"Breathing New Life": The C92 Reference and the Status of UNDRIP In Canadian Law

The Supreme Court Law Review

Kevin Hille and Jesse Abell*

(2025), 6 S.C.L.R. (3d) 173 - 199 @3

2025

PART II: SPECIAL ESSAYS

Supreme Court Law Review > 2025 > Vol. 6 > PART II SPECIAL ESSAYS

ABSTRACT:

After years of silence about UNDRIP, in 2024, the Supreme Court addressed the status of UNDRIP in two decisions, Reference re An Act respecting First Nations, Inuit and Metis children, youth and families ("C92 Reference"), and Dickson v. Vuntut Gwitchin First Nation ("Dickson"). In the C92 Reference, the unanimous Court held that UNDRIP has been incorporated into the country's domestic positive law by the federal United Nations Declaration on the Rights of Indigenous Peoples Act ("UNDRIPA"). Similarly, in Dickson, the majority relied on UNDRIP as an interpretive tool for the Charter and held that UNDRIPA brought UNDRIP into Canadian law. The authors examine the potential implications of these recent watershed Supreme Court decisions for Indigenous rights, in areas of federal jurisdiction, provincial and territorial jurisdiction, and administrative decision-making. The language in these decisions suggests that UNDRIP has been brought into Canadian law, and likewise the law of the provinces and territories that have passed UNDRIP implementation legislation - B.C. and the N.W.T. - and should attract the presumption of conformity. The question of UNDRIP's status in provinces and territories without UNDRIP implementation legislation remains unanswered, but section 2(d) labour cases offer an example of how courts can interpret constitutional provisions - such as section 35 - in light of international law instruments, to strike down provincial or territorial legislation that is inconsistent with those constitutional protections, even without legislative implementation of those instruments. Finally, the Supreme Court's decisions in Baker and Vavilov suggest that international law instruments like UNDRIP can operate as mandatory relevant considerations or even constraints in administrative decision-making.

I. INTRODUCTION

1 After 17 years of silence on the subject, in 2024 the Supreme Court of Canada addressed the most important expression of Indigenous rights in international law: the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").[1] The Court grappled with UNDRIP in two decisions. First, in the *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*.[2] Second, in *Dickson v. Vuntut Gwitchin First Nation*.[3]

2 This is the first time the Supreme Court has addressed UNDRIP in an Indigenous rights decision since it was formally adopted by the United Nations General Assembly in 2007. But the decisions seem to go farther than mere recognition of UNDRIP. In the *C92 Reference*, the

unanimous Court held that UNDRIP has been "incorporated into the country's domestic positive law" by the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* ("UNDA").[4] Similarly, in *Dickson*, the majority relied on UNDRIP as an interpretive tool for the *Canadian Charter of Rights and Freedoms*, holding that the UNDA "brought [UNDRIP] into Canadian law".[5]

3 The Supreme Court's recognition and application of UNDRIP is an important development for Indigenous peoples seeking recognition of their rights. Yet the ways the Court interpreted and applied UNDRIP in these decisions leave a number of questions unanswered. What exactly does UNDRIP's incorporation into Canada's "domestic positive law" mean? Do all UNDRIP Articles now operate directly like a statute? Or are they primarily tools for statutory and constitutional interpretation? How do they interact with the common law? How does this impact provinces and territories that have not passed UNDRIP implementation legislation?

4 To answer all of these questions would be well beyond the scope of this paper or the expertise of the authors. We will, however, explore their broad outlines and suggest possible pathways for future research and litigation. Before embarking on that analysis, we describe some of the basic principles guiding the interaction of international and domestic law in Part I. We then turn to an analysis of the four main issues we see arising from the Supreme Court's recognition of UNDRIP: (1) The application of UNDRIP in federal law; (2) The application of UNDRIP in jurisdictions with UNDRIP implementation legislation; (3) The application of UNDRIP in jurisdictions without implementation legislation; and (4) the potential role of UNDRIP in administrative decisions.

II. THE APPLICATION OF INTERNATIONAL LAW DOMESTICALLY

5 There are two models of reception of international law into domestic law: "monist" and "dualist". The "monist" or "adoptionist" model treats international legal obligations as automatically forming part of domestic law without any legislative action. Canadian courts take this approach to customary international law. Under the "dualist" model, international law and international rules must be implemented through a domestic law-making process before they can have formal, domestic legal effect. Usually this happens through legislation. Canadian courts typically take the dualist approach to treaties. Under the dualist approach, treaty practice has two stages: treaty-making by the executive and treaty implementation by the legislature.[6]

6 Below, we discuss these varied interpretive approaches to international law in Canadian law, before turning to the status of UNDRIP: (a) adoption into the common law under the monist approach; (b) ratification and implementation under the dualist approach; (c) attraction of the presumption of conformity; (d) attraction of interpretative weight; and (e) as a constraint or consideration in administrative law.

1. Adoption into the Common Law Under the Monist Approach

7 Under the monist approach, customary international law automatically becomes part of the common law of Canada through the doctrine of adoption, without the need for legislative action, as the Supreme Court recognized in *Nevsun Resources Ltd. v. Araya*.[7] Legislatures are free to override those norms, but no legislative action is required to give them effect. By virtue of the

doctrine of adoption, customary international law automatically becomes the law of Canada, and must be treated with the same respect as any other law.[8]

8 The Supreme Court has justified the automatic incorporation of customary international law into the common law on the basis that international custom, as the law of nations, is also the law of Canada, absent express legislation to the contrary.[9] Customary international law is one of the most authoritative sources of international law because -- with very few and narrow exceptions -- it is universally binding. It arises from the sustained conduct of states which they themselves believe to be legally required.[10] There are two requirements for a norm to constitute customary international law: (1) general state practice, and (2) *opinio juris*. For the first requirement, the practice must be sufficiently general, widespread, representative and consistent, but need not be universal. For the second requirement, *opinio juris*, the practice must be undertaken with a sense of legal right or obligation.[11] Nonetheless, there are limits to the role of customary international law in Canadian law. Proving that a right is a customary international law norm requires more than equivocal state practice; the Court will only follow the bulk of the authority. Even where a customary international law norm is proven, it can be ousted by a complete legislative code, and breach of it does not necessarily give rise to a domestic civil remedy.[12] In *Kazemi Estate v. Islamic Republic of Iran*, a majority of the Supreme Court found that the customary international law prohibition against torture did not trump state immunity, and did not allow for a civil remedy against foreign countries.[13] More recently, the majority of the Court in *Nevsun* recognized that breach of the same customary international law norm prohibiting torture could give rise to a civil cause of action, but that was a case against private parties, not governments.[14] It remains to be seen how a novel cause of action based on customary international law would intersect with the doctrine of Crown immunity.

2. Ratification and Implementation Under the Dualist Approach

9 Under the dualist model, international instruments like treaties must be ratified by the executive, and implemented through a domestic law-making process by the legislative branch, before they obtain formal, domestic legal effect. The dualist approach seeks to reconcile the executive's role in entering into international obligations, with the separation of powers between the different branches of government. While the federal executive branch has the exclusive power to ratify treaties, it cannot infringe on the legislature's role in making law. The dualist approach reconciles the separation of powers by recognizing that the legislature is responsible for transforming the relevant international rule into a rule of domestic law.[15]

10 Nonetheless, international treaties that Canada's executive has ratified attract the presumption of conformity, whether or not they have been legislatively implemented.[16] As we discuss below, the presumption of conformity offers its own legislative counterbalance to the executive's power in entering into international obligations.

11 Beyond the separation of powers issue, the dualist approach poses challenges for the division of powers between the federal and provincial governments. The federal executive has the sole constitutional authority to ratify treaty obligations on behalf of Canada. The jurisdiction to implement treaties will sometimes rest with the federal Parliament, sometimes with provincial and territorial legislatures, and sometimes both, depending on the subject matter in the treaty.[17]

Where Parliament implements internationally ratified treaties, this raises questions for the division of powers: to what extent can the federal government, even when it incorporates international law into domestic law through legislation, bind provincial governments in areas of provincial or shared jurisdiction? We explore this question in Part V.

3. **The Presumption of Conformity**

12 Both customary international law and international treaties attract the presumption of conformity.[18] The presumption of conformity requires that domestic law be interpreted consistently with international law. In *Hape*, the Supreme Court majority explained, "The presumption of conformity is based on the rule of judicial policy that, as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result." The presumption has two aspects. First, the legislature is presumed to act in compliance with Canada's international obligations, and so courts will avoid constructions that would place Canada in breach. Second, the legislature is presumed to comply with the principles of customary international and convention law, which form part of the context in which statutes are enacted, and courts will prefer a construction that reflects them.[19] As a result, the presumption attracts to both implemented and unimplemented treaties.[20]

13 There are limits to how far the presumption of conformity will go. It can be rebutted by express legislative intent to default on an international obligation.[21] As a result, the presumption preserves respect for the separation of powers and Parliamentary sovereignty, as courts must adhere to legislative intent in a statute even where it may conflict with Canada's international obligations.[22]

14 The presumption of conformity applies both to legislation and to the *Charter.* [23] The Supreme Court has frequently applied the presumption to interpret *Charter* provisions, including section 6(1),[24] section 7,[25] and section 32[26] of the *Charter*. In *Divito v. Canada*, the Supreme Court confirmed, "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".[27]

15 As yet, the Supreme Court has not employed the presumption of conformity to interpret section 35 of the *Constitution* and its protection of Indigenous rights. Given the Court's application of the presumption of conformity to the *Charter,* there is no principled reason why the presumption could not apply to this "sister provisio[n]".[28] The Supreme Court recognized in *Suresh v. Canada,* that "in seeking the meaning of the Canadian Constitution, the courts may be informed by international law".[29] As we explore in Part V, the interpretation of section 35 in light of UNDRIP would be analogous to the Supreme Court's interpretation of other constitutional protections -- like section 2(d) of the *Charter*-- in light of international legal obligations.

