prior and informed consent, as it appears in several provisions of the United Nations Declaration on the Rights of Indigenous Peoples. For this purpose, the Expert Mechanism held a seminar in Santiago on 5 and 6 December 2017. The present study was informed by presentations shared at the seminar and submissions by Member States, indigenous peoples, national human rights institutions, academics and others.[1]

2. The study seeks to contribute to an understanding of free, prior and informed consent in the context of developing practices and interpretations of this human rights norm enshrined in the Declaration. Taking into account 11 years of advocacy and jurisprudence following the adoption of the Declaration, the present study is not intended to be either exhaustive or definitive, but should contribute to the body of interpretative guidance now available to States, indigenous peoples and others working on issues of concern to indigenous peoples.

II. Human rights basis of free, prior and informed consent

3. Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination guaranteed by the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination. The provisions of the Declaration, including those referring to free, prior and informed consent, do not create new rights for indigenous peoples, but rather provide a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples (see A/HRC/9/9, para. 86), as shown in the following sections.

4. Consistent with the right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities. The contemporary concept and practice of mutually negotiated, consensual agreement among indigenous peoples and State governments is deeply grounded in the historic treaty-making process that characterized indigenous-State relations for several hundred years in many regions of the world and persists in many places where those treaties remain the law of the land,[2] even if they have often been dishonoured.[3] Historically and today, it can be challenging for indigenous peoples to negotiate with States under conditions of colonization and the many other limitations that often characterize the situation of indigenous peoples around the world.

5. Yet, as Special Rapporteur Miguel Alfonso Martínez concluded in his final report, the process of negotiation and seeking consent inherent in treaty-making is the most suitable way not only of securing an effective contribution from indigenous peoples to any effort towards the eventual recognition or restitution of their rights and freedoms, but also of establishing much needed practical mechanisms to facilitate the realization and implementation of their ancestral rights and those enshrined in national and international texts. It is thus the most appropriate way to approach conflict resolution of indigenous

[1] All the submissions are available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx.

[2] E.g., Treaty No. 6 between the Cree and other Nations with the British Crown, in 1876, made reference to the requirement for “consent” in paragraph 3, as did article 16 of the 1868 Treaty of Fort Laramie between the United States of America and the Oceti Sakowin States.

[3] *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

issues at all levels with indigenous free and educated consent (see E/CN.4/Sub.2/1999/20, para. 263). He also referred to a widespread desire of indigenous peoples to establish a solid, new and different kind of relationship — quite unlike the almost constantly adversarial, often acrimonious relationship they had always had — with the non-indigenous sector of society in countries where they coexisted (ibid., para. 262). In this context, the standards for free, prior and informed consent articulated in the Declaration are particularly important to indigenous peoples' relationships with States today and going forward.

A. Self-determination

6. The right to self-determination is the fundamental human right upon which free, prior and informed consent is grounded. It includes internal and external aspects.[4] Historically, the right to self-determination, which is rooted in the decolonization movement, was devised to ensure subjected nations and peoples could recover their autonomy, preside over their destinies, make decisions for themselves and control their resources.[5] The right to self-determination was indeed construed as a pillar right, including other rights of peoples and nations to be free from coercion of any sort, to live in dignity and to enjoy all rights equally, including the right to be responsible for their futures, to be fully informed and to be in a position to freely refuse or accept offers, plans, projects, programmes and proposals that affected them or their resources.

7. The concepts of being free, being fully informed, having the right to say yes or no and having control over their own lands and resources as nations or peoples are not therefore new in international human rights law.[6] These concepts derive from the elements of the right to self-determination, on which the Declaration bases its provisions on free, prior and informed consent, as a way of operationalizing the right to self-determination, taking into account the particular historical, cultural and social situation of indigenous peoples.

8. The international legal framework that conceptualized the right to self-determination paid particular attention to peoples and nations recovering control over their lands and natural resources as an important constituent element of the right to self-determination.[7] It is for this reason that free, prior and informed consent is of particular relevance to lands and resources.

B. Non-discrimination

9. Free, prior and informed consent is also grounded in the human rights framework devised to dismantle the structural bases of racial discrimination against indigenous peoples. The Doctrine of Discovery,[8] along with other doctrines of conquest that justified the legal and policy framework for dispossessing indigenous peoples of their lands and annihilating their cultures, was based on racial theories and principles that considered indigenous peoples as inferior beings who could not possibly own lands and decide their own futures. The international indigenous rights movement in the 1960s and 1970s highlighted systemic racial discrimination and human rights violations faced by indigenous peoples, prompting a study on the issue by the Sub-Commission on Prevention of

[4] See Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995).

[5] See General Assembly resolution 1514 (XV).

[6] See General Assembly resolution 1803 (XVII); and Nicolaas Schrijver, "Self-determination of peoples and sovereignty over natural wealth and resources" in *Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development* (United Nations publication, Sales No. E.12.XIV.1).

[7] See Marion Mushkatt, "The process of decolonization: international legal aspects", *University of Baltimore Law Review*, vol. 2, No. 1 (Winter 1972).

[8] See the recommendations of the Permanent Forum on Indigenous Issues following its discussion on "The Doctrine of Discovery: its enduring impact on indigenous peoples and the right to redress for past conquests" (see E/2012/43-E/C.19/2012/13).

Discrimination and Protection of Minorities.[9] This eventually led to the elaboration of the Declaration, as a dual framework combining remedial rights with ongoing rights.

10. As early as 1997, 10 years before the adoption of the Declaration by the General Assembly, the Committee on the Elimination of Racial Discrimination concluded that racial discrimination constituted the main underlying cause of most discrimination suffered by indigenous peoples. It affirmed that discrimination against indigenous peoples fell under the scope of the Convention and that all appropriate means had to be taken to combat and eliminate such discrimination.[10] The Committee pointed specifically at "consent" as a human rights norm seeking to negate false doctrine and dismantle conceptual structures that dispossessed and disempowered indigenous peoples. It called upon States to ensure that members of indigenous peoples had rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests were taken without their informed consent.[11] It also called upon States to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they had been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.[12]

III. Free, prior and informed consent as a human rights norm

A. Rationale

11. Free, prior and informed consent as provided for in the Declaration has three major rationales. First, it seeks to restore to indigenous peoples control over their lands and resources, as specified in article 28. Some authors argue that, "free, prior and informed consent has its origins in the native title principle, according to which native people have their right to lands based on their customary law and sustained connection with the land",[13] and others that "historical legal doctrine firmly establishes indigenous peoples' sovereign rights over ancestral lands and resources as a matter of long-standing international law".[14] Second, the potential for free, prior and informed consent to restore indigenous peoples' cultural integrity, pride and self-esteem is reflected in article 11 of the Declaration. Indigenous peoples' cultural heritage, including human remains, taken without consent, are still held by others. Third, free, prior and informed consent has the potential to redress the power imbalance between indigenous peoples and States, with a view to forging new partnerships based on rights and mutual respect between parties (see A/HRC/EMRIP/2010/2), as reflected in articles 18 and 19 of the Declaration.

