ABORIGINAL TITLE ALLIANCE

2836 B Trans Canada Hwy
Chase, British Columbia, V0E 1M3, Canada
Phone: (250) 319-0688

SHADOW REPORT TO THE UN HUMAN RIGHTS COMMITTEE ON CANADA

ON CANADA'S VIOLATION OF INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION

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I. INVOLVEMENT OF THE UN HUMAN RIGHTS COMMITTEE

In Canada, we as Indigenous Peoples, are experiencing human right violations regarding our right to self-determination under Article 1 of *ICCPR/ICESCR* and Article 3 of *UNDRIP*. Our right to self-determination is not recognised by Canada. We continue to be colonized, experience territorial dispossession and live in poverty and dependency created by the settler state.

The United Nations ("UN") has rejected colonialism and all its manifestations of dispossession, dependency and oppression. The international remedy to colonialism put forward by the UN is the right to self-determination.[1] As Gerald Taiaiake Alfred argues, the effects of colonialism must be remedied in "an indigenous way according to indigenous needs, values and principles."[2] Again this is best reflected in the international principle and right of self-determination of Indigenous Peoples.

Canada is a settler colonial state that unilaterally claimed sovereignty and underlying title to Indigenous territories, despite Indigenous Peoples across British Columbia and in many other parts of Canada never ceding, releasing or surrendering our lands. Still the federal and provincial governments claim mutually exclusive jurisdiction over our lands, resources and peoples. The colonial doctrines of discovery and colonial concepts continue to underlie the Canadian legal system. We therefore require international monitoring and support in the implementation of our right to self-determination.

The first manifestation of colonialism is dispossession of Indigenous Peoples of their land and resources. Dispossession can be understood as the process by which the Canadian government limited Indigenous Peoples' access to their territories and resources. In imposing strict policies that restricted the accessibility of their lands, the government effectively forced Indigenous Peoples out of their traditional territories and onto Indian Reserves. All Indian Reserves in Canada amount to 0.2% of the total land mass of Canada. Further, Indigenous Peoples living on reserve required a pass in order to leave.[3] Overall, this time period was plagued with "limited land access, limited assistance … and limited defences against threats to their traditional way of life."[4]

The *Indian Act* sets aside reserve land but the boundaries of these plots of land were established with little to no regard for the previous agreements and treaties made with the Nations in the eighteenth century. The prime land was taken for settlers and reserves were largely situated on useless, barren land. Early treaty

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[1] Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514(XV), UNGAOR, 15th Sess, Supp No 16, UN Doc A/4684, (1960) 66.

[2] Gerald Taiaiake Alfred, "Colonialism and State Dependency" (2009) Journal of Aboriginal Health 42 at 48.

[3] F Laurie Barron, "The Indian Pass System in the Canadian West, 1882-1935" (1988) 13:1 Prairie Forum 25.

[4] Murray, supra note 76.

jurisprudence[5] and British authorities alike saw Indigenous access to land as a *privilege* and not as a right. To this effect, colonial officials imposed farming on the Indigenous Peoples living on reserves in hopes to "civilize" them. A technique, they thought, would discourage Indigenous Peoples from maintaining our traditional lifestyle.[6] Still today, courts often interpret Indigenous rights to access resources in a limited manner. In *Sappier* and *Gray*, the SCC circumscribed the Aboriginal right to harvest wood by restricting it to harvest for domestic purposes only.[7] Likewise, in *R v. Marshall* I (1999), the SCC also acknowledged the Mi'kmaq treaty right to commercial fisheries, yet it immediately limited the right to a moderate livelihood, not "a right to trade generally for economic gain".[8]

The Creation of Dependency and the Legislation of Systemic Discrimination is manifested in the federal government's enactment of the *Indian Act* in 1876.[9] With this enactment, systemic discrimination towards Indigenous Peoples was legislated by way of "status-Indian" classifications and resulted in a system of dependency.The *Indian Act*, among other things, determined who was an Indian for the purposes of the Act and imposed Indian status definitions and restrictions. The *Indian Act* was, and arguably remains, "an important tool in assimilating or subjugating Indigenous Peoples in service to the needs of Canadian capitalist expansion."[10]

Another manifestation that colonialism creates is oppression and the ensuing violence and the marginalization that is faced by Indigenous Peoples. As argued by Taiaiake, meaningful discussion on alleviating the harms of colonization means:recognizing that colonial injustices and oppression have had effects on both individuals and collectivities, and that addressing these effects necessitates perspectives and strategies that situates First Nations people not simply as individuals within Canada, <u>but as members of cultured communities on the land</u>.[11]

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[5] *Simon v The Queen*, [1985] 2 SCR 387.

[6] Karen Bridget Murray, "The Silence of Urban Aboriginal Policy in New Brunswick" in Ian MacPherson, ed, *Fields of Governance: Policy Making in Canadian Municipalities*, vol 2, Urban Aboriginal Policy Making in Canadian Municipalities (Montreal: McGill-Queen's University Press, 2012) at 58.

[7] *Sappier* and *Gray*, *supra* note 10.

[8] *R v Marshall*, [1999] 3 SCR 456 at para 56.

[9] *Indian Act*, RSC 1985, c I-5, as amended by *An Act to Amend and Consolidate the Laws Respecting* Indians, SC 1876, c 18. The *Indian Act* 1876 was the consolidation of various pieces of legislation that dealt with Indians, including *The Dominion Lands Act* of 1872 and the *Gradual Civilization Act* of 1857.

[10] Terry Wotherspoon & Vi Satzewich, *First Nations: Race, Class, and Gender Relations*, (Regina: University of Regina Press, 2007) at 14.

[11] Alfred, *supra* note 58 at 44 [emphasis added].

II. BACKGROUND

A. Description of the Aboriginal Title Alliance

The Aboriginal Title Alliance is the network of Indigenous Peoples who have Aboriginal Title and Rights to their Indigenous territories and refuse to negotiate with the Canadian government under its current land rights policy, entitled the Comprehensive Land Claims Policy and other policies that violate our indigenous and human rights as set out in the following. A number of UN Human Rights Bodies have found Canada's land rights policy to be in violation of international human rights standards, because its current "modification" and "non-assertion" models will result in the *de facto* extinguishment of Aboriginal Title and Rights.

B. International Involvement

Indigenous Peoples from Canada have been involved at the international level for many decades. Just among the Secwepemc people in British Columbia, Chief William Parrish from Neskonlith went to London, England in 1926 to protest the non-recognition and implementation of their land rights by the colonial government. Grand Chief George Manuel founded the first international indigenous organization, the World Council of Indigenous Peoples (WCIP) in 1975, which has been recognized by many contemporary international leaders as a precursor to the present international Indigenous institutions. The late Elder Irene Billy accompanied by Ska7cis Manuel have raised land rights issues, including the expansion of Sun Peaks resort without the prior informed consent of Secwepemc People, at the 2005 United Nations Human Rights Committee meeting. Secwepemc leaders were also organizers of Special Rapporteur Rodolfo Stavenhagen's unofficial Visit to Canada in 2003. Special Rapporteur Stavenhagen visited Sun Peaks Resort and met with other activist groups. Secwepemc people have been active in the North American Indigenous Peoples Caucus (NAIPC) at the U.N. Permanent Forum of Indigenous Issues. The Aboriginal Title Alliance has also submitted reports to U.N. Special Rapporteur Anaya and Tauli-Corpuz. Indigenous Peoples in Canada have always looked to the international community for justice when we cannot get justice here in Canada.

III. RIGHT TO SELF-DETERMINATION

A. Our Inherent Right

As Indigenous Peoples, we are the original peoples of our territories. In our own language we call ourselves the people of the land. Our names tell us where we come from. We have inherited our land from our ancestors and we have the responsibility to govern our territories. Our birthright is inalienable and cannot be transferred or taken from us. We are one with the land.

As Indigenous Peoples, we have the right to self-determination. This means we are entitled to freely and independently determine our own political, legal, economic, social and cultural systems without external interference. As Indigenous Peoples, we have the right to make decisions about our political status and development according to our own beliefs, world views, priorities, traditions and aspirations for the future. We possess the inherent power to govern our territories and ourselves. International Law recognizes that, as Indigenous Peoples, we have the collective right to self-determination. (Art. 1 – *ICCPR/ICESCR* and Art.3 *UNDRIP*) As Indigenous Peoples, our political status is equal to all other peoples in the world.

This means that the Canadian State must respect our internationally recognized right to self-determination and obtain our free, prior and informed consent before interfering with our political status and our economic, cultural and social rights.

Our political and legal status as Indigenous Peoples predates contact with Europeans. It supersedes any assertion or assumption of sovereignty by states such as Britain or Canada. We have territorial integrity and sovereignty, but unlike States our legitimacy is not based on colonial doctrines. British Columbia is one of the largest areas in North America where historically no treaties were signed but for small areas on Vancouver Island and in the North. There are also other Indigenous Peoples across Canada, such as the Algonquin, some of whom have joined the Aboriginal Title Alliance, who have not signed treaties. Together we fight the colonial doctrines of discovery and the ongoing manifestations of colonialism in law and policy. Our struggle is especially complex since we are dealing with Canada, a settler colonial state.

