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*

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Introduction

In 2015, the Truth and Reconciliation Commission of Canada ("TRC") suggested that, despite over 30 years of interpretation in the courts, section 35 of the *Constitution Act, 1982*, which "recognizes and affirms" the Aboriginal and treaty rights of the Aboriginal peoples of Canada, is not achieving meaningful reconciliation.[1] The TRC defined reconciliation as being about "establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country."[2] According to the TRC, the "reconciliation vision that lies behind Section 35 should not be seen as a means to subjugate Aboriginal peoples to an absolute sovereign Crown," implying this has been a problem with s 35 interpretation to date.[3] Problems raised by the TRC include s 35 case law's implicit acceptance of the doctrine of discovery (a racist doctrine that posits the superiority of Europeans over Indigenous peoples and justifies claiming jurisdiction over them and their lands) that manifests into Indigenous peoples having to prove their rights under narrow and problematic legal tests,[4] and a reluctance to appropriately recognize and respect Indigenous peoples' jurisdiction and laws.[5] A chorus of Aboriginal and Indigenous law scholars agree with this diagnosis of s 35.[6]

What is the source of the problems with s 35? Are these limitations inherent to the provision? Does change require a constitutional amendment? The government of Quebec is currently arguing it does. In a reference challenging federal legislation that recognizes the Aboriginal right to inherent self-government in child and family services, Quebec argues the law alters our

[1] Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future - Summary of the Final Report of Truth and Reconciliation Commission of Canada (2015) ["TRC"] at 203; *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35(1) [s 35].
[2] *Ibid* at 6.
[3] *Ibid* at 203.
[4] *Ibid* at 194-195. For an excellent discussion on the doctrine of discovery, see Aboriginal Justice Inquiry of Manitoba in 1991 at Vol. 1, Chap 5.
[5] TRC, *supra* note 1 at 202-207.
[6] See, for example, Kent McNeil & David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 SCLR 177; Peter Vicaire, "Two Roads Diverged: A Comparative Analysis of Indigenous Rights in a North American Constitutional Context" (2013), 58 McGill Law Journal. 607; Felix Hoehn "Back to the Future: Reconciliation and Indigenous Sovereignty after Tshilqot'in" (2016) 67 UNBLJ; John Borrows, "Canada's Colonial Constitution" in *The Right Relationship – Reimagining the Implementation of Historical Treaties*, ed. by John Borrows and Michael Coyle (Toronto: University of Toronto Press, 2017); Gordon Christie, "Reconciliation in the Face of Crown Intransigence on Indigenous Sovereignty," in Karen Drake & Brenda L Gunn, Renewing Relationships: Indigenous Peoples and Canada (Saskatoon: Native Law Center, 2019), c2, 37-58 ["*Renewing Relationships*"]; Aimée Craft, "Neither Infringement nor Justification: The Supreme Court of Canada's Mistaken Approach to Reconciliation," in *Renewing Relationships*, c3, 59-82; Naiomi Metallic, "Ending Piecemeal Recognition of Indigenous Nationhood and Jurisdiction: Returning to RCAP's Aboriginal Nation Recognition and Government Act" in *Renewing Relationships, ibid* ["Returning to RCAP"], c 10, 243-280; Mark Walters, "Promise and Paradox: The Emergence of Indigenous Rights Law in Canada," Benjamin J Richardson, Shin Imai & Kent McNeil, eds, Indigenous Peoples and the Law - Comparative and Critical Perspectives (Oregon: Hart Publishing, 2009) 21; Kent McNeil, "Shared Indigenous and Crown Sovereignty: Modifying the State Model," (2020 Osgoode Digital Commons, Articles & Book Chapters, 2815; and Robert Hamilton and Joshua Nichols, (2021) "Reconciliation and the Straightjacket: A Comparative Analysis of the Secession Reference and R v Sparrow," 52:2 Ottawa LR 205.

constitutional structure, thus requiring a constitutional amendment.[7] However, the TRC took the opposite view, suggesting that the problem is not innate to s 35 (and therefore does not require amendment), but simply that courts and governments have failed to implement the provision with sufficient strength and vigour.[8] Again, a chorus of Aboriginal and Indigenous law scholars concur.[9] This view posits that it's not the Constitution itself that needs changing, but the approach and attitudes of those interpreting it. This position is consistent with the view that our Constitution is a 'living tree' capable of change through new interpretations as society evolves.[10]

The main source of the problem with s 35 to-date has been its very general wording without a clear articulation of specific rights of Indigenous peoples or government obligations in relation to these rights, what some have called an 'empty box'. This, paired with the lack of political will to proactively implement s 35 has resulted in Canadian governments largely failing to take active measures to recognize and implement Aboriginal and treaty rights over the last 30 years. As a result of this political resistance to implementing s 35, it has fallen to the courts, particularly the Supreme Court of Canada ("SCC"), to interpret and apply the provision in specific cases. As suggested by the TRC, what has come from the courts in the last thirty years has been narrow and has not achieved meaningful reconciliation. Again, I believe the open-ended language of s 35 is a major source of the problem. Judges have had to identify principles and develop legal tests on Aboriginal and treaty rights without much to draw on, often articulating the contours of Aboriginal and treaty rights and government obligations based on problematic Euro-Canadian values and assumptions. The result has been the development of concepts and tests that have been inadequate for meaningful reconciliation.

To galvanize a more robust approach to s 35, the TRC called on governments throughout Canada to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* ("UN Declaration")[11] as the framework for reconciliation.[12] On June 21, 2021, the federal government took an important step towards its commitment to implement the TRC Calls to Action and the UN Declaration by passing into law, *An Act respecting the United*

[7] On appeal from *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 ["QCCA Decision"], where the Quebec's Court of Appeal rejected Quebec's amendment argument, holding self-government to be already included in s 35, and held the vast majority an *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 to be constitutional.

[8] TRC, *supra* note 1 at 203.

[9] Most of the critical scholarship on Aboriginal and treaty rights that I am aware of argues that solutions are to be found in new interpretations of s 35 and 91(24) of *The Constitution Act, 1867*, 30 & 31 Vict, c 3. For collection of nine article precisely illustrating this, see *Judicial Tales Retold: Reimagining Indigenous Rights Jurisprudence*, [2020] CNLR Special Edition ["*Judicial Tales Retold*"].

[10] For a further discussion, see *infra* Part 2, subsection 4 below.

[11] GA Res 61/295 (Annex), UN GAOR, 61st Sess, Supp No 49, Vol III, UN Doc A/61/49 (2008) 15 ["UN Declaration"].

[12] TRC, *supra* note 1 at 189-191.

Nations Declaration on the Rights of Indigenous Peoples ("*UN Declaration Act*").[13] By providing comprehensive details about the nature and content of Indigenous rights and states' obligations in relation to them, the UN Declaration and the *UN Declaration Act* hold much potential to breathe new life into s 35 to achieve the robust interpretation and implementation the TRC envisioned. The fact that the right to self-determination is the cornerstone of the UN Declaration also means that the jurisdiction, laws and institutions of Indigenous groups will have to be taken seriously, and this will serve to strengthen the constitutional roots of our country, which lay not only in British and French legal orders but also Indigenous legal orders which have long been overlooked.[14]

Meaningful change to our current approach to s 35 is possible without any need for a constitutional amendment. Together, the UN Declaration and the *UN Declaration Act* supply some important details that have been missing or overlooked up to this point and will facilitate a much more just interpretation of the provision. These details include (1) several provisions on which to attack the doctrine of discovery as a legally invalid basis for domestic laws; (2) a comprehensive elaboration of the specific rights to which Indigenous peoples are entitled; (3) the framing of the nature of these rights as fundamental human rights; and (4) a comprehensive elaboration of government obligations in relation to Indigenous rights. These arguments are unpacked in Part 2 of this paper.