4. **Interpretive Weight**

16 International instruments that are not ratified treaties, and that do not constitute customary international law, can nonetheless carry interpretive weight when interpreting the *Charter*. In *Quebec v. 9147-0732 Quebec inc.*, the majority of the Supreme Court set out a methodology for using different international law instruments to interpret the *Charter*. The majority held that non-

binding international instruments (which Canada is not a party to) carry less interpretive weight than binding instruments (which Canada is a party to), and do not attract the presumption of conformity.[30]

17 However, the majority carved out an exception for non-binding instruments that pre-date the *Charter*, which should be accorded more interpretive weight than other non-binding instruments. The majority held that whether or not Canada was a party to such instruments is less important, because they clearly formed part of the historical context of *Charter* development, and illuminate the *Charter*'s framing. The majority held that the *Universal Declaration of Human Rights* is a prime example. Like UNDRIP, it is a Declaration adopted by Resolution of the UN General Assembly, which Canada voted to adopt. It inspired ratified treaties like the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*,[31] and is an example of an international instrument that is highly relevant even though it could not be ratified like a treaty.[32]

18 The majority's holding in *9147 Quebec* is underpinned by a concern with preserving Canadian sovereignty.[33] It is animated by the necessity of "preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty" and retaining a dualist system of application of international law and a constitutional and parliamentary democracy.[34]

19 Yet the bright line between instruments that pre and post-date the *Charter* is less useful when interpreting post-*Charter* instruments that uphold rights enshrined in pre-*Charter* conventions. The Supreme Court, in an earlier decision, recognized that the adoption date of an international Declaration is less relevant to its interpretive weight when it contains rights enshrined in older conventions. In *Health Services and Support*, the majority of the Court recognized that the fact that the international *Declaration on Fundamental Principles and Rights at Work* ("*Declaration on Rights at Work*") post-dated the *Charter*"does not detract from its usefulness" in interpreting the *Charter*, because the Declaration was made based on interpretations of international conventions that pre-dated the *Charter* and were within the contemplation of *Charter* framers. The majority held that this is consistent with the fact that the *Charter*, as a living document, grows with society and speaks to Canadians' current situations and needs.[35] On that basis, the majority held, "Canada's *current* international law commitments and the current state of international thought on human rights provide a persuasive source for interpreting the scope of the *Charter*".[36] This suggests that Declarations and other international instruments that post-date the *Charter*, but enshrine rights expressed in treaties that pre-date the *Charter*, warrant interpretive weight, particularly given the living tree approach to constitutional interpretation. We discuss these parallels further in Part V.

5. Constraint or Consideration in Administrative Law

20 There is also the possibility of international law influencing administrative decision-making. In other common law jurisdictions, it is common that international legal obligations are considered mandatory relevant considerations in administrative decision-making. This principle was recognized by the Supreme Court of Canada in *Baker* and more recently in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, as we discuss in Part VI.[37] It has not, however, been treated uniformly by lower courts -- particularly in areas of provincial jurisdiction.

That said, if these decisions require administrative decision-makers to treat international legal obligations as mandatory relevant considerations and constraints, this would have a significant impact on Indigenous rights, given that administrative decision-makers routinely make decisions affecting the lands and rights of Indigenous peoples.

6. What About UNDRIP?

21 UNDRIP is not a treaty, and cannot be ratified by states. It is a Declaration that was adopted by UN General Assembly Resolution.[38] In some early decisions, this was taken by lower courts to signal that it was aspirational and non-binding and did not attract the presumption of conformity.[39]

22 Nonetheless, UN Declarations are formal, solemn instruments, relating to matters of major importance, and states are expected to comply with them.[40] As a resolution adopted by the General Assembly with the approval of an overwhelming majority of member states, UNDRIP represents a commitment by the United Nations and its member states to its provisions.[41]

23 Canada originally voted against the adoption of UNDRIP when it was before the UN General Assembly -- one of only four nations to do so. In 2010, Canada modified its earlier position and supported UNDRIP with qualifications, specifying that UNDRIP was an "aspirational", "non-legally binding" document that did not change Canada's laws. Then in 2016, Canada reversed its position and endorsed UNDRIP without qualification. Carolyn Bennett, then Minister of Indigenous and Northern Affairs, affirmed that "[b]y adopting and implementing the *Declaration*, we are excited that we are breathing life into section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada".[42]

24 UNDRIP did not create new rights for Indigenous peoples. Rather, it elaborated upon already existing, fundamental human rights that have universal application, and applied these fundamental rights to the specific culture, historic, social and economic circumstances of Indigenous peoples.[43] UNDRIP's Articles constitute "minimum standards" for the survival, dignity and well-being of Indigenous peoples.[44] UNDRIP enshrines numerous rights of Indigenous peoples, including the right to self-determination, the right to lands, property and resources, the right to consultation in order to obtain free, prior and informed consent, and the right to effective remedies.[45]

25 In 2019, British Columbia became the first Canadian jurisdiction to pass UNDRIP implementation legislation.[46] In 2021, the federal Parliament followed suit,[47] followed by the Northwest Territories in 2023.[48]

III. THE APPLICATION OF UNDRIP IN FEDERAL LAW

26 After years of silence on UNDRIP, in the *C92 Reference* the unanimous Supreme Court held that it had been "incorporated into the country's domestic positive law" by virtue of UNDA:

> While the Declaration is not binding as a treaty in Canada, it nonetheless provides that, for the purposes of its implementation, states have an obligation to take, "in consultation and cooperation with indigenous peoples . . . the appropriate measures, including legislative measures, to achieve the ends" of the Declaration (art. 38). Recognized by

> Parliament as "a universal international human rights instrument with application in Canadian law", the Declaration has been incorporated into the country's positive law by the *United Nations Declaration on the Rights of* Indigenous Peoples Act, S.C. 2021, c. 14 ("*UNDRIP Act*"), s. 4(a).
>
> [. . .]
>
> In 2021, Parliament enacted the *UNDRIP Act*, s. 4(a) of which affirms the Declaration "as a universal international human rights instrument with application in Canadian law". It is therefore through this Act of Parliament that the Declaration is incorporated into the country's domestic positive law.[49]

27 The Court's statements on UNDRIP are *obiter dicta*, given that arguments about the status of UNDRIP and the federal UNDA were not directly before the Court. The statements are not supported by extensive analysis.[50] Nonetheless, they were made by the unanimous Court, after years of silence on UNDRIP, and reflect a development in the Court's thinking.

28 The *C92 Reference* was followed soon after by the Supreme Court's decision in *Dickson*, where six of the seven justices commented on UNDRIP's status. The majority noted that UNDRIP obtained federal executive support in 2016, that the federal UNDA affirmed it as "a universal international human rights instrument with application with application in Canadian law". The majority then referred to UNDRIP as having been "brought into Canadian law by the *UNDRIP Act*". Finally, the majority interpreted the purpose of section 25 of the *Charter* in light of UNDRIP, noting that its interpretation of the purpose of section 25 was "consonant with the *United Nations Declaration on the Rights of Indigenous Peoples*, as brought into Canadian law by the *UNDRIP Act*", in particular UNDRIP Article 34.[51] The dissenting judgment of Martin and O'Bonsawin JJ. held that "UNDRIP is binding on Canada and therefore triggers the presumption of conformity".[52]

29 When read together, the Supreme Court's statements in the *C92 Reference* and *Dickson* reflect judicial recognition that UNDA constitutes federal legislative implementation of UNDRIP -- an instrument that has already obtained federal executive support[53] -- which has thereby been brought into Canadian law.[54] The *Dickson* majority decision also reflects judicial recognition that *Charter* provisions should be interpreted in light of UNDRIP rights.[55]

1. **UNDRIP Has Satisfied the Dualist Model**

30 The dualist approach is not necessarily limited to treaties. It is one approach to receiving international law into domestic law, that Canadian courts typically apply to treaties. Although not a treaty (and therefore "not binding *as a treaty*"[56]), UNDRIP has now met the two stages of the dualist approach, by obtaining federal executive and legislative support, as Naomi Metallic has written.[57] The federal executive demonstrated its commitment to UNDRIP at the international level by endorsing UNDRIP without qualification in 2016, reversing its earlier positions on UNDRIP.[58] Parliament's enactment of UNDA in 2021 reflects federal legislative support for an international instrument already adopted without qualification by the federal executive.