In the Canadian context, especially in British Columbia, our right to self-determination and our basic human rights have been transgressed and denied through deliberate laws and policies that maintain colonial concepts and doctrines. As Indigenous Peoples, we remain colonized and this has and continues to wreak havoc on our traditional lands and governance systems.

As Indigenous Peoples, we have been active in bringing these human rights violations to world bodies in search of international remedies. In order to understand our recommendations, it is important that we set out the history and the current state of Indigenous Peoples – Canadian relations.

IV. CANADIAN CONSTITUTIONAL FRAMEWORK AND THE RIGHT TO SELF-DETERMINATION

A. Doctrine of Discovery and Colonial Law in Canada

The primary claim made by Canada to our Indigenous territories is based on the colonial legal theories of the Doctrine of Discovery. These colonial concepts and legal fictions were used to claim sovereignty and try to justify Europeans confiscating land from Indigenous Peoples.

Canada's legal system remains based on these legal fictions with the federal and provincial governments claiming mutually exclusive jurisdictions over our lands and resources. Most recently, in the Supreme Court of Canada decision in Tsilhqot'in Nation[12] the Supreme Court of Canada referenced the colonial doctrine of discovery in the first part of para 69:

> **69** The starting point in characterizing the legal nature of Aboriginal title is Justice Dickson's concurring judgment in *Guerin*, discussed earlier. At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* (*1763*), R.S.C. 1985, App. II, No. 1. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.

This paragraph is the first in the section on the legal characterization of Aboriginal Title. It is disturbing to see the court at the outset reference the colonial doctrine of discovery, claiming that at the time of the assertion of European sovereignty the Crown acquired radical title or underlying to all land in the province. The court references the Guerin decision, which in turn references a long line of jurisprudence all the way back to the decisions by US Chief Justice Marshall in the 1830s.

How can a country continue to claim (and the highest court in the country maintain its) sovereignty based on colonial doctrines today, when international human rights instruments recognize Indigenous Peoples' right to self-determination?

The Supreme Court of Canada then went on to reject the doctrine of terra nullius finding that "the Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest'. What is troubling about this is that it treats our inherent rights in our land, which pre-exist their claim to sovereignty, as a "burden" while they maintain their claim to underlying title. This is the essence of settler colonialism, the continued claim to sovereignty and control over our lands and resources. In this paragraph the court attempts to separate out proprietary interests, so they do not have to address the underlying issue how they can maintain claims to sovereignty under colonial doctrines. Clearly the court is not in a position to answer the deeper question, because they are set up under the same claim to sovereignty. This is why the issue of the implementation of our right to self-determination under Article 1 of the ICCPR has to be addressed at the international level, by the Human Rights Committee.

As Indigenous Peoples, we are seeking redress under the universal human rights standards and the right of all peoples to self-determination. The UN has the responsibility to oversee

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[12] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

implementation of that right. As Indigenous Peoples within Canada we are oppressed peoples because our rights to govern our territories and ourselves and to develop our own economies has not been recognized and implemented by Canada.

The United Nations in its resolution on granting of independence to colonial countries and peoples in 14 December 1960 declared that:

> *Recognizing* that the peoples of the world ardently desire the end of colonialism in all its manifestations,
>
> *Convinced* that the continued existence of colonialism prevents the development of international economic cooperation, impedes the social, cultural and economic development of dependent peoples and militates against the United Nations ideal of universal peace,

Although the Declaration and Articles regarding decolonization were at the time limited in their application, they clearly stipulated a commitment of the community of nations to decolonization. Indigenous Peoples have the right to self-determination and decolonization and these rights are now recognized in the UN *Declaration on the Rights of Indigenous Peoples*. Countries like Canada, the United States, Australia and New Zealand, the four governments, all settler states, that initially voted against the United Nations *Declaration on the Rights of Indigenous Peoples*, dispossessed Indigenous Peoples of their territories and then tried to assimilate them with limited or no success. They have still not taken the necessary steps to recognize our rights. Indigenous Peoples in Canada can only escape this colonial relationship and the political and economic oppression that has defined it, by asserting their right to self-determination.

B. British North America Act 1867: Canadian Colonialism

The first constitution of Canada was the *British North America Act, 1867* (BNA Act 1867), which remains in force as the *Constitution Act (1867*). It sets out the division of powers between the federal and provincial governments. Indigenous Peoples, and our jurisdiction were excluded from this document. All law-making powers and control of every square inch of Indigenous territories were distributed between the federal and provincial crowns of Canada. This dispossession of our territories immediately impoverished us and made us dependent on Canada. The BNA Act 1867 put provinces in control of local matters and land management, making them the direct adversaries of Indigenous Peoples in regard to access to the land and resources. The provinces have no interest in sharing our resources fairly, consequently Indigenous Peoples have been impoverished, generation after generation.

In addition, the BNA Act, 1867 and federal legislation made Indigenous Peoples wards of the State. Under the Canadian Constitution, we become the responsibility of the federal government

under section *91 (24) Indians and Lands Reserved for Indians*. Our peoples suffered being removed from our territories and put on Indian Reserves, while our children were taken from our families and sent to Indian Residential Schools. This Canadian State action meets the international law definition of genocide. To eradicate the state of colonial dependency we currently live in, we must resist Canada's efforts to assimilate us and continue our common struggles to be self-determining peoples.

C. Patriation of the Canadian Constitution

The Canadian Constitution remained under the formal control of the British Parliament until the 1980s.

When Canada sought to patriate its Constitution from Britain in 1980, Indigenous peoples lobbied in Canada and England to influence the British Parliament to require that Aboriginal and Treaty Rights be recognized and affirmed by Canada and the provinces. The British then sent a clear signal to Canada that it would not approve the constitutional transfer unless there was an agreement with Indigenous peoples. This British response was a clear indication that the colonial relationship between settlers and Indigenous peoples continued to exist in Canada.

In addition to recognizing and affirming Aboriginal and treaty rights under section 35 (1) in Canada's Constitution 1982, Canada was also required to conduct several constitutional conferences on Aboriginal matters, which were mandated in Section 37 of the Constitution Act 1982:

> **37.** (1) A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces shall be convened by the Prime Minister of Canada within one year after this Part comes into force.
>
> (2) The conference convened under subsection (1) shall have included in its agenda an item respecting constitutional matters that directly affect the aboriginal peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada, and the Prime Minister of Canada shall invite representatives of those peoples to participate in the discussions on that item.

There were, in fact, four such conferences held between 1983 and 1987 with the mandate of defining our self-governing rights. But each of these constitutional conferences ended in failure. Despite the promise in the constitution to "recognize and affirm" Aboriginal rights, it soon became apparent that the federal and many of the provincial governments were attempting to "ignore and deny" our rights.

In both of the conferences held under the Trudeau government and those held under Brian

Mulroney's Progressive Conservative government, the Canadian state proposed, instead of recognition of our inherent Aboriginal right to self-government, the same sort of a municipal-style government that is on the table in today's negotiating tables.

Indigenous representatives at the conference, which included representatives of the First Nations, the Inuit and Métis people, steadfastly rejected this diminution of our rights and insisted that recognition of Aboriginal and treaty rights in the constitution had to include recognition of our inherent right to self-government.

Between these two positions—recognition of constitutionally protected self-governing peoples and the colonialist package from the federal and provincial governments—the differences were irreconcilable.

By the end of the negotiations, the federal minister of justice and attorney general, Ray Hnatyshyn, rejected even the idea of "self-determination." He said that it was the same as demanding sovereign rights, and sovereignty applied only to Canada as a whole.

On the Indigenous side, there was a kind of shock that the decolonization process that Section 35 was supposed to address had been blocked by the Canadian federal and provincial governments. Canadian Indigenous Leader Jim Sinclair expressed the frustration in the room when he said:

> First of all we feel that the Conference has been a failure and the work that we put into it, it was very disheartening to come to a conclusion that we cannot make a deal. We do not really know if the good will was ever here to make a deal to begin with. We came to set a foundation for the liberation and justice for our people, that's the purpose of coming to this conference. I think what we came here for, we are not disappointed because we have lost, we are not disappointed in the stand that we took, the right to land and the right to self-government, the right to self-determination, those causes are right in any society. I am disappointed that some of the premiers who made a stand and I have to say they made a stand against us for reasons that I consider were invalid.

But for the federal and provincial governments, the failure of the negotiations was the intended outcome, the prerequisite for their colonial business-as-usual approach with the intention of sweeping the constitutional rights of Indigenous peoples under Canada's constitutional carpet with the vague assertion that these issues could be sifted through by the courts in some undetermined future.

But this was offering Indigenous people a constitutional merry-go-round. The politicians said they would leave the courts to spell out the rights they themselves refused to spell out in the document that the court would use to determine our rights. In fact, the fundamental change needed to decolonize Canada is beyond the domestic capacity of the Supreme Court of Canada to decide.