My arguments are premised on the UN Declaration being capable of meaningfully influencing the development of Canadian law. However, this is not yet a widely accepted premise. Unfortunately, and similar to how the application of key international human rights conventions to Indigenous peoples was long denied (which was the impetus for Indigenous peoples worldwide to push for the creation of the UN Declaration),[15] the Declaration's status and effect on Canadian law has been questioned and undermined since the time it was adopted by the UN General Assembly.[16] There has been and continues to be significant confusion about how the UN Declaration applies in Canada, even since the passing of the *UN Declaration Act*.[17] In addition, a recent SCC decision, creating a framework for the courts' use of international law

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[13] *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples,* 2020 S.C. c 14 ["*UN Declaration Act*"].

[14] For an excellent discussion for the need for greater for recognition of Indigenous laws, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

[15] See *infra* Part 1, subsection 2.

[16] Clearly, this is not a coincidence. Indigenous peoples throughout the world continue to face hostility, or at the very least significant ambivalence, towards the recognition and implementation of their fundamental human rights. For a discussion on this, see Paul Joffe "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe, and Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing Ltd, 2010) [*Realizing the UN Declaration*] 70; and Sheryl Lightfoot, "A Leopard Cannot Hide Its Spots: Unmasking Opposition to the UN Declaration on the Rights of Indigenous Peoples" (2021) 53:4 UBC L Rev 1147.

[17] See, in general, Brenda L. Gunn, "Legislation and beyond: Implementing and Interpreting the UN Declaration on the Rights of Indigenous Peoples" (2021) 53:4 UBC L Rev 1065 [Gunn, "Legislation and Beyond"]; and *Lightfoot*, *ibid*.

principles, raises questions about the place of the UN Declaration within that framework and whether this has diminished the promise the Declaration holds in influencing s 35.[18] I conclude that it hasn't. However, dispelling the various misconceptions about the Declaration and arriving at a clear understanding of how it applies to Canadian law requires unpacking several concepts relating to international human rights law, its reception in domestic law, and statutory and constitutional interpretive principles. Part 1 of this paper is therefore dedicated to this.

Part 1 – Why and how the UN Declaration applies in Canada

1) International law and the status and role of declarations

International law has been summarized as a system of law that sets the rules for states' interactions with other states, individuals, and corporations.[19] The UN Declaration is an international human rights law instrument. International human rights law is a subset of international law and describes the rights of individuals and peoples that states must uphold. There are a variety of international law instruments, including declarations, treaties and conventions, decisions and resolutions of international governing bodies, directives, and more.[20] Such instruments are sometimes divided into 'binding' and 'non-binding' categories (also called 'hard law' and 'soft law'). However, scholars and international organizations have cautioned that using such binaries can obscure important nuances in international law.[21]

When speaking of 'binding' in the international context, it is important to understand that there is no real equivalent to a domestic court having the power to enforce breaches of law through punishment, backed by state police powers. When an instrument, like a treaty or convention, is 'binding' in international law, it means that there could be international law remedies for its breach, such as diplomatic steps, or economic and even military sanctions. Various UN bodies publish opinions or reports condemning breaches of international law, but these bodies do not have direct coercive enforcement power. Therefore, even for 'binding' international law instruments, international law operates at the level of persuasion.[22]

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[18] *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32.

[19] Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples—An Introductory Handbook* (Winnipeg: Indigenous Bar Association, 2011) at 7 [*UNDRIP Handbook*]. See also *Nevsun Resources Ltd. v Araya,* 2020 SCC 5 at paras. 104-116.

[20] For more information, see Organizations for Economic co-operation and Development, *Compendium of International Organisations' Practices: Working Towards More Effective International Instruments* (Paris: OECD Publishing, 2021), c1, Table 1.1.

[21] *UNDRIP Handbook, supra* note 19 at 7.

[22] Kevin Hille, Roger Townshend and Jaclyn McNamara, "Bill C-15 (UNDRIP Act) Commentary" (23 March 2021), *OKT Blog* at 2. See also Gerald Heckman, "International Human Rights Norms and Administrative Law," in in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond Publishing: Toronto, 2017), c16 at 575, "Although many international human rights treaties comprise enforcement mechanisms, they rely primarily on the institution of the signatory states to enforce their guarantees in domestic law."

There can be strategic reasons why the UN might prefer proceeding with a 'non-binding' instrument over a 'binding' one, including the ability to garner greater state buy-in for a set of international norms and this appears to have been a calculus behind the UN Declaration.[23] Thus, it would be wrong to assume that the UN's expectations of states' compliance with 'non-binding' instruments are necessarily lower than with 'binding' instruments. Declarations are a type of international instrument used by the UN when it seeks to weigh in on "matters of major and lasting importance where maximum compliance is expected".[24] In other words, it's what the UN uses when it wants to set out some major, important principles that all states are expected to comply with.[25] The *Universal Declaration of Human Rights*, adopted in 1948, is a prime example and has developed into a leading human rights standard by which UN member states conduct their affairs.[26]

Finally, while declarations are not 'ratified' in the same way that treaties or conventions are (which has been a source of confusion for some Canadian judges[27]), states nonetheless signify their support and commitment to a declaration at the international level through voting in favour of (e.g., 'endorsing') it. In the courts of some countries, a state's endorsement of the Declaration is a solid basis for holding the state accountable to it. For example, the Supreme Court of Belize found this to be sufficient grounds to assess the Belize Government's relationship with the Mayan People, stating, "this Declaration, embodying as it does general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it."[28]

2) The UN Declaration and its contents

The UN Declaration was over twenty years in the making.[29] It was the first UN instrument created in collaboration with the right-holders themselves.[30] Clive Baldwin and Cynthia Morel

[23] See Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the *United Nations Declaration on the Rights of Indigenous Peoples*" (2009) 58:4 ICLQ 957 at 959-60.
[24] *Ibid* at 160.
[25] See also Joffe, *supra* note 16 at 86-92. See also Heckman, *supra* note 22 at 573-74.
[26] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 7.
[27] See *infra* notes 99 to 102.
[28] *Cal v Attorney General (Belize)*, Supreme Court of Belize (Conteh CJ), 18 October 2007, Claim Nos 171 and 172 of 2007 at para 132 (emphasis added). See also Clive Baldwin and Cynthia Morel, "Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation," in Stephen Allen and Alexandra Xanthaki, eds., *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Oxford: Hart Publishing, 2011) at 131-132; and Claire Charters, "The Declaration on the Rights of Indigenous Peoples in New Zealand Courts: A Case of Cautious Optimism" (2019) University of Auckland.
[29] For a short history, see James (Sa'ke'j) Youngblood Henderson, "The Art of Braiding Indigenous Peoples' Inherent Rights into the Law of Nation-States" in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws* (Waterloo, Ontario 2017), at 10 [CIGI, *Braiding*]. See also *UNDRIP Handbook*, *supra* note 19 at 6.

characterize the Declaration as "the end product of many years of discussion represent[ing] a consolidation of law affecting indigenous peoples in a universal framework," thereby giving it "unparalleled legitimacy" as a reference document on Indigenous rights.[31] On the other hand, the UN Declaration has also been critiqued as an imperfect, compromise document, particularly in the extent to which it balances Indigenous peoples' sovereignty interests with those of states.[32] Nonetheless, Brenda Gunn argues that, despite the compromises made in the instrument, "the UN Declaration largely achieves the goals of Indigenous peoples" and "many Indigenous peoples are of the view that the *UN Declaration* represents a positive development for the realization of Indigenous peoples' rights."[33]