B. Nature of free, prior and informed consent as a human rights norm

12. The Declaration recognizes collective rights and protects collective identities, assets and institutions, notably culture, internal decision-making and the control and use of land and natural resources. The collective character of indigenous rights is inherent in indigenous culture and serves as a bulwark against disappearance by forced assimilation.

13. Free, prior and informed consent operates fundamentally as a safeguard for the collective rights of indigenous peoples. Therefore, it cannot be held or exercised by

[9] See "Martínez Cobo Study" (E/CN.4/Sub.2/476 and Add.1–5; E/CN.4/Sub.2/1982/2 and Add.1–7; and E/CN.4/Sub.2/1983/21 and Add.1–7).

[10] See Committee on the Elimination of Racial Discrimination general recommendation No. 23 (1997) on the rights of indigenous peoples.

[11] Ibid.

[12] Ibid.

[13] See MacInnes, Colchester and Whitmore submission.

[14] S. James Anaya, "Divergent discourses about international law, indigenous peoples, and rights over lands and natural resources: toward a realist trend", *Colorado Journal of International Environmental Law and Policy* (Spring 2005).

individual members of an indigenous community. The Declaration provides for both individual and collective rights of indigenous peoples. Where the Declaration deals with both individual and collective rights, it uses language that clearly distinguishes "indigenous peoples" from "individuals". Understandably, however, none of the provisions of the Declaration dealing with free, prior and informed consent (arts. 10, 11, 19, 28, 29 and 32) make any reference to individuals. To "individualize" these rights would frustrate the purpose they are supposed to achieve.[15]

C. Scope of free, prior and informed consent

1. Free, prior and informed consent: rights to consultation, participation and to lands and resources

14. Free, prior and informed consent is a manifestation of indigenous peoples' right to self-determine their political, social, economic and cultural priorities. It constitutes three interrelated and cumulative rights of indigenous peoples: the right to be consulted; the right to participate; and the right to their lands, territories and resources. Pursuant to the Declaration, free, prior and informed consent cannot be achieved if one of these components is missing.

15. States' obligations to consult with indigenous peoples should consist of a qualitative process of dialogue and negotiation, with consent as the objective (see A/HRC/18/42, annex, para. 9). The Declaration does not envision a single moment or action but a process of dialogue and negotiation over the course of a project, from planning to implementation and follow-up. Use in the Declaration of the combined terms "consult and cooperate" denotes a right of indigenous peoples to influence the outcome of decision-making processes affecting them, not a mere right to be involved in such processes or merely to have their views heard (see A/HRC/18/42). It also suggests the possibility for indigenous peoples to make a different proposal or suggest a different model, as an alternative to the one proposed by the Government or other actor.

16. Former Special Rapporteur on the rights of indigenous peoples James Anaya underscored that the Declaration suggests a heightened emphasis on consultations that are in the nature of negotiations towards mutually acceptable arrangements prior to decisions on proposed measures, rather than mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process (A/HRC/12/34, para. 46). Consultation will also often be the starting point for seeking free, prior and informed consent.

17. The right of indigenous peoples to participate in decision-making is provided for separately in article 18 of the Declaration, a provision grounded in article 25 of the International Covenant on Civil and Political Rights, which guarantees every citizen's right to "take part in the conduct of public affairs". The Declaration adapts this general right to participation to the needs and circumstances of indigenous peoples by seeking to achieve two objectives: first, to correct de jure and de facto exclusion of indigenous peoples from public life or decision-making processes owing to many factors, including prejudiced views against them, a low level of education, difficulties in obtaining citizenship or identification documents and non-participation in electoral processes and political institutions; and, second, to revitalize and restore indigenous peoples' own decisions-making and representative institutions that have either been disregarded or abolished. These institutions should be recognized, revitalized and given opportunities to participate in decision-making.

18. The Human Rights Committee has also elaborated on indigenous peoples' right to participate in a way that goes beyond consultation, noting that participation in the decision-making process must be "effective".[16] The supervisory bodies of the International Labour Organization (ILO) have underlined the interconnection between consultation and

[15] See Siegfried Weissner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis", *Harvard Human Rights Journal*, vol. 12 (1999).

[16] See *Poma Poma v. Peru* (CCPR/C/95/D/1457/2006), para. 7.6.

participation.[17] Participation connotes more than mere consultation and should include the development of initiatives by indigenous peoples. "In this sense, the intertwined concepts of consultation and participation are mechanisms to ensure that indigenous peoples can decide their own priorities for the process of development and exercise control over their own economic, social and cultural development".[18]

19. The rights of indigenous peoples over their lands, resources and territories are also integral parts of free, prior and informed consent, as construed in the Declaration. The right to "own, use, develop and control" the lands, territories and resources (art. 26) gives rise to a right to free, prior and informed consent consistent with indigenous peoples' right of self-determination. In this regard, the role of free, prior and informed consent is to safeguard indigenous peoples' cultural identity, which is inextricably linked to their lands, resources and territories.

2. Constituent elements of free, prior and informed consent

20. As affirmed in the Declaration, decisions to grant or withhold consent must be free. The term "free" is understood as addressing both direct and indirect factors that can hinder indigenous peoples' free will. To that end, for a process of consultation to be genuine in the form of a dialogue and negotiation towards consent, the following should occur or the legitimacy of the consultation process may be called into question:

(a) The context or climate of the process should be free from intimidation, coercion, manipulation (see A/HRC/18/42, annex, para. 25) and harassment, ensuring that the consultation process does not limit or restrict indigenous peoples' access to existing policies, services and rights;

(b) Features of the relationship between the parties should include trust and good faith, and not suspicion, accusations, threats, criminalization (see A/HRC/39/17), violence towards indigenous peoples or prejudiced views towards them;

(c) Indigenous peoples should have the freedom to be represented as traditionally required under their own laws, customs and protocols, with attention to gender and representation of other sectors within indigenous communities. Indigenous peoples should determine how and which of their own institutions and leaders represent them. They should therefore enjoy the freedom to resolve international representation issues without interference;

(d) Indigenous peoples should have the freedom to guide and direct the process of consultation; they should have the power to determine how to consult and the course of the consultation process. This includes being consulted when devising the process of consultation per se and having the opportunity to share and use or develop their own protocols on consultation. They should exert sufficient control over the process and should not feel compelled to get involved or continue;

(e) Indigenous peoples should have the freedom to set their expectations and to contribute to defining methods, timelines, locations and evaluations.

21. Any free, prior and informed consent process must also be prior to any other decisions allowing a proposal to proceed and should begin as early as possible in the formulation of the proposal. The Inter-American Court of Human Rights in *Saramaka People v. Suriname* (2007) (the *Saramaka* case) uses the terms "early stage" and "early notice". To that end, the "prior" component of free, prior and informed consent should entail:

(a) Involving indigenous peoples as early as possible. Consultation and participation should be undertaken at the conceptualization and design phases and not

[17] See ILO Committee of Experts on the Application of Conventions and Recommendations, general observation on indigenous and tribal peoples (observation 2010/81).

[18] See International Labour Organization, *Understanding the Indigenous and Tribal Peoples Convention, 1989 (No. 169): Handbook for ILO Tripartite Constituents* (Geneva, 2013), p. 19.

launched at a late stage in a project's development, when crucial details have already been decided;

(b) Providing the time necessary for indigenous peoples to absorb, understand and analyse information and to undertake their own decision-making processes (see A/HRC/18/42, annex, para. 25).