V. International Right to Self-Determination

When the political class walked away from the requirements of Section 37, they were refusing to resolve the colonial relationship that existed between Canada and Indigenous peoples since Confederation in 1867. This meant that Indigenous peoples had a right to address their issue not only under colonial courts, which by definition can offer only a partial satisfaction, but under the United Nations protection for all peoples, particularly under Article 1 of the *International Covenant on Civil and Political Rights* which states that:

1) All 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.

2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3) The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

This claim of Indigenous protection under the *International Covenant on Civil and Political Rights* has been strengthened by the passage by the United Nations General Assembly in 2007 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) which echoes the International Covenant and erases all doubt that the right applies to Indigenous Peoples with the confirmation in Article 3, stating that "*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."*

When Canada turned its back on the decolonization process by walking away from the constitutionally mandated conferences in 1987, it left Indigenous peoples without a domestic resolution to their demands for self-government. It is clear that unrest among Indigenous Peoples today, and growing grassroots movements like Idle No More, are intimately linked to the failure of Canada to decolonize its relationship with the Indigenous peoples within its borders.

It is clear that the failure of Canada to come to agreement on the implementation of the constitutional rights of Indigenous Peoples and our jurisdiction is creating serious unrest amongst Indigenous Peoples and spawning grassroots movements like Idle No More, the idea for which was actually born at the funeral of Jim Sinclair who had fought for recognition of our right to

self-government in the constitution. This unrest is causing economic uncertainty in Canada. It is likely to result in serious physical conflicts between government, industry and grassroots Indigenous Peoples. It is also clear that the courts do not have the legal capacity to address all the outstanding issues that exist between Canada and Indigenous Peoples. The courts' capacity is much narrower and is intended to resolve specific disputes under a larger more comprehensive constitutional arrangement.

It is therefore imperative that the United Nations Human Rights Committee direct its ongoing attention to how Canada implements Article 1 in *International Covenant on Civil and Political Rights* and the corresponding Article 3 in the *Declaration on the Rights of Indigenous Peoples* in order ensure peace and harmony between settlers and Indigenous Peoples in Canada and to assist the parties along a path toward a peaceful decolonization process. The consequences of doing nothing will be increased conflict with possibly hugely tragic consequences.

A. UN Human Rights Committee questions to Canada regarding right to self-determination

In 1984, the United Nations expressed its concerns regarding the lack of state reporting and provision of adequate information on compliance with Article 1 of the *International Covenant on Civil and Political Rights*: Self-determination. To meet state obligations, the United Nations Human Rights Committee in its General Comment stated:

> Although the reporting obligations of all States parties including article 1, only some reports give detailed explanations regarding each of its paragraphs. The Committee has noted that many of them completely ignore article 1, provide inadequate information in regard to it or confine themselves to a reference to election laws. The Committee considers it highly desirable that State parties' reports should contain information on each paragraph of article 1.

Twenty-one years later, in 2005, the United Nations Human Rights Committee specifically asked Canada about the implementation of Article 1 in relation to Indigenous Peoples during Canada's 4th Periodic Report. Canada's response was that its concept of self-determination was evolving within the context of negotiations on the draft declaration on Indigenous rights:

> 8. The Government of Canada acknowledges the Human Rights Committee's request for further explanation of the elements that make up Canada's concept of self-determination as it applied to Aboriginal Peoples. As the Government of Canada's concept of self-determination as it may be applied to Aboriginal Peoples is continuing to evolve in relation to its ongoing participation in the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples and other international fora, the Government of Canada will present information on this specific issue at the oral presentation of this report. (Canada's 5th Periodic Report (October 2005)

In 2005, the UN Human Rights Committee asked Canada to respond to a "list of issues" regarding Self-Determination and Indigenous Peoples:

1. Please provide information on the concept of self-determination as it applied to Aboriginal Peoples in Canada, including the Métis people, as promised in paragraph 8 of the fifth periodic report (previous conclusions (CCPR/C/79/105), para.7).

2. Please be more specific about the new approaches adopted at federal level when negotiating comprehensive land claims agreements with Aboriginal Peoples. What precisely are the legal and practical differences between, on the one hand, the "modified rights model" and the "non-assertion model", and on the other hand, extinguishment of land rights? Please also inform the Committee about the practices of provinces and territories in this regard, what is the policy regarding past extinguishment of land rights, such as those of the Innu People (Fifth periodic report, para. 186; previous conclusions, para. 8)?

3. What steps have the federal, provincial and territorial governments taken to promote the equal participation of Aboriginal women in the negotiations of self-government agreements, treaties, and any agreement relating to Aboriginal people?

The United Nations Committee is aware of Canada's obligations under Article 1 to deal with Indigenous Peoples' right to self-determination. The Committee is not fully satisfied with Canada's models that deal with land rights that result in *de facto* extinguishment. Canada provided a highly unsatisfactory response to these issues.

B. Canada's Response in 2005

In October 2005, Canada made the following presentation to the United Nations Human Rights Committee:

> "The purpose of this response is to discuss the application of the right to self-determination to indigenous peoples living within democratic states, and the issues arising from the implementation of such rights, for those states and indigenous peoples."

Canada's response also discussed its view of the right to self-determination in international law in relation to who constitutes a "people" for the purposes of self-determination. Canada did not reach any conclusions on these topics other than to put forward its belief that the evolving understanding of the right to self-determination includes a right for groups living within existing states which qualify as peoples under international law that respects the political, territorial and constitutional integrity of the State. Canada concluded its response by stating it had special programs for Indigenous Peoples and marked its participation in the draft declaration on the rights of indigenous peoples, in particular the development of a concept for self-determination:

> 2. The Government of Canada notes that whether implementing minority rights, a policy recognizing that Aboriginal people have rights of self-government, or a right of self-determination, the practical questions raised are not dissimilar. How can groups, living in an existing democratic state, fulfill the economic, social and cultural objectives of the group, while being part of the sovereignty of the state? Through programmes and policies and special measures, the Government of Canada attempts to support this objective in the domestic context, and through participation in the UN Working Group on the Draft Declaration contributes to development of international law on this point.

In 2005, the UN Human Rights Committee could not make any observations and recommendations regarding Canada's response because the outstanding question of self-determination was part of on-going discussions at the Working Group on the Draft Declaration on the Rights of Indigenous Peoples. Canada's 2005 position on self-determination was not accepted by most of the nations of the world in 2007 when Article 3 of *UNDRIP* came into existence.

In 2007, Article 1 on Self-determination of the *ICCPR* and *ICESCR*, was officially recognized in the indigenous context by the international community (excluding Canada, United States, Australia and New Zealand) in Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*:

> 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.

Canada opposed *UNDRIP* until November 2010, when it finally endorsed the Declaration. However, this did not mean that our rights to self-determination were recognized, affirmed or implemented by Canada at that time. This remains the case to date.

Conflict still exists about the conceptual understanding of what self-determination means. In 2005, Canada told the United Nations Human Rights Committee that its population has the right to self-determination, and that Indigenous Peoples' right to self-determination can be included and controlled inside that population. As Indigenous Peoples, we have our own distinct status as peoples and we each have the right to self-determination, separate from state populations.

Pressure must be applied by United Nations human treaty right bodies like the United Nations Human Rights Committee to follow up on outstanding issues regarding the right to self-determination as it relates to Indigenous Peoples in Canada. Without the achieving self-determination, we as Indigenous Peoples in Canada remain colonized, oppressed and forcibly dependent on Canada. Since 1960, the United Nations has identified colonialism and the subjugation of peoples as violations of human rights and contrary to the UN Charter, world peace and cultural development. (G.A. Resolution 1514)

What is needed is a mutually acceptable balance between Indigenous Peoples and settler governments. Indigenous peoples must fully participate and agree to how self-determination can be achieved. This is the price that settlers must pay when moving into someone else's territories. Canada cannot unilaterally dictate and decide how Article 1 and Article 3 is given meaning, interpreted, applied and implemented. Indigenous Peoples must consent to how their respective self-determining rights are to be exercised at international and domestic levels of decision-making regarding their affairs. Decolonization in Canada must be also measured against Canada's capacity to meet its constitutional obligations to recognize and affirm our rights on the ground. This is not happening in Canada and it is imperative that the Special Rapporteur brings this fact to the attention of the United Nations human right treaty bodies and the General Assembly.

Indigenous Peoples do have a right to self-determination like all other peoples. The fact that we are trapped inside a settler state does not preclude us from self-determination. It just makes it more difficult to achieve. The persistent poverty that Indigenous Peoples have been enduring is proof that the existing system does not work. Indigenous Peoples have become beggars in our own lands and international redress is not only warranted, but it is necessary if the Canadian State is to be compelled to confront its internal colonialism and to remedy the damage it has done to Indigenous peoples.