31 On this basis, in addition to UNDRIP's significance as a UN Declaration, UNDRIP warrants significant interpretive weight. At minimum, it should attract the presumption of conformity.[59]

32 This is the interpretation recently adopted by the Quebec Superior Court in *R. c. Montour*.[60] The Court recognized the significance of the events leading up to Canada's adoption of UNDRIP without qualification in 2016. The Court held that Canada's initial reluctance to vote in favour of UNDRIP, followed by Canada's adoption of UNDRIP *with* qualifications, before endorsing it *without* qualification in 2016, "proves that Canada was well aware of the potential legal consequences of such a step and it runs contrary to an interpretation that would strip this instrument of any legal consequences". Canada's adoption of UNDRIP without qualification demonstrated the executive's desire to go further in Canada's commitment, elevating UNDRIP beyond the "aspirational", "non-legally binding" document Canada previously held it to be. This was affirmed by the Minister of Indigenous and Northern Affairs' recognition that UNDRIP was "now . . . a full box of rights for Indigenous people". The Court held that Parliament's enactment of UNDA likewise "proves a willingness to abide by the *UNDRIP*". As a result, the Court concluded that "*UNDRIP*, despite being a declaration of the General Assembly, should be given the same weight as a binding international instrument in the constitutional interpretation of s. 35(1)".[61] The Federal Court also recently reached the same conclusion in *Kebaowek First Nation v. Canadian Nuclear Laboratories*, concluding that UNDRIP triggers the presumption of conformity, and s. 35 should be interpreted consistently with UNDRIP.[62]

33 The Supreme Court's statements in the *C92 Reference* and *Dickson* can be read consistently with an interpretation that UNDRIP has met the requirements of the dualist model. In the *C92 Reference,* the Court held that UNDA, section 4(a), is a recognition by Parliament that UNDRIP "is a universal international human rights instrument with application in Canadian law", and as a result, UNDA incorporated UNDRIP into "the country's domestic positive law".[63] In other words, Parliament, by enacting UNDA, recognized UNDRIP as an international instrument with application in Canadian law, and it was thus incorporated into Canadian law.

2. **UNDRIP Should Attract Interpretive Weight**

34 In *Dickson*, the majority affirmed UNDRIP's interpretive weight.[64] Assigning more interpretive weight to UNDRIP, and interpreting Canadian law consistently with UNDRIP, is also consistent with the Supreme Court's methodology for interpreting international instruments set out in *9147 Quebec*. Although UNDRIP is not a ratified treaty, and is a more recent Declaration that post-dates the *Charter* and many statutes, this does not detract from its interpretive usefulness. This is because many of the rights enshrined in UNDRIP are contained in international covenants Canada ratified pre- *Charter*, such as the ICCPR and ICESCR (both ratified in 1976), and norms of customary international law, as we discuss in Part V. These rights have informed the *Charter* and legislation, and been adopted into the common law. These rights now enshrined in UNDRIP, but which were codified as early as the 1970s, should be given significant weight in the interpretive exercise, in line with the Supreme Court's reasoning in *Health Services and Support*.[65]

35 Further, giving less interpretive weight to UNDRIP just because it post-dates the *Charter* would cut again the grain of the living tree approach to *Charter* interpretation.[66]

36 Finally, assigning more interpretive weight to UNDRIP respects rather than undermines the separation of powers, which is the animating concern in *9147 Quebec.* [67] As Naomi Metallic notes, it is difficult to see how it would be contrary to Parliamentary sovereignty to interpret Canadian law consistently with a declaration that the federal executive endorsed without qualification, that Parliament affirmed in UNDA, and which is based on rights that Canada has ratified in other covenants and on customary international law that Canada is bound to.[68]

3. **UNDRIP Should Be Treated as Binding on the Federal Crown**

37 The Supreme Court has not explicitly stated whether UNDA's implementation of UNDRIP is binding on the federal Crown. UNDA does not contain an express statement that it binds the Crown, and federal statutes are not binding on the federal Crown unless expressly stated.[69]

38 Nonetheless, it is difficult to see how UNDRIP's incorporation into Canadian law could impact all domestic legal persons *except* the federal Crown. This would be a bizarre result.[70]

39 If UNDRIP is taken to have met the dualist approach, and to thus attract the presumption of conformity, a finding that the federal Crown is bound to act in accordance with UNDRIP is consistent with the function of interpretive presumptions like this, which is to protect against interference by the state with the subject's liberty and property.[71] Such an interpretation also accords with the fact that under the dualist model, the focus of judicial interpretation is generally on the implemented international instrument, rather than the implementation legislation. The Supreme Court has held that it is appropriate for courts to focus on the underlying international instrument, not the implementing legislation, when applying the presumption of conformity.[72] This is also consistent with the fact that the presumption of conformity can attract to unimplemented treaties,[73] indicating that implementation legislation is less relevant to the interpretive exercise. If the proper focus of judicial interpretation is the underlying instrument (UNDRIP), not the implementing legislation (UNDA), then it is less relevant that UNDA is not expressly binding on the federal Crown. The focus of judicial interpretation should be on UNDRIP itself, which enshrines an obligation on states to abide by UNDRIP.[74]

40 Although brief, the Supreme Court's recent statements in the *C92 Reference* and *Dickson* reflect judicial recognition that UNDA constitutes federal legislative support for UNDRIP, which has already obtained federal executive support, and has

41 brought UNDRIP into Canadian law.[75] In addition to UNDRIP's significance as a United Nations Declaration, it has now met the two stages of the dualist model for receiving international instruments into Canadian law: it has attained federal executive and legislative support. At minimum, UNDRIP should trigger the presumption of conformity. It would be a anomalous result, running counter to the purpose and content of the presumption, if all parties except the federal Crown were bound to act consistently with UNDRIP.

IV. THE APPLICATION OF UNDRIP IN OTHER JURISDICTIONS WITH UNDRIP LEGISLATION

1. BC and the NWT's UNDRIP Implementation Legislation Incorporate UNDRIP

42 Besides the federal Parliament, two other legislatures have passed statutes implementing UNDRIP: British Columbia and the North West Territories.[76] Given the similarities between the three UNDRIP implementation statutes, the Supreme Court's reasoning in the *C92 Reference* suggests that BC and the NWT's UNDRIP implementation legislation likewise incorporates UNDRIP into the domestic positive law of that province and territory, and are binding in those jurisdictions.

43 In the *C92 Reference*, the Court relied on UNDA, section 4(a) to find that UNDRIP has been incorporated "into the country's domestic positive law".[77] The language in BC and the NWT's implementation legislation is almost identical to UNDA, section 4(a). UNDA, section 4(a) states that one purpose of UNDA is to "affirm the Declaration as a universal international human rights instrument with application in Canadian law".[78] BC's DRIPA, section 2, states that one purpose of DRIPA is "to affirm the application of the Declaration to the laws of British Columbia".[79] The NWT's UNDRIPIA, section 5, states that one purpose of UNDRIPIA is "to affirm the Declaration as a universal human rights instrument with application to the Indigenous peoples of the Northwest Territories and the laws of the Northwest Territories".[80] Given these similarities, the Supreme Court's conclusions in the *C92 Reference* must likewise apply in BC and the NWT, and BC's DRIPA and the NWT's UNDRIPIA likewise incorporate UNDRIP into the domestic positive law of that province and territory.

44 Further, both BC and the NWT's Acts are expressly binding on the respective Crowns. Under BC's *Interpretation Act*, statutes are binding on BC unless they specify otherwise,[81] and DRIPA does not specify otherwise. BC's *Interpretation Act* also expressly mandates that every statute and regulation must be construed consistently with UNDRIP.[82] The NWT UNDRIPIA expressly states that it is binding on the Crown,[83] as required under the NWT *Interpretation Act*.[84]

2. Lower Court Decisions Support the Conclusion That UNDRIP has Been Incorporated into Provincial Law

45 There has been very limited judicial treatment of BC and the NWT's UNDRIP implementation legislation. At the time of writing, only three British Columbia Supreme Court decisions substantively address the legislation and its implications for the status of UNDRIP, and no NWT decisions do so.[85] The most recent of these British Columbia Supreme Court cases, *J.N.C. v. A.G.H.*, found that UNDRIP has been incorporated into Canadian law, and that courts can consider cases through an UNDRIP lens.[86]

46 In the first British Columbia Supreme Court case substantively addressing BC's DRIPA, *Gitxaala v. British Columbia* (currently under appeal),[87] Ross J. held that while BC's *Interpretation Act*, section 8.1, created an overlay to the statutory interpretive process, requiring him to interpret legislation in a way that upholds UNDRIP rights, BC's DRIPA, section 2(a) did not implement UNDRIP into the domestic law of BC. Justice Ross held that DRIPA, section 2(a)

was not intended to be a rights-creating, substantive provision, and only contemplates a process by which BC will carry out an action plan to address UNDRIP's objectives.[88] However, Ross J. did not have the benefit of the *C92 Reference* when deciding *Gitxaala.* The finding that DRIPA's section 2(a) -- which is almost identical to UNDA's section 4(a) -- was not a rights-creating provision has arguably been overtaken by the Supreme Court's conclusion that UNDA's section 4(a) incorporated UNDRIP into Canada's domestic positive law. There is no obvious reason why DRIPA's section 2(a) would not have the same effect in BC.

