

## Selected Leading Aboriginal Law Decisions

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In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.



### ***Calder v. British Columbia*, [1973] S.C.R. 313**

This case is the origin of modern Aboriginal law. The Nishga sued for a declaration that their “Indian title” had never been extinguished. Six of seven judges agreed Aboriginal title could exist because Aboriginal people lived in Canada before the arrival of Europeans. This was a big step in the law as some argued that prior occupation did not matter; what mattered was whether the Crown formally recognized title in a statute. The real issue was whether the title had been extinguished. Three judges held that the title was extinguished; the other three judges held otherwise. The seventh and final vote did not address the Aboriginal law issues at all. He dismissed the claim on a technicality. *Calder* is less important as a legal precedent and more important for prompting Canada to take Aboriginal rights seriously. (The Nishga in this case are the same Nishga that signed a modern treaty in 2000 in north western BC).

### ***Guerin v. The Queen*, [1984] 2 S.C.R. 335**

This case is the origin of the principle that Canada can owe a fiduciary duty to Aboriginal people. Canada persuaded the Musqueam to surrender reserve land in Vancouver on certain terms so that the land could be developed into a golf course. Canada then leased the property to a golf club on significantly less advantageous terms than what Canada originally told the band. The band sued for breach of fiduciary duty. The Court found a breach and awarded the band \$10 Million. In so doing, the Court rejected the argument that Canada simply owed the band a non-enforceable “political” duty as opposed to a legal duty.

### ***R. v Sparrow*, [1990] 1 S.C.R. 1075**

This is the first case to consider the meaning of s. 35 of the *Constitution Act, 1982*. A Musqueam man was fishing for food with a drift net longer than permitted. The Court held that s. 35 protected rights that existed as of 1982. Rights could only be extinguished by a clear and plain intention before 1982 and not by mere regulation. Further, rights could be justifiably infringed if (1) the government was pursuing a valid objective (e.g. conservation) and (2) the infringement was consistent with the fiduciary duty owed to Aboriginals. For the second part of the test, one could consider if (i) there was as little infringement as possible (ii) if fair compensation was paid in the case of expropriation and (iii) whether there had been consultation. The case was sent back to trial for consideration of whether the regulation on fishing was justifiable. This case laid the ground work for the duty of consultation that would arise 14 years later.

### ***R. v Van der Peet*, [1996] 2 S.C.R. 507[1]**

This case answered a question left open in *Sparrow*: What are Aboriginal rights and how are they proven? The Court held “in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right”. The activity must be central to the Aboriginal group at the time of contact. In this case, Ms Van der Peet, a Sto:lo person, sold fish contrary to her food fishing licence (10 fish for \$50). Commercial trade of fish occurred prior to contact, but was not integral to Sto:lo culture. Ms Van der Peet was convicted.

### ***R v. Badger*, [1996] 1 S.C.R. 771[2]**

Three accused were charged with hunting moose out of season in Alberta. They claimed that they had a treaty right (Treaty No. 8) to hunt for food. The Court considered the effect of the Natural Resources Transfer Agreement (NRTA) on treaty rights. The NRTA allowed the treaty right to hunt for food to be exercised on all “unoccupied Crown lands” and on lands to which the Indians had a “right of access.” Lands that are put to a visible use incompatible with hunting are occupied and will not create a right of access to hunt on such lands. This case held that the *Sparrow* justification test applied to both Aboriginal rights and treaty rights. Two of the three accused were convicted because the land on which they were hunting were put to a visible, incompatible use- namely there were buildings on the land and indications that the land was recently harvested. The third accused was hunting on unoccupied Crown land, but the Court sent the matter back to trial to determine if the Crown could justify its hunting laws under the *Sparrow* test.