C. CANADA'S SIXTH PERIODIC REPORT – FAILURE TO REPORT ON ARTICLE 1

Despite the important question that the UN Human Rights Committee had previously raised regarding Canada's implementation of Article 1 and despite its general comment on Article 1 asking countries to report on it; Canada in its current sixth periodic report DID NOT REPORT on ARTICLE 1. This is unacceptable, now that Canada's previous excuse that the negotiations of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) were still underway, is no longer valid. Rather, the vast majority of the world's nations voted in favour of UNDRIP and its Article 3 that Indigenous Peoples have the right to self-determination. Most states with a past of colonization voted in favour of UNDRIP, none of the decolonized countries opposed it. Initially it was only the four settler states, Canada, the US, Australia and New Zealand who voted against it, but later begrudgingly changed their position to endorse UNDRIP. This constitutes evidence of the consensus amongst the world nations and an increasing practice and *opinio juris* that the principles, such as self-determination of Indigenous Peoples, enshrined in UNDRIP are binding as customary international law. A line has been drawn under the long standing debate about Indigenous Peoples right to self-determination, and no nation can any longer claim that the right to self-determination does not apply to Indigenous Peoples. Our peoples are actually the ones who most need the protection and implementation of this right today. This is evidenced by Canada not reporting on Article 1, documenting its ongoing denial and failure to implement our right to self-determination.

Canada is denying our right to self-determination by saying we are afforded expression of our rights under Article 27 and that they also provide "meaningful access to government" to exercise the right to self-determination within the Canadian mainstream political system. Their default position is that they are not discriminating against Indigenous Peoples because they have rights under Article 27. This adds insult to injury because it denies our right to maintain our own political, economic and social systems which are covered under Article 1. Article 27 includes provision for culture, religion and language but does not include the political, economic and social elements essential to self-determination as Articles 1 and 2 do.

VI. CANADA'S DENIAL OF OUR RIGHT TO SELF-DETERMINATION

Canada's denial of our indigenous right to self-determination has been well-documented, including by the Royal Commission on Aboriginal Peoples (RCAP), commissioned by the federal government, whose extensive recommendations were never implemented. Most recently, on June 2, 2015, Canada's Truth and Reconciliation Commission (TRC) mandated by the parties to the residential school settlement agreement, released its final report and recommendations[13] building on the RCAP recommendations. The UN Human Rights Committee and other UN human rights bodies have referred to RCAP findings in past concluding recommendations, yet they have not been implemented yet, hence we are including them here, as a source to draw on, interrelating them with relevant recent TRC recommendations.

The Truth and Reconciliation Commission Report[14] documents Canada's denial of Indigenous Peoples right to self- determination. Although the Report focuses primarily on the Residential School system and reconciliation, it also shows the history and current state of relations between Canada and Indigenous Peoples. We note that the TRC found that Canada's policies aimed at the removal of Aboriginal Children with the intention to take their culture away constituted cultural genocide. In its report the TRC found that:

> The Canadian government pursued this policy of cultural genocide because it wished to divest itself of its legal and financial obligations to Aboriginal people and gain control over their land and resources. If every Aboriginal person had been "absorbed into the body politic," there would be no reserves, no Treaties, and no Aboriginal rights.

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[13] The recommendations of the Truth and Reconciliation Commission of Canada can be found at: http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf

[14] Truth and Reconciliation Commission of Canada: For full report:http://www.trc.ca/websites/trcinstitution/index.php?p=3

This further underscores the need for the implementation of our indigenous right to self-determination. The recommendations section also incorporates viable solutions and actions and reinforces key aspects of our right to self-determination that Canada has continuously ignored or denied.

RCAP released in October of 1996- TRC recommendations 2015 (approximately 19 years and 8 months later) show that Canada is failing to fulfil commitments and implement any substantial actions towards respecting or recognizing the rights of Indigenous Peoples. This in and of itself shows the discriminatory and racist attitudes that persist within the Canadian government.

The following are some of the most relevant recommendations from RCAP and the TRC that we urge the committee to take into account and urge Canada to implement.

RCAP Recommendation RE: terra nullius and the doctrine of discovery:

1.16.2

Federal, provincial and territorial governments further the process of renewal by:

> (a) acknowledging that concepts such as terra nullius and the doctrine of discovery are factually, legally and morally wrong;
>
> (b) declaring that such concepts no longer form part of law making or policy development by Canadian governments;
>
> (c) declaring that such concepts will not be the basis of arguments presented to the courts;
>
> (d) committing themselves to renewal of the federation through consensual means to overcome the historical legacy of these concepts, which are impediments to Aboriginal people assuming their rightful place in the Canadian federation; and
>
> (e) including a declaration to these ends in the new Royal Proclamation and its companion legislation.

So that the appropriate place of Aboriginal peoples in Canadian history be recognized.

Matching TRCR Recommendations: (45-47 and 49)

Royal Proclamation and Covenant of Reconciliation

45. WE call upon the Government of Canada, on behalf of all Canadians, to jointly develop with Aboriginal peoples a Royal Proclamation of Reconciliation to be issued by the Crown. The

proclamation would build on the Royal Proclamation of 1763 and the Treaty of Niagara of 1764, and reaffirm the nation to nation relationship between Aboriginal peoples and the Crown.

The proclamation would include, but not be limited to the following commitments:

i. Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius.

ii. Adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

iii. Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.

iv. Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiations and implementation processes involving Treaties, land claims, and other constructive agreements.

46. We call upon the parties to the Indian Residential Schools Settlement Agreement to develop and sign a Covenant of Reconciliation that would identify principles for working collaboratively to advance reconciliation in Canadian society, and that would include, but not be limited to:

i. Reaffirmation of the parties' commitment to reconciliation.

ii. Repudiation of concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discover and terra nullius, and the reformation of laws, governance structures, and policies within their respective institutions that continue to rely on such concepts.

iii. Full adoption and implementation of the United Nations Declaration on the Rights of Indigenous Peoples as the framework for reconciliation.

iv. Support for the renewal or establishment of Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.

v. Enabling those excluded from the Settlement Agreement to sign onto the Covenant of Reconciliation.

vi. Enabling additional parties to sign onto the Covenant of Reconciliation.

47. We call upon the federal, provincial, territorial and municipal governments to repudiate concepts used to justify European sovereignty over Indigenous peoples and lands, such as the

Doctrine of Discovery and terra nullius, and to reform those laws, government policies, and litigation strategies that continue to rely on such concepts.

49. We call upon all religious denominations and faith groups who have not already done so to repudiate concepts used to justify European sovereignty over Indigenous lands and peoples, such as the Doctrine of Discovery and terra nullius.

Comments: The TRCR report takes the RCAP recommendations a step further by calling directly upon the federal, provincial, territorial and municipal governments along with religious denominations and faith groups to repudiate concepts "used to justify European sovereignty over Indigenous lands and peoples such as the Doctrine of Discovery and terra nullius." In addition to this the Report adds that each entity and its institutions should adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples.

We note that these TRC recommendations, especially those calling on Canada to implement UNDRIP received a standing ovation by the many Canadian representatives, politicians and the public present, the one person who did not stand was the current federal Minister of Aboriginal and Northern Affairs, Bernard Valcourt, who was sent as the representative of Canadian Prime Minister Stephen Harper.

More specific wording of the RCAP and TRC reports and recommendations in regard to self-determination are included in the appendix.

VII. CANADA'S POLICIES REGARDING LAND RIGHTS

A. Canada's Policies

Along with expressing dissatisfaction about Canada's failure to address the rights of Indigenous peoples to self-determination, the United Nations Human Rights Committee 2005 expressed concerns with Canada's processes and policies that deal with indigenous land rights resulting in *de facto* extinguishment.

The Canadian federal government's two main policies in regard to territorial indigenous rights are the Comprehensive Land Claims Policy and the Self-Government Policy. The Comprehensive Claims Policy employs a "modification" and "non-assertion" approach that results in the *de facto* extinguishment of Aboriginal Title. This policy has been found in violation of international human rights standards by a number of UN Human Rights bodies. In British Columbia, this policy is currently being implemented through the British Columbia Treaty Commission Process (BCTC). In this process, Canadian provincial and federal negotiators have strict mandates to implement the policy and negotiate agreements that result in delegated jurisdiction (similar to municipalities) for aboriginal peoples, rather than implementation of

Aboriginal Title and Rights and indigenous jurisdiction.

Canada's self-government policy is called the "inherent right to self-government" policy. This government policy does not implement a broad indigenous right to self-government, let alone self-determination. It permits only limited powers over specific areas, while entirely excluding others. These are just some of the areas that are explicitly excluded from the scope of any negotiations:

> Other National Interest Powers: management and regulation of the national economy, maintenance of national law and order and substantive criminal law, protection of the health and safety of all Canadians; federal undertakings and other powers, including: broadcasting and telecommunications; aeronautics; navigation and shipping; maintenance of national transportation systems; postal service; census and statistics

The land extinguishment policies and the exceedingly narrow interpretation of the inherent right of Indigenous people to govern themselves that successive Canadian governments have pursued have been sharply criticized not only by Indigenous peoples but by Canadian courts.

