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Let's Get on With it:
Implementing The Declaration
on the Rights of Indigenous
People

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Let's Get on With it: Implementing The Declaration on the Rights of Indigenous Peoples

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Editor's Note: *Brenda Gunn's teaching and research is in the area of Indigenous people's rights in international and domestic law, constitutional law and international law. The following article by Ms. Gunn discusses Canada's announcement in 2010 that it would endorse the UN Declaration on the Rights of Indigenous Peoples. Ms. Gunn explores the significance of the Declaration for Indigenous people, communities and lawyers within Canada.*

Introduction

Indigenous peoples fought for decades for a declaration which would detail their specific rights and be part of the larger system of international human rights protections. Over a 30 year negotiation process, Indigenous advocates worked with member-states and the UN to articulate the scope of rights to be included within what is now known as the *United Nations Declaration on the Rights of Indigenous Peoples*. The *Declaration* represents a major turning point for the way in which the human rights of Indigenous peoples are recognized and protected within the United Nations system.

When the vast majority of the United Nations General Assembly voted in favour of the *Declaration*, the Chair of the UN Permanent Forum on Indigenous Issues explained its significance:

This Declaration has the distinction of being the only Declaration in the UN which was drafted with the rights-holders, themselves, the Indigenous Peoples. We see this

is as a strong Declaration which embodies the most important rights we and our ancestors have long fought for; our right of self-determination, our right to own and control our lands, territories and resources, our right to free, prior and informed consent, among others. Each and every article of this Declaration is a response to the cries and complaints brought by indigenous peoples before the UN- Working Group on Indigenous Populations (WGIP).¹

Indigenous peoples' from across Canada actively participated in the drafting and negotiation process from the original Working Group on Indigenous Populations draft text through to the final draft submitted to the General Assembly.² Throughout this negotiation process, Canada's position on the *Declaration* changed and ultimately ended with Canada voting against the *Declaration* in the General Assembly.³ Canada has since indicated that

it now endorses the *Declaration*, with some qualification.⁴ These qualifications will be discussed in greater detail below, but include the contention that the *Declaration* is only an aspirational document with no impact on Canadian law.

The crux of my argument is that Canada's position that the *Declaration* is only an aspirational document with no ability to affect Canadian law is unfounded. However, rather than spend time debating the significance and role of the *Declaration* in Canada, I advocate for Indigenous peoples, communities and lawyers within Canada to start using the *Declaration* as the standards by which to judge and develop domestic laws and policies. Using the *Declaration* will have normalizing effects, which promote a better place for Indigenous peoples in Canada.

Background

When the United Nations General Assembly passed Resolution 61/295⁵ in 2007, the United Nations *Declaration on the Rights of Indigenous Peoples* became part of the body of international law. Getting the *Declaration* to a majority General Assembly vote involved many stages of drafting, analysis and debate through various UN bodies. At each stage, there was opportunity for input from States and Indigenous peoples.

In 1985, the United Nations officially started drafting the *Declaration on the Rights of Indigenous Peoples* through the Working Group on Indigenous Populations, a body of five experts appointed by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.⁶ Over the next nine years the experts of the Working Group worked in collaboration with States and Indigenous Peoples to formulate the articles of the *Declaration*. With completion of the first draft of the *Declaration on the Rights of Indigenous Peoples*, the Working Group draft was considered and unanimously approved by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1994.⁷ The Sub-Commission draft "was divided into a Preamble and eight parts covering general principles; life, integrity and security; cultural rights; education, information, and labour rights; development, decision making, and economic and social

rights; lands, territories and resources; self-determination and indigenous institutions; and implementation."⁸ From the beginning, the *Declaration* was to be an all-encompassing instrument, addressing almost every aspect of Indigenous peoples' lives. From this original Sub-Commission draft, the UNDRIP underwent several revisions: in the Working Group of the Draft Declaration and before the General Assembly vote. These revisions changed the wording of the Sub-Commission text and modified the scope of certain provisions, but overall the categories of rights identified in the original draft were maintained in the final text.

The next stage of adopting the *Declaration* was consideration by the Human Rights Commission. In March 1995, the Commission decided not to approve the draft of the *Declaration* in order to provide for more opportunity to discuss the text. Instead, they established the open-ended inter-sessional working group on the Draft Declaration (WGDRIP),⁹ to consider for adoption by the General Assembly within the first International Decade of the World's Indigenous Peoples.¹⁰ This Working Group, like others before it, provided participation for States, UN agencies and Indigenous peoples.