22. Consultation in the free, prior and informed consent context should be "informed", implying that:

(a) The information made available should be both sufficiently quantitative and qualitative, as well as objective, accurate and clear;

(b) The information should be presented in a manner and form understandable to indigenous peoples, including translation into a language that they understand. Consultations should be undertaken using culturally appropriate procedures, which respect the traditions and forms of organization of the indigenous peoples concerned (see A/HRC/18/42). The substantive content of the information should include the nature, size, pace, reversibility and scope of any proposed project or activity (see E/C.19/2005/3); the reasons for the project; the areas to be affected; social, environmental and cultural impact assessments; the kind of compensation or benefit-sharing schemes involved; and all the potential harm and impacts that could result from the proposed activity;[19]

(c) Adequate resources and capacity should be provided for indigenous peoples' representative institutions or decisions-making mechanisms, while not compromising their independence. Such institutions or decision-making processes must be enabled to meet technical challenges — including, if necessary, through capacity-building initiatives to inform the indigenous peoples of their rights in general — prior or parallel to the process of consultation. For example, the Australian Referendum Council recommended that the Government of Australia consider proposals designed by Aboriginal and Torres Strait Islander peoples during 13 regional dialogues and a national indigenous constitutional convention in May 2017 calling for a new First Nations representative public institution called "Voice to Parliament" based on articles 18 and 19 of the Declaration.[20] In two cases (*Finmark Estate Agency v. Nesseby regional society* (the *Unjárga* case) and *Norway v. Jovsset Ánte Iversen Sara* (the *Sara* case)), the Supreme Court of Norway referred to the consent and participation of the Sami Parliament as support for its decision that national legislation was in accordance with international law on indigenous rights, including the Declaration, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169).[21] However, in the Sara case, the Court referred to the participation of the Sami Parliament as support for its decision, although consent was not achieved. It is a concern if participation is used as support for State decisions where consent is not achieved, as this could discourage indigenous peoples from participating in decision-making processes.

23. Failure to engage with legitimate representatives of indigenous peoples can undermine any consent received. In the Declaration it is clear that States and third parties should consult and cooperate with indigenous peoples "through their own representative institutions" (arts. 19 and 32) and "in accordance with their own procedures" (art. 18). All parties should ensure representation from women, children,[22] youth and persons with disabilities, and efforts should be made to understand the specific impacts on them (see

[19] United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, *Guidelines on Free, Prior and Informed Consent* (Geneva, 2013).

[20] See www.referendumcouncil.org.au/final-report.

[21] See www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/rulings/rulings-2018/the-scope-of-collecetive-rights-of-use-to-land-in-nesseby-finnmark/ and www.domstol.no/globalassets/upload/hret/decisions-in-english-translation/hr-2017-2428-a.pdf.

[22] The Committee on the Rights of the Child in its general comment No. 11 (2009) on indigenous children and their rights under the Convention notes that the right of the child to be heard includes the right to representation.

A/HRC/18/42). Yet, identifying the legitimate representatives of indigenous peoples can be challenging. States should be mindful of situations where indigenous peoples' decision-making institutions have been undermined by colonialism and where communities have been dispersed, dispossessed of land or relocated, including to urban areas. These situations may require State assistance to rebuild indigenous peoples' capacity to represent themselves appropriately. It is important for States or third parties to ensure that institutions supporting indigenous peoples and claiming to represent them are so mandated.

D. Consent

24. As former Special Rapporteur James Anaya has stated, consent is not a freestanding device of legitimation. The principle of free, prior and informed consent, arising as it does within a human rights framework, does not contemplate consent as simply a "yes" to a predetermined decision (A/HRC/24/41, para. 30). This means that consent can only be received for proposals when it fulfils the three threshold criteria of having been free, prior and informed, and is then evidenced by an explicit statement of agreement.

25. Consent is a key principle that enables indigenous peoples to exercise their right to self-determination, including development that involves control over or otherwise affects their lands, resources and territories. With such an understanding, indigenous peoples are considered to engage with and are entitled to give or withhold consent to proposals that affect them.

26. Indigenous peoples' decision to give or withhold consent is a result of their assessment of their best interests and that of future generations with regard to a proposal. When they give their consent it provides an important social licence and a favourable environment to any actor operating on and around their lands, territories and resources, as many studies and research have shown, including by the private sector.[23] Indigenous peoples may withhold their consent in a number of situations and for various purposes or reasons:

(a) They may withhold consent following an assessment and conclusion that the proposal is not in their best interests. Withholding consent is expected to convince the other party not to take the risk of proceeding with the proposal. Arguments of whether indigenous peoples have a "veto" in this regard appear to largely detract from and undermine the legitimacy of the free, prior and informed consent concept;

(b) Indigenous peoples may withhold consent temporarily because of deficiencies in the process. Such deficiencies often consist of non-compliance with the required standards for the consent to be free, prior and informed. Indigenous peoples may seek adjustment or amendment to the proposal, including by suggesting an alternative proposal;

(c) Withholding consent can also communicate legitimate distrust in the consultation process or national initiative. This is generally the situation in countries where there is insufficient recognition of indigenous peoples or protection of their rights to lands, resources and territories. Cases of indigenous peoples being harassed, arrested and even being killed for resisting "trap-like" consultation offers are numerous.

27. Withholding consent can be a positive mechanism for democratic and inclusive governance. It can be of critical importance to the ultimate success of a proposal or project. Indigenous peoples' consent should be given "in accordance with international human rights standards" (Declaration, art. 34) and particular attention should be paid "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities", including in the elimination of all forms of discrimination and violence against indigenous children and women (ibid., art. 22).

[23] Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*, Routledge Research in Human Rights Law (London and New York, Routledge, 2014), chap. 5.

28. In any event, a number of countries and stakeholders have endorsed a policy not to proceed if indigenous peoples withhold their consent. The United Nations Global Compact, in its business reference guide on the Declaration,[24] advises its members not to proceed with a project after the withholding of consent by indigenous peoples. A State or stakeholder that decides to proceed after consent is withheld by indigenous peoples moves into a legal grey area and exposes itself to judicial review and other types of recourse mechanisms, potentially including international, regional and national tribunals, and by indigenous peoples' own institutions (see paras. 38–41 below);

29. Particular caution should be exercised regarding indigenous peoples in voluntary isolation or of recent contact, including the non-imposition of contact and the obligation to protect their territories, natural resources and lives. In the case of indigenous peoples in voluntary isolation, the decision and expression not to be in contact or not to have constant interaction with other societies and the Government can be an expression of non-consent. States should respect their will and are obliged to protect their lives through the protection of their territories and natural resources.[25]

30. If indigenous peoples choose to give their consent to a project, consent should be consistent with indigenous peoples' own laws, customs, protocols and best practices, including representation by legal counsel whenever possible and as required by law. In many, if not all, instances, consent must be recorded in a written instrument, negotiated by the parties, and signed affirmatively by a legitimate authority or leader of the relevant indigenous peoples, which may include more than one group (see paras. 42–45 below). Full understanding by indigenous peoples must be ensured and additional measures should be taken by the State in cases involving indigenous peoples of recent contact.