### ***Delgamuukw v. British Columbia*, [1997] 3 S.C.R.**

This case considered the nature of Aboriginal title. Aboriginal title is a right in land that allows a group to use the land in almost any way deemed fit. The use need not be an

Aboriginal right per se (e.g. the right to hunt). Title land can be used in many ways, but not in a way that is irreconcilable with the original connection with the land (e.g. cannot strip mine a land that was used as a hunting ground). Aboriginal title can only be surrendered to the Crown. It is also communally held land, not individually held land. To show Aboriginal title, the land must be exclusively occupied prior to sovereignty (not contact as is the case for Aboriginal rights). The case also affirmed that oral history evidence was admissible. Further, only Canada and not the provinces could extinguish Aboriginal rights. This claim by the Gitksan and Wet'suwet'en for title was remitted back to trial for determination.

### ***R. v. Marshall*, [1999] 3 S.C.R. 456**

This case is not a ground breaking case of Aboriginal law, but is well-known for two reasons. First, the accused Marshall is the same Donald Marshall who was wrongly convicted of murder. Second, the *Marshall* case prompted publicized clashes between Atlantic First Nations and commercial fishermen over control and use of the commercial fishery.

In this case, Marshall was fishing eel for commercial purposes and charged for fishing without a licence. The Court considered a peace and friendship treaty signed by the Mi'kmaq that read in part, "I do further engage that we [the Mi'kmaq] will not traffic, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty's Governor." The evidence indicated that the Mi'kmaq had a commercial treaty right to fish for a moderate livelihood. The case again affirmed the principle that treaties are to be given a large and liberal interpretation, but as Justice Binnie cautioned, "Generous rules of interpretation should not be confused with a vague sense of after-the-fact largesse."

### ***R. v. Powley*, [2003] 2 S.C.R. 207**

This case is the breakthrough for Métis rights. The Powleys shot a moose around Sault Ste. Marie, Ontario. They were charged with hunting without a licence. The Powleys were Métis who asserted an Aboriginal right to hunt for food. The Supreme Court agreed and acquitted the Powleys. In doing so, the Court noted that the *Van der Peet* test for showing Aboriginal rights applied to the Métis, but the time at which the right would have to exist was not contact but the date that Europeans took effective control over a Métis territory. The Court noted that a Métis person would have to show (i) he/she self-identified as Métis (ii) he/she had an ancestral connection to a rights-bearing Métis community and (iii) the person was accepted by the modern Métis community. On this last point, the Court noted that membership in a Métis organization could satisfy the community acceptance requirement but there must be some link between the organization and the historic Métis community.

### ***Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 and *Taku River Tlingit First Nation v. British Columbia*, [2004] 3 S.C.R. 550**

These two cases created the duty of consultation and accommodation. The practical need for the duty arose from the fact that Aboriginal groups did not have satisfactory power to prevent or control resource development on lands to which they asserted, but had yet to prove, an Aboriginal right. As cases marched to court, the Crown could allow resource development on claimed land that could, in the opinion of the Aboriginal group, adversely impact their rights.

The duty was created to make the Crown (not private parties) engage in a dialogue with Aboriginal groups notwithstanding that a right had not been formally proven in court. The duty arises when the Crown has real or constructive knowledge of an Aboriginal rights claim and contemplates action that could adversely affect the right. Depending on the strength of the claim and the nature of the impact, the duty could range from notice of a potential decision to allowing an Aboriginal group the right to make submissions, participating in the decision making process and being provided with written reasons. In addition to creating the duty, the Court replaced the concept of a fiduciary duty seen in *Guerin* and *Sparrow* with the concept of the “Honour of the Crown.” While fiduciary duties can arise in situations of reserve surrenders, the Honour of the Crown now is the main concept that defines Crown/Aboriginal relationships.

In *Haida*, BC allowed a transfer of a “sustainable forest licence” from one company to another. The SFL did not allow cutting per se, but allowed strategic planning on timber cutting in the SFL area. The Crown did not consult with the Haida at all on the transfer thus the duty was not met. In *Taku*, the First Nation was part of a lengthy environmental review process. The First Nation did not want a road to be constructed to a mine. Due to the environmental review process, the Court held that the duty was met in this case.