The WGDRIP spent eleven years considering the Sub-Commission text in their annual meetings. During the First International Decade of the World's Indigenous Peoples (1995-2004) "little progress was made in negotiating the Declaration. ... [O]nly two articles ... of the text adopted by the Sub-Commission ... were approved, one on the right of indigenous peoples to a nationality (Article 6), and the other on equal rights between indigenous men and women (Article 44)."¹¹ Part of the difficulties facing the WGDRIP was that "the indigenous peoples' representatives, participating in the Commission as observers, stated their unanimous support for the Sub-Commission Text and called for its rapid approval without amendment, the member states held different and contrasting opinions."¹² Another issue the WGDRIP had to address was the role of Indigenous peoples in the WGDRIP, as Indigenous peoples did not want to be simple observers in a

process of States defining their rights.¹³ It was acknowledged that Indigenous peoples needed to be active participants in the process for the *Declaration* to have any legitimacy.¹⁴ It has been noted these "Procedural and substantive issues plagued the WGDRIP for years, with the former drawing much debate throughout the course of its sessions, prompting walkouts by indigenous peoples, as well as closed-door meetings of government representatives intent on re-drafting the text."¹⁵ This impasse which prevented any substantial agreement on the text of the *Declaration* was finally broken when WGDRIP Chairman, Luis Enrique Chávez of Peru, produced a new draft of the *Declaration*.

The Chairman's text was the basis of the negotiations in the final two sessions of the WGDRIP. The Chairman's draft "took into account the different concerns of governmental delegations and representatives of indigenous peoples involved in the discussion"¹⁶ expressed over the preceding eleven years. It was at this point in the negotiation process that participants now identify the change from a Liberal to the Conservative government led Canada to change "from playing the comfortable role of promoter and defender of the declaration to a state that categorically opposed its adoption."¹⁷ While many Indigenous advocates' original position was that no changes should be made to the Sub-Commission draft, "the final 'compromise Chairman's text' ... retained an allegiance, not totally but in large part, to the spirit and letter of the Sub-Commission Text as well as to the indigenous peoples' proposals."¹⁸ In the end, a majority of the Indigenous participants supported the Chairman's text.

The WGDRIP draft was submitted to the UN's newly formed Human Rights Council, who approved the text in June 2006.¹⁹ The only two members of the Human Rights Council who opposed the WGDRIP draft were Canada and Russia. When the vote was called, "the debate in the room was, in any case, positive and the positions of Canada and Russia as Human Rights Council members, and Australia, New Zealand and the United States as observers, represented a clear minority that was unable to prevent the adoption of

the HRC Text.”²⁰ Albert Barume notes that “Of the twelve African members of the Council, only three voted in favour of the *Declaration* (Cameroon, South Africa and Zambia), six abstained (Algeria, Ghana, Morocco, Nigeria, Senegal and Tunisia) and three were absent (Djibouti, Gabon and Mali).”²¹ Concerns of some African states became evident at the next stage of the process, discussed below.

Yet the majority of the international community was supportive of the *Declaration*. Not only was the text supported by a majority of members of the Human Rights Council, but also “on the NGO and indigenous peoples’ side, the vast majority had made known their support of the WGDD Text by means of declarations from the regional indigenous caucuses of Asia, Africa, Latin America, North America and the Pacific.”²² Indigenous advocates would have preferred a declaration that set higher standards, but decided that it “was the time to adopt it and move on to its dissemination and implementation.”²³ Canada’s position against the *Declaration* and their concerns were not those of the general international community.

The final step to approve the *Declaration* was for the General Assembly to hold a vote. In late September 2006, the Canadian government released its position on the *Declaration*.²⁴ Canada was never successful in amending the *Declaration* text to address their specific concerns. This is not surprising, nor problematic given that the goal of creating a general instrument which would have worldwide relevance and applicability.

In November 2006, Namibia put forth a resolution supported by many African states, which was passed by the General Assembly’s Third Committee,²⁵ to defer consideration of the *Declaration* and allow for further consultation on the matter.²⁶ It was at this stage that several African states identified several concerns. Namely, “the *Declaration* failed to define indigenous peoples; that all Africans are indigenous; that the right to self-determination would cause insurrection and division in Africa; and, finally, that the right to free, prior and informed consent would become a veto mechanism against governmental projects.”²⁷ The General Assembly

decided “to conclude its consideration of the *Declaration* ... before the end of its sixty-first session” in September 2007,²⁸ which would give States and Indigenous peoples another nine months to discuss the text of the *Declaration*. During that nine month period, intense negotiations were conducted between the different interested parties and the African Group.²⁹ On 30 August 2007, the African Group and the Co-Sponsors’ Group announced an agreement consisting of nine amendments to the text adopted by the Human Rights Council, which was submitted to the General Assembly for the final vote.³⁰

From this overview to the final text of the *Declaration*, we can see that there were many opportunities for States to voice concerns with the text and for the international community to consider and address those concerns. While full international consensus on the precise wording and scope of the provisions of the *Declaration* may have been desirable, such a consensus may never have been possible given the diversity of State and Indigenous peoples’ interests. What is critical is that at each stage there was sufficient opportunity for State and Indigenous peoples’ input.

The General Assembly Vote

On September 13, 2007 an overwhelming majority of States in the United Nations General Assembly voted in favour of the *Declaration on the Rights of Indigenous Peoples*.³¹ The final tally 143³² States voted in favour of the *Declaration*, and four states voted against the *Declaration*. The four states that voted against the *Declaration* were Australia, Canada, New Zealand and the United States.