The Declaration became part of international law on September 13, 2007, when 144 States voted in favour of it, with four states voting against it (Australia, Canada, New Zealand and the United States), and eleven abstentions. Within four years of the vote, all the States that had originally voted against the UN Declaration and several abstainers had changed their position and endorsed it.[34] One international law scholar describes this as a "global consensus" on the UN Declaration.[35]

The UN Declaration addresses the rights of Indigenous peoples in a comprehensive way. It has 24 clauses in its preamble and 46 articles, many with subsections. It touches on virtually every area that affects the rights of Indigenous peoples, both individual and collective. This ranges from articles on Indigenous peoples' rights to—and governments' obligations in relation to—land, resources, self-government, consultation, social and economic rights, education, employment, health, culture, spirituality, language, non-discrimination, and more. Article 43 states that the rights in the Declaration, "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[36]

It is crucial to appreciate that the UN Declaration "does not create new rights but elaborates on existing ones that are enshrined in various international human rights treaties and instruments, placing them in the context of indigenous peoples' realities."[37] This includes binding

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[30] Paul Oldham & Miriam Anne Frank, "'We the Peoples…' the United Nations Declaration on the Rights of Indigenous Peoples" (2008) 24:2 Anthropology Today 5.
[31] Baldwin and Morel, *supra* note 28 at 122.
[32] On this, see Rosemary Nagy, "Transformative Justice in a Settler Colonial Transition: implementing the UN Declaration on the Rights of Indigenous Peoples in Canada," (2022) 26:2 Int J HR 191 at 199-201; Michael Asch, "UNDRIP, Treaty Federalism, and Self-Determination" (2019) 24:1 Rev Const Stud 1 at 2-4; Ryan Beaton, "Performing Sovereignty in a Time of Ideological Instability: BC's Bill and the Reception of UNDRIP into Canadian Law" (2021) 53:4 UBC L Rev 1017 at 1028; Hayden King, "UNDRIP's fundamental flaw" (2 April 2019), Open Canada blog.
[33] Brenda L Gunn, "Overcoming Obstacles to Implementing the *UN Declaration on the Rights of Indigenous Peoples* in Canada" (2013) 31 Windsor YB Access Just 147 at 149 [Gunn, "Overcoming Obstacles…"].
[34] *Ibid* at 151.
[35] See Siegfried Wiessner, "Re-Enchanting the World: Indigenous Peoples' Rights as Essential Parts of a Holistic Human Rights Regime" (2019) 15: 239 STU Law 253.
[36] UN Declaration, *supra* note 11 at art. 43.
[37] *UNDRIP Handbook*, *supra* note 19 at 13.

conventions that Canada has ratified, such as the *Convention on the Elimination of Racial Discrimination,* the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child,* and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions.* The Declaration incorporates key norms from these conventions, as well as decisions interpreting these conventions by international governance and human rights bodies.[38] Indigenous peoples felt the UN Declaration was necessary because many States were unconvinced the human rights norms in these conventions applied to Indigenous peoples as "peoples."[39] A key purpose of the Declaration is to make this clear. Several reports and scholars also indicate that many of the rights in the UN Declaration are already considered customary international law, which is also held to be binding on states.[40] Thus, the UN Declaration seeks to make it clear that Indigenous peoples are entitled to minimum human rights standards the UN recognizes for individuals and peoples.

Finally, while there are no UN bodies charged with directly enforcing the UN Declaration (because it is 'non-binding'), Baldwin and Morel note that article 42 of the Declaration, requires the UN and its bodies to promote respect for and full application for the Declaration and should be interpreted to mean that "treaty bodies, and any other UN judicial body, should produce decisions consistent with the Declaration."[41] This approach has been embraced by the UN Human Rights Commission.[42]

3) Canada's earlier positions on the UN Declaration

Canada was significantly involved in the drafting of the Declaration for years. However, in 2007, the minority Conservative government of Stephen Harper voted against the Declaration.[43] Kenneth Deer, a Mohawk from Kahnawake and a long-standing member of the Indigenous Peoples' Caucus who was involved in all stages of the development of the Declaration at the UN from 1982 to 2007, describes the extent of this about-face:

> [Canada] had completely changed its approach to the declaration. Canada had sponsored the resolution that created the WGDD [the Working Group on the Draft

[38] See International Law Association, Rights of Indigenous Peoples Committee, *ILA Interim Report on a Commentary on the Declaration on the Rights of Indigenous Peoples*, Sofia Conference (2012), at 44-49 [*ILA Interim Report*].
[39] For example, constitutional talks in the 1980s, Canada asserted that the right to self-determination in ratified human rights covenants did not apply to Indigenous peoples because they were the wrong kind of people: Henderson in CIGI, *Braiding, supra* note 29 at 16.
[40] For analysis and lists of these, see *ILA Interim Report, ibid* at 51-52; Gunn, "Overcoming Obstacles…," *supra* note 33 at 161-162; and Joffe, *supra* note 16 at 90-91.
[41] Baldwin & Morel, *supra* note 28 at 127.
[42] See UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3624/2019 (22 September 2022), CCPR/C/135/D/3624/2019 at para 8.13.
[43] For an analysis of the Harper government's objections to the UN Declaration, see Paul Joffe, "UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation," (2010) 26 Nat'l J. Const. L. 121

> Declaration that lasted from 1995 to 2006]. Especially in the last few years of that body's deliberations, Canadian representatives spent much time and energy promoting the draft declaration. When Paul Martin was Prime Minister, Canada's contributions to the WGDD were positive and in good faith. In October 2006, Martin confirmed that his government "would have unequivocally signed the document leading to the UN declaration on indigenous rights."
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> Many governments were upset at Canada, including those that had changed their position on the declaration because Canada had convinced them to support it. The Canadians had previously persuaded fellow states not to be afraid of the draft declaration. They had convinced other states that the affirmation of Indigenous peoples' collective rights was a central element of the draft declaration, convincing them that self-determination was not a threat, but a reflection of an existing right in the two human rights covenants [the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*].[44]

It is also worth noting that the Harper minority government's opposition to the UN Declaration was not shared by the majority of Parliamentarians at the time. The three other federal parties in Parliament—the Liberals, New Democrat and Block Québécois—all supported the Declaration. On April 8, 2008, Members of Parliament voted 148 to 113 in favour of the following motion: "[t]hat the government endorse the *United Nations Declaration on the Rights of Indigenous Peoples* as adopted by the United Nations General Assembly on 13 September 2007 and that Parliament and Government of Canada fully implement the standards contained therein."[45]

The Harper government would later give the Declaration a qualified endorsement in 2012.[46] Prime Minister Justin Trudeau's Liberal majority government came to power in 2015 promising to implement all 94 Calls to Action of the TRC, including implementing the UN Declaration. After taking power, the government endorsed the UN Declaration without qualification in 2016.[47]

In committing to implement the UN Declaration, the Canadian government intended that this would lead to an evolution in the case law around s 35. At a speech before the United Nations Permanent Forum on Indigenous Issues, Minister of Indigenous and Northern Affairs, Carolyn Bennett, spoke of Canada's intention to adopt and implement the UN Declaration in accordance with the Canadian Constitution, the effect of which would be to "[breathe] life into

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[44] Kenneth Deer, "Reflections on the Development, Adoption and Implementation of the UN Declaration on the Rights of Indigenous Peoples," in *Realizing the UN Declaration*, *supra* note 16, 18 at 26.
[45] On the vote, see *House of Commons Debates,* No. 074 (8 April 2008) at 4656. The text of the motion is reproduced in *House of Commons Debates,* No. 073 (7 April 2008). Cited in Joffe, *supra* note # at 75-76.
[46] See Government of Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples," November 12, 2012 (online).
[47] See Minister of Indigenous and Northern Affairs (Carolyn Bennett), "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10", May 10, 2016.

Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada."[48] An attempt to begin implementing the UN Declaration could then be seen in 2017, when Canada released a policy setting out principles to guide its relationship with Indigenous peoples, incorporating several references to UN Declaration provisions.[49] The Policy emphasized that it was rooted in an approach to s 35 "guided by the UN Declaration… ."[50]

4) The UN Declaration Act and its contents

The *UN Declaration Act* would not be a reality without the efforts of Cree lawyer and NDP MP, Romeo Saganash. Saganash first introduced a UN Declaration implementation Bill in 2014, but it was defeated by the Conservatives. Saganash then introduced a similar bill, Bill C-262, in December 2015.[51] At first, Bill C-262 was not supported by the governing Liberal government and so lived in legislative purgatory for a couple of years, but eventually was supported by the Liberals in 2018. Unfortunately, however, Bill C-262 died on the order paper in the Senate before the 2019 elections, when some Conservative Senators engaged in filibustering to avoid a vote on the Bill.[52] Following the election, the Liberals delivered on their promise to introduce new UN Declaration implementation legislation through Bill C-15. It passed both the House of Commons and Senate, with the *UN Declaration Act* becoming law on June 21, 2021.

The *UN Declaration Act* has a lengthy preamble that, among other things, describes the UN Declaration as a framework for reconciliation, constituting the minimum standards for the survival, dignity and well-being of Indigenous peoples, and recognizes Canada's obligation to implement the UN Declaration and take concrete measures to address the injustices Indigenous peoples have faced. Its substantive provisions seek to do two things:

1) Affirm the UN Declaration as a universal human rights instrument with application in Canadian law; and
2) Commit Canada to implement the Declaration, including developing a national plan, in consultation and cooperation with Indigenous peoples, and to report on its efforts.[53]

Committing to the UN Declaration requires the government of Canada to "take all measures necessary" to ensure that its laws are consistent with the Declaration.[54] The provisions of the

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[48] *Ibid*.
[49] Canada, "Principles Respecting the Government of Canada's Relationship with Indigenous Peoples" (19 July 2017).
[50] *Ibid*.
[51] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples,*1st Sess, 42nd Parl, 64-65-66-67 Elizabeth II, 2015-2016-2017-2018 (as passed by the House of Commons 30 May 2018).
[52] See Marie-Danielle Smith, "Dozens of bills, including on sexual assault and UNDRIP, die in Senate amid Conservative filibuster" *National Post* (20 June 2019). Filibustering is a political tactic where one or more members of a legislative body debate over a proposed piece of legislation so as to delay or prevent a decision being made on the law.
[53] *UN Declaration Act, supra* note 13 at s 4.

UN Declaration Act further stipulate specific content that will need to be in Canada's action plan, including measures to address the injustices, violence, racism and discrimination Indigenous peoples have faced within Canadian society, promote mutual respect and understanding, as well as specific measures relating to monitoring, oversight and recourse or remedy or other accountability measures for the implementation of the Declaration.[55] The action plan must be completed within two years of the *Act* coming into force.[56] The *Act* also includes annual reporting requirements for the government's implementation efforts.[57]

It is important to note that, while the *UN Declaration Act* affirms the UN Declaration's general application in Canadian law, the sections that compel implementation apply only to the federal government; it does not force the provinces to develop their own plans to ensure their laws and policies conform to the UN Declaration. Canada opted to take a decentralized approach to implement the UN Declaration, leaving it to provinces to pass their own implementation legislation when it comes to their core areas of jurisdiction under the *Constitution Act, 1867*, as British Columbia did in 2019.[58] Arguably, Canada could have taken a more centralized approach, dictating the implementation of the Declaration across the country, but it chose not to.[59]

5) How international law can impact Canadian law

There are three ways in which international law principles can affect domestic law: (1) by being incorporated into binding domestic legislation; (2) as binding customary international law; and (3) as an interpretive aid to domestic law. I explain each in turn.

a. Binding domestic legislation

Governments can take specific norms in international instruments and incorporate their provisions into domestic statutes in a way that makes them directly binding substantive norms.[60] This means domestic courts can enforce violations of those substantive norms by punishing offenders and/or issuing remedies to victims under the law. Sometimes, for individuals or companies who violate domestic law, the punishment in the statute will be fines or even imprisonment. But fines and imprisonment are normally not used for government

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[54] *Ibid* at s 5.
[55] *Ibid* at s 6.
[56] *Ibid* at s 6(4).
[57] *Ibid* at s 7.
[58] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44.
[59] For an examination of this issue, see Robert Hamilton, "The United Nations Declaration on the Rights of Indigenous Peoples and the Division of Powers: Considering Federal and Provincial Authority in Implementation" (2021) 53:4 UBC L Rev 1097. See also Kerry Wilkins, "So You Want to Implement UNDRIP…" (2021) 53:4 UBC L Rev 1237 at 1286-1290.
[60] In fact, this is required to making conventions and treaties domestic law: see Gib van Ert, "Dubious Dualism: The Reception of International Law in Canada" (2010) 44:3 Valparaiso ULR 927. See also Heckman, *supra* note 22 at 578.

violations of laws (and government violations of rights are the main type of breach we are concerned about when talking about UNDRIP).[61] Instead, the consequences for government breach of domestic law can range from declarations that the government is violating rights, orders for the government to do, or refrain from doing certain things, and compensation for victims.[62]

Federal and provincial human rights statutes provide an example of the implementation of international law into binding domestic law.[63] Such statutes represent governments' efforts to implement their obligations under international human rights covenants, as well as the *Universal Declaration of Human Rights*. These human rights statutes are drafted not to reproduce word for word the text of the international instruments they are based on, but rather seek to capture the spirit of the principles laid down in the instrument through more precise rules dealing with the specific contexts in which the statute applies.

While word for word incorporation of international commitments is possible and is an approach that Bolivia employed to bring the UN Declaration within its domestic law,[64] this is not the only way,[65] nor perhaps the ideal method, to create domestic law to implement international law commitments. This is because many international instruments, including the UN Declaration, are drafted at the level of general principles, as opposed to spelling out precise rules, to provide greater flexibility in the implementation of the instrument. Brenda Gunn explains that the UN Declaration was drafted this way to accommodate the differences between the various Indigenous peoples around the world and the nation-states in which they reside.[66] She argues that "this flexibility strengthens the *UN Declaration* because it provides for a greater contextual application of the rights in particular national contexts."[67] Thus, implementation of the UN Declaration requires interpreting its norms to apply in specific contexts. Placing the UN Declaration's general principles into a binding law without further particularizing their application could lead to confusion (governments and individuals not knowing what behaviour is caught by the act) and, consequently, courts being unwilling to punish such behaviour or provide remedies to victims where the law is vague. Outside of constitutional provisions, statutes tend to be drafted with a fair degree of precision and particularity.[68]

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[61] See Peter W. Hogg, Patrick J. Monahan and Wade Wright, *Liability of the Crown*, 4th ed (Toronto: Thomson Reuters Canada Inc., 2011) at 46.
[62] See, for example, Hon. Russel W. Zinn, *The Law of Human Rights in Canada – Practice and Procedure* (loose-leaf) (Toronto: Thomson Reuters Canada Inc., 2022) c18 "Remedies".
[63] See, for example, the *Canadian Human Rights Act*, RSC 1985, c H-6.
[64] See National Law 3760 on the Rights of Indigenous Peoples. The wording of the law is an exact copy of the Declaration. The following year, Bolivia's Constitution was amended to contain specific rights for Indigenous Peoples based on the norms in UN Declaration, though not a word for word reproduction.
[65] van Ert, *supra* note 60 at 928-929.
[66] Gunn, "Overcoming Obstacles…," *supra* note 33 at 148-149.
[67] *Ibid* at 149.
[68] See O.P. Motiwal, "The Principles of Legislative Drafting," (1974) 16:1 J Indian L Inst 11.