### ***Mikisew Cree First Nation v. Canada*, [2005] 3 S.C.R. 388**

This case held that the duty of consultation and accommodation could arise as an implied treaty term in the Prairie treaties. In this case, Canada planned to run a winter road through the reserve of Mikisew. The First Nation objected (as there was no consultation). Canada, again without consultation, decided to move the road to go around the reserve. The Court held that a duty was owed, but it was on the lower end of the spectrum. The road had minor impact and was on land that was surrendered via treaty to the Crown. The Crown was to give the First Nation notice of the road work, provide information on the road, and listen to the concerns of the First Nation. The duty was not met in this case because the Crown did not consult at all.

### ***Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53**

Little Salmon/Carmacks First Nation (LSCFN) entered into a treaty with the governments of Canada and the Yukon Territory in 1997 under which LSCFN members have a right of access for hunting and fishing for subsistence in their traditional territory. Mr. Paulsen applied to the

Yukon Territory for an agricultural land grant within LSCFN traditional territory, and more specifically, within the trapline of one of its members. The treaty contemplated lands being taken up for agricultural purposes. LSCFN argued that in considering the grant to Paulsen, the Crown proceeded without proper consultation. The Land Application Review Committee had considered Paulsen's application at a public meeting. LSCFN had been invited to the meeting and had submitted a letter of opposition, but did not attend.

Where a modern land claim treaty has been concluded, the first step is to look at its provisions to determine the parties' obligations, including any consultation obligations set out in the treaty. However, the Crown cannot contract out of its duty of honourably dealing with Aboriginal people. Although it was undisputed that the LSCFN Treaty is the "entire agreement" between the parties, the Treaty does not exist in isolation: the duty to consult is part of the legal framework in which it is to be performed so as to uphold the honour of the Crown. The purpose of such consultation was to manage the ongoing relationship between the Crown and the First Nations. The court found that LSCFN received appropriate notice and information and that the Crown considered LSCFN's written submission in reaching its decision to grant the agricultural land application. The Crown had met its duty to consult.

The duty to consult will exist even in the context of a modern treaty, but it is likely the duty will be at the low end of the spectrum. The duty to consult, grounded in the honour of the Crown, forms part of the legal framework which informs treaties – both modern and older. The appropriate scope of consultation may be shaped by language used in treaties, but will principally depend on the aboriginal or treaty rights at issue and the extent to which contemplated Crown action adversely affects such rights. The Court additionally clarified that the affected trapper himself was exercising a "derivative benefit based on the collective interest of the First Nation" (para. 35) and therefore was not entitled to be consulted individually.

### ***Rio Tinto Alcan v. Carrier Sekani Tribal Council*, [2010] SCC 43**

This case confirmed the *Haida* principles and expanded the law of Aboriginal consultation, including the remedies available to First Nations. Fifty years ago the Province gave the water rights in the Nechako River (Carrier Sekani traditional lands) to Alcan Aluminum Inc. to use it to generate power. First Nations were never consulted. BC Hydro went to the BC Utilities Commission (BCUC) for approval of a contract to buy electricity from Alcan. The Carrier Sekani Tribal Council objected on the basis that they had not been consulted. There were two main issues before the SCC: 1) did the BCUC have to consider consultation at all (the Court said it did), and 2) did the energy purchase agreement trigger a duty to consult? The Court said it did not give rise to a duty to consult. The agreement would not adversely impact the claims or rights of the First Nations and that an underlying infringement in and of itself would not constitute an adverse impact giving rise to a duty to consult. The infringement occurred 50 years ago, so the Court found no duty to consult on the energy purchase agreement. The Court considered whether the obligation to consult or

accommodate Aboriginal concerns may be "delegated", either expressly or by implication, to a third party. The Court stated that a legislature may delegate its duty to consult to a "tribunal". However, in the absence of express or implied authorization, the tribunal in *Rio Tinto*, the British Columbia Utilities Commission, was found to have had no authority to undertake consultations with the Carrier Sekani First Nations.