B. Background

The legal landscape of Canada was dramatically changed by a decision of the Supreme Court of Canada on December 11, 1997, when it recognized Aboriginal Title "as a right to the land itself." The *Delgamuukw* decision, written primarily by Chief Justice Antonio Lamer, now provides Indigenous Peoples from unceded Aboriginal Title territories with a strong legal foundation and consequently, an historic opportunity, to attain the justice that our ancestors have been struggling for centuries to achieve.

The 2004, the Supreme Court of Canada *Haida Nation* decision also changed the legal landscape by establishing the legal principles around the Crown's Duty to Consult and Accommodate Aboriginal Rights and Title on an interim basis until the matter is resolved in a more permanent manner through agreement, treaty or litigation.

Up to now the federal government has refused to change its Comprehensive Claims Policy, regarding land rights, to be consistent with the *Delgamuukw* decision or even more recently the *Haida* decision.

The federal government's priority is to try to accelerate the settlement of Final Agreements with the Actively Negotiating Nations and it intends to use all Final Agreements reached with the Actively Negotiating Nations as precedents against Indigenous Nations Not Negotiating.

On September 4, 2012, the federal government let fall any pretence of seeking compromise or

reform of its extinguishment polices when it announced the "results-based" approach to Modern Treaty (Comprehensive Claims) and Self-Government Agreements. Henceforth, the federal government would only deal with bands, which in effect agree to surrender before the negotiations continue. To be included in the future negotiations bands would be required to:

Accept the extinguishment (modification) of Aboriginal Title;
Accept the legal release of Crown liability for past violations of Aboriginal Title & Rights;
Accept elimination of Indian Reserves by accepting lands in fee simple;
Accept removing on-reserve tax exemptions;
Respect existing Third Party Interests (and therefore alienation of Aboriginal Title territory without compensation);
Accept (to be assimilated into) existing federal & provincial orders of government;
Accept application of Canadian Charter of Rights & Freedoms over governance & institutions in all matters;
Accept Funding on a formula basis being linked to own source revenue;
Other measures, and accept becoming Aboriginal municipalities.

The Prime Minister's policy has been to try to accelerate final settlements with the Actively Negotiating Nations under guidelines that ensure the extinguishment of Aboriginal title and rights. In the landmark *Tsilhqot'in Nation v British Columbia*[15] decision rendered on June 26, 2014, the Supreme Court of Canada issued the first ever declaration of Aboriginal Title in Canadian history, finding that Aboriginal Title could be established on a territorial basis. By granting this powerful remedy and recognizing the existence of Aboriginal title on the ground in a 2,000 square kilometre section of *Tsilhqot'in* territory, the court has shown that extinguishment is far from the only option in Canada. The court also found that the governments' arguments were based on the erroneous theory that Aboriginal Title could only be established on a site specific basis. In effect their laws and policies are still based on this erroneous theory, they actually fail to recognize or take into account Aboriginal Title altogether. The shock of this decision to the federal government led to the commissioning of the so-called Eyford Report on reforming the land claims policy, a poorly received attempt to keep alive what even the courts have ruled as a failed policy. The report does not provide any fundamental change, it does not suggest recognition and implementation of Aboriginal Title and Rights. It has been broadly rejected by Indigenous Peoples in BC. (See Appendix II: *Interior Alliance letter on the Eyford report.*) Some policy analysts feel that the decision of the province of British Columbia to cancel the appointment of a chief commissioner for the British Columbia Treaty Process is also connected to its disappointment with the failure of the federal government to propose an alternative approach. There is speculation that the province will divest itself entirely from the process which has cost over a billion Canadian dollars so far.

[15] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44

C. Ongoing Processes and Policies

It is imperative to understand that Canada position is to basically keep all the colonial structures it operated under when it was a part of Britain. Under the British North America Act 1867 only British property rights and sovereignty mattered. Indigenous Peoples are still subject to that same kind of top down approach to programs, services and funding because Canada has not taken its responsibility to recognize and affirm Aboriginal and Treaty Rights seriously.

The Canadian Constitution was patriated in 1982, but Canada has failed in implementing its obligations toward Indigenous Peoples under the new constitution. Indeed, Canada's policy is still basically to terminate Indigenous Peoples.

Right now the balance of power is on the federal and provincial governments' side. Indian Reserves in Canada only measure 0.2% of Canada and 99.8% is under federal and provincial power and control. This is an unfair and unjust distribution of power and resources and must change in favour of Indigenous Peoples. Exclusive areas for Indigenous Peoples must be substantively increased from 0.2% of Canada. Furthermore, land must not only vest in the Crown title but also vest in Aboriginal and Treaty Rights. This would create the economic framework for Indigenous Peoples to rebuild their Indigenous economies.

Unfortunately, the federal government does not want to substantively change their Comprehensive Land Claims Policy. In fact even the notion that Indigenous Peoples have to claim our own land back is absurd. It is clear that the courts have recognized Aboriginal and Treaty Rights but these legal findings have gotten no support from the Canadian and provincial governments. The federal Comprehensive Land Claims Policy is out dated and inconsistent with the more recent findings of the Supreme Court of Canada. Canada has been told by the United Nations that it cannot extinguish Indigenous proprietary rights in any settlement agreement. The Canadian government cannot be permitted to continue to operate outside of its own laws and outside of international law.

VIII. PERSISTENT DISPARITY = SYSTEMIC RACISM

A. Colonialism against Indigenous Peoples in Canada

Former UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples, Rodolfo Stavenhagen, reported to the United Nations General Assembly on his Official Visit to Canada, in September 2005. One of his primary findings was that "persistent disparities" existed between Canadian settlers and Indigenous Peoples:

> During his visit to Canada, the Special Rapporteur noted the persistent disparities between aboriginal Canadians and the rest of the population with regard to the progress achieved in

areas such as access to basic social services, and collected information about disputes between the various levels of government and aboriginal people concerning rights to land and natural resources. Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, abuse of women and child prostitution are issues of particular concern to the communities. The data collected during the visit showed that, despite efforts to remedy the situation, educational attainment, health standards, housing conditions, family income and access to economic opportunity and to social services are much worse among aboriginal people than among other Canadians.

It is important to note that this persistent disparity between Canada and Indigenous Peoples is due to an ongoing colonial relationship between the settler government and Indigenous Peoples. The systemic poverty that Indigenous Peoples experience is simply because Canada has claimed 100% of all Aboriginal and Treaty territory and law making and fiscal power over them.

Canada's colonial policy is to claim all land from Indigenous Peoples and assimilate us, under existing programs and services. The Special Rapporteur noted that Canada is making a commitment to ensure that Canada's prosperity will be shared with Indigenous Peoples.

1. Canada's commitment to ensuring that the country's prosperity is shared by aboriginal people is encouraging. The Government is devoting a large number of programmes and projects, together with considerable financial resources, to achieving this goal. Ever since colonial times, Canada's indigenous peoples have been progressively dispossessed of their lands, resources and culture, a process that has led them into destitution, deprivation and dependency. Current negotiated land claims agreements between Canada and aboriginal peoples are intended to provide certainty and predictability, but require aboriginal people to waive certain rights in exchange for specific compensation packages, a situation that has led in several instances to legal controversy and occasional confrontation. In his report on Canada, the Special Rapporteur makes a number of recommendations intended to help the parties to bridge the existing gaps in areas such as access to basic social services.

The UN Human Rights Committee needs to understand that regardless of how Canada states that the Canadian system is open and indiscriminate; the reality speaks for itself and shows that Indigenous Peoples rights are not being implemented. Indigenous territories in Canada are very rich. It is therefore not justifiable that Indigenous Peoples remain poor. It is clear that all the government accessibility and programs and services have done nothing to correct this disparity. Indigenous Peoples cannot be blamed for their poverty simply because the land they own is controlled 100% by Canada and its provinces. Eradicating this form or manifestation of colonialism is what the Indigenous Peoples' struggle in Canada is all about. The application of self-determination in Canada is one of the key conflicts that needs to be mutually addressed and agreed to between Canada and the Indigenous Peoples in order to root out the cause of the persistent disparity that presently exists. This will require a fundamental change in Canada's analysis and understanding of colonialism. Canada raised a number of questions regarding self-determination as it applies to Indigenous Peoples but it admitted that some Indigenous Peoples living within an existing State could be eligible for self-determination.

1. The Government of Canada recognizes that there may be collectivities, within the overall population of a State, that may meet the criteria of a "people" at international law and who have a right of self-determination under common Article 1 of the Covenants. The Government of Canada recognizes that some indigenous collectivities may meet the criteria to qualify as "peoples" at international law, on the same basis as other collectivities qualify as peoples.

It is clear from the October 2005 paper that Canada was staying away from recognizing Indigenous Peoples as Peoples under international law and that nothing has been done to implement our right to self-determination. Canada talked about us as being "Indigenous collectivities", but they did not recognize us all as Peoples with the full right to self-determination.