To date, the federal government has directly incorporated UN Declaration norms into legislation on two occasions, employing the contextual application approach described by Gunn. The first example is the *Indigenous Languages Act*, which is an attempt to respond to the Declaration's articles on Indigenous languages by creating an Office of the Commissioner of Indigenous Languages with a mandate to promote Indigenous languages and support their reclamation, revitalization and maintenance.[69] The second is *An Act respecting First Nations, Inuit and Métis children, youth and families,* which, among other things, partially implements the UN Declaration's recognition of the right to self-government in article 4 by setting out a framework for the exercise of self-government over child and family services.[70] Given Canada's commitment in the *UN Declaration Act* to ensure the laws of Canada reflect the UN Declaration, we can expect to see more legislation incorporating UN Declaration norms in the future.[71] Also, given the comprehensiveness of the UN Declaration, it is likely this will take the form of several new pieces of legislation and amendments to existing laws, not one overarching law.

It is important to appreciate that the *UN Declaration Act* does not implement the UN Declaration's substantive norms directly into Canadian law in the way described in this subsection.[72] Rather, the *Act* is the first step in putting forward a framework guiding the creation of such laws (and amendment of existing laws) in the future.[73] However, that does not mean that the norms in the UN Declaration currently do not have any substantive impact on Canadian law beyond the two statutes mentioned above.[74] There are two further ways that the UN Declaration impacts domestic law.

b. Customary international law as binding domestic common law

As noted earlier, international law lawyers and scholars argue that many of the provisions of the UN Declaration reflect customary international law.[75] Unlike other international norms, rules of customary international law are automatically incorporated into the common law without legislative action unless there is clear statutory direction to the contrary.[76] This means that those provisions of the UN Declaration that reflect customary international law are binding

[69] *Indigenous Languages Act,* SC 2019, c 23, preambular clause 2 and s 5(g).
[70] *An Act respecting First Nations, Inuit and Métis children, youth and families, supra* note 7 at preambular clause 1 and s 8(c).
[71] But if Quebec succeeds in its constitutional challenge to *An Act respecting First Nations, Inuit and Métis children, youth and families*, *ibid*, this possibility may be jeopardized. See discussion *infra* at Part 2, subsection 4.
[72] See Nigel Bankes, "Implementing UNDRIP: An Analysis of British Columbia's Declaration on the Rights of Indigenous Peoples Act" (2021) 53:4 UBC L Rev 971 at 972; Wilkins, *supra* note 59 at 1244; Hille et al., *supra* note 22.
[73] Canada commitment to develop and action plan is enforceable, however. For a discussion on this, see Bankes, *ibid* at 1001-1006.
[74] To see direct incorporation of international norms through legislation as the only way to incorporate international law into Canadian law is an over-simplification": see van Ert, *supra* note 60 at 934; and Heckman, *supra* note 22 at 579-580.
[75] See note 40 above.
[76] *Ibid* at 928 and 930; *R v Hape,* 2007 SCC 26 at paras 35-39; *Nevsun, supra* note 19 at paras 85-95.

on Canada even without legislation.[77] In practice, this means that if an Indigenous person or group can establish before a Canadian court that a provision of the UN Declaration represents a rule of customary international law, and it is not ousted by an express statutory provision, they may proceed to rely on that rule as if it were a common law rule.[78]

The use of customary international law as domestic common law is an emerging area of Canadian law and thus "only a handful of Canadian cases recognize rules of customary international law as decisive in the outcome of disputes."[79] However, in the recent case of *Nevsun*, a majority of the Supreme Court of Canada affirmed that customary international law becomes part of Canadian common law and upheld the possibility of Eritrean workers obtaining damages from a Canadian company for breaches of customary international law.[80] Gib van Ert notes that a major challenge to succeeding in such cases is proving that an international norm has become customary international law.[81] This requires showing that adherence to the norm is a general, widespread state practice and has achieved the status of *opinio juris*, the belief that the norm amounts to a legal obligation.[82] The degree of evidence required to demonstrate the existence of a new customary international law was left open in *Nevsun*.[83] Thus, there could be challenges in proving that a provision in the UN Declaration has become customary international law depending on the degree of evidence required. This remains to be seen. That said, greater use of the UN Declaration by governments (as discussed in the previous section)—and interpretation of it by courts (as discussed next)—spurred by the *UN Declaration Act*, could, in fact, help to solidify the norms within the Declaration as customary international law.[84]

c. Interpretive aid to domestic law

It is a well-established interpretive principle that both binding and non-binding international instruments, as well as customary international law, can be used as interpretive guides for domestic law.[85] There are numerous examples of the SCC using international human rights instruments, including declarations, to interpret human rights protections set out in the *Charter* and human rights codes.[86]

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[77] For more on this, see Gunn, "Overcoming Obstacles…," *supra* note 33 at 164-165

[78] van Ert, *supra* note 60 at 930.

[79] *Ibid* at 931.

[80] *Nevsun*, *supra* note 19. The case involved Eritrean workers to claim damages from a Canadian company for breaches of customary international law, namely forced labour, slavery, cruel, inhuman or degrading, treatment, and crimes against humanity.

[81] van Ert, *supra* note 60 at 931.

[82] Nevsun, *supra* note 19 at paras 77-78.

[83] This is because the customary international laws in issue – prohibitions against crimes against humanity – are well accepted as *jus cogens* or peremptory norms. These are norms which have been "accepted and recognized by the international community of States as a whole … from which no derogation is permitted… ." Judicial notice their status as customary international law could be taken. However, question of the extent to which judicial notice can be taken of other customary international laws was left open: see *ibid* 97-99.

[84] On this, see Baldwin & Morel, *supra* note 28 at 123.

[85] See *R v Hape, supra* note 77 at para 53.

[86] See list of cases Heckman, *supra* note 22 at 581, note 76. See also van Ert, *supra* note 60 at 931.

i. Addressing *Quebec (Attorney General) v. 9147-0732 Québec inc.*

In the 2020 case, *Quebec (Attorney General) v 9147-0732 Québec inc.*, a majority of the SCC sought to provide clarification on the use of international law by courts when interpreting domestic law.[87] The majority offered a framework to be considered when using international law to interpret the *Charter*, however, it likely also applies to other domestic law (other constitutional provisions and statutes).

The majority stressed that primary emphasis in constitutional interpretation ought to be given to the text of the provision in issue and its purposive interpretation.[88] Typically, international law should play "a limited role in providing *support* or *confirmation* for the result reached by way of purposive interpretation."[89] Within this more limited or confirming role, the judges indicated that the weight and persuasiveness of an international law would depend on the nature of the source and its relationship to the Constitution.[90] In this regard, the leading factor in the weight to be given to an international law is whether the government has taken steps to bind itself under the instrument, such as through ratifying a treaty.[91] Such instruments will attract the presumption of conformity.[92] This interpretive principle holds that Canadian domestic law should be presumed (e.g., interpreted) to be consistent with Canada's international human rights obligations, unless there is a clear statutory provision to the contrary.[93] The majority held that other international law instruments, though not benefitting from the presumption, can still serve as persuasive precedents, particularly those instruments that influenced the drafting of the *Charter*.[94]

Before the passing of the *UN Declaration Act,* there were several cases finding that the UN Declaration benefited from the presumption of conformity in the interpretation of Canadian law, including common law,[95] statutes,[96] and the Constitution.[97] However, there were also

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[87] *Quebec (Attorney General) v 9147-0732 Québec inc*., *supra* note 18, per Brown and Rowe JJ for the majority of five judges. Justices Abella, Martin and Karatkastanis urged for a less hierarchical approach to international law. Justice Kasirer thought the case could be resolved without the need delve into a discussion on the application international law to Canadian law.