47 In *Kits Point Residents Association v. Vancouver (City),* released shortly after *Gitxaala*, the British Columbia Supreme Court adopted Ross J.'s conclusion that the *Interpretation Act*, section 8.1, is an "umbrella that covers the entirety of the [statutory interpretation] process" and held that, as a result, the *Vancouver Charter* must be construed consistently with UNDRIP.[89]

48 Most recently, in *J.N.C.*, the British Columbia Supreme Court held that UNDRIP is incorporated into Canada's domestic positive law, which "provide[s] an opening for courts to incrementally start considering the principles and rights set out in *UNDRIP*", when appropriately raised. The petitioner had argued that UNDRIP is incorporated into Canada's domestic law, and as a result, the Court should adjust the common law test for habitual residence, to prioritize Indigeneity, for consistency with the *Hague Convention* and UNDRIP. The Court agreed that UNDRIP is incorporated into Canadian law. The Court declined to reformulate the test, finding that prioritizing Indigeneity was inconsistent with the approach other courts have taken to applying the *Hague Convention,* and that the common law test already provided space to consider the child's Indigeneity. However, the Court did not suggest that courts had no role to play in interpreting statutes and the common law in light of UNDRIP. Although the Court recognized the critical role of governments under UNDA and DRIPA in aligning statutes with UNDRIP, the Court held that "[c]ourts do not need to wait for that work to be completed to begin interpreting UNDRIP and considering the cases before them through an UNDRIP lens".[90]

49 The decisions in *J.N.C.* and *Kits Point* support the conclusion that, by virtue of DRIPA and the *Interpretation Act*, UNDRIP has been incorporated into BC law, and courts should interpret legislation and the common law consistently with UNDRIP. The ongoing *Gitxaala* appeal may provide an opportunity for the British Columbia Court of Appeal to further clarify the status of UNDRIP in BC law.

V. THE APPLICATION OF UNDRIP IN JURISDICTIONS WITHOUT IMPLEMENTING LEGISLATION

50 Despite the fact that UNDRIP has been "incorporated into the country's domestic positive law" by UNDA,[91] there is an outstanding question about what effect this has in provinces and territories that have not passed UNDRIP legislation. This is particularly important because decisions about lands and resources are generally controlled at a provincial and territorial level,[92] as are most social services.[93] The Supreme Court has confirmed that provinces have jurisdiction over resource and land use decisions in Indigenous traditional territory, regardless of whether those decisions impact Aboriginal rights or title, and despite the federal government's exclusive jurisdiction over "Indians, and Lands reserved for the Indians".[94] It would be problematic if the widest and deepest expression of Indigenous rights at international law had no

effect at the provincial or territorial level, where most key decisions affecting those rights are being made.[95]

51 Application of international law at the provincial level has traditionally raised constitutional tensions. In addition to the separation of powers tension in international treaty-making described in Part II, there is a division of powers tension in applying those international obligations to provinces. How can the federal government purport to bind the provinces in their areas of exclusive jurisdiction? Most of the work done by the courts in applying international law has been in areas of federal jurisdiction, notably criminal and immigration law. Much less work has been done interpreting provincial legislation in light of international commitments.[96] Some provincial courts show little patience for such arguments.[97] Nonetheless, as scholars have noted, "the presumption of conformity applies to all Canadian statutes, whether federal, provincial, or territorial".[98]

52 There is one key area of provincial jurisdiction where international law has played a considerable role: labour rights. Since the 2000s, the Supreme Court has interpreted and enriched the *Charter* section 2(d) right to freedom of association, based on international law principles, to include the right to collectively bargain and to strike. This led the Court to declare numerous provincial statutes that restricted bargaining rights and the right to strike as unconstitutional.

53 Things did not start out this way. In the 1930s, to meet its obligations under the Versailles Treaty, the federal government enacted statutes regulating conditions of employment.[99] Because these statutes related to property and civil rights, areas squarely under provincial heads-of-power, they were referred to the Supreme Court for consideration. Ultimately, the Judicial Committee of the Privy Council declared all the statutes *ultra vires*, on the basis that the federal government could not purport to bind the provinces in areas of provincial jurisdiction by entering international agreements.[100] Decades later, this remained the rule.[101] International legal obligations were not considered relevant to the validity of provincial legislation.

54 With the advent of the *Charter,* unions challenged provincial legislation as violating the *Charter* section 2(d) right to freedom of association, and sought to interpret section 2(d) in light of international law. This led to a trilogy of Supreme Court cases now referred to as the *Labour Trilogy*.[102] In the first of these, *Reference Re Public Service Employee Relations Act*, the majority declined to find that section 2(d) enshrined a right to bargain collectively or to strike. However, Dickson C.J.C. delivered a powerful dissent, looking to international law as a "fertile source of insight" to interpret section 2(d):[103]

> Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the Charter. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the Charter. . . . I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.[104]

55 Chief Justice Dickson looked to the ICCPR, the ICESCR, and the *International Labour*

Organization ("ILO Convention 87") to infer a right to collectively bargain at international law.[105] "As a party to these human rights documents, Canada is cognizant of the importance of freedom of association to trade unionism, and has undertaken as a binding international obligation to protect to some extent the associational freedoms of workers within Canada."[106] It followed that the right to freedom of association must be protected by section 2(d). The majority, however, did not agree. Nor did the rest of the Court in subsequent cases for several decades.[107]

56 Nevertheless, Dickson C.J.C.'s dissent in the *Alberta Reference* laid the foundation for three major Supreme Court decisions in the 2000s, all of which looked to the "fertile source" of international law to interpret labour rights: *Dunmore v. Ontario (Attorney General)*, *Health Services and Support*, and *Saskatchewan Federation of Labour v. Saskatchewan.* [108] In these three cases, the Court used international law to interpret the Charter in the following ways. First, the Court applied the principle that "the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".[109] Second, the Court examined relevant provisions in binding conventions that Canada has ratified like the ICCPR, ICESCR and *ILO Convention 87* that pre-date the *Charter*.[110] Third, the Court examined similar provisions in instruments that post-date the *Charter*, like the *Declaration on Rights at Work*,[111] and the *Charter of the Organization of American States*.[112] Fourth, the Court looked to how international advisory bodies have interpreted and applied those provisions.[113]

57 The Court drew on international law to infer that section 2(d) of the *Charter* protected a right to collectively bargain and a right to strike, even though the plain language of section 2(d) did not protect either. Importantly, as discussed in Part III, in *Health Services and Support,* the majority of the Court interpreted the *Charter* right in light of the *Declaration on Rights at Work,* which post-dated the *Charter*. The majority held that the fact that the Declaration post-dated the *Charter*"does not detract from its usefulness" in interpreting the *Charter,* since the Declaration was informed by international instruments that were adopted pre- *Charter* and were within the contemplation of the *Charter* framers. Further, since the *Charter* is a living document that grows with society, Canada's current international law commitments provide a persuasive source for interpreting the *Charter.* [114]

58 A similar approach could be applied to reinterpret another area of collective rights: those protected under section 35. Just as the Supreme Court interpreted section 2(d) of the *Charter* in light of international conventions and Declarations, to find that provincial legislation violated section 2(d), courts could interpret the meaning and effect of section 35 in light of UNDRIP. The "minimum standards" enshrined in UNDRIP, particularly the rights to lands and resources,[115] could be read into section 35, which in turn could be used to read down or invalidate provincial legislation that unjustifiably interferes with those rights. This would be an exercise in "breathing new life" into the existing tests for infringement under section 35,[116] which has already begun.[117]

59 Provinces did not have to statutorily implement the ICCPR, the ICESR or other international instruments, to enable the Supreme Court to use them to interpret the *Charter* and strike down provincial legislation. Likewise, provincial and territorial courts can use UNDRIP to interpret section 35, regardless of whether those jurisdictions have passed implementation legislation.

60 Moreover, the fact that UNDRIP was adopted after the enactment of section 35 does not detract from its usefulness. This is because many rights expressed in UNDRIP are rooted in binding international conventions that pre-date section 35, including the rights to self-determination; to lands, property and resources; and to effective remedies.