Canada, by not getting agreement from Indigenous Peoples based on recognition and affirmation of Aboriginal and Treaty Rights, does not have comprehensive or legitimate territorial integrity. Canada cannot simply get the colonial approval of Britain to take over Aboriginal and Treaty Territories. Canada must obtain recognition from Indigenous Peoples, based on the recognition of our Aboriginal and Treaty territories. It is the mutual agreement between settlers and Indigenous Peoples that is the only way to eradicate colonialism.

Indigenous Peoples cannot ask the settlers to return to their homeland any more than the settlers can continually deny the right of Indigenous Peoples to their territories and self-determination. How Canada and Indigenous Peoples define and measure self-determination will create a new Canada not based simply on the Colonial Doctrines of Discovery but also on recognition and affirmation of the territorial rights, history, values and culture of Indigenous Peoples. These parameters are not outside Canada's constitutional and legal capacity to work out. It is really a question of political will. We know from experience that Canada will need some extra pushing like that provided by the Sandra Lovelace case. Canada has become too accustomed to the privileges of the status quo. It is time for Canada to take steps away from its colonial underpinnings and recognize and implement Aboriginal and treaty rights as they have been instructed to by their own Supreme Court.

IX. ECONOMIC DIMENSION OF SELF-DETERMINATION

A. Indigenous Economies

The right to self-determination encompasses the right of Indigenous Peoples to freely pursue their economic, social and cultural development. The Indigenous Network on Economies and Trade (INET) is involved in seeking recognition of Indigenous economies and is specifically interested in having the underlying proprietary rights of Aboriginal and Treaty Right recognized. Canada and the provinces have been claiming exclusive jurisdiction and proprietary rights over

our lands and resources despite the fact that Aboriginal and Treaty Rights are judicially recognized and constitutionally protected.

Indigenous Peoples realize that Indigenous economic rights must be negotiated and mutually agreed to with Canada and the business community. With the unpredictable impact of global warming and reckless support of the oil, gas and tar sand industry, it is imperative that Indigenous Peoples' jurisdiction, including the requirement for indigenous prior informed consent to developments, are recognized and implemented. The sustainable management practices of our Peoples continue and can form the basis for more economically and environmentally sustainable development in Canada. It is also obvious that Canada's greed and depletion-based economies have over-harvested our fish and our forests and are now wreaking further havoc by mining the tar sands and fracking. This will not stop unless Indigenous Peoples challenge these mainstream economic strategies that create markets for depletion.

Eurocentric commercial-industrial economies are "good while they lasted economies" because as resources get depleted old time resource harvesters reflect back on their younger days, noting that it was good while it lasted. Indigenous Peoples need to get involved in this national and international debate about establishing Price Signals on natural resource and oil and gas extraction. Canada and the provinces are increasingly vacating the field of environmental protection and Indigenous Peoples must take over this responsibility. The economic strategies of Prime Minister Harper will catastrophically impact our grand children. Indigenous Peoples have politically and legally stood up to Canada, the provinces and industry on environmental issues. Balancing the environment and economics is what Indigenous economies are all about.

B. Idle No More and Defenders of the Land

It is important to point out that Idle No More a grassroots response to the lack of substantive progress made by the Canadian government and the establishment Indigenous organizations. Idle No More entered into an agreement with the Defenders of the Land. The Defenders of the Land is a network of Indigenous activists who have taken on struggles based on Aboriginal and Treaty Rights for the last several decades. Idle No More and the Defenders of the Land just had an International Day of Action on October 7, 2013. October 7th was the 250th Anniversary of the Royal Proclamation of 1763. It is important to point out these groups because they do have influence on Canadian politics regarding Indigenous Peoples. There is also a growing support base for Idle No More and the Defenders from other national and international non-Indigenous organizations and activists.

C. Decolonization

Indigenous Peoples need to decolonize under the framework of Article 1 of the International Covenant on Civil and Political Rights on self-determination. This means that Canada needs to

broaden its thinking beyond the colonial restrictions of the *BNA Act 1867*. The Constitution Express 1980 and the British Lobby in 1981 resulted in section 35 and section 37 be added to the Canadian Constitution in 1982. It is important that Canada approach Indigenous Peoples right to self-determination based on the constitutionally imposed recognition and affirmation of Aboriginal and Treaty Rights and fulfill its obligation to hold formal constitutional conferences until Aboriginal and Treaty Rights are mutually agreed to with Indigenous Peoples.

X. SUGGESTED RECOMMENDATIONS TO THE UN HUMAN RIGHTS COMMITTEEE

We urge the UN Human Rights Committee to accept and act upon the following recommendations for achieving our right to self-determination and addressing these human rights violations so that we may live in peace as peoples in decolonized relations with Canada:

1. We request that the UN Human Rights Committee recommend that Canada recognise that Indigenous Peoples in Canada have the right to self-determination.

2. We request the UN Human Rights Committee to investigate Canada's failure to meets its international obligations to Indigenous Peoples concerning our right to self-determination. It is a fact that Canada does not recognise and has not implemented Indigenous Peoples' right to self-determination.

3. We urge the UN Human Rights Committee to formulate recommendations and proposals for the development of appropriate measures and activities to 1) prevent violations of our right to self-determination by Canada; 2) remedy them; and 3) coordinate cooperation with other UN bodies to ensure there is international oversight and review over the implementation of our right to self-determination as Indigenous Peoples in Canada based on detailed plans and processes.

4. We request that the United Nations Human Rights Committee on the implementation of Article 1 of the *ICCPR/ICESCR* and Article 3 of *UNDRIP* in Canada and to report to this Committee about Canada's violations of our human rights, in particular our right to self-determination.

5. We further urge the United Nations Human Rights Committee to independently investigate Canada's answer to the Committee's question on "the concept" of self-determination as it applies to Indigenous Peoples in Canada.

6. We recommend that the UN Human Rights Committee condemn the on-going colonization of Indigenous Peoples in Canada through territorial dispossession as found by the Royal

Commission Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC) and to call for the implementation of their recommendations.

7. We urge the UN Human Rights Committee to concur with former Special Rapporteur Stavenhagen's finding that persistent disparities continue between settler Canadians and Indigenous Peoples. This fact makes Indigenous Peoples dependent upon Canada. When our peoples get out on the land to protect it, they are oppressed, subjected to expensive court processes and persecution, unnecessary police surveillances and arrests and even the militarization of our land. We urge the UN Human Rights Committee to condemn the ongoing violation of our human and Indigenous rights that result in systemic poverty, discrimination, consistent disparities and criminalization.

8. We recommend that the UN Human Rights Committee find that Canada's lack of recognition and affirmation of Aboriginal Title and Rights is a human rights violation and a violation of our right to self-determination.

9. We urge the UN Human Rights Committee to pay heightened attention to Indigenous Peoples not negotiating under Canada's current Comprehensive Claims Policy and current processes since they are most vulnerable to permanent and immediate impacts due to the government's refusal to directly engage with them on land rights and matters outside of the policy.

10. We further urge the UN Human Rights Committee to find Canada's Comprehensive Claims Policy in violation of international human rights standards in accordance with the concluding observations of numerous by UN Human Rights bodies and previous UNSR Stavenhagen who found it to result in *de facto* extinguishment of Aboriginal Title.

11. We urge the UN Human Rights Committee to acknowledge the efforts by Idle No More, Defenders of the Land, grassroots organizations and Indigenous Peoples to protect the land and indigenous jurisdiction often at great personal cost, especially when faced with criminalization for exercising their rights.

12. Finally we look to the UN Human Rights Committee to bring a conceptualization based on the foundational right to self-determination to Canada and show how the promise of recognition of Aboriginal and Treaty Rights under s. 35 of the Canadian Constitution can be fulfilled, in part, by implementing the Indigenous right to self-determination on the ground.

APPENDIX I: SPECIFIC WORDING AND RECOMMENATIONS OF RCAP AND TRC REPORT RELATING TO SELF-DETERMINATION

RCAP Recommendation RE: Self-determination specifically

Chapter 3 Governance

With regard to the establishment of Aboriginal governance, the Commission concludes that

1. The right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis peoples. The right finds its foundation in emerging norms of international law and basic principles of public morality. By virtue of this right, Aboriginal peoples are entitled to negotiate freely the terms of their relationship with Canada and to establish governmental structures that they consider appropriate for their needs.

2. When exercised by Aboriginal peoples within the context of the Canadian federation, the right of self-determination does not ordinarily give rise to a right of secession, except in the case of grave oppression or disintegration of the Canadian state.

3. Aboriginal peoples are not racial groups; rather they are organic political and cultural entities. Although contemporary Aboriginal groups stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestry. As organic political entities, they have the capacity to evolve over time and change in their internal composition.

4. The right of self-determination is vested in Aboriginal nations rather than small local communities. By Aboriginal nation we mean a sizeable body of Aboriginal people with a shared sense of national identity that constitutes the predominant population in a certain territory or group of territories. Currently, there are between 60 and 80 historically based nations in Canada, compared with a thousand or so local Aboriginal communities.