***Manitoba Métis Federation et al. v. Canada (Attorney General) et al.*, [2013] S.C.J. No. 14 (the "MMF case")**

The Manitoba Métis sought a declaration that the lands they were promised in the *Manitoba Act, 1870* were not provided in accordance with the Crown's fiduciary and honour of the Crown obligations. The Supreme Court granted the MMF's appeal and held that the federal Crown failed to implement the land grant provision set out in s.31 of the *Manitoba Act, 1870* in accordance with the honour of the Crown.

The relationship between the Métis and the Crown is fiduciary in nature; however, that does not mean all dealings between the Crown and the Métis give rise to fiduciary duties. The Supreme Court said that in order to give rise to a fiduciary duty the collectively-held interest must be distinctly aboriginal. The Court held that the federal government was not under a fiduciary duty in its administration of the lands under s.31.

The Court recognized that as long as the constitutional grievance relating to the failed implementation of s. 31 remains outstanding, the goal of reconciliation with the Manitoba Métis, which is mandated by s. 35 of the *Constitution Act, 1982* and underlies the purpose of s. 31 of the *Manitoba Act*, remains unachieved. The decision points to future negotiations between the MMF and the federal government in order to address this unfinished business to advance reconciliation. The Court also recognized that the purpose of the MMF's claim was to secure a declaration that would assist in securing future negotiations with the federal government in order to advance the "constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*."

***Xeni Gwet'in First Nations (William) v. British Columbia*, 2014 SCC 44**

This case is about claims to Aboriginal title and rights in an extensive area of west central British Columbia. The Xeni Gwet'in First Nations Government share a common culture, history and language with members of five other bands; together these bands make up the Tsilhqot'in Nation. The Xeni Gwet'in First Nation sought declarations of Aboriginal rights and title in response to proposed logging in an area called Tachelach'ed (also known as "the Brittany Triangle"). The area claimed (the Claim Area) makes up about five percent of the Tsilhqot'in Nation's traditional lands.

The Court declared Aboriginal Title to approximately 1900 km<sup>2</sup> of the Claim Area, including Xeni (Nemiah Valley) stretching north into Tachelach'ed (Brittany Triangle) and along the

Tsilhqox (Chilko River). The claim to Aboriginal title was limited to public land and does not include privately held lands. This is the first time in Canadian history that a court has declared Aboriginal title to lands outside of a reserve.

The Court held that Aboriginal title is not restricted to small, intensively used sites, but extends to all the territory that a First Nation regularly and exclusively used when Crown asserted sovereignty. Aboriginal title gives the Tsilhqot'in the right to control the land. This means the lands can be managed according to Tsilhqot'in laws and governance, and the Tsilhqot'in have the right to the economic benefits of the land and its resources. The only limit is that Aboriginal Title lands cannot be developed in a way that deprives future generations of the control and benefit of the land.

The Court also held that the government must first seek consent from the Aboriginal peoples before interfering with Aboriginal title lands. If consent cannot be obtained, the government cannot interfere with Aboriginal title unless it can justify the infringement. The Court indicated that infringements of Aboriginal title will not be lightly justified. In this appeal, the Court confirmed that clear cut forestry proposed for the Claim Area was not justified.

Proven Aboriginal rights were not at issue before the Supreme Court as those rights were confirmed in the Court of Appeal.

### ***Daniels v Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12**

This Supreme Court case clarifies and extends federal jurisdiction to Métis and non-status Indians (MNSI). The Plaintiffs sought declarations that: (1) MNSI are "Indians" within the meaning of section 91(24) of the *Constitution Act, 1867*; (2) the federal Crown owes a fiduciary duty to MNSI as Aboriginal people; and (3) that MNSI have a right to be consulted and negotiated with by the federal government. The first declaration was granted and the others were dismissed.