E. Operationalization of free, prior and informed consent

1. When is free, prior and informed consent required?

31. The Declaration contains five specific references to free, prior and informed consent (see arts. 10, 11, 19, 29 and 32), providing a non-exhaustive list of situations when such consent should apply. Free, prior and informed consent may be required for adoption and implementation of legislative or administrative measures [26] and any project affecting indigenous peoples' lands, territories and other resources, within the context referred to in the paragraphs below (arts. 19 and 32). It is also required in instances of relocation of indigenous peoples from their lands or territories and storage of hazardous materials on their lands or territories (arts. 10 and 29).[27]

32. The role of free, prior and informed consent in the realm of natural resource development is set out in article 32 of the Declaration. This provision is particularly important given the well-known risks and impacts of extractive industries on indigenous peoples (see A/HRC/24/41, A/HRC/21/52 and A/HRC/21/55). As stated by James Anaya, the general rule in the case of extractive industries' projects within the territories of indigenous peoples is that the free, prior and informed consent of indigenous peoples is required. Indigenous peoples' consent may also be required when extractive activities

[24] See www.unglobalcompact.org/library/541.

[25] See http://periodicos.unb.br/index.php/ling/article/view/26661 (in Portuguese).

[26] Many indigenous peoples suggest that social development programmes often have an impact on their customary laws, traditions and customs, including cultural, intellectual, religious and spiritual property for which free, prior and informed consent should be obtained (cf., Declaration, art. 11, para. 2; see also http://iphrdefenders.net/statement-asia-indigenous-peoples-pact-asia-indigenous-peoples-caucus-agenda-4-study-advice-free-prior-informed-consent/.)

[27] Article 29 of the Declaration is the basis for the revision of the International Code of Conduct on the Distribution and Use of Pesticides and review of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade by the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes.

otherwise affect indigenous peoples (outside their territories), depending upon the nature of and potential impacts of the proposed activities on their rights (see A/HRC/24/41).

2. The proportionality principle

33. In several articles, the Declaration calls for free, prior and informed consent regarding matters, projects or issues that "affect" indigenous peoples. This concept is not limited to matters that affect indigenous peoples exclusively. To the contrary, matters of broad societal application "may affect indigenous peoples in ways not felt by others in society" (see A/HRC/12/34, para. 43). Measures and projects considered to "affect" indigenous peoples to the extent that free, prior and informed consent will be required under articles 19 and 32 include matters of "fundamental importance to their rights, survival, dignity and well-being" (A/HRC/21/55, para. 27). Relevant factors in this assessment include: the perspective and priorities of the indigenous peoples concerned; the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, inter alia, the cumulative effects of previous encroachments or activities[28] and historical inequities faced by the indigenous peoples concerned (see A/HCR/18/42 and A/HRC/21/55).

34. The perspective of the indigenous peoples concerned on the potential broader impact of a decision is the starting point for assessing whether a legislative or administrative measure or any project affecting their lands or territories and other resources affects them (see A/HCR/18/42). Indigenous peoples should have a major role in establishing whether the measure or project affects them at all and, if it does, the extent of the impact. Indigenous peoples may highlight possible harms that may not be clear to the State or project proponent, and may suggest mitigation measures to address those harms.

35. As to impact, if a measure or project is likely to have a significant, direct impact on indigenous peoples' lives or land, territories or resources then consent is required (see A/HRC/12/34, para. 47). It has been referred to as a "sliding scale approach" to the question of indigenous participatory rights, which means that the level of effective participation that must be guaranteed to indigenous peoples is essentially a function of the nature and content of the rights and activities in question.[29] This view is supported by the Human Rights Committee,[30] which uses the language "substantive negative impact", and the Committee on Economic, Social and Cultural Rights. Both have linked the issue of free, prior and informed consent to the nature and the effects that a proposed initiative will have on indigenous peoples' rights in the respective human rights treaty: an approach in line with the jurisprudence of the Inter-American Court of Human Rights[31] and the African Commission on Human and Peoples' Rights.[32] Assessment of the impact requires consideration of the nature, scale, duration and long-term impact of the action, such as damage to community lands or harm to the community's cultural integrity.

36. Other projects requiring free, prior and informed consent and tending to have "adverse impacts" as defined by International Finance Corporation Performance Standard 7, include projects located on lands, or natural resources on lands, subject to traditional ownership or under customary use; and projects significantly impacting on critical cultural heritage of indigenous peoples or using cultural heritage, including knowledge, innovation or practices for commercial purposes.[33]

37. A number of domestic court decisions support these principles. An expansive view of consent was recently taken by the Supreme Court of Canada in the case of *Tsilhqot'in Nation v. British Columbia* (2014). The Court decided that once the right of an indigenous

[28] See *Saramaka* case.

[29] Gaetano Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective*, International Studies in Human Rights, vol. 102 (Brill/Nijhoff, 2009), p. 113.

[30] See *Länsman et al. v. Finland* (CCPR/C/52/D/511/1992) and *Poma Poma v. Peru*.

[31] See *Saramaka* case.

[32] See *Centre for Minority Rights Development v. Kenya*, 276/03 (the *Endorois* case).

[33] See Performance Standard 7 (2012) on Indigenous Peoples; and Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources*, chap. 5.

community to control a portion of land has been recognized, no use of that land will be permitted without the consent of that community.[34] The Constitutional Court of Colombia recognizes three situations in which consent is mandatory: displacement of indigenous peoples; the storage of toxic waste; and when the existence of the group is put at risk.[35] The Constitutional Court of the Plurinational State of Bolivia has recognized similar situations as warranting consent, as established by the Inter-American Court of Human Rights.[36] The need for consent in the case of large-scale development projects on indigenous lands was generally agreed by the Constitutional Court of Colombia.[37] The Supreme Court of Belize has made express references to free, prior and informed consent, including to article 32 of the Declaration, ultimately finding that the failure to obtain consent prior to granting concessions and permissions was unlawful.[38]

38. Certain rights, such as the right to be free from torture, are never subject to limitation by States. Even for those rights that may, theoretically, be limited by States in accordance with article 46, paragraph 2, of the Declaration, such limitation must be necessary and proportionate for the purpose of achieving the human rights objectives of the society as a whole and be non-discriminatory. As James Anaya has said, "no valid public objective is found in mere commercial purpose, private gains or revenue-raising objective".[39] Given the nature of the impact of large-scale development projects on the rights of indigenous peoples, it will often be difficult to justify such projects in view of these restrictions.