[88] *Ibid* at paras 9-10. At issue in the case was interpretation of s 12 of the *Charter*, the prohibition on cruel and unusual punishment.

[89] *Ibid* at para 22 (emphasis in original).

[90] *Ibid* at para 30.

[91] *Ibid* at paras 32-33.

[92] *Ibid* at paras 33 and 35.

[93] See *R v Hape, supra* note 77. See also Heckman, *supra* note 22 at 582.

[94] *Quebec (Attorney General) v 9147-0732 Québec inc*., *supra* note 18 at paras 35 and 41.

[95] *Simon v Canada (Attorney General),* 2013 FC 1117 (administrative duty of procedural fairness) rev'd on appeal on other grounds, 2015 FCA 18.

[96] See *Adoption — 1212*, 2012 QCCQ 2873 (child welfare legislation); *Canada (Human Rights Commission,* RSC 1985, c H-6*) v Canada (Attorney General)*, 2012 FC 445 aff'd 2013 FCA 75 (*Canadian Human Rights Act)*; *First Nations Child and Family Caring Society of Canada v Attorney General of Canada,* 2016 CHRT 2 and 2018 CHRT 4

cases where judges refused to apply the UN Declaration based on arguments like (1) it did not apply because it was not 'ratified' by Canada; [98] (2) it is 'non-binding' and merely aspirational;[99] or (3) that counsel had provided insufficient argument on how it ought to apply to Canadian law.[100] Gunn has argued that many of these cases demonstrate "a lack of understanding of the status of the UN Declaration as an international instrument and its reception in Canadian law."[101]

There is a strong argument that the coming into force of the *UN Declaration Act* removes any lingering doubt that the UN Declaration should be applied to Canadian law as an interpretive guide, and benefit from the presumption of conformity. This is clear from the text of the *Act*. The preamble of the *Act* states "the Declaration is affirmed as a source of interpretation of Canadian law," followed immediately by another preambular clause stating that "Canadian courts have stated that [s 35] rights are not frozen and are capable of evolution and growth."[102] The clauses both suggest that the UN Declaration can specifically be used to interpret s 35 of the *Constitution,* as well as other provisions in Canadian law. These clauses aid in understanding s 4(a) of the *Act*, which identifies one of the *Act's* purposes as to "affirm the Declaration as a universal international human rights instrument with application in Canadian law."[103] The preamble clauses suggest the "application in Canadian law" that is affirmed in s 4(a) is the Declaration's application as "a source of interpretation of Canadian law."[104] Regarding a similar provision in British Columbia's act on the Declaration,[105] Nigel Bankes argues, "[t]he affirmation must mean that, to the extent that the Declaration or any part of it is on point (i.e., relevant), the Declaration may be used to aid in the interpretation of statutory provisions. Indeed, in my view, this provision *requires* a court to consider the Declaration to the extent that is relevant to

(*Canadian Human Rights Act); Sheck v Canada (Minister of Justice),* 2019 BCCA 364 (*Extradition Act*, SC 1999, c 18); and *R. v Francis-Simms*, 2017 ONCJ 402 (s 718(2)(e) of the *Criminal Code of Canada,* RSC 1985, c C-46).

[97] See *R. v Powley* (2000), 47 O.R. (3d) 30 (s 35 of the *Constitution Act, 1982); Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 (s 15 of the *Charter*); *Hamilton Health Sciences Corp. v D.H.*, 2015 ONCJ 229 (s 35 of the *Constitution Act, 1982*); and *Catholic Children's Aid Society of Hamilton v H. (G.)*, 2016 ONSC 6287 (s 15 of the *Charter*).

[98] *Mississaugas of Scugog Island First Nation v National Automobile, Aerospace, Transportation and General Workers Union of Canada*, 2007 ONCA 814 (CanLII) 287 D.L.R. (4th) 452, *Adoption - 09201*, 2009 CarswellQue 14792; *Laboucan v The Queen*, 2013 TCC 357; and *Sackaney v The Queen*, 2013 TCC 303.

[99] *Snuneymuxw First Nation v Board of Education – School District #68*, 2014 BCSC 1173; *Sackaney v R.*, *ibid*; and *Manitoba Metis Federation Inc. v The Government of Manitoba et al.*, 2018 MBQB 131.

[100] *Hupacasath First Nation v Canada (Foreign Affairs*), 2013 FC 900; and *Nunatukavut Community Council Inc. v Canada (Attorney General)*, 2015 FC 981.

[101] Gunn, "Legislation and beyond," *supra* note 17 at 1088.

[102] *UN Declaration Act*, supra note 13 at preambular clauses 18, 19 [emphasis added].

[103] *Ibid* at s 4(a) [emphasis added].

[104] Hille et al., *supra* note 22, at 4, point out that the Department of Justice backgrounder on the draft *UN Declaration Act* confirmed that "the Declaration is an important source to interpret provincial and federal law…[and] provincial and federal courts are already using the Declaration in this regard."

[105] *Declaration on the Rights of Indigenous Peoples Act*, *supra* note 58 at s 2(a).

the issue at hand."[106] Finally, s 2(3) also supports this reading, which states "[n]othing in this Act is to be construed as delaying the application of the Declaration in Canadian law."[107] I read this as the drafters seeking to clarify that the future efforts to incorporate the Declaration directly into Canadian law, contemplated in ss 5-6 of the *Act*, ought not to delay or prevent the UN Declaration from continuing to be a source of interpretation of Canadian law.

One scholar has suggested that, despite the *UN Declaration Act*, the UN Declaration does not benefit from the presumption of conformity on account of it being a 'non-binding' international instrument which, under *Quebec (Attorney General) v 9147-0732 Québec inc.,* would only be accorded weak interpretive weight.[108] However, it is wrong to read the majority's decision as disqualifying all 'non-binding' international instruments capable of benefiting from the presumption of conformity. First, this misses the nuances of the meaning of 'binding' in international law when it comes to declarations.[109] As discussed in subsection 1 above, declarations' status as 'non-binding' does not mean states are relieved from expectations of complying with a human rights instrument. States demonstrate their commitment to follow such an instrument through voting for it (or later endorsing it in the case of Canada) and are thereafter expected to take steps to implement it.

Second, the underlying principle supporting the majority's framework in *Quebec* is the need to preserve Canadian sovereignty.[110] The judges felt the presumption of conformity is only appropriate for international law instruments that the Canadian government has in some way committed itself to, otherwise, this would impinge on Canadian sovereignty. I do not read the decision to suggest, however, that only treaties or conventions can attract the presumption and soft-law instruments like declarations are incapable of attracting the presumption. The judges' use of the language of 'binding' in the decision appears to be less about technical distinctions between 'hard' and 'soft' international law and more about whether Canada committed itself to the instrument.[111] Such a distinction would also not align with the principle behind the rule, since there are soft-law instruments, like declarations, that governments commit themselves to through vote and endorsement. The majority also appears to recognize this when it states, "is entirely proper and relevant to consider the *Universal Declaration of Human Rights*… which

[106] Bankes, *supra* note 72 at 998 [italics in original; underline my emphasis]. See also Hille et al., *supra* note 22 at 5, who argued that s 4(a) "appears to confirm that UNDIRP's principles can immediately be used as an interpretive tool."