61 First, the right to self-determination is one of the most fundamental rights of a people at international law. While expressed in UNDRIP,[118] it is also enshrined in article 1(1) of the ICCPR and article 1(1) of the ICESCR.[119] Canada has ratified both, and the Supreme Court has recognized that the ICCPR is binding on Canada, triggering the presumption of conformity.[120]

62 Second, Indigenous peoples' right to traditional territories and resources is expressed in UNDRIP,[121] and in article 27 of the ICCPR, which upholds minorities' rights to enjoy their culture and protection of their way of life.[122] The UN Human Rights Committee has held that article 27 of the ICCPR protects Indigenous peoples' rights to engage in economic and social activities, including about territory and resource use.[123] This right is also upheld in the *American Declaration of the Rights and Duties of Man* and the *American Convention on Human Rights*.[124] The *American Declaration* is a source of legal obligation for member states of the Organization of American States,[125] which Canada is.[126]

63 Third, the right to effective remedies is expressed in UNDRIP,[127] but it is also enshrined in article 2(3) of the ICCPR, and the *American Declaration* and the *American Convention*.[128]

64 In this way, UNDRIP is akin to the *Declaration on the Rights at Work* that the majority of the Supreme Court used to interpret section 2(d) in *Health Services and Support*, despite the fact that the Declaration post-dated the *Charter*, on the basis that it was informed by instruments that pre-dated the *Charter*.[129] Likewise, many UNDRIP rights are enshrined in earlier conventions that pre-date the *Charter* and other statutes, and thus courts can use those UNDRIP rights to interpret the *Charter* and statutes. The living tree approach to constitutional interpretation also warrants interpreting constitutional provisions in line with current international commitments, like those enshrined in UNDRIP. As the Supreme Court has held, the *Charter* is a living document that grows with society, and thus "Canada's *current* international law commitments . . . provide a persuasive source for interpreting the scope of the *Charter*",[130] The same must be true for section 35.

65 Further, many of these UNDRIP rights -- to self-determination; to lands, property and resources; and to effective remedies -- have also been recognized as having the status of customary international law.[131] The right to self-determination has been recognized as a peremptory norm (*jus cogens*)[132] -- the highest form of customary international law. This means it cannot be breached by any state, and can only be

66 modified by another peremptory norm.[133] The Supreme Court has held that when an international law principle is included in numerous conventions, supported by states' domestic practices, and considered a peremptory norm by international authorities, it cannot be deviated

from easily.[134] The right to lands, property and resources has also been recognized as a customary international law norm, as has the right to effective remedies.[135]

67 These customary international law norms are automatically adopted into the common law.[136] This could mean that common law tests like the *Haida* duty to consult test, or the *Van der Peet* Aboriginal rights test, need to be adjusted to better align with customary international law.[137] For example, there is distance between the *Van der Peet* Aboriginal rights test and the principle of self-determination.[138] There is also tension between the duty to consult test and the principle of free, prior and informed consent.[139] Canadian approaches to compensation have also been decidedly out of step with the principle of *restitutio in integrum* until recently.[140]

68 Customary international law could even inform new causes of action against the Crown or third parties, as in *Nevsun*.[141] The Supreme Court has been willing to reshape *Charter* remedies in light of international law,[142] so the same should hold true for Indigenous rights. As the labour cases demonstrate, this can happen in areas of provincial and territorial jurisdiction even without legislative implementation of UNDRIP.

VI. THE APPLICATION OF UNDRIP IN ADMINISTRATIVE DECISIONS

69 Another area where UNDRIP has a role to play is in administrative decision-making. Recently, in *Vavilov*, the Supreme Court recognized that "international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power".[143] These international obligations operate as relevant considerations, and possibly constraints, on administrative decision-making and exercises of discretion. The question is when is a decision-maker required to engage with these obligations.

70 The Supreme Court recognized the role of international law in administrative decision-making as far back as the 1970s,[144] but the watershed decision was *Baker v. Canada (Minister of Citizenship and Immigration)*.[145] In *Baker,* while recognizing that "treaties and conventions are not part of Canadian law unless they have been implemented by statute", the majority held that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". The majority held that the *Convention on the Rights of the Child*, the *Universal Declaration of Human Rights,* and the United Nations *Declaration of the Rights of the Child* were all relevant considerations that should have informed the decision-maker's exercise of their discretion in determining a humanitarian and compassionate grounds application. These conventions and Declarations were thus relevant considerations in determining whether the decision was a reasonable exercise of the decision-maker's discretion. The majority explained: "The principles of the Convention and other international instruments place special importance on protections for children and childhood" and "[t]hey help show the values that are central in determining whether this decision was a reasonable exercise of the H & C power".[146] Thus, the majority held that international law could inform the reasonable exercise of discretion.

71 The majority cited a New Zealand Court of Appeal case, *Tavita v. Minister of Immigration*, where the court found that international obligations were necessarily relevant considerations in

administrative decision-making. In *Tavita*, the Court held, "some international obligations are so manifestly important that no reasonable Minister could fail to take them into account".[147] In order to give effect to universal human rights, the judiciary had to be prepared to take administrative decision-makers -- and even Ministers -- to task for ignoring such obligations in their decision-making.[148] This principle clearly helped influence the decision in *Baker*, although our Supreme Court did not state it as forcefully.

72 Since *Baker*, the way the doctrine of relevant considerations has operated in administrative law has been mixed. Tribunals consider international law, particularly in the human rights space, but also in environmental law and other areas. This is particularly true in federal areas of jurisdiction, like immigration and copyright. Yet provincial human rights bodies also regularly look to international human rights law to interpret their own Human Rights Codes and inform their decisions. Provincial environmental decision-makers also look to international law, particularly the precautionary principle, to inform their decisions.

73 How this use of international law works in practice -- what is relevant to statutory interpretation, how exactly it is to be weighed, and how much deference is then given on judicial review -- varies widely. A good example is the recent Supreme Court decision in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*.[149] The Federal Court of Appeal had cautioned against an expansive use of international law to "twist or amend the authentic meaning of domestic law to make it accord with international law", which was "something forbidden under our constitutional arrangements and fundamental orderings" and held that international law should only be employed to resolve ambiguities in the statutory text.[150] The majority of the Supreme Court, however, took a more expansive approach, finding that international legal obligations must be considered as part of the "entire context" when interpreting the statutes' text, and there is "no need to find textual ambiguity in a statute before considering the treaty". Instead, "[w]here the text permits, legislation should be interpreted so as to comply with Canada's treaty obligations, in accordance with the presumption of conformity".[151]

74 What is clear from the cases to date is that international law plays at least two roles in administrative decision-making. First, it is part of the decision-maker's statutory interpretation exercise, part of the "entire context" for the statute's text. Second, it may supply additional relevant considerations for the decision-maker and impose constraints on their decision. There is no principled reason why UNDRIP protections should not be employed in both ways when making decisions affecting Indigenous peoples. UNDRIP is a statement of minimum standards,[152] which should in turn act as legal constraints. UNDRIP rights at minimum should attract the presumption of conformity and should form part of a decision-maker's interpretive exercise.[153] Even absent ambiguity, decision-makers should strive for interpretations that conform with UNDRIP. Given that administrative decision-makers routinely make decisions affecting the lands and rights of Indigenous people, it would also be unreasonable for a decision-maker to ignore UNDRIP or treat it superficially, as the highest and widest expression of those rights at international law.

VII. **CONCLUSION**

75 This paper has explored the Supreme Court's recent watershed decisions in the *C92 Reference* and *Dickson*, and the potential implications of these decisions for Indigenous rights, in areas of federal jurisdiction, provincial and territorial jurisdiction, and administrative decision-making. The language in these decisions suggests that UNDRIP has been brought into Canadian law, and likewise the law of the provinces and territories with UNDRIP implementation legislation -- BC and the NWT -- and should attract the presumption of conformity. The question of UNDRIP's status in provinces and territories without UNDRIP implementation legislation remains unanswered, but the labour cases offer an example of how courts can interpret constitutional provisions -- such as *Charter* provisions or section 35 -- in light of international law instruments, to strike down provincial or territorial legislation that is inconsistent with those constitutional protections, even without legislative implementation of those instruments. Finally, the Supreme Court's decisions in *Baker* and *Vavilov* suggest that international law instruments can operate as mandatory relevant considerations or even constraints in administrative decision-making. The authors look forward to these questions receiving greater attention in the coming years.

Notes

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* Kevin Hille is a partner at Olthuis Kleer Townshend LLP and the co-author of *Treaty Law: Principles of the Treaty of Waitangi in Law and Practice* (Auckland: Thomson Reuters, 2023). He has previously written on the *United Nations Declaration on the Rights of Indigenous Peoples* for the *Miiori Law Review* (April 2018). Jesse Abell is an associate at Olthuis Kleer Townshend LLP, and acted as co-counsel representing an intervener in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024] S.C.J. No. 5, 2024 SCC 5 (S.C.C.) [hereinafter, "*C92 Reference*"]. The views expressed in this paper are the authors' own. The authors are grateful to Haritha Popuri for her thorough research, and to Lo Stevenson for their detailed work on the copy editing and footnotes in the paper.

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GAOR, 61st Sess., Supp. No. 49, UN Doc. 61/295 (2007) [hereinafter "UNDRIP"].

2 *C92 Reference*, at paras. 4 & 15 (S.C.C.).