In the General Assembly, Canada explained its negative vote by citing similar concerns to those identified above. Canada stated:

We have stated publicly that Canada has significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; on free, prior and informed consent when used as a veto; on self government without recognition of the importance of negotiations; on intellectual property; on military issues; and on the need to achieve an appropriate balance

between the rights and obligations of indigenous peoples, Member States and third parties.”³³

Australia, New Zealand and the United States also explained their negative vote by citing concerns with the specific wording of different provisions and some concerns with the process taken to finalize the text. These States would have preferred to undertake further work negotiating the text submitted to the General Assembly.³⁴ Their concerns are difficult to accept as legitimate because the text had already gone through decades of discussion and revisions. While the final amendments to the *Declaration* made after the Namibia resolution perhaps occurred without full participation of all UN member states, it can hardly be substantiated that the negotiations on the *Declaration* lacked an “open and transparent” process for States to voice their concern.³⁵ Further, the position of Australia, Canada, New Zealand and the United States that debate on the *Declaration* should have continued until full international consensus was reached would set the bar for adopting the *Declaration* higher than for any other international human rights instrument.³⁶ Requiring full consensus could have effectively given these States a veto on the *Declaration*.

As well as negative votes, there were eleven abstentions (including three African states). Alberta Barume notes that “a staggering 15 African countries were absent from the room (Chad, Côte d’Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea-Bissau, Mauritania, Morocco, Rwanda, Sao Tome and Principe, Seychelles, Somalia, Togo and Uganda)” on the day of the General Assembly vote on the *Declaration*, “most of whom had been present and voted in favor of the Namibian-led deferment Resolution almost a year earlier.”³⁷ While the abstaining votes were not explained, given the strong opposition from certain states “it is believed that several African states preferred to be seen as being as neutral as possible” on the *Declaration*.³⁸

Fortunately, subsequent to the General Assembly vote all States that voted against the *Declaration* have changed their position and now endorse the *Declaration*. The Labour government in Australia

endorsed the *Declaration* in 2009.³⁹ New Zealand too has since indicated their support for the *Declaration*.⁴⁰ Most recently, the United States has indicated its endorsement for the *Declaration* on December 15, 2010.⁴¹ Additionally, several States that abstained from voting have since indicated their support for the *Declaration*.⁴² With these States indicating their endorsement for the *Declaration*, it now has almost unanimous support of the international community.

It is interesting to note that while the above State's positions have changed, the text of the *Declaration* as well as its status in international law has remained constant. The change in position of Australia, New Zealand and the United States followed changes in the respective State's government. This has not been the case in Canada. It was Harper's Conservative government that voted against the *Declaration* in 2007 who later changed its opinion to finally endorse the *Declaration* three years later.

The Significance of the *Declaration*

On the day of the General Assembly vote, the *Declaration*, as a UN General Assembly resolution, became part of international law. It was celebrated as "a major victory for Indigenous Peoples who actively took part in crafting this Declaration."⁴³ Many Indigenous advocates celebrated the passing of the *Declaration* because it provided "a framework for States to link and integrate with Indigenous peoples, to initiate new and positive relations but this time without exclusion, without discrimination and without exploitation."⁴⁴ The *Declaration* is a significant achievement because through the process of negotiation and the *Declaration* itself, the United Nations, nation-states and Indigenous peoples "reconciled with past painful histories and decided to march into the future on the path of human rights."⁴⁵

Many commentators have discussed the *Declaration*'s importance. Paul Joffe writes that the *Declaration* "constitutes a major step towards addressing the persistent human rights violations against Indigenous peoples worldwide. It is the most comprehensive universal international human rights instrument explicitly addressing the

rights of Indigenous peoples."⁴⁶ The *Declaration* is significant for Indigenous peoples' rights because it "demonstrates a remarkable consensus among States as the most important actors on the global playing field that indigenous persons and peoples are back not only as fully entitled holders of individual human rights, but as collective actors with distinct rights and status under international law."⁴⁷ Through the protections set out in the *Declaration*, Indigenous peoples can renegotiate and define their relationship with States.

While Canada refers to the *Declaration* as an "aspirational" document that is not legally binding and not reflective of customary international law,⁴⁸ international scholars have contested these assertions.⁴⁹ It is true that a *Declaration* in and of itself does not create binding legal obligations on a State. Rather, "a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected."⁵⁰ But even as a declaration, States are required to respect the rights contained in the *Declaration*. The Indigenous Rights Committee of the International Law Association argues this requirement is evidenced by "the words used in the first preambular paragraph of the *Declaration*, according to which, in adopting it, the General Assembly was '[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter.'"⁵¹ Therefore "this text clearly implies that respect of the [*Declaration*] represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter."⁵²

The *Declaration* did not create new rights for Indigenous peoples; instead, the *Declaration* expanded upon existing human rights law and clarifies how those general human rights protections apply to Indigenous peoples.⁵³ Special Rapporteur James Anaya contends that "far from affirming special rights per se, the *Declaration* aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights affirmed in international instruments of general applicability."⁵⁴ As the *Declaration*

is an articulation of existing human rights (including those articulated in treaties which Canada is a party to), the *Declaration* does have implications in Canada and thus is not simply an "aspirational" document.