- The more specific attributes of an Aboriginal nation are that:
- the nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland;
- it is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner; and
- it constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, will operate from a defined territorial base.

2.3.2

All governments in Canada recognize that Aboriginal peoples are nations vested with the right of self-determination.

With regard to government recognition of Aboriginal nations, the Commission concludes that

6. Aboriginal peoples are entitled to identify their own national units for purposes of exercising the right of self-determination. For an Aboriginal nation to hold the right of self-determination, it does not have to be recognized as such by the federal government or by provincial governments. Nevertheless, as a practical matter, unless other Canadian governments are prepared to acknowledge the existence of Aboriginal nations and to negotiate with them, such nations may find it difficult to exercise their rights effectively. Therefore, in practice there is a need for the federal and provincial governments actively to acknowledge the existence of the various Aboriginal nations in Canada and to engage in serious negotiations designed to implement their rights of self-determination.

The Commission therefore recommends that

2.3.3

The federal government put in place a neutral and transparent process for identifying Aboriginal groups entitled to exercise the right of self-determination as nations, a process that uses the following specific attributes of nationhood:

a) The nation has a collective sense of national identity that is evinced in a common history, language, culture, traditions, political consciousness, laws, governmental structures, spirituality, ancestry and homeland.

b) The nation is of sufficient size and capacity to enable it to assume and exercise powers and responsibilities flowing from the right of self-determination in an effective manner.

c) The nation constitutes a majority of the permanent population of a certain territory or collection of territories and, in the future, operates from a defined territorial base.

With regard to the jurisdiction of Aboriginal governments, the Commission concludes that

7. The right of self-determination is the fundamental starting point for Aboriginal initiatives in the area of governance. However, it is not the only possible basis for such initiatives. In addition, Aboriginal peoples possess the inherent right of self-government within Canada as a matter of Canadian constitutional law. This right is inherent in the sense that it finds its ultimate origins in the collective lives and traditions of Aboriginal peoples themselves rather than the Crown or Parliament. More specifically, it stems from the original status of Aboriginal peoples as independent and sovereign nations in the territories they occupied, as this status was recognized and given effect in the numerous treaties, alliances and other relations maintained with the

incoming French and British Crowns. This extensive practice gave rise to a body of inter-societal customary law that was common to the parties and eventually became part of the law of Canada.

8. The inherent right of Aboriginal self-government is recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty-protected right. The inherent right is thus entrenched in the Canadian constitution, providing a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.

9. The constitutional right of self-government does not supersede the right of self-determination or take precedence over it. Rather, it is available to Aboriginal peoples who wish to take advantage of it, in addition to their right of self-determination, treaty rights and any other rights that they enjoy now or negotiate in the future. In other words, the constitutional right of self-government is one of a range of voluntary options available to Aboriginal peoples…. ***goes into discussing the inherent right to self-government***

...22. Nevertheless, there is a profound need for a process that will afford Aboriginal peoples the opportunity to restructure existing governmental institutions and participate as partners in the Canadian federation on terms they freely accept. The existing right of self-government under section 35 of the *Constitution Act, 1982* is no substitute for a just process that implements the basic right of self-determination by means of freely negotiated treaties between Aboriginal nations and the Crown.

And finally:

4.3.1

Aboriginal, federal, provincial and territorial governments acknowledge the essential role of Elders and the traditional knowledge that they have to contribute in rebuilding Aboriginal nations and reconstructing institutions to support Aboriginal self-determination and well-being. This acknowledgement should be expressed in practice by

(a) involving Elders in conceptualizing, planning and monitoring nation-building activities and institutional development;

(b) ensuring that the knowledge of both male and female Elders, as appropriate, is engaged in such activities;

(c) compensating Elders in a manner that conforms to cultural practices and recognizes their expertise and contribution;

(d) supporting gatherings and networks of Elders to share knowledge and experience with each other and to explore applications of traditional knowledge to contemporary issues; and

(e) modifying regulations in non-Aboriginal institutions that have the effect of excluding the participation of Elders on the basis of age.

TRC REPORT AND RECOMMENDATIONS

COMMENTS: There are notably less direct references to self-determination in the TRC recommendations compared to the RCAP recommendations. As seen above but it is discussed more fully within the report as follows:

The TRC is "cautiously optimistic" that "constructive reforms" can happen if strategies are employed which include: respect of Aboriginal self-determination and Treaty obligations, and by endorsing the United Nations Declaration on the Rights of Indigenous Peoples. The central conclusion they make is that the recognition of the Aboriginal right to self-determination is a precondition to reconciliation.

Furthermore, they cite residential schools, the Indian Act, and the Crown's failure to keep its Treaty promises as destructive forces at the root of damaged relationship between Aboriginal and non-Aboriginal peoples. To repair the broken trust and damage a new vision for Canada must replace the old vision. A vision that: "fully embraces Aboriginal peoples' right to self-determination within, and in partnership with, a viable Canadian sovereignty. If Canadians fail to find that vision, then Canada will not resolve long-standing conflicts between the Crown and Aboriginal peoples over Treaty and Aboriginal rights, lands, and resources, or the education, health, and well-being of Aboriginal peoples. They foresee that failure of the Government here will result in further conflict and unrest that challenges "the country's own sense of well-being and its very security." The right to self-determination is also essential to upholding Canada's constitutional obligations and compliance with international human rights law.

The TRC concurs with the view of S. James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples in regards to self-determination and says it must be integrated into Canada's constitutional and legal framework and civic institutions. In 2012 The Executive Committee of the World Council of Churches (WCC) repudiated the Doctrine of Discovery and requested their member churches do the same, thereby affirming Indigenous Peoples rights of self-determination and self-governance. In March 2012 The United Church of Canada followed suit and "agreed unanimously to disown the Doctrine of Discovery." A year later, the UN Expert Mechanism on the Rights of Indigenous Peoples issued a study that found that substantial changes need to be made and that "The right to self-determination is a central right for indigenous peoples from which all other rights flow. In relation to access to justice, self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws."

In relation to government actions and harms the TRC says: "The Treaty, constitutional, and human rights violations that occurred in and around the residential school system confirm the dangers that exist for Aboriginal peoples when their right to self-determination is ignored or limited by the state, which purports to act "in their best interests." Historically, whenever Aboriginal peoples have been targeted as a specific group that is deemed by government to be in need of protective legislation and policies, the results have been culturally and ethnically destructive. For Aboriginal peoples in Canada, the protection and exercise of their right to self-determination is the strongest antidote to further violation of their rights. In the coming years, governments must remain accountable for ensuring that Aboriginal peoples' rights are protected and that government actions do, in fact, repair trust and foster reconciliation. Repairing trust begins with an apology, but it involves far more than that.

APPENDIX II: INTERIOR ALLIANCE LETTER ON THE EYFORD REPORT

INTERIOR ALLIANCE

Southern Carrier St'át'imc Secwepemc
Okanagan Nlaka'pamux

Interior Alliance
St'at'imc, Secwepemc, Nlaka'pamux, Okanagan

April 10, 2015

The Honourable Bernard Valcourt
House of Commons
Ottawa, Ontario, K1A 0A6

Honourable Minister Valcourt:

RE: A New Direction, Advancing Aboriginal and Treaty Rights, By Douglas R. Eyford

The Interior Alliance consists of the St'at'imc, Secwepemc, Nlaka'pamux and Okanagan Indigenous Nations. We do have Aboriginal Title throughout our territories which cover the whole South Central Interior of BC. The member nations of the Interior Alliance have never signed treaties with Great Britain or with Canada. Nor are we negotiating under the British Columbia Treaty Process or under the federal Comprehensive Land Claims Policy. Therefore we feel compelled to give our perspective on the Eyford Report you commissioned because it proposes to impact our Aboriginal Title and Rights.

We, the Interior Alliance Nations are following in the footsteps of our ancestors who worked together to seek recognition for our land rights. Our chiefs and leaders articulated their position in the Laurier Memorial (1910) and the St'at'imc Declaration (1911), we supported each other in maintaining our land rights through our territories, in which we were and are sovereign and which had boundaries recognized by all. We have place names, stories and laws which determine our territories and how they are to be managed. We will work together based on our indigenous laws to protect our territories. We cannot allow Canada to impose conceptions regarding our land and people under their laws and policies and the common law. Canada must recognize our ownership of our lands and jurisdiction on the basis of our indigenous laws. We assert our sovereignty over our territories and that Indigenous Peoples and laws must be recognized as the third pillar and jurisdiction under the Canadian constitution and legal system.

The Interior Alliance Nations are not negotiating under the Comprehensive Land Claims Policy and will not make an analysis of the observations and recommendations made about treaty negotiations. We will focus our attention on the fact that we are outside the BC treaty process and not inside that process. We feel our comments should be taken seriously because we will not participate in any

process that will extinguish or in any way modify our Aboriginal Title. This fundamental position will continue with whatever changes may or may not be made to the present Comprehensive Land Claims Process.