39. The burden of proof is on the State to demonstrate that the decision to pursue the activity following failure to obtain consent meets these exceptional criteria. In *Tsilhqot'in Nation*, the Supreme Court of Canada held that consent may only be overridden in strict circumstances when the government can demonstrate that: it has discharged its responsibilities in respect of the rights of the peoples concerned, including a procedural duty to consult; the action is aimed at pursuing an objective that is compelling and substantial from the perspective of the broader public and the indigenous community; the action will not substantially deprive future generations of an aboriginal group of the benefits of their land; and the principle of necessity and proportionality applies.[40]

40. Any decision to limit indigenous peoples' rights within the exceptional circumstances of article 46 must be accompanied not only by necessary safeguards, including redressing balance-of-power issues, impact assessments, mitigation measures, compensation and benefit sharing, but also by remedial measures taking into account any rights violations. The need for benefit sharing was also referred to in the *Saramaka* case, and in the *Endorois* case the African Commission on Human and Peoples' Rights stated that benefit sharing may be understood as a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the community. Of course, in some cases, including injuries to human life, sacred sites and cultural practices, it may be difficult or impossible to put a financial valuation on rights violations. Any tensions in this regard arising within indigenous communities in the process of seeking free, prior and informed consent should be resolved by the indigenous peoples themselves, in accordance with their own laws, traditions and customs, through their own representative institutions.

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[34] For more Canadian Supreme Court cases see Mauro Barelli, "Free, Prior and Informed Consent in the United Nations Declaration on the Rights of Indigenous Peoples", in *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, Jessie Hohmann and Marc Weller, eds. (Oxford, Oxford University Press, 2018).

[35] Case T-129 of 3 March 2011.

[36] Case No. 2003/2010 R of 25 October 2010 and Barelli, "Free, Prior and Informed Consent".

[37] Cases T-769/09 of 29 October 2009, T-129 of 11 March 2011 and T-376/12 of 18 May 2012; see also Barelli, "Free, Prior and Informed Consent".

[38] See *Sarstoon Temash Institute for Indigenous Management v. Belize*, 3 April 2014.

[39] S. James Anaya and Sergio Puig, "Mitigating State sovereignty: the duty to consult with indigenous peoples", *University of Toronto Law Journal*, vol. 67, No. 4 (Fall 2017).

[40] See *Endorois* case.

41. Given that the pursuit of an activity or measure that affects indigenous peoples may result in a violation of their human rights, there should be a possibility for judicial or administrative review in the event that indigenous peoples wish to challenge that decision.[41] Such judicial or administrative review should be based on indigenous peoples' rights in the Declaration, including their rights to self-determination and effective remedies,[42] and their rights under human rights treaty law, regional and domestic law, and indigenous peoples' own laws, customs and protocols.

3. Documenting, monitoring, reviewing and recourse mechanism for free, prior and informed consent

42. Free, prior and informed consent should be documented, capturing the steps for accomplishing such consent and the essence of the agreement reached by the concerned parties, in accordance with indigenous peoples' customary norms and traditional methods of decision-making, including diverging opinions and conditional views. Guidelines or models for seeking free, prior and informed consent that are developed by either States or private actors should not prevail over indigenous peoples' own community protocols or traditional practices of capturing or recording agreements.

43. Forms of expressing consent may include, for example, treaties, agreements and contracts. Often terms are commemorated in a memorandum of agreement or understanding, or other document that is satisfactory to the indigenous peoples. Translation services must be provided where needed. Indigenous peoples must have the opportunity, moreover, to consent to each relevant aspect of a proposal or project. A generalized or limited statement of consent that, for example, does not expressly acknowledge different phases of development or the entire scope or impact of the project will not be considered to meet the standard for consent. Consent must be "ongoing" with express opportunities and requirements for review and renewal set by the parties.

44. Agreements on consent should include detailed statements of the project, its duration and the potential impacts on the indigenous peoples, including their lands, livelihoods, resources, cultures and environments (see A/HRC/24/41, para. 73); provisions for mitigation, assessment, and reimbursement for any damages to those resources; statements of indemnification of indigenous peoples for injuries caused to others on their lands; methods and venues for dispute resolution; detailed benefit-sharing arrangements (including investment, revenue sharing, employment and infrastructure); and a timetable of deliverables, including opportunities to negotiate continuing terms and licences. As a matter of best practice, any form of consent should include a detailed description of the process of notice, consultation and participation that preceded the consent.

45. As a dynamic process, the implementation of free, prior and informed consent should also be monitored and evaluated regularly. Such agreements should "include mechanisms for participatory monitoring" (ibid.). The ILO Committee of Experts on the Application of Conventions and Recommendations underlines the need for "periodic evaluation of the operation of the consultation mechanisms, with the participation of the peoples concerned" to continue to improve their effectiveness.[43] The implementation of free, prior and informed consent should also include accessible recourse mechanisms for disputes and grievances, devised with the effective participation of indigenous peoples, including judicial review.

[41] See statement of James Anaya at conference on "The role of the Ombudsman in Latin America: the right to prior consultation with indigenous peoples", Lima, 25 April 2013. Available from http://unsr.jamesanaya.org/statements/el-deber-estatal-de-consulta-a-los-pueblos-indigenas-dentro-del-derecho-internacional (in Spanish).

[42] See *Poma Poma v. Peru*.

[43] ILO observation 2010/81, p. 7.

IV. Review of free, prior and informed consent practices

46. The United Nations Declaration on the Rights of Indigenous Peoples and the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) are complementary and mutually supportive, and both are cited by judicial and quasi-judicial bodies. As emphasized by the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, following a visit to Guatemala, "compliance with the obligations of ILO Convention 169 is not limited to the regulation of the right to consultation, but requires the application of the full range of rights affirmed in that instrument".[44]

47. The Declaration, including its free, prior and informed consent requirements, is founded on the right to self-determination, which was not necessarily at the heart of the ILO Convention when it was drafted in 1971. The *travaux preparatoires* of that Convention appear to reveal that this instrument did not specifically address the right to self-determination of indigenous peoples. As a result, the free, prior and informed consent requirement under the Declaration goes beyond the consultation requirement of the ILO Convention, at least as interpreted in the past by some States and others, such as in Latin America, where the ILO Convention is most widely ratified.[45] Yet, while the ILO Convention contains different wording from "free, prior and informed consent", elements of consent requirements are present[46] that would not preclude a substantive free, prior and informed consent-driven approach. Noting that "the protection of human rights evolves",[47] the Human Rights Committee has stated that the International Covenant on Civil and Political Rights should be interpreted as a living instrument, with the rights protected under it applied in context and in the light of present-day conditions. A similar approach applied to the ILO Convention could broaden an interpretation that some may regard as overly narrow.

48. With regard to consent, Indigenous and Tribal Peoples Convention, 1989 (No. 169) cannot be interpreted in isolation from the Declaration and other international instruments. As emphasized by ILO, differences in the legal status of the Declaration and the ILO Convention "should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples ... The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing".[48] Special Rapporteur on the rights of indigenous peoples Victoria Tauli-Corpuz also affirms that the ILO Convention is not the only source of legal obligation with respect to consultation and free, prior and informed consent (see A/HRC/33/42/Add.1, para. 98 (b)). State obligations to consult indigenous peoples also derive from universal and regional human rights instruments of general application and the interpretative jurisprudence by supervisory mechanisms of these instruments. The interpretation of the ILO Convention could be aligned with the emerging consensus of human rights bodies on free, prior and informed consent, as imposing both procedural and substantive requirements, including the emerging consensus in international law that large-scale development projects affecting indigenous peoples will often trigger free, prior and informed consent requirements. The Special Rapporteur's view is reflected in article 35 of the ILO Convention, which states that: "the application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements".