Canada's contention that the *Declaration* is not representative of customary international law is also contested. The Rights of Indigenous Peoples Committee of the International Law Association undertook a review in 2010 "assessing whether certain prescriptions in [the *Declaration*] have already reached the status of customary international law."⁵⁵ Through their review of existing international law, the authors concluded that "even though it cannot be maintained that as a whole [the *Declaration*] can be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to which States are *bound* to comply with."⁵⁶ After reviewing several of the different categories of rights contained within the *Declaration*, the Committee concluded that State support for the *Declaration*, the practice of both States and international bodies "unequivocally show that a general *opinio iuris* as well as *consuetudo* exists within the international community according to which certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law."⁵⁷ This in-depth study of customary international law conducted by internationally renowned international law experts clearly delegitimizes Canada's simple assertion that the *Declaration* is not representative of customary international law. The rights in the *Declaration* that reflect existing and developing customary international law are binding on Canada.⁵⁸

The *Declaration* as an applicable document for Canada, it contains 24 preambular paragraphs and 46 substantive articles. The preamble sets out the context for the *Declaration*, including recognizing the injustices of colonization and places the rights contained in the document

within the context of the broader system of international human rights protections. The *Declaration* recognizes the rights of Indigenous peoples are collective rights and not just rights held by individual Indigenous people, but belong to the communities and Indigenous nations.⁵⁹

The scope of the *Declaration* is broad and covers almost all aspects of Indigenous peoples' lives. As a complete review of all the rights contained in the *Declaration* is beyond the scope of this paper, there are a number of important categories of rights protected in the *Declaration*.⁶⁰ The *Declaration* recognizes that Indigenous peoples have the right to equality and to the enjoyment of all human rights and fundamental freedoms in international law.⁶¹ The starting point for the protection of Indigenous peoples' rights in the *Declaration* is self-determination which is to be defined by existing international law and can include the right to autonomy or the right to self-government over internal affairs.⁶²

The *Declaration* includes political and civil rights. For example, the *Declaration* recognizes Indigenous peoples' right to determine their own identity and membership.⁶³ It also recognizes that Indigenous peoples have the right to participate in public affairs (provincial and national governments) through their own representatives, but also have the right to maintain and develop their own decision-making institutions.⁶⁴

The *Declaration* recognizes certain social, cultural and economic rights including the right to adequate standards of living and economic well-being.⁶⁵ Indigenous peoples have the right to be actively involved in developing health, housing and other economic and social programming that affects them and may have the right to administer these programs.⁶⁶ Indigenous peoples have a right to their distinctive cultures, which includes the right to education in their own languages. The *Declaration* states that Indigenous peoples should be protected against cultural assimilation.⁶⁷

In addition to civil, political, economic, social and cultural rights, the *Declaration* contains provisions which are specific to Indigenous peoples. For instance, the *Declaration* protects rights to traditional lands, territories and resources

in accordance with the communities legal traditions and ways of using land.⁶⁸ The land protections include the right to the conservation and protection of the environment.⁶⁹ The *Declaration* promotes the standard of free, prior and informed consent of Indigenous peoples when their interests in land are affected.⁷⁰ The *Declaration* protects Indigenous peoples' cultural heritage (including traditional medicines) and intellectual property.⁷¹ The *Declaration* also provides protection to existing treaties.⁷²

Clearly, the *Declaration* is all encompassing and considers many rights that are protected in other human rights instruments, but clarifies how these rights apply in the Indigenous context.

Effects of Canada's Endorsement of the *Declaration*

In the previous section, I explained how the *Declaration* is part of a larger system of human rights protections, and moreover, that there are legal opinions which hold that certain rights contained within the *Declaration* may already be part of customary international law. These rights reflective of customary international law are binding on Canada as well as all other States. In this section, I respond to Canada's contention that the *Declaration* has little to no affect domestically before concluding the article by providing ideas on how to start implementing the *Declaration* and stop spending our time constantly responding to Canada's groundless assertions. The more time we spend debating the impact of the *Declaration*, the less time we spend implementing the *Declaration* for Indigenous peoples in Canada.

In November 2010, Canada officially endorsed the *Declaration* but it did so by qualifying its support and reiterating its previous concerns. The Government of Canada maintains that it has concerns with the "provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States and third parties."⁷³ And as already stated above, Canada's endorsement

also included their interpretive caveat that the *Declaration* is only an aspirational document – the understanding being that aspirational means non-binding – and also that it is not reflective of customary international law.