Section 3 of the Eyford Report on the "Evolution of the Legal Landscape," starts by validating the colonial point-of-view that Great Britain, by simply asserting European sovereignty, automatically obtained underlying title to our territory. This is based on the colonial doctrine of discovery, which was used 150 years ago to steal our lands, just like the morally bankrupt notion that white people could own black people as slaves at the time. These colonial and race-based assertions and theories can no longer be morally or legally accepted today. Indeed Canada must accept the fact that the United Nations has condemned colonization in all its manifestations. Canada must recognize that claiming sovereignty based on white supremacy over Indigenous Peoples is wrong and it must stop.

It is clear that the Canadian Constitution Act 1867 (Formerly British North America Act 1867) unilaterally distributed our Aboriginal territory to the federal and provincial governments and have left us with nothing more than Indian Reserves. In fact the existing Indian reserves only amount to 0.2% of Canada, they have always been seriously inadequate to meet our needs, they have economically marginalized us and perpetuated our poverty. This means that Canada and the provinces unlawfully claimed 99.8% of our Aboriginal territory. Colonial dispossession has left our people systemically impoverished and dependent upon the federal and provincial governments. Creating these dependencies, as a result of the dispossession of our lands, constitutes manifestations of colonialism. In fact your Department has been the primary agency responsible for managing our poverty and dependency with Canada and the provinces. We do not agree with this ongoing colonial system. That is why we are fighting for self-determination.

We believe that section 35 (1) of the Canada Constitution 1982 offers Canada the opportunity to de-colonize our relationship between settler state governments and Indigenous Peoples. This however is not reflected in the Eyford Report. In Section 4 on the "New Reconciliation Framework" Section 35 (1), for example, is limited to reconciliation between Aboriginal and non-Aboriginal people. Reconciliation without full recognition of our Aboriginal Title and Rights and without rejecting colonial doctrines and colonial concepts underlying the Canadian legal system, just serves to validate the status quo. It legitimizes colonization and provincial and federal jurisdiction despite the fact that Section 35 (1) actually constitutionally protects Aboriginal Title and Rights from being unilaterally extinguished or terminated by the Crown. Our indigenous jurisdiction over our lands, resources and peoples also has to be recognized.

Eyford does acknowledge, however, that the concerns of the Indigenous Nations in the Central Interior should have been addressed under the framework of the Laurier Memorial of 1910. It is apparent that we were willing to share 50-50 but we never envisioned the settler state government would force the colonial 0.2 – 99.8 ratio in terms of our land on us.. The existing colonial system cannot be justified and we had hoped that the Eyford Report would address this disproportionate and morally bankrupt system, but it has essentially just provides a formula to maintain the status quo.

co/ Shuswap Nation Tribal Council 680 West Athabasca Street Kamloops, BC Canada V2H 1C4
Telephone: 778-471-8200 Fax: 778-471-5804 Email: sntcadmn@shuswapnation.org

The majority of Indigenous Peoples in BC are actually not active in the BC treaty process, when you consider that many that are inside are either not actively negotiating or dragging negotiations out without success. This and the failure to recognize our Aboriginal Title and Rights has created substantive "economic uncertainty" for the Canadian and BC settler based economies. The fact that the majority of Indigenous Peoples are not negotiating will only increase economic uncertainty and increase pressure on the status quo and the Canadian economy. The Eyford Report wants to deal with this pressure under "Other Reconciliation Arrangements" which would follow a similar strategy implemented by British Columbia government. Basically those agreements set up a parallel bureaucracy that enables the government to discharge their duty to consult without fully engaging regarding our Aboriginal Title and rights.

This approach is basically an "economic uncertainty relief valve", which brings some immediate economic benefit to our impoverished communities in the form of bureaucratic jobs, business opportunities and limited resource revenue sharing (usually at 5% or less). But these reconciliation arrangements do not address the substantive issue of recognition and affirmation of our Aboriginal Title and Rights on the ground. It merely sidesteps this matter by setting out an engagement matrix and leaving the final decision making authority with the respective provincial decision-maker. In the long-term this nearsighted approach does not benefit the settler state government or the Indigenous Peoples. The Eyford Report should have strived harder to find a more substantive strategy to convert economic uncertainty to economic certainty.

One method highlighted under the report section on "A new Rights-informed Approach" is for the federal policy to move away from the colonial view that suggests that Indigenous Peoples do not have any Section 35(1) rights. This is the primary reason why the Interior Alliance member nations do not negotiate with the federal and provincial governments on Aboriginal Title and Rights. Collectively the Interior Alliance nations have Aboriginal Title throughout our South Central Interior in British Columbia and this must be acknowledged before any negotiation can begin.

The Interior Alliance does support the Eyford Report recommendation that: Canada should develop an alternative approach for modern treaty negotiations, one informed by the recognition of existing Aboriginal rights, including title. We note that this has to be done on a territorial basis as mandated by the Supreme Court of Canada in Tsilhqot'in and not based on the erroneous laws and policies and arguments of the provincial and federal government that the court rejected. This would be a small step in the right direction.

British Columbia is as large as California, Oregon and Washington State combined with a population of 4.5 million people of which over two hundred thousand are Indigenous Peoples. There is no reason why we should be systemically impoverished generation after generation when we could build an economic future based on the recognition of our Aboriginal Title and Rights on the ground. We want the freedom to become independent as Indigenous Peoples like we were for millennia before Canada existed as a colonial state government.

If we cannot receive justice in Canada, we will seek to have our right to self-determination recognized internationally in accordance with international law. The United Nations Declaration on the Rights of Indigenous Peoples recognizes our right to self-determination under Article 3. Canada is also bound by Article 1 on self-determination in the UN International Covenant on Civil and Political Rights and the UN Covenant on Economic Social and Cultural Rights.

Canada has unfinished business. When the Canadian Constitution 1982 was passed it mandated Constitutional Conference on Aboriginal Matters under Section 37 where our Aboriginal title and rights and our right to self-government and jurisdiction, were to be mutually agreed upon. These Constitutional Conferences between the federal and provincial governments and Indigenous representatives were held in the 1980's but they ended in failure when Canada and the provinces refused to define our Section 35 (1) rights.

Meeting the obligations under s. 37 was part of the obligations Canada took on to secure the patriation of the Canadian constitution and thereby the decolonization of Canada. Canada failed this international obligation and also its obligation to Indigenous Peoples to effect decolonization vis-a-vis them. There was no provision in the Constitution Act 1982 for the Canadian government to simply walk away and let the Supreme Court of Canada (SCC) decide what Section 35 (1) means. In terms of the right of Indigenous Peoples to self-determination, that is impossible for the SCC to do because the SCC is itself part of the colonial legal system and was established under the same assertion of sovereignty that we are questioning.

Since the government has walked away from the mandated constitutional negotiations with our peoples, our right to self-determination should be monitored by the United Nations Human Rights Committee under Article 1 of the International Covenant on Civil and Political Rights. This is the only course of action left to us if the government continues the policies of non-recognition and extinguishment presented in the Eyford report.

Indeed the full definition of what Section 35 (1) means with regard to Indigenous Peoples is a fundamental part of our right to self-determination and cannot be subjugated to federal jurisdiction and Comprehensive Land Claims Process which violate international legal obligations. Decisions that we need to make ultimately must be made by additional Constitutional Conference on Aboriginal Matters that result in mutually agreeable solutions of how we will live together as a fully decolonized Canada.

co/ Shuswap Nation Tribal Council 680 West Athabasca Street Kamloops, BC Canada V2H 1C4
Telephone: 778-471-8200 Fax: 778-471-5804 Email: sntcadmn@shuswapnation.org

Sincerely,

Name	Nation	Signature
Chief Lee Spahan	N'laka'pamux	
Council Leland Wilson	Okanagan	
Chief Susan James	Statimc	
Kathleen Robin Smith	Samahquam St'at'imc	
Don Harris	Xaixtsa St'at'imc	
Larry Casper	St'at'imc	
Francis Atc	Tsk'wayl'axw St'at'imc	

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Name	Nation	Signature
Shelley Leech	ST'ATÍ,mc	
Percy Joe	Nlaka'pamux	
Ryan Day	Secwépemc	
Darrell Bob	XAXLIP	
Michael LeBourdais	Secwepemc	
Shane Gottfriedson	Secwepemc	
Kukpi7 Judy Wilson	Secwepemc	
Mike Arnouse	cistalen Secwepemc	
Arthur Anthony	Skatsistk Secwepemc	
Steve Rasi	Secwepemc/Sylx	
Harvey McLeod	Okanagan	
Ronald Ned	okanagan	
Byron Louis	Okanagan	
Harry Oesterreich	N'Quatqua	

c.c. Right Honourable Steven Harper, Canada

Victoria Tauli-Corpuz, UN Special Rapporteur on Rights of Indigenous Peoples

Ed John, UN Permanent Forum on Indigenous Peoples

Grand Chief Stewart Phillip, UBCIC

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