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[44] See www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=23068&LangID=E.

[45] Ibid; see also "Additional comments on Honduras, 9 June 2017" available at http://unsr.vtaulicorpuz.org/site/images/docs/special/2017-06-09-honduras-unsr-additional-observations.pdf (in Spanish).

[46] See S.J. Rombouts, "The evolution of indigenous peoples' consultation rights under the ILO and UN regimes", *Stanford Journal of International Law*, vol. 53, No. 2 (Spring 2017).

[47] See *Judge v. Canada* (CCPR/C/78/D/829/1998), para. 10.7.

[48] "ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners", available from http://pro169.org/res/materials/en/convention169/Information%20Note%20on%20ILO%20standards%20and%20UNDRIP.doc.

49. In the private sector, free, prior and informed consent is developing into an international standard for companies operating on indigenous lands. In November 2014, First Peoples Worldwide published the "Indigenous Rights Risk Report",[49] finding that 89 per cent of the projects assessed had a high or medium risk exposure "to indigenous community opposition or violations of indigenous peoples' rights" and that Governments that disregarded their commitments to the Declaration, often with the justification that they were obstacles to development, "actually propagate volatile business environments that threaten the viability of investments in their countries". Many entities such as extractive industries are aware of these risks inherent in not soliciting free, prior and informed consent and have endeavoured to create their own free, prior and informed consent protocols.

50. There are numerous publications outlining the business case for free, prior and informed consent[50] and an increase in policy commitments to free, prior and informed consent by companies between 2012 and 2015: a report from Oxfam concluded that, "extractive industry companies are increasingly seeing the relevance of free, prior and informed consent in their operations".[51] A guide for businesses by the United Nations Global Compact equates consent with "a formal, documented social licence to operate", noting that "indigenous peoples have the right to give or withhold consent, and in some circumstances, may revoke their consent previously given".[52] Thus, for example, between 1975 and 2015 First Nations entered into formal "impact benefit agreements" in respect of 198 mining projects in Canada; however, sometimes these are agreed upon in the framework of an unwanted project to which First Nations believe they cannot object.

51. At least one third of the Sustainable Development Goal targets are linked to the rights in the Declaration[53] and a number of them have been connected to free, prior and informed consent.[54] In its Voluntary National Report 2017, Malaysia listed under Goal 15 (life on land) the aim to include indigenous and local communities in the management of natural resources and recognition of their right to give or withhold consent to proposed projects that may affect their lands. Indigenous peoples demand the recognition of free, prior and informed consent in the implementation of the Sustainable Development Goals to address their distinct circumstances with a view to ensuring that "no one is left behind".

52. Article 8 (j) of the Convention on Biological Diversity, which refers to access to traditional knowledge being subject to the approval and involvement of the holders of traditional knowledge, has been consistently interpreted as "prior and informed consent", and "free, prior and informed consent", as substantiated in the Akwé: Kon Voluntary Guidelines. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity establishes that access to traditional knowledge associated with genetic resources is based on "prior informed consent" or "approval and involvement" and on an equitable sharing of benefits. The Green Climate Fund has developed its own interpretation of free, prior and informed consent based on the Declaration. Article 29 of the Declaration is also the basis for the revision of the International Code of Conduct on the Distribution and Use of Pesticides as endorsed by the International Indian Treaty Council, the Permanent Forum on Indigenous Issues and other bodies.

53. International Finance Corporation Performance Standard 7 on Indigenous Peoples (2012) conditions funding of the private sector on documenting consent in certain circumstances. The receipt of free, prior and informed consent is also one of the nine fundamental principles guiding engagement of the International Fund for Agricultural

[49] Available at https://mahb.stanford.edu/wp-content/uploads/2014/12/Indigenous-Rights-Risk-Report.pdf.

[50] E.g., *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges* (Foley-Hoag LLP, July 2010); and Boreal Leadership Council, *Free, Prior and Informed Consent in Canada* (September 2012).

[51] See www.oxfam.org/en/pressroom/pressreleases/2015-07-23/global-mining-companies-improve-policies-community-consent-while.

[52] See www.unglobalcompact.org/library/541, p. 28.

[53] See http://nav.indigenousnavigator.com/images/Documents/Tools/Navigator_UNDRIP-SDGs.pdf.

[54] Goals 3, 6, 8, 9, 11 and 15.

Development with indigenous peoples. The new Environment and Social Standard 7, adopted by the World Bank in August 2016, is more aligned with a human rights-based approach to consultation than its predecessor (Operational Policy 4.10), and calls for borrowers to carry out consultations with indigenous peoples' representative bodies and organizations. This links consultation to the grass-roots indigenous organizations whose lands and resources might be adversely affected.[55] The 2013 edition of the Equator Principles, a risk management framework adopted by 80 financial institutions, expressly requires that projects with adverse impacts on indigenous peoples will require their free, prior and informed consent.

54. However, despite the recognition of free, prior and informed consent by financial institutions and the private sector, the experience of indigenous peoples shows that problems remain with its implementation. The process of seeking free, prior and informed consent is, at times, viewed as merely procedural in nature, rather than focused on human rights. It is sometimes seen as a goodwill gesture to indigenous peoples and can lead to serving third party interests rather than protecting the rights-holders interests. A debate around the first project of the Green Climate Fund in Peru in 2015, "PROFONANPE", for example, suggests a lack of understanding about the operative implications of free, prior and informed consent and issues related to full and effective participation and consultation of indigenous peoples.[56] Questions also remain on the application of free, prior and informed consent as now recognized in World Bank Performance Standard 7; in no instance should this policy lower the level of protection achieved for indigenous peoples.[57]

55. Some concerns have been raised about the many guidelines on free, prior and informed consent, including that the language used is often imprecise and sometimes introduces ambiguities, for example with respect to the point at which impact assessments are required or when consultation should begin. Sometimes these guidelines do not address the issue of indigenous peoples wishing to define their own consent process and to control aspects of the impact assessments. In addition, there is sometimes ambiguity in the event that consent is not forthcoming.

56. To ensure that financial institutions and the private sector can better align their policies with the rights protected in the Declaration, there is a need to develop and adopt stringent social and environmental safeguards, an indigenous peoples' policy based on international human rights standards and the Declaration, and effective oversight and compliance mechanisms and to ensure that indigenous peoples are involved throughout the process. As States are the duty bearers in implementing indigenous peoples' rights, their human rights obligations cannot be delegated to a private company or other entity (see A/HRC/12/34) and they remain responsible for any inadequacy in the process.

57. Indigenous peoples are also establishing their own protocols for free, prior and informed consent, particularly in North America and Latin America, including in Belize, Bolivia (the Plurinational State of), Brazil, Canada, Colombia, Guatemala, Honduras, Paraguay, Suriname and the United States of America. These protocols are an important tool in preparing indigenous peoples, States and other parties to engage in a consultation or free, prior and informed consent process, setting out how, when, why and whom to consult. The establishment of these protocols is an instrument of empowerment for indigenous peoples, closely linked to their rights to self-determination, participation and the development and maintenance of their own decision-making institutions (see A/HRC/EMRIP/2010/2). The right to be consulted "through their own representative institutions", mentioned in several articles relating to free, prior and informed consent, suggests the seriousness with which they should be recognized. In some cases, these

[55] Other international and regional organizations that have incorporated free, prior and informed consent into their policies and programmes on indigenous peoples include the United Nations Development Programme, the Food and Agricultural Organization of the United Nations, the Inter-American Development Bank and the European Bank for Reconstruction and Development.