Another approach that Canada has taken with the aim of limiting the impact of the *Declaration* in Canada. This was to state that "Canada can interpret the principles expressed in the *Declaration* in a manner that is consistent with our Constitution and legal framework."⁷⁴ This proposition that international law cannot be used to modify Canadian law incorrectly characterizes the role of international law in Canada. Binding international obligations that have been properly incorporated into Canadian law can be directly enforced in Canadian courts.⁷⁵ As argued by many Indigenous advocates and NGOs, other sources of international law, including "International human rights standards are vital tools in the promotion of rights that states have failed to uphold. They are intended to help guide the reform of laws and policies. It would be inherently contradictory to support an international human rights instrument only to the extent that it is consistent with current national laws and policies."⁷⁶

One final point on Canada's statement endorsing the *Declaration* is worth noting. This is that with the endorsement of the *Declaration*, Canada stated that it reaffirmed "its commitment to build on a positive and productive relationship with First Nations, Inuit, and Métis peoples to improve the well-being of Aboriginal Canadians, based on our shared history, respect, and a desire to move forward together."⁷⁷ This is a critical statement because the *Declaration* can help give guidance on what is necessary to build this 'positive and productive relationship'. With the guidance of the *Declaration*, we can move forward together in way the promotes and enhances the special place of Aboriginal people. This increased clarity of the relationship and certainty of rights benefits all Canadians.

Implementing the *Declaration* to Promote A New Relationship Between Indigenous Peoples' and the State

The *United Nations Declaration on the Rights of Indigenous Peoples* was passed to set minimum standards necessary to

reverse the negative impact of domestic colonial laws and policies. It seeks to improve the socio-economic condition of Indigenous people and their communities. However, there has been little work done to implement these standards in Canada. Using the *Declaration's* standards domestically will promote normative values and “effective implementation of the *Declaration* will be the test of commitment of States and the whole international community to protect, respect and fulfill indigenous peoples collective and individual human rights.”⁷⁸ That is, having the *Declaration* alone is not sufficient to protect Indigenous peoples: it is only through its implementation that Indigenous peoples lives will be improved.

The process of implementing the standards set out in the *Declaration* must be multi-faceted. There must be continued legal academic consideration of the *Declaration* and how it fits within the Canadian legal landscape.⁷⁹ However, academic writing alone will not improve the position of Indigenous peoples in Canada. There must also be greater public knowledge and understanding of the *Declaration* and the rights contained therein. This includes educating both Indigenous⁸⁰ and non-Indigenous peoples. The Canadian government has set out a consistent message that the *Declaration* may not be compatible with Canadian law and may jeopardize non-Indigenous property interests.⁸¹ These campaigns of misinformation must be publicly corrected. Indigenous peoples have the unfortunate responsibility to ensure that the general Canadian public understands the significance of the *Declaration* and that “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.”⁸²

There are other ways that the *Declaration* can be used domestically in Canada, which will promote its normative value and improve the position of Indigenous peoples in Canada. One of these begins with its formal endorsement by Indigenous governments. This step has already been taken by the Assembly of First Nations⁸³ and

the Grand Council of Mi'kmaw Nation.⁸⁴ Taking this step to endorse the *Declaration* promotes self-government by exercising governance powers.

A second way that communities can promote self-government with the *Declaration* is to ensure that their own laws and policies meet the standards set out in the *Declaration*. The Grand Council of the Mi'kmaw Nation's decision to endorse the *Declaration* recognizes the *Declaration* as an interpretive and implementation guide to Mi'kmaw self-determination, collective rights and responsibilities.⁸⁵ The Mi'kmaw Nation's endorsement also strives to “promote respect for, and progressive implementation of the rights and freedoms of indigenous peoples as set out in the United Nations Declaration on the Rights of Indigenous Peoples, within our own territory, within our region and abroad.”⁸⁶

As well, implementation may be achieved through citing the *Declaration* in domestic courts. The *Declaration* can be an important interpretive tool for the rights protected under s.35(1) of the *Constitution Act, 1982* as well as other Canadian laws and policies relating to Aboriginal people.⁸⁷ In relation to the *Charter*, Chief Justice Dickson held that “the various sources of international human rights law—declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms—must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter's* provisions.”⁸⁸ If declarations can be used to interpret the *Charter*, then the *Declaration on the Rights of Indigenous Peoples* should and can be used to interpret s.35(1).

Providing interpretations of domestic law supported by international declarations is not a new practice, “International declarations have been cited by the judiciary on countless occasions.”⁸⁹ This approach of using the *Declaration* to interpret domestic law has been promoted by the UN Special Rapporteur on Indigenous Rights, Professor S. James Anaya: “Domestic courts also play a key role in operationalizing the rights of indigenous peoples as affirmed in international standards. ... Even if not empowered to directly apply

the *Declaration*, domestic courts may and should use the *Declaration* as an interpretive guide in applying provisions of domestic law.”⁹⁰ The Special Rapporteur cites a recent decision of the Supreme Court of Belize as a good example where “the Court used the *Declaration* and other international sources to guide its interpretation of the Constitution of Belize to uphold the rights of Maya villages over their traditional land.”⁹¹

If lawyers and advocates do not cite the *Declaration* in their pleadings and arguments, the courts will not be able to consider the *Declaration* in their decisions. Once cited, it is important to encourage the courts to take a flexible and generous approach to interpreting the *Declaration*, as is generally done in Canadian constitutional interpretation.⁹² By citing the *Declaration* in domestic pleadings, the Canadian courts have an opportunity to consider the *Declaration* and apply it in the domestic context. This can have significant impact on the weight of the *Declaration* domestically.