The Court concluded that the term "Indian" under section 91(24) encompasses MNSI. The second and third requests were dismissed as there is previous case law which stated that the Crown owed both a fiduciary duty and a duty of consultation to Canada's Aboriginal peoples, and as such a declaration in regard to the second and third requests would simply be restating law. The federal government now has jurisdiction over Métis and non-status Indians. This move qualifies these groups as "Indians" under the *Constitution Act, 1867*. The Court found that issues of whether MNSI hold rights under s. 35 of the *Constitution Act, 1982* are distinct from the issue of federal powers under s. 91(24) of the *Constitution Act, 1867*.

### **Constitutional Legislative Provisions**

#### **I. Constitution Act, 1982**

- (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

## **II. Constitution Act, 1867**

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say...

- (24) Indians, and Lands reserved for the Indians.

## **III. Constitution Act, 1930 (the Natural Resources Transfer Agreement)**

13. In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

## **The Royal Proclamation of October 7, 1763**

The Indian Provisions

***And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as***

***their Hunting Grounds*** -- We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida. or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments. as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.

***And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.***

1. **Indian Act, R.S.C 1985 c. I-5**

***Exercise of powers conferred on band or council***

2. (3) Unless the context otherwise requires or this Act otherwise provides,

(a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band; and

(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

***Grants, etc., of reserve lands void***

28. (1) Subject to subsection (2), any deed, lease, contract, instrument, document or agreement of any kind, whether written or oral, by which a band or a member of a band purports to permit a person other than a member of that band to occupy or use a reserve or to reside or otherwise exercise any rights on a reserve is void.

***Minister may issue permits***

(2) The Minister may by permit in writing authorize any person for a period not

exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve or to reside or otherwise exercise rights on a reserve.

### ***Exemption from seizure***

29. Reserve lands are not subject to seizure under legal process.

## ***LANDS TAKEN FOR PUBLIC PURPOSES***

### ***Taking of lands by local authorities***

35. (1) Where by an Act of Parliament or a provincial legislature Her Majesty in right of a province, a municipal or local authority or a corporation is empowered to take or to use lands or any interest therein without the consent of the owner, the power may, with the consent of the Governor in Council and subject to any terms that may be prescribed by the Governor in Council, be exercised in relation to lands in a reserve or any interest therein.

### ***Property exempt from taxation***

87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal Management Act*, the following property is exempt from taxation:

- (a) the interest of an Indian or a band in reserve lands or surrendered lands; and
- (b) the personal property of an Indian or a band situated on a reserve.

### ***General provincial laws applicable to Indians***

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or the *First Nations Fiscal Management Act*, or with any order, rule, regulation or law of a band made under those Acts, and except to the extent that those provincial laws make provision for any matter for which provision is made by or under those Acts.

### ***Restriction on mortgage, seizure, etc., of property on reserve***

89 (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian or a band.

### ***Exception***

(1.1) Notwithstanding subsection (1), a leasehold interest in designated lands is subject to charge, pledge, mortgage, attachment, levy, seizure, distress and execution.

### ***Conditional sales***

(2) A person who sells to a band or a member of a band a chattel under an agreement

whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve.

**[1]** *Van der Peet* is part of a trilogy of cases- the other two being *R. v. Gladstone* (commercial right to harvest herring spawn on kelp recognized for the Heiltsuk) and *R v. NTC Smokehouse* (Sheshaht and Opetchesaht people did not have Aboriginal right to commercially fish salmon).

**[2]** 1996 was a busy year for Aboriginal law. In addition to *Badger* and the *Van der Peet* trilogy, the Court held as follows: *R. v. Nikal* (requirement for Aboriginal people to obtain a free fishing licence held to unjustifiably infringe Aboriginal right), *R v. Pamajewon* (self-government deemed to be too imprecise to be an Aboriginal right); *R v Cote* (one need not show Aboriginal title to prove an Aboriginal right, the two rights are different) *R v. Adams* (extinguishing Aboriginal title in itself does not mean that Aboriginal rights have been extinguished).