[56] See www.forestpeoples.org/en/topics/un-framework-convention-climate-change-unfccc/publication/2015/green-climate-fund-and-fpic-ca.

[57] See http://indianlaw.org/mdb/world-bank-approves-indigenous-peoples-policy.

protocols have been recognized by the State (for example, Brazil)[58] and in others by the World Bank (Belize). In January 2018, a Federal Court in the state of Amazonas in Brazil demanded compliance with free, prior and informed consent for the Waimiri Atroari people regarding any law or development plan affecting them and regarding military activities on their lands.[59]

58. Many States have started to adopt legislation, practices and guidelines on consulting and obtaining consent. In the United States, several federal statutes require consultation, for example with respect to indigenous peoples' sacred sites, cultural patrimony and human remains. In some instances, federal agencies have adopted the Declaration[60] or otherwise entered into consensual agreements with indigenous peoples regarding these matters.[61] In Latin America, States have either enacted or are discussing enacting laws on consultation with indigenous peoples. A general consultation mechanism aimed at obtaining free, prior and informed consent has recently been established by Costa Rica.[62] Assuming that the necessary measures are taken to ensure its implementation, it can hopefully be used as a good practice for other States. There are also laws, practices or guidelines in Argentina, Canada, Chile, Ecuador, Finland, Guatemala, Mexico, Peru, the Philippines, the United States and Venezuela (the Bolivarian Republic of), among others. Some States are in the process of developing protocols on free, prior and informed consent, including the Democratic Republic of the Congo, Chile, Honduras, Paraguay and Suriname. The development of some of these laws has not been without criticism (see E/CN.4/2004/80/Add.2, A/HRC/27/52/Add.3 and A/HRC/33/42/Add.2). The Expert Mechanism has highlighted some of the requirements that such legislation should contain to ensure free, prior and informed consent in an advisory note of 2018, including adequate resources, equality and a mechanism to monitor agreements.[63] During its technical cooperation mission to Mexico City, the Expert Mechanism welcomed the inclusion of free, prior and informed consent in the City's Constitution, adopted in January 2017.

59. In Colombia, there is no law regulating free, prior and informed consent. However, between 1991 and 2012, around 156 consultations have taken place[64] pursuant to obligations laid down by the Constitutional Court (see para. 37 above). Of those, 3 out of 10 cases have been opposed by indigenous peoples,[65] and 95 per cent of projects and development activities have reached favourable outcomes.[66] A recent consultation process in Colombia, which culminated in a decree for the protection of isolated people, appears to have been a good practice, having involved dialogue with indigenous organizations and communities near isolated groups.[67] South Africa does not have a mechanism, but consultation and consent procedures have been successfully pursued through the Nagoya Protocol. In the Russian Federation, on a subnational level indigenous peoples are entitled to initiate and participate in "ethnological impact assessments" prior to decision-making on planned economic and other activity, and to access the results and recommendations; however, only international companies comply with this procedure due to the lack of regulation and legal clarity on who can represent indigenous peoples in negotiations.[68]

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[58] The state and federal government are using the Wajãpi Consultation Consent Protocol in the case of the expansion of a non-indigenous settlement neighbouring the Wajãpi indigenous land in the state of Amapá.

[59] See www.mpf.mp.br/am/sala-de-imprensa/docs/decisao-liminar-acp-waimiri-atroari-ditadura (in Portuguese).

[60] See www.achp.gov/UNdeclaration.html.

[61] See Robert J. Miller, "Consultation or consent: the United States duty to confer with American Indian governments", *North Dakota Law Review*, vol. 91 (2015).

[62] See www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1 NRTC&nValor1=1&nValor2=77482&nValor3=97132&strTipM=TC (in Spanish).

[63] Available from www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session11.aspx.

[64] See Garavito and Díaz submission.

[65] See Gerber submission.

[66] See Colombia national human rights institution submission.

[67] See http://opiac.org.co/los-pueblos-indigenas-de-la-amazonia-colombiana-celebramos-la-firma-del-decreto-de-proteccion-para-pueblos-indigenas-aislados/ (in Spanish).

[68] See Novikova submission (in Russian).

60. There are concerns, however, about some of the legislation and practices on free, prior and informed consent emerging around the world. These include that some consultation laws have been elaborated, quite ironically and problematically, without consultation with indigenous peoples. Additional concerns include a narrow focus on obligations under Indigenous and Tribal Peoples Convention, 1989 (No. 169) and not on the United Nations Declaration or regional or international human rights obligations; a focus on the procedural steps of a consultation process, without ensuring the genuine participation and protection of the rights of affected indigenous peoples; and a failure to address the structural concerns that violate the rights of indigenous peoples. Often, the right to consultation has not been translated into a law guaranteeing its enforcement, and the requirements of what constitutes consent are not clarified.

61. Indigenous peoples also raise concerns about "consultation fatigue"; "manufactured" consent; limits put on consultation; a lack of a common understanding of international standards relating to free, prior and informed consent; an increase in encroachments of extractive industries; and a lack of structural change to ensure free, prior and informed consent at the institutional level. These problems not only harm indigenous peoples, whose rights are often disregarded in development plans, but also lead to work-stoppages, protests, litigation and other problems with negative financial and political implications for States and industry alike.[69] For all of these reasons, the need for effective mechanisms for the operationalization of free, prior and informed consent are becoming urgent. The absence of rights-based regulatory mechanisms defining how to carry out a consultation encourages contradictory interpretations of which measures and projects need to be preceded by consultation processes and which require consent.

62. National human rights institutions play an important role in contributing towards the implementation of free, prior and informed consent. As bodies acting independently from the Government, some with an expertise in the area of indigenous peoples, they can and do fulfil many roles in the consent context. For example, in Argentina, the national human rights institution intervened in a project by ArSat Co. Telecommunications, where it had several roles, including as general coordinator of the whole process, facilitator and guarantor controlling compliance with the legal framework. Its engagement included an open consultation process that overcame three years of roadblocks. In the Bolivarian Republic of Venezuela, the national human rights institution promotes the application of prior consultation mechanisms, ensures that the right to consultation is incorporated in legislation and carries out activities promoting the right to prior consultation.

[69] In North America, failed consultations regarding development using the traditional lands and resources of indigenous peoples have led to years of costly litigation, protests and delay, even if the projects are ultimately approved. See, e.g., *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F.Supp.3d 101 (D.D.C. 2017); and *Ktunaxa Nation v. British Columbia*, 2 S.C.R. 386 (2017). In the extractive industries context, some sources indicate that work stoppages can cost upwards of $1 million per day.