Outside of the courts, another method to push for Canada to uphold the standards set out in the *Declaration* is to refer to the standards when entering into negotiations with Canadian governments (both federal and provincial). When engaging in self-government negotiations, many articles in the *Declaration* provide some useful guidance on the scope of possible self-government arrangements. As discussed above, the *Declaration* includes the right to self-determination (article 3), and it also states that “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.”⁹³ Article 18 is important in self-government negotiations because it sets out that “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.” This article is supported by the provision in article 20 that Indigenous peoples have

the right “to maintain and develop their political, economic and social systems or institutions.” Several articles make reference to the protection and promotion of Indigenous traditions, laws and customs in relation to belonging to Indigenous communities or nations and the right to practice, preserve and transmit these traditions;⁹⁴ which may be better achieved through self-government arrangements. Some of the areas that are set out in the *Declaration* which may be prime for self-government include the establishment and control education systems and institutions;⁹⁵ the administration of health, housing and other economic and social programmes;⁹⁶ and determination of membership.⁹⁷

Similarly, the *Declaration* includes provisions that could set minimum standards for land claim negotiations. The *Declaration* requires States to give legal recognition and protection to Indigenous peoples’ “lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁹⁸

It further stipulates that there is to be “a fair, independent, impartial, open and transparent process” to adjudicate Indigenous peoples’ land rights.⁹⁹ The adjudication process is to give “due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems.”¹⁰⁰ The *Declaration* includes a right to redress for lands for lands “which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.”¹⁰¹ Free, prior and informed consent is the general standard by which government conduct vis a vis Indigenous peoples’ land is measured. The *Declaration* also sets out the right to set development strategies on their lands and requires governments to obtain Indigenous peoples’ free prior and informed consent before approving projects that affect Indigenous peoples’ lands.¹⁰²

Finally, full implementation of the *Declaration* in Canada will require governments to review existing laws and policies to ensure compliance with the standards set out in the *Declaration*. Indigenous peoples can play an important role lobbying for such a review and also identifying specific pieces of legislation and policy that do not conform with the international standards of the *Declaration*. It is important to remember that article 19

of the *Declaration* requires governments to “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” Indigenous peoples.

Conclusion

While Canada may still contest that the *Declaration* applies in Canada, there is sufficient legal support for its application here. There is a lot that Indigenous and non-Indigenous advocates can do to begin implementing the *Declaration*. This process of using the *Declaration* in domestic work will help the *Declaration* to be normalized within the Canadian legal system as the standard by which we evaluate laws and policies. The *Declaration* is an excellent additional tool available to advocates to promote and protect Indigenous peoples’ rights and interests.

(Endnotes)

¹ Victoria Tauli-Corpuz, “Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples” at the 61st Session of the UN General Assembly, 13 September 2007, New York.

² Indigenous participation has varied over the years, but include the Assembly of First Nations, the Native Women’s Association of Canada, the Métis National Council, the Grand Council of the Crees, other regional political organizations and also various Aboriginal communities. A detailed list of participation is annexed to the report submitted after each session of the various Working Groups and Councils, which are available through the UN web site.

³ Official Records of General Assembly, 61st session, 107th plenary meeting, 13 September 2007, U.N. Doc A/61/PV.107.

⁴ Canada, News Release, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (November 12, 2010), online: <<http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp>> [Canada’s Endorsement].

⁵ GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

⁶ Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 2 (XXXIV) of 8 September 1981. The establishment of WGIP was endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982 and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982.

⁷ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1994/45 of 26 August 1994.

⁸ Rights of Indigenous Peoples Committee of the International Law Association, *Interim Report for the Hague Conference*, (2010) at 4, online: <<http://www.ila-hq.org/en/committees/draft-committee-reports-the-hague-2010.cfm>>. [Hereinafter ILA Report]

⁹ UN Commission on Human Rights resolution 1995/32 of 3 March 1995, which was endorsed by the Economic and Social Council in its resolution 1995/32 of 25 July 1995. [Hereinafter the WGDRIP]

¹⁰ UN Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, para. 105. The first Decade (*International Decade of the World’s Indigenous People* (1995-2004), G.A. Res. 48/163 of 21 December 1993) began in 1995 and ended in 2004; the second Decade (*Second International Decade of the World’s Indigenous People* (2005-2014), G.A. Res. 59/174 of 22 December 2004) started in 2005.