[107] *UN Declaration Act*, supra note 13 at s 2(3) [emphasis added].

[108] See Wilkins, *supra* note 58 at 1240, who argues that, on account of the case, the UN Declaration, as a 'non-binding' declaration, would be accorded, "less interpretive weight than those [international instruments] with binding effect, especially in construing legislation that precedes them." I address the arguments that *Quebec (Attorney General) v 9147-0732 Québec inc*. results in the UN Declaration having a limited effect on the interpretation of s 35 further at Part 2, subsection 3(a)(i) below.

[109] See Part 1, subsection 1, above.

[110] *Quebec (Attorney General) v 9147-0732 Québec inc*., *supra* note 18 at paras 23 and 38 (emphasis added).

[111] See at *ibid* at para 33 the reference to "*obligations* or *commitments*" (emphasis in original), as well as para 35, "Non-binding sources notably include international instruments to which Canada is *not* a party" (emphasis in original).

Canada voted to adopt and which inspired the *[International Covenant on Civil and Political Rights]*, the *International Covenant on Economic, Social and Cultural Rights*… and related protocols Canada has ratified… ."[112]

For similar reasons, the presumption of conformity should apply to the UN Declaration because the government has now fully endorsed the instrument and it also reflects the norms of the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and other binding instruments that Canada has ratified. It is difficult to see how it would be contrary to Canadian sovereignty to interpret Canadian law as consistent with a declaration that the Canadian government has endorsed, was deeply involved in developing, and is based on rights and obligations that Canada has ratified in other covenants. Because it is informed by conventions that Canada has agreed to, as well as international customary law that it is bound to, the UN Declaration should "be given the highest interpretive weight."[113]

Beyond this, the status of the UN Declaration within Canada has also been elevated with the coming into force of the *UN Declaration Act* which affirms that the UN Declaration "is a source for the interpretation of Canadian law."[114] The Canadian executive government's endorsement of the Declaration and policy commitments to implement it, now paired with Parliament's affirmation of its use as an interpretive aid to Canadian law (as well as an instrument to be further implemented as set out in the *Act),* clearly speaks to Canada's desire to commit itself to the instrument.[115] Canada's commitment is also made explicit in the *Act*: "the Government of Canada is committed to taking effective measures—including legislative, policy and administrative measures—at the national and international level … to achieve the objectives of the Declaration."[116] If we analogize the 'duelist approach' that is needed to incorporate treaties into domestic law, which requires both the executive and legislative branches to 'ratify' an international law instrument (e.g., signal their willingness to be bound),[117] both steps are met in the circumstances. In this regard, the Quebec Court of Appeal, in speaking about Canada's endorsement of the Declaration and the passing of the *UN Declaration Act*, implied that the status of the Declaration in Canada is now more than a 'non-binding' international law and benefits from the presumption of conformity, using it to confirm its interpretation of s 35 as recognizing an Indigenous right to self-govern over child and family services.[118]

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[112] *Ibid* at para 41 (my emphasis).
[113] Hille et al., *supra* note 22 at 5.
[114] *UN Declaration Act, supra* note 13 at preambular clause 18.
[115] It has also been argued that Canada's commitment to the Declaration invokes the honour of the Crown and, consequently, the instrument should apply in Canada because the honour of the Crown requires the Crown to keep its promises: see Gib van Ert, in "Three Good Reasons Why UNDRIP Can't be Law – and One Good Reason Why it Can," (2017) The Advocate 29.
[116] *UN Declaration Act*, *supra* note 13 at preambular paragraph 13.
[117] van Ert, *supra* note 60 at 927-929.
[118] QCCA, *supra* note 7 at paras 511-513.

ii. Other grounds for using the UN Declaration as an interpretive guide

Apart from the presumption of conformity, it should be noted, too, that there are now several federal and provincial laws that reference the relevance of the UN Declaration to the specific law's subject.[119] As a matter of statutory interpretation, the Declaration can and should be used as an interpretive guide for those specific laws. This is because the modern law of statutory interpretation requires that the entire text of a law, including its preamble, as well as its purpose and context, be considered when interpreting it.[120] And concerning those statutes that directly incorporate substantive norms of the UN Declaration, Heckman notes, "[i]n interpreting a statute that expressly implements an international treaty, courts must rely on the provisions of that treaty."[121]

iii. How international law can be used as an interpretive guide

Finally, before turning to how the UN Declaration can specifically impact s 35, it is worthwhile to consider the various ways international law can be used as an interpretive guide. First, note that international human rights instruments, including the UN Declaration, contain several different kinds of provisions that can be drawn upon to make interpretive arguments. These include substantive rights of individuals or peoples, substantive obligations on state parties, requirements of states to provide "effective remedy" to persons or peoples whose substantive rights have been violated, as well as guarantees of institutional and procedural rights.[122] These provisions can be used to inform Indigenous peoples' rights, and government obligations, both substantive and procedural, as well as the remedies that should be provided.

In *Nunatukavut Community Council v Canada (Attorney General)*, Strickland J. suggested that the UN Declaration could only be considered as an interpretive guide in relation to statutes and not s 35.[123] However, the authority upon which the judge relied, *Hupacasath First Nation v Canada (Foreign Affairs)*,[124] did not cite any legal principle in support of this conclusion. With respect, there is no principled distinction between statutes and the Constitution when it comes to using international law as an interpretive guide. International instruments have long been used to interpret the *Charter*, and it would be a troubling double-standard to hold otherwise for s 35.

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[119] At the provincial level, see *The Path to Reconciliation Act*, 2016 C.C.S.M. c. R30.5; the *Child, Youth and Family Services Act*, 2017, SO 2017, c 14, Sch 1, and the *Indigenous Institutes Act*, 2017, SO 2017, c 34, Sch 2. At the federal level, see the *Department for Women and Gender Equality Act*, SC 2018, c 27, s 661; *Poverty Reduction Strategy Act*, SC 2018, c 40; *Impact Assessment Act*, SC 2019, c 28, s 1; *Department of Indigenous Services Act*, SC 2019, c 29, s 336; and *Department of Crown-Indigenous Relations and Northern Affairs Act*, SC 2019, c 29, s 337.
[120] See *Rizzo & Rizzo Shoes Ltd*. (Re), [1998] 1 SCR 27.
[121] Heckman, *supra* note 22 at 583. I see no principled reason why this statement would not apply to declarations, as well as treaty and coventions.
[122] *Ibid* at 574-575.
[123] *Nunatukavut Community Council v Canada (Attorney General), supra* note 100 at para 104.
[124] *Hupacasath First Nation v Canada (Foreign Affairs), supra* note 100 at 51.