## **UN Declaration on the Rights of Indigenous Persons**

### **Resolution adopted by the General Assembly**

*[without reference to a Main Committee (A/61/L.67 and Add.1)]*

### **61/295. United Nations Declaration on the Rights of Indigenous Peoples**

*The General Assembly,*

*Taking note* of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,<sup>1</sup> by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples, *Recalling* its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly, *Adopts* the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting  
13 September 2007*

### **Annex**

### **United Nations Declaration on the Rights of Indigenous Peoples**

*The General Assembly,*

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

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

1. See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53)*, part one, chap. II, sect. A.

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

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

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

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

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

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

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

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

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

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social

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progress and development, understanding and friendly relations

among nations and peoples of the world,

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

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

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

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> and the International Covenant on Civil and Political Rights,<sup>2</sup> as well as the Vienna Declaration and Programme of Action,<sup>3</sup> affirm the fundamental importance of the right to self-determination of all peoples,

by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

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

*Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations

between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

2. See resolution 2200 A (XXI), annex.

3. A/CONF.157/24 (Part I), chap. III.

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

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

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance

of national and regional particularities and various historical and cultural backgrounds should be taken into consideration, *Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

*Article 1*

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights<sup>4</sup> and international human rights law.

*Article 2*

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

*Article 3*

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

*Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to 4.Resolution 217 A (III).

their internal and local affairs, as well as ways and means for financing their autonomous functions.

#### *Article 5*

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

#### *Article 6*

Every indigenous individual has the right to a nationality.

#### *Article 7*

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

#### *Article 8*

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
  - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

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#### *Article 9*

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

#### *Article 10*

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

#### *Article 11*

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts,

designs, ceremonies, technologies and visual and performing arts and literature.

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

### *Article 12*

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

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

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### *Article 13*

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

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

#### *Article 14*

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

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

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

#### *Article 15*

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

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding

and good relations among indigenous peoples and all other segments of society.

#### *Article 16*

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

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

#### *Article 17*

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

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

3. Indigenous individuals have the right not to be subjected to any

discriminatory conditions of labour and, inter alia, employment or salary.

#### *Article 18*

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

#### **Article 19**

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

#### *Article 20*

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

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

#### *Article 21*

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

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

#### *Article 22*

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

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

#### *Article 23*

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

#### *Article 24*

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

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

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#### *Article 25*

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

#### *Article 26*

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

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

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

#### *Article 27*

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

#### *Article 28*

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

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources

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equal in quality, size and legal status or of monetary compensation

or other appropriate redress.

#### *Article 29*

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

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

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

#### *Article 30*

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

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

### *Article 31*

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

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

### *Article 32*

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

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

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

#### *Article 33*

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

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

#### *Article 34*

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

#### *Article 35*

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

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#### *Article 36*

1. Indigenous peoples, in particular those divided by international

borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

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

#### *Article 37*

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

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

#### *Article 38*

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

#### *Article 39*

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

#### *Article 40*

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

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#### *Article 41*

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

#### *Article 42*

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

#### *Article 43*

The rights recognized herein constitute the minimum standards for

the survival, dignity and well-being of the indigenous peoples of the world.

*Article 44*

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

*Article 45*

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

*Article 46*

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

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law

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and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for

the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

**[1]** *Van der Peet* is part of a trilogy of cases- the other two being *R. v. Gladstone* (commercial right to harvest herring spawn on kelp recognized for the Heiltsuk) and *R v. NTC Smokehouse* (Sheshaht and Opetchesht people did not have Aboriginal right to commercially fish salmon).

**[2]** 1996 was a busy year for Aboriginal law. In addition to *Badger* and the *Van der Peet* trilogy, the Court held as follows: *R. v. Nikal* (requirement for Aboriginal people to obtain a free fishing licence held to unjustifiably infringe Aboriginal right), *R v. Pamajewon* (self-government deemed to be too imprecise to be an Aboriginal right); *R v Cote* (one need not show Aboriginal title to prove an Aboriginal right, the two rights are different) *R v. Adams* (extinguishing Aboriginal title in itself does not mean that Aboriginal rights have been extinguished).

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