¹¹ Adolfo Regino Montes and Gustavo Torres Cisneros, “The United Nations Declaration on the Rights of Indigenous Peoples: the Foundation of a New Relationship between Indigenous Peoples, States and Societies” in Claire Charters and Rodolfo Stavenhagen eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 138 at 141.

¹² Luis Enrique Chávez, “The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: the Middle Ground” in Claire Charters and Rodolfo Stavenhagen eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 96 at 97.

¹³ Andrea Carmen, “International Indian Treaty Council Report from the Battle Field – the Struggle for the Declaration” in Claire Charters and Rodolfo Stavenhagen eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 86 at 89-90.

¹⁴ Andrea Carmen, *ibid* at 90.

¹⁵ ILA Report, *supra* note 8 at 4.

¹⁶ ILA Report, *ibid* at 4.

¹⁷ Regino and Torres at 148.

¹⁸ Andrea Carmen, *supra* note 13 at 90.

¹⁹ Human Rights Council, *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, Res. 2006/2. The text of the *UN Declaration* was included as an Annex.

²⁰ Luis Alfonso De Alba, “The Human Rights Council’s Adoption of the United Nations Declaration on the Rights of Indigenous Peoples” in Claire Charters and Rodolfo Stavenhagen eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 108 at 123.

²¹ Albert Barume, “Responding to the Concerns of the African States” in Claire Charters and Rodolfo Stavenhagen eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 170 at 179.

²² Luis Alfonso de Alba, *supra* note 20 at 124.

²³ Luis Alfonso de Alba, *ibid*, at 124.

²⁴ Indian and Northern Affairs Canada, “Canada’s Position: United Nations Draft Declaration on the Rights of Indigenous Peoples—June 29, 2006”,

online: <<http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-eng.asp>> [INAC, Canada's Position]. Paul Joffe, an international lawyer and advocate, notes that "The document was completed and put on the Indian Affairs Web site on 28 September 2006, but then backdated to three months earlier. This gave the impression that the information was available at the time of the vote on the Declaration at the Human Rights Council on June 29, 2006. Government officials claimed that the wrong date was an "error by the web master", but no correction has ensued" in Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation" (2010) 26 National Journal of Constitutional Law 121 at 166.

²⁵ The Third Committee (Social, Humanitarian and Cultural Committee) deals with social and humanitarian issues, see <<http://www.un.org/en/ga/maincommittees/index.shtml>>.

²⁶ UNGA Third Committee "Resolution on the draft Declaration on the Rights of Indigenous Peoples" Un Doc A/C.3/61/L.18/Rev.1 (28 November 2006).

²⁷ Albert Barume, supra note 21 at 171 (he specifically identifies the concerns stated by Botswana).

²⁸ UN General Assembly, *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994, A/RES/61/178*, adopted 20 December 2006.

²⁹ Adelfo Regino Montes and Gustavo Torres Cisneros, supra note 11 at 150.

³⁰ Albert Barume, supra note 21 at 179.

³¹ Supra note 3.

³² The General Assembly Official Records indicate that 143 States voted in favour of the Declaration and that "Subsequently the delegation of Montenegro advised the Secretariat that it had intended to vote in favour" of the Declaration. Hence some authors put the count of votes for the Declaration at 144. Supra note 3 at 19.

³³ Supra note 3 at 12-13. Also supra note 24.

³⁴ Supra note 3.

³⁵ *Ibid* 3 at 13.

³⁶ Depending on your definition of consensus, even the Universal Declaration of Human Rights was not passed by a full consensus as there were eight abstentions.

³⁷ Albert Barume, supra note 21 at 180-1.

³⁸ Albert Barume, *ibid* at 180.

³⁹ Australia Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, "Statement on the United Nations Declaration on the Rights of Indigenous Peoples", Parliament House, Canberra (April 3, 2009), online: <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm>.

⁴⁰ Dr. Pita Sharples, "New Zealand Statement at the Opening Ceremony to the Ninth Session of the Permanent Forum on Indigenous Issues" April 19, 2010. online: <<http://docip.org/gsd/cgi-bin/library?a=q&c=cendocdo&q=Pita%20SHARPLES>>

⁴¹ United States State Department, "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples" December 15, 2010 online: <<http://www.state.gov/documents/organization/153223.pdf>>.

⁴² Colombia is one example: Colombia, "Gobierno anuncia respaldo unilateral a la Declaración de

Naciones Unidas sobre los Derechos de los Pueblos Indígenas" (21 April 2009), online: <<http://web.presidencia.gov.co/sp/2009/abril/21/10212009.html>>.

⁴³ Victoria Tauli-Corpus, supra note 1.

⁴⁴ Les Malezer, Chairman Global Indigenous Caucus, Statement made on the Adoption of the UN Declaration on the Rights of Indigenous Peoples, September 13, 2007 online: <<http://www.iwgia.org/sw248.asp>>.

⁴⁵ Victoria Tauli-Corpus, supra note 1.

⁴⁶ Paul Joffe, supra note 24 at 123.

⁴⁷ ILA Report, supra note 8 at 2.