3 *Dickson v. Vuntut Gwitchin First Nation*,[2024] S.C.J. No. 10, 2024 SCC 10, at paras. 47 & 117 *per* Kasirer and Jamal JJ. (majority), at para. 317 *per* Martin and O'Bonsawin JJ. (dissenting in part) (S.C.C.) [hereinafter "*Dickson*"].

4 *C92 Reference*, at para. 15 (S.C.C.), see also para. 4, citing *United Nations Declaration on the Rights of Indigenous Peoples Act,* S.C. 2021, c. 14, s. 4(a) [hereinafter "UNDA"].

5 *Dickson*, at para. 117, *per* Kasirer and Jamal JJ (majority) (S.C.C.), interpreting the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the "*Charter*"]; see also *Dickson,* at para. 317, *per* Martin and O'Bonsawin JJ. (dissenting in part) (S.C.C.).

6 John H. Currie, "Reception of International Law in Domestic Law", in J.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 225-245; Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 228; *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5, at paras. 90 & 94-96(S.C.C.); *R. v. Hape*,[2007] S.C.J. No. 26, 2007 SCC 26, at para. 36 (S.C.C.).

7 *Nevsun Resources Ltd. v. Araya*,[2020] S.C.J. No. 5, 2020 SCC 5, at paras. 86 & 90 (S.C.C.); see also John H. Currie, "Reception of International Law in Domestic Law", in J.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 225.

8 *Nevsun Resources Ltd. v. Araya*,[2020] S.C.J. No. 5, 2020 SCC 5, at paras. 94-95 (S.C.C.).

9 *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26, at para. 39 (S.C.C.); see also *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5, at para. 90 (S.C.C.).

10 John H. Currie, "Reception of International Law in Domestic Law", in J.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 95 & 100; see also *Nevsun Resources Ltd. v. Araya*, [2020] S.C.J. No. 5, 2020 SCC 5, at para. 76 (S.C.C.).

11 *Nevsun Resources Ltd. v. Araya*,[2020] S.C.J. No. 5, 2020 SCC 5, at paras. 77 & 78 (S.C.C.).

12 *Kazemi Estate v. Islamic Republic of Iran*, [2014] S.C.J. No. 62, 2014 SCC 62, at paras. 50, 58, 62 & 102 (S.C.C.).

13 *Kazemi Estate v. Islamic Republic of Iran*, [2014] S.C.J. No. 62, 2014 SCC 62, at paras. 50, 58 & 62 (S.C.C.).

14 *Nevsun Resources Ltd. v. Araya*,[2020] S.C.J. No. 5, 2020 SCC 5, at paras. 117-118, 128 & 132 (S.C.C.).

15 John H. Currie, "Reception of International Law in Domestic Law", in J.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 235, 237, 239-242 & 245-246; see also Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 228 & 270.

16 Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 163; John H. Currie, "Reception of International Law in Domestic Law", inJ.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 255; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32,2020 SCC 32, at paras. 33-35 (S.C.C.). Gib van Ert notes that this is because the presumption aims to prevent breaches of Canada's international obligations, and a treaty commitment is no less binding on Canada internationally for being unimplemented in Canadian law.

17 John H. Currie, "Reception of International Law in Domestic Law", in J.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 242 & 246; see also Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 270.

18 John H. Currie, "Reception of International Law in Domestic Law", in J.H. Currie, ed.,*Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 255-256; *R. v. Hape*,[2007]S.C.J. No. 26, 2007 SCC 26, at paras. 53-56 (S.C.C.).

19 *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26, at para. 53 (S.C.C.).

20 Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 163; John H. Currie, "Reception of International Law in Domestic Law", inJ.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 255; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32,2020 SCC 32, at paras. 33-35 (S.C.C.).

21 Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: IrwinLaw, 2008), at 130 & 131-132; *R. v. Hape*, [2007] S.C.J. No. 26,2007 SCC 26, at paras. 34& 53 (S.C.C.).

22 *B010 v. Canada (Citizenship and Immigration)*, [2015] S.C.J. No. 58, 2015 SCC 58, atpara. 49 (S.C.C.); *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26, at para. 53 (S.C.C.).

23 *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26, at paras. 53-56 (S.C.C.); *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at paras. 33-35 (S.C.C.).

24 *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47, at paras. 22-27 (S.C.C.).

25 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1, at paras. 46, 60-75 & 119 (S.C.C.).

26 *R. v. Hape*, [2007] S.C.J. No. 26, 2007 SCC 26, at paras. 53-56 & 105 (S.C.C.).

27 *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47, at para. 23 (S.C.C.), citing *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27,2007 SCC 27, at para. 70 (S.C.C.)[hereinafter "*Health Services and Support*"].

28 *Tsilhqot'in Nation v. British Columbia*,[2014] S.C.J. No. 44, 2014 SCC 44, at para. 142 (S.C.C.); see also Brenda L. Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2020) 53:4 U.B.C. Law Review 1065, at 1082.

29 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1, at para. 60 (S.C.C.).

30 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at paras. 35, 38 & 41-42 (S.C.C.).

31 *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) [hereinafter, "ICCPR"]; *International Covenant on Economic, Social and Cultural Rights*, 1966, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) [hereinafter "ICESCR"].

32 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at para. 41 (S.C.C.).

33 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at para. 23 (S.C.C.); see Naomi Metallic, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard Alpert, Wade Wright, Kate Berger & Michael Pal, eds., *Rewriting the Canadian Constitution,* 2022 [forthcoming], at 18-19, see online: <digitalcommons.schulichlaw.dal.ca/scholarly_works/1200 />.

34 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at para. 23 (S.C.C.).

35 *Health Services and Support*, at para. 78 (S.C.C.). The dissenting opinion in *9147 Quebec* also recognized that giving less interpretive weight to international sources that post-date the *Charter* cuts against the grain of the living tree approach to *Charter* interpretation: *Quebec (Attorney General) v. 9147-0732 Québec inc.*,[2020] S.C.J. No. 32, 2020 SCC 32, at para. 76 (S.C.C.), *per* Abella, Karakatsanis, and Martin JJ. (dissenting).

36 *Health Services and Support*, at para. 78 (S.C.C.) [emphasis in original].

37 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39,[1999] 2 S.C.R. 817 (S.C.C.); *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65,2019 SCC 65 (S.C.C.).

38 UNDRIP; see also *R. c. Montour*,[2021] J.Q. no 1888, 2021 QCCS 714, at paras. 1178-1180 (Que. S.C.).

39 *Hupacasath First Nation v. Canada (Foreign Affairs)*, [2013] F.C.J. No. 927, 2013 FC 900, affirmed, [2015] F.C.J. No. 4, 2015 FCA 4 (F.C.A.).

40 United Nations Office of Legal Affairs, *Use of the Terms "Declaration" and "Recommendation"*, UN Doc. E/CN.4/L.610 (1962); see also Brenda L. Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2020) 53:4 U.B.C. Law Review 1065, at 1074.

41 S. James Anaya, *Report of the Special Rapporteur on the Situation of Humans Rights and Fundamental Freedoms of Indigenous People*, UNHRCOR, 2008, UN Doc. A/HRC/9/9, at para. 41; see also Brenda L. Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2020) 53:4 U.B.C. Law Review 1065, at 1074.

42 *R. c. Montour*, [2021] J.Q. no 1888,2021 QCCS 714, at paras. 1181-1185 (Que. S.C.).

43 S. James Anaya, *Report of the Special Rapporteur on the Situation of Humans Rights and Fundamental Freedoms of Indigenous People*, UNHRCOR, 2008, UN Doc. A/HRC/9/9, at paras. 40-41.

44 UNDRIP, art. 43.

45 UNDRIP, arts. 3, 4, 8(2), 10, 11(2), 19, 20(2), 26(1)- (3), 28(1), 29(1), 32(1)-(3) & 40.

46 *Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 [hereinafter "DRIPA"].

47 UNDA.

48 *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*,S.N.W.T. 2023, c. 36 [hereinafter "UNDRIPIA"].

49 *C92 Reference*, at paras. 4 & 15 (S.C.C.) [emphasis added].

50 On this point, see Nigel Bankes & Robert Hamilton, "What Did the Court Mean When It Said that UNDRIP has been incorporated into the country's positive law'? Appellate Guidance or Rhetorical Flourish?" February 28, 2024), *ABlawg*, see online: <ablawg.ca>.

51 *Dickson*, at para. 117 (S.C.C.) [emphasis added].

52 *Dickson*, at para. 317 (S.C.C.), *per* Martin and O'Bonsawin JJ. (dissenting in part).

53 *Dickson*, at para. 47 (S.C.C.).

54 *C92 Reference*, at paras. 4 & 15 (S.C.C.); see also *Dickson*, at para. 117 (S.C.C.).

55 *Dickson*, at para. 117 (S.C.C.).

56 *C92 Reference*, at para. 4 (S.C.C.) [emphasis added].

57 Naomi Metallic, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard Alpert, Wade Wright, Kate Berger & Michael Pal, eds., *Rewriting the Canadian Constitution,* 2022 [forthcoming], at 19, see online:<digitalcommons.schulichlaw.dal.ca/scholarly_wor ks/1200/>.