Annex

Expert Mechanism advice No. 11 on indigenous peoples and free, prior and informed consent

1. The United Nations is an important venue for facilitating free, prior and informed consent in negotiations with States. To the extent that United Nations system organizations, including the United Nations Development Programme, the United Nations Educational, Scientific and Cultural Organization, the World Bank, the World Health Organization and the World Intellectual Property Organization (WIPO), encounter indigenous peoples' issues, they are advised that the human rights expressed in the Declaration apply broadly in all of these settings. In particular, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources is currently in the process of negotiating several multilateral instruments on traditional knowledge, genetic resources, traditional cultural expressions and other forms of intellectual and cultural property. In the negotiation and drafting of these instruments, WIPO and Member States should reference the Declaration, and especially the norm of free, prior and informed consent, with respect to the ownership, use and protection of indigenous peoples' intellectual property and other resources.

2. States should observe a human rights approach to free, prior and informed consent, among others by promoting capacity-building for State authorities and officials, including judges and lawmakers. Because local and subnational level authorities are in many cases closer and more sensitive to indigenous issues, local officials and company employees should receive better instructions on free, prior and informed consent.

3. States should establish an appropriate regulatory mechanism or mechanisms at the national level, preferably at the constitutional or legislative level, to regulate consultations in situations where free, prior and informed consent is required or is sought as the objective of the consultation. It should include references to the Declaration. The establishment of such a mechanism itself necessitates a process of consultation with indigenous peoples in a context of trust and good faith, and should be accompanied by the development of adequate implementing institutions, employing well-trained officials and ensuring adequate funding. Such a mechanism could also act as an oversight mechanism.

4. States should engage directly with indigenous peoples. When direct negotiations between indigenous peoples and private enterprises are sought by indigenous peoples themselves, companies must exercise due diligence to ensure the adequacy of the consultation procedures. States remain responsible for any inadequacy and should ensure measures are in place to oversee and evaluate procedures undertaken by business enterprises, which could include legislation or guidelines requiring the operationalization of free, prior and informed consent and penalizing corporations for failing to comply with such consent.

5. States should establish preconditions for achieving effective free, prior and informed consent, including building trust, good faith, culturally appropriate methods of negotiation and recognition and respect for indigenous peoples' inherent rights. The process should be formal and carried out with mutual respect.

6. States should ensure that consent is always the objective of consultations, bearing in mind that in certain cases consent will be required. Consultations should start at the planning phase (i.e., prior to the State or enterprise committing to undertake a particular project or adopting a particular measure, such as the licensing of a project) so indigenous peoples can influence final decisions. The measures to be consulted on should be clear. Consultations should occur throughout the evolution of the project, entailing "constant communication between the parties"[1] and should not be confused with public hearings for environment and regulatory statutes.

[1] *Saramaka* case, para. 133.

7. States should ensure that all information, including about the potential impact of the project or measure, is provided to indigenous peoples and is presented in a manner and form that is understandable to them, culturally appropriate, in accordance with their inherent traditions and independent. If necessary, it should also be presented orally and in indigenous languages.

8. States should ensure that there is institutional capacity and political will within the organs of the State to understand the meaning of and process to seek and obtain free, prior and informed consent, including by respecting existing indigenous protocols.

9. States should ensure that indigenous peoples have the resources and capacity to effectively engage in consultation processes by supporting the development of their own institutions, while not compromising the independence of those institutions. States and the private sector should promote and respect indigenous peoples' own protocols, as an essential means of preparing the State, third parties and indigenous peoples to enter into consultation and cooperation, and for the smooth running of the consultations.

10. States should ensure equality throughout the process and that the issue of the imbalance of power between the State and indigenous peoples is addressed and mitigated, for example employing independent facilitators for consultations and establishing funding mechanisms that allow indigenous peoples to have access to independent technical assistance and advice.

11. States should engage broadly with all potentially impacted indigenous peoples, consulting with them through their own representative decision-making institutions, in which they are encouraged to include women, children, youth and persons with disabilities, and bearing in mind that the governance structures of some indigenous communities may be male dominated. During each consultation, efforts should be made to understand the specific impacts on indigenous women, children, youth and persons with disabilities.

12. States should ensure that the free, prior and informed consent process supports consensus building within the indigenous peoples' community, and practices that might cause division should be avoided, including when indigenous peoples are in situations of vulnerability like economic duress. Special attention should be given in this regard to indigenous peoples representing distinct sectors in the community, including dispersed communities and indigenous peoples no longer in possession of land or who have moved to urban areas.

13. States should ensure that if indigenous peoples are in voluntary isolation no activities impacting on their rights should be considered. Where interventions related to those peoples are necessary to ensure their well-being or are unavoidable the appropriate United Nations and regional safeguards should be adhered to.

14. Indigenous peoples are encouraged to establish robust representative mechanisms and laws, customs and protocols for free, prior and informed consent. At the start of a consultation process indigenous peoples should agree on and make clear how they will make a collective decision, including the threshold to indicate when there is consent (see A/HRC/21/55).

15. States should ensure that indigenous peoples have the opportunity to participate in impact assessment processes (human rights, environmental, cultural and social), which should be undertaken prior to the proposal. Such impact assessments should be objective and impartial.

16. States should prevent measures or projects that may cause significant harm to indigenous people, including cumulative harm from competing land-use forms.

17. States should consult and cooperate with indigenous peoples to establish procedures to regulate, verify and monitor the consultation process, to ensure that the State consults and cooperates to obtain free, prior and informed consent, and if consent is required, that it is received.

18. States should ensure that treaties and other constructive agreements and arrangements recognizing the jurisdiction or decision-making authority of indigenous peoples are upheld and enforced.

19. States that have ratified Indigenous and Tribal Peoples Convention, 1989 (No. 169) should interpret and apply its provisions on consultation and free, prior and informed consent in accordance with other relevant standards, notably the United Nations Declaration on the Rights of Indigenous Peoples and emerging jurisprudence, including by regional human rights mechanisms.

20. States should ensure that, when relevant, indigenous peoples are provided with redress, which may include restitution, and that indigenous peoples are able to make their own decision about the form of redress best able to restore and protect their rights. This could be provided through culturally appropriate redress mechanisms, taking into account customary laws. States should not limit redress to cash compensation or arbitrarily exclude the potential for return or restoration of lands. Compensation should as far as possible take the form of lands and territories.[2]

21. States should ensure that indigenous peoples who have unwillingly lost possession of their lands, or whose lands have been confiscated, taken, occupied or damaged without their free, prior and informed consent, are entitled to restitution or other appropriate redress (Declaration, art. 28). If direct financial benefits in the form of compensation are agreed upon for any adverse effects caused by the project, they should accrue to indigenous peoples irrespective of whether or not they own the land or resources. This may require amendments to legislation.

22. States should ensure that any consent agreements are in writing and include, inter alia, provisions on impact mitigation, compensation and an equitable distribution of the benefits from the project; joint management arrangements; grievance procedures; and a dispute regulation mechanism with equal capacity of both sides. Access to justice for claims by indigenous peoples should be guaranteed.

23. States should facilitate and support processes to draw up long-term development plans in collaboration and cooperation with indigenous peoples, including national action plans, as committed to by States in the Declaration at the World Conference on Indigenous Peoples.[3]

[2] Committee on the Elimination of Racial Discrimination, general recommendation No. 23.

[3] See General Assembly resolution 69/2.