⁴⁸ This includes Canada's statement endorsing the Declaration. See supra note 4.

⁴⁹ For example, see Paul Joffe, supra note 24.

⁵⁰ Economic and Social Council, *Report of the Commission on Human Rights (E/3616/Rev. 1)*, para. 105, 18th session, 19 March – 14 April 1962.

⁵¹ ILA Report, supra note 8 at 6.

⁵² ILA Report, *ibid* at 6.

⁵³ Report of the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya, A/HRC/9/9, August 11, 2008, at para 41.

⁵⁴ Report of Special Rapporteur James Anaya, at para 36.

⁵⁵ ILA Report, supra note 8 at 6. The ILA looked at the rights of self-determination, cultural rights, land rights, education and media, social and economic improvements, treaty rights, development and international co-operations and finally the provisions on reparations, redress and remedies.

⁵⁶ ILA Report, *ibid* at 43.

⁵⁷ ILA Report, *ibid* at 43.

⁵⁸ *R. v. Hape*, [2007] 2 S.C.R. 292 at paras 35-9.

⁵⁹ Article 1 of the Declaration states, "Indigenous peoples have the right to 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."

⁶⁰ Paul Joffe classifies the rights into several categories, which is the basis for my overview of the Declaration.

enjoyment of all human rights under international law; equality with all other peoples; self-determination, including self-government; recognition and enforcement of treaties; identity and membership; maintenance and strengthening of their distinct institutions; live in freedom, peace and security; traditions, customs, cultural heritage and intellectual property; traditional medicines and health practices; subsistence and development; lands, territories and resources; education; conservation and protection of environment; labour and cross-border contacts and co-operation.

Joffe, supra note 24 at 124.

⁶¹ Articles 1 and 2.

⁶² Article 3 and 4.

⁶³ Article 33 and 35.

⁶⁴ Articles 5, 18, 20(1), 33(2) and 34.

⁶⁵ Article 21.

⁶⁶ Article 23.

⁶⁷ Articles 8 and 14.

⁶⁸ Article 10 and 25-30.

⁶⁹ Articles 29 and 32(2).

⁷⁰ Articles 10, 19 and 28.

⁷¹ Articles 11(1), 12, 13, 15, 24(1) and 31.

⁷² Article 37.

⁷³ Canada's endorsement, supra note 4.

⁷⁴ Canada's endorsement, *ibid*.

⁷⁵ Hugh M. Kindred, Philip M. Saunders & Jutta Brunnée, *International Law, Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) at 206.

⁷⁶ Amnesty International Canada, et. al. "Joint Statement in Response to Canada's Endorsement of the UN Declaration on the Rights of Indigenous Peoples," November 16, 2010, online: <http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=5709&c=Resource+Centre+News>.

⁷⁷ Canada's endorsement, supra note 4.

⁷⁸ Victoria Tauli-Corpus, supra note 1.

⁷⁹ For example, see James (Sa'ke'j) Youngblood Henderson, "Implementation Quandaries" in *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing Ltd., 2008) 90.

⁸⁰ For example, see Assembly of First Nations "The United Nations Declaration on the Rights of Indigenous Peoples: What It Says and What It Means for First Nations in Canada" online: <<http://www.afn.ca/index.php/en/policy-areas/implementing-the-united-nations-declaration-on-the-rights-of-indigenous-peo>>

⁸¹ Canada's position, supra note 24.

⁸² Declaration, preamble paragraph 18.

⁸³ Assembly of First Nations, Chiefs-in-Assembly in Resolution No. 37/2007.

⁸⁴ Grand Council of Mi'kmaq Nation, Letter to the United Nations High Commissioner for Human Rights and Chairperson of the United Nations Permanent Forum on Indigenous Issues, July 27, 2008 [Mik'maw Nation Decision].

⁸⁵ Mi'kmaq Nation Decision, *ibid*.

⁸⁶ Mi'kmaq Nation Decision, *ibid*.

⁸⁷ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

⁸⁸ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 at para 80.

⁸⁹ Paul Joffe, supra note 24 at 201.

⁹⁰ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, A/HRC/9/9 (11 August 2008), at para 54.

⁹¹ *Manuel Coy et al. v. The Attorney General of Belize et al.*, Supreme Court of Belize, Claims No. 171 and 172 (19 October 2007).

⁹² See *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124, 1929 CarswellNat 2 (Canada P.C.), at 136: "The [Constitution Act, 1867] planted in Canada a living tree capable of growth and expansion within its natural limits." See also *R. v. Sparrow*, [1990] 1 S.C.R. 1075, Dickson C.J.C. holds: "A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights."

⁹³ Article 5.

⁹⁴ See articles 9, 11, 12, 13 and 34.

⁹⁵ Article 14.

⁹⁶ Article 23.

⁹⁷ Article 33.

⁹⁸ Article 26.

⁹⁹ Article 27.

¹⁰⁰ Article 27.

¹⁰¹ Article 28.

¹⁰² Article 32.