58 *R. c. Montour*, [2021] J.Q. no 1888,2021 QCCS 714, at para. 1185 (Que. S.C.).

59 Naomi Metallic, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard Alpert, Wade Wright, Kate Berger & Michael Pal, eds., *Rewriting the Canadian Constitution,* 2022 [forthcoming], at 19, see online:<digitalcommons.schulichlaw.dal.ca/scholarly_wor ks/1200/>.

60 *R. c. Montour*, [2021] J.Q. no 1888,2021 QCCS 714 (Que. S.C.). The Federal Court also recently reached the same conclusion: see *Kebaowek First Nation v. Canadian Nuclear Laboratories*,[2025] F.C.J. No. 300, 2025 FC 319 (F.C.), at paras. 81-82, 85 (under appeal).

61 *R. c. Montour*, [2021] J.Q. no 1888,2021 QCCS 714, at paras. 1189-1201 (Que. S.C.).

62 *Kebaowek First Nation v. Canadian Nuclear Laboratories,* [2025] F.C.J. No. 300, 2025FC 319 (F.C.), at paras. 81-82, 85 (under appeal).

63 *C92 Reference*, at para. 15 (S.C.C.); see also para. 4.

64 *Dickson*, at para. 117 (S.C.C.).

65 *Health Services and Support*, at para. 78 (S.C.C.).

66 *Health Services and Support*, at para. 78 (S.C.C.).

67 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020 SCC 32, at para. 23 (S.C.C.).

68 Naomi Metallic, "Breathing Life into Our Living Tree and Strengthening our Constitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard Alpert, Wade Wright, Kate Berger & Michael Pal, eds., *Rewriting the Canadian Constitution,* 2022 [forthcoming], at 19, see online:<digitalcommons.schulichlaw.dal.ca/scholarly_wor ks/1200/>.

69 *Interpretation Act*, R.S.C., 1985, c. I-21, s. 17.

70 On this point, see Nigel Bankes & Robert Hamilton, "What Did the Court Mean When It Said that UNDRIP has been incorporated into the country's positive law'? Appellate Guidance or Rhetorical Flourish?" February 28, 2024), *ABlawg*, see online: <ablawg.ca>.

71 Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 131.

72 *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46,[1998] 1 S.C.R. 982, at para. 51 (S.C.C.); see also Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 277-278. Van Ert has noted that any other approach would frustrate Parliament's purpose in implementing the instrument, and potentially breach Canada's obligations under that instrument.

73 Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 163; John H. Currie, "Reception of International Law in Domestic Law", inJ.H. Currie, ed., *Public International Law*, 2nd ed. (Toronto: Irwin Law, 2008), at 255; see also *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32,2020 SCC 32, at paras. 33-35 (S.C.C.).

74 UNDRIP, arts. 38 & 42. These articles enshrine the obligation that states shall take the appropriate measures, including legislative measures, to achieve UNDRIP's ends, and that states shall promote respect for and full application of UNDRIP rights.

75 *C92 Reference*, at paras. 4 & 15 (S.C.C.); *Dickson*, at paras. 47 & 117 (S.C.C.).

76 DRIPA; UNDRIPIA.

77 DRIPA, s. 2; UNDRIPIA, s. 5(a).

78 UNDA, s. 4(a).

79 DRIPA, s. 2(a).

80 UNDRIPIA, s. 5(a).

81 *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 14.

82 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 8.1(3).

83 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 4.

84 *Interpretation Act*, S.N.W.T. 2017, c. 19, s. 8.

85 Prior to publication of this article, the Court of Appeal for the Northwest Territories released a decision that briefly addressed UNDRIP and the territory's UNDRIP implementation legislation. The Court of Appeal stated that "UNDRIP is part of Canadian law" but did not reach any other conclusions about its relevance or applicability in that case: *Colville Lake Renewable Resources Council v. Northwest Territories (Minister of Environment and Natural Resources)*, [2025] N.W.T.J. No. 1, 2025 NWTCA 1 (C.A.), at para. 54.

86 *J.N.C. v. A.G.H.*, [2024] B.C.J. No. 1812,2024 BCSC 1783, at paras. 202 & 219 (B.C.S.C.).

87 *Gitxaala v. British Columbia (Chief Gold Commissioner)*, [2023] B.C.J. No. 1865,2023 BCSC 1680 (B.C.S.C.) (under appeal). The authors are representing an intervener in the appeal.

88 *Gitxaala v. British Columbia (Chief Gold Commissioner)*, [2023] B.C.J. No. 1865,2023 BCSC 1680, at paras. 417-417, 461 & 464-470 (B.C.S.C.).

89 *Kits Point Residents Assn. v. Vancouver (City)*, [2023] B.C.J. No. 1886, 2023 BCSC 1706 (B.C.S.C.).

90 *J.N.C. v. A.G.H.*, [2024] B.C.J. No. 1812,2024 BCSC 1783, at paras. 201-210 & 219 (B.C.S.C.).

91 *C92 Reference*, at para. 115 (S.C.C.).

92 See *Reference re Impact Assessment Act*,[2023] S.C.J. No. 23, 2023 SCC 23, at paras. 123-128 (S.C.C.).

93 See *Brown v. Canada (Attorney General)*,2017 ONSC 251, 136 O.R. (3d) 497 (Ont. S.C.J.); *C92 Reference* (S.C.C.).

94 *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] S.C.J. No. 48, 2014 SCC 48 (S.C.C.); *Tsilhqot'in Nation v. British Columbia,* [2014] S.C.J. No. 44, 2014SCC 44 (S.C.C.).

95 For a good early example of this problem see for example United Nations Human Rights Committee, *Ominayak (Lubicon Lake Band) v. Canada*, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (March 26, 1990).

96 See for example *Khan Resources Inc. v. Atomredmetzoloto JSC*, 2012 ONSC 1522,110O.R. (3d) 298 (Ont. S.C.J.).

97 See *Grassroots For Affordable Jewish Education Inc. v. Ontario (Minister of Education)*,[2023] O.J. No. 3738, 2023 ONSC 3722 (Ont. S.C.J.) for provincial court unease about international law. To note, in *Greenpeace Canada v. Ontario (Minister of the Environment, Conservation and Parks)*,2021 ONSC 4521, 157 O.R. (3d) 497 (Ont. Div. Ct.), the Divisional Court declined to grant a declaration that Ontario acted contrary to international norms grounded in the ICCPR, as Ontario had not implemented the ICCPR with respect to its environmental laws. As the ICCPR did not constrain Ontario's actions, the court had no jurisdiction to grant a declaration for the violation of international law: see paras. 91-92.

98 Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 305.

99 For a contemporary account of the origins and fate of this legislation, see Vincent C. MacDonald, "The Canadian Constitution Seventy Years After" (1937) 15:6 Can. Bar Rev. 401.

100 *Reference re: Weekly Rest in Industrial Undertakings Act (Can.)*, [1937] J.C.J. No. 5,[1937] 1 D.L.R. 673, at 682-684 (P.C.).

101 *Alberta Union of Provincial Employees v. Alberta*, [1980] A.J. No. 531, at paras. 67-70 (Alta. Q.B.).

102 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10,[1987] 1 S.C.R. 313 (S.C.C.); *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8,[1987] 1 S.C.R. 460 (S.C.C.). The *Alberta Reference* challenged the same legislation at issue in *Alberta Union of Provincial Employees*.

103 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10,[1987] 1 S.C.R. 313, at para. 59 (S.C.C.), *per* Dickson C.J.C. (dissenting).

104 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10,[1987] 1 S.C.R. 313, at para. 59 (S.C.C.), *per* Dickson C.J.C. (dissenting).

105 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10,[1987] 1 S.C.R. 313, at paras. 61 & 65 (S.C.C.), *per* Dickson C.J.C. (dissenting), citing ICCPR; ICESCR; United Nations International Labour Organization Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, 67 U.N.T.S. 18 (1948).

106 *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] S.C.J. No. 10,[1987] 1 S.C.R. 313, at para. 72 (S.C.C.), *per* Dickson C.J.C. (dissenting).

107 *Public Service Alliance of Canada v. Canada*, [1987] S.C.J. No. 9, [1987] 1 S.C.R. 424 (S.C.C.); *Retail, Wholesale and Department Store Union v. Saskatchewan*, [1987] S.C.J. No. 8,[1987] 1 S.C.R. 460 (S.C.C.).

108 *Dunmore v. Ontario (Attorney General)*,[2001] S.C.J. No. 87, 2001 SCC 94 (S.C.C.); *Health Services and Support* (S.C.C.); *Ontario (Attorney General) v. Fraser*, [2011] S.C.J. No. 20, 2011 SCC 20 (S.C.C.). The history and debate surrounding these cases is recorded in detail elsewhere: see for example, Roy J. Adams, "Bringing Canada's Wagner Act Regime into Compliance with International Human Rights Law and the Charter" (2016) 19:2 Can. Labour & Employment L.J. 365; Brian Langille, "Why are Canadian Judges Drafting Labour Codes - And Constitutionalizing the Wagner Act Model" (2009) 15:1 Can. Labour & Employment L.J. 101.

109 *Health Services and Support*, at para. 70 (S.C.C.); *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4, at para. 64 (S.C.C.), citing *Divitov. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 47, 2013 SCC 47, at para. 23 (S.C.C.).

110 *Health Services and Support*, at paras. 73-76 (S.C.C.); see also *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4, at paras. 27, 65, 67& 70 (S.C.C.).

111 *Health Services and Support*, at para. 78 (S.C.C.); United Nations International Labour Organization, *Declaration on Fundamental Principles and Rights at Work*, 86th Sess. (1998).

112 *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4, at para. 66 (S.C.C.); United Nations Organization of American States, *Charter of the Organization of American States*, 119 U.N.T.S. 3 (entered into force December 13, 1951).

113 *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] S.C.J. No. 4, 2015 SCC 4, at paras. 16 & 67-69 (S.C.C.).

114 *Health Services and Support,* at para. 78 (S.C.C.).

115 UNDRIP, arts. 26(1), (2) and (3), 29(1), 32(1)-(2) & 43.

116 Naomi Metallic, "Breathing Life into Our Living Tree and Strengthening ourConstitutional Roots: The Promise of the United Nations Declaration on the Rights of Indigenous Peoples Act", in Richard Alpert, Wade Wright, Kate Berger & Michael Pal, eds., *Rewriting the Canadian Constitution,* 2022 [forthcoming], at 41, see online:<digitalcommons.schulichlaw.dal.ca/scholarly_wor ks/1200/>.

117 *Yahey v. British Columbia*,[2021] B.C.J. No. 1428, 2021 BCSC 1287 (B.C.S.C.);*Thomas v. Rio Tinto Alcan Inc.*, [2022] B.C.J. No. 24, 2022 BCSC 15 (B.C.S.C.); *Gitxaala v. British Columbia (Chief Gold Commissioner)*, [2023] B.C.J. No. 1865,2023 BCSC 1680 (B.C.S.C.).

118 UNDRIP, arts. 3 & 4.

119 ICCPR, art. 1(1); ICESCR, art. 1(1).

120 *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020] S.C.J. No. 32, 2020SCC 32, at para. 39 (S.C.C.).

121 UNDRIP, arts. 25, 26(1), (2), (3), 29(1) & 32(1)-(2).

122 ICCPR, art. 27; see also Brenda L. Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2020) 53:4 U.B.C. Law Review 1065, at 1077-1078.

123 United Nations Human rights Committee, *Poma Poma v. Peru*, Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006, at paras. 7.2 & 7.6.

124 *American Declaration of the Rights and Duties of Man*, May 2, 1948, Organization ofAmerican States, Art. XXIII; *American Convention on Human Rights*, November 22, 1969, Organization of American States, Art. 21.

125 *Advisory Opinion OC-10/89*, Inter-American Court of Human Rights, July 14, 1989, Series A, No. 10 (1989), at paras. 39-45.

126 United Nations Organization of American States, *Charter of the Organization of American States*, 119 U.N.T.S. 3 (entered into force December 13, 1951).

127 UNDRIP, arts. 40, 8(2), 10, 11(2), 20(2), 28(1) & 32(3).

128 ICCPR, art. 2(3); *American Declaration of the Rights and Duties of Man*, May 2, 1948, Organization of American States, art. XVIII; *American Convention on Human Rights*, November 22, 1969, Organization of American States, art. 25.

129 *Health Services and Support,* at para. 40 (S.C.C.).

130 *Health Services and Support,* at para. 78 (S.C.C.).

131 International Law Association, Rights of Indigenous Peoples Committee, "Final Report", Sofia Conference (2012), at 29-31, see online: <https://www.ila- hq.org/en/documents/conference-report-sofia-2012-10>; see also Brenda L. Gunn, "Legislation and Beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2020) 53:4 U.B.C. Law Review 1065, at 1075.

132 Report of the International Law Commission, U.N.G.A.O.R., (2022), 77th Sess., Supp. No. 10, U.N. Doc A/77/10, at 16.

133 *Nevsun Resources Ltd. v. Araya*,[2020] S.C.J. No. 5, 2020 SCC 5, at para. 83 (S.C.C.).

134 *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1, at para. 65 (S.C.C.).

135 International Law Association, Rights of Indigenous Peoples Committee, "Interim Report", Hague Conference (2010), at 51, see online: <https://www.ila- hq.org/en_GB/documents/conference-report-the-hague-2010- 13>; International Law Association, Rights of Indigenous Peoples Committee, "Final Report", Sofia Conference (2012), at 30-31, see online: <https://www.ila-hq.org/en/documents/conference-report- sofia-2012-10>; International Law Association, Implementation of the Rights of Indigenous Peoples, "Final Report", Kyoto Conference (2020), at 2 & 11-12, see online: <https://www.ila-hq.org/en/documents/ila- comm-impl-rights-ind-peoples-final-report-dec-13-2020>.

136 *Nevsun Resources Ltd. v. Araya*,[2020] S.C.J. No. 5, 2020 SCC 5, at paras. 90 & 94-96 (S.C.C.).

137 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73 (S.C.C.); *R. v. Van der Peet*,[1996] S.C.J. No. 77, [1996] 2 S.C.R. 507 (S.C.C.).

138 John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges" in John Borrows, Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz, eds., *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal: McGill-Queen's University Press, 2023), at 29.

139 Ryan Beaton, "Articles 27 and 46(2): UNDRIP Signposts Pointing beyond the Justifiable-infringement Morass of Section 35" in John Borrows, Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz, eds., *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal: McGill- Queen's University Press, 2023), at 159.

140 Compare the trial decision in *Southwind v. Canada*, [2017] F.C.J. No. 966, 2017 FC 906 (F.C.) to the S.C.C. decision (*Southwind v. Canada*, [2021] S.C.J. No. 28, 2021 SCC 28 (S.C.C.)). See also the discussion of remedies in *Quebec (Attorney General) v. Pekuakamiulnuatsh Takuhikan*,[2024] S.C.J. No. 39, 2024 SCC 39 (S.C.C.).

141 See the use of nuisance actions against third parties in *Thomas v. Rio Tinto Alcan Inc.*,[2022] B.C.J. No. 24, 2022 BCSC 15 (B.C.S.C.).

142 *Henry v. British Columbia (Attorney General)*, [2015] S.C.J. No. 24, 2015 SCC 24, at paras. 135-137 (S.C.C.), *per* McLachlin C.J.C. & Karakatsanis J. (concurring).

143 *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65, 2019 SCC 65, at para. 114 (S.C.C.).

144 *Capital Cities Communications Inc. v. Canadian Radio- Television Commission*, [1978] 2 S.C.R. 141 (S.C.C.), discussed in Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed. (Toronto: Irwin Law, 2008), at 295-298.

145 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39,[1999] 2 S.C.R. 817 (S.C.C.).

146 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39,[1999] 2 S.C.R. 817, at paras. 69-73 (S.C.C.).

147 *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] S.C.J. No. 39,[1999] 2 S.C.R. 817, at para. 70 (S.C.C.), citing *Tavita v. Minister of Immigration*, [1994] 2N.Z.L.R. 257 (C.A.), describing the earlier finding in *Ashby v. Minister of Immigration*, [1981] N.Z.L.R. 222.

148 Andrew S. Butler & Petra Butler, "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29:1 Victoria University Wellington L.R. 173.

149 *Entertainment Software Assn. v. Society of Composers, Authors and Music Publishers of Canada*, [2020] F.C.J. No. 671, 2020 FCA 100 (F.C.A.).

150 *Entertainment Software Assn. v. Society of Composers, Authors and Music Publishers of Canada*, [2020] F.C.J. No. 671, 2020 FCA 100, at paras. 76-92 (F.C.A.).

151 *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Assn.*,[2022] S.C.J. No. 30, 2022 SCC 30, at paras. 44-46 (S.C.C.); also see *Thales DIS Canada Inc. v. Ontario (Ministry of Transportation)*, 2023 ONCA 866,170 O.R. (3d) 241 (Ont. C.A.); Paul Daly, "An Update on Administrative Law: the Supreme Court of Canada in 2022" (October 17, 2022), see online: <https://ssrn.com/abstract=4250315>.

152 UNDA, Preamble; see also UNDRIP, art. 43.

153 The Federal Court recently recognized this. Prior to publication of this article, the Federal Court released a decision finding that the Canadian Nuclear Safety Commission, an administrative decision-maker, has the jurisdiction to and was required to interpret s. 35 and the duty to consult consistently with UNDRIP and the principle of free, prior and informed consent ("FPIC"). The Court remitted the matter to the Commission to re- assess the duty to consult considering UNDRIP and FPIC: *Kebaowek First Nation v. Canadian Nuclear Laboratories*, [2025] F.C.J. No. 300, 2025 FC 319 (F.C.), at paras. 70, 86, 177, 226-229(under appeal).

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