Next, there are several different interpretive arguments that can be made using international law. First, international law can be used to inform the contextual approach to statutory and constitutional interpretation, supplying principles and values that ought to inform the analytical approach to an issue.[125] For example, non-discrimination, respect for fundamental human rights and the self-determination of Indigenous peoples are just some of the values and principles that animate the UN Declaration and can be drawn upon. In addition, the UN Declaration also identifies values and principles that should be discarded and not used to inform the law, namely "all doctrines, policies and practices based on or advocating superiority of a peoples" that are "racist, scientifically false, legally invalid, morally condemnable and socially unjust."[126]

Second, international law plays an important role in judicial review of government actions and decision-making. Since the SCC's decision in *Baker v Canada (Minister of Citizenship and Immigration)*, it is well established that government actors must carry out their duties while being mindful of Canada's international law obligations.[127] In that case, an officer making a deportation decision about a mother had to consider Canada's obligations under the *Conventions of the Rights of the Child* as part of his overall conclusion on whether there were humanitarian and compassionate grounds to allow her to stay in Canada. His failure to do so resulted in the decision being overturned. Thus, international law informs the review of substantive exercises of administrative discretion and decision-making under law.[128] In addition, international law can inform review of administrative decision-making for procedural defects.[129] For example, in the case of *Simon v Canada*, article 19 of the UN Declaration was used to find that Canada, under the duty of procedural fairness, owed First Nations a duty to consult concerning changes to social assistance programming that would harm social assistance recipients.[130]

International law can be used to prefer an interpretation of statutory and constitutional provisions that are more consistent with Canada's international obligations.[131] Thus, when faced with a situation of two potential interpretations of domestic law, under the presumption of conformity with international law, the interpretation that is consistent with the UN Declaration should be selected. For Indigenous rights, this rule will be important in the many areas where s 35 has yet to provide a clear answer to an issue—where there are gaps, or where

[125] See *Canada (Human Rights Commission) v Canada (Attorney General)*, *supra* note 96 at para 351. See also Heckman *ibid* at 583-593.
[126] UN Declaration, *supra* note 11, preambular clause 4.
[127] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817.
[128] See *Baker, ibid* at paras 69-71; Heckman, *supra* note 22 at 570, 583, 586-587, 610.
[129] Heckman, *ibid* at 571, 611-612.
[130] *Simon v Canada*, supra note 95 at para 121.
[131] *Canada (Human Rights Commission) v Canada (Attorney General), supra* note 96 at para 351. See also Heckman, *supra* note 22 at 583-593.

there is yet no precedent on a subject. As will be discussed further below, the UN Declaration can fill gaps and supply additional content to the sparsely filled s 35 box.

Even where there is existing law on a subject, there is a role for international law. If a precedent is out of step with international norms that are relevant in Canada, it can be reconsidered. In *Canada (Attorney General) v Bedford* and *Carter v Canada*, the SCC identified when judges can depart from previous constitutional interpretations in favour of new ones.[132] As stated in *Carter*, "stare decisis is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate.'"[133] Scholars have already started to identify specific instances of s 35 interpretation that deviate from the rights set out in the UN Declaration and warrant reconsideration under the *Bedford/Carter* test.[134]

Likewise, with regard to the evolution of common law property and tort rules, which can come into tension with Indigenous rights in the context of land and resource development, the case of *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.,* tells us that common law rules can be recalibrated to conform to evolving constitutional provisions and values.[135] In *Pepsi*, the common law tort of secondary picketing had to give way to concerns about appropriately balancing the *Charter* value of workers' rights to express themselves in the context of a labour dispute. Since constitutional values must now be informed by the UN Declaration, this can reveal the need for further evolution of common law rules.

Part 2 – Why s 35 needs to change and how the UN Declaration can help

1) The problems with s 35

a. Lack of political will by governments to implement proactively

The text of s 35(1) is an open-ended recognition and affirmation of Aboriginal and treaty rights, what some have called an 'empty box,' suggesting uncertainty in its contents.[136] This

[132] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at paras 38-47; and *Carter v Canada (Attorney General),* 2015 SCC 5 at paras 42-48.
[133] *Carter*, *ibid* at para 44.
[134] See Brenda Gunn, "Beyond Van der Peet: Bringing Together International, Indigenous and Constitutional Law," in CIGI, *Weaving, supra* note # at 135-144; Karen Drake, "*R v Pamajewon"* in *Judicial Tales Retold, supra* note # at paras 73-92; and Kent McNeil, "The Inherent Indigenous Right of Self-Government," (4 May 2022) ABlawg (blog).
[135] See *R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 at paras 15-22. See also *Grant v Torstar Corp.*, 2009 SCC 61 at paras 27-87.
[136] See Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (Research Paper for the National Center for First Nations Governance, 11 October 2007); Ardith Walkem and Halie Bruce, eds, *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton, Canada: Theytus Books, 2003); Sarah Morales & Joshua Nichols, "Reconciliation Beyond the Box: The UN Declaration and Plurinational Federalism in Canada" (2018) Centre for International Governance Innovation.

uncertainty stems, in part, from the contested nature of s 35's inclusion in the *Constitution Act, 1982.* The inclusion of a provision recognizing Indigenous peoples' Aboriginal and treaty rights was not originally contemplated by the First Ministers during repatriation negotiations, and its inclusion was largely the product of advocacy by Indigenous peoples. That said, many First Nations were initially leery of the proposed repatriation as they thought it would be used as an excuse by Canada to resile from the promises and commitments made by the British in the Royal Proclamation of 1763 and early treaties.[137] Based on these concerns, a group of First Nations went so far as lobbying the Queen in England and bringing a lawsuit before the Royal Courts of Justice asking it to rule that repatriation was illegal. While holding that Canada could repatriate the Constitution, the panel of the Royal Courts of Justice emphasized that Canada inherited—and was bound by—the responsibilities of the British Crown to Indigenous peoples. Lord Denning stated that the obligations assumed by the Crown in the Royal Proclamation of 1763 formed part of the Canadian constitution, calling the Proclamation "equivalent to an entrenched provision in the Constitution of the colonies in North America."[138]

Following the Royal Courts of Justice's decision, Canada became open to including a provision on the recognition of Aboriginal and treaty rights in the proposed constitution but removed it after receiving complaints from the provinces.[139] In response, some Indigenous groups lobbied hard for its re-inclusion.[140] This led to the re-insertion of s 35, but with the word "existing" placed before "recognized and affirmed" to appease the provinces. In the first case to interpret s 35, Canada argued that "existing" meant Aboriginal rights as they were regulated by the federal and provincial governments in 1982.[141] However, the SCC rejected the argument, finding that "existing aboriginal right" could not be read to incorporate the specific manner in which a right was regulated in 1982, and that this would create a "crazy patchwork" of varying Aboriginal rights across the country. Rather, the phrase "existing aboriginal rights" should be interpreted flexibly to permit their evolution over time.[142]

A takeaway from this history is that the creation of s 35 symbolized more of a political struggle between Indigenous peoples and Canadian governments, rather than based on some grand design, informed by thoughtful study on Indigenous peoples' rights, or negotiations with Indigenous peoples, into the nature and content of the rights s 35 was intended to protect. At the time, Indigenous peoples raised concerns about the uncertain nature of the wording of s 35 and sought for the provision to be made more explicit in terms of the rights and responsibilities it protected. However, Indigenous groups were told this would not be possible within the

[137] *The Queen v The Secretary of State for Foreign and Commonwealth Affairs, ex parte*, [1981] 4 CNLR 86 (Royal Crts of Justice).
[138] *Ibid* at 5.
[139] George Erasmus, "Introduction" in Boyce Richardson, ed., Drum Beat – Anger and Renewal in Indian Country", (Summerhill Press – The Assembly of First Nations: Toronto, 1989, at 24.
[140] See *BC Studies*, No. 212 Winter 2021/22 for a collection telling stories of resistance to repatriation and the inclusion of s 35 in the Constitution entitled, "The Constitution Express: A 40-Year Retrospective."
[141] This was in *R. v Sparrow,* [1990] 1 SCR 1075.
[142] *Ibid* at 1091.

timeframe sought to repatriate the constitution.[143] They were reassured that future constitutional negotiations would 'fill in' the box, and a provision committing the First Ministers to hold a constitutional conference to discuss matters directly affecting Indigenous peoples was added to the proposed constitution.[144] When that meeting failed to produce results, a commitment to two further conferences over five years was added as an amendment to the *Constitution Act* in 1983.[145]

Following entrenchment, therefore, the intent was for the s 35 'box' to be filled through future constitutional talks, but these attempts failed for several reasons.[146] Indigenous peoples involved in those negotiations in the 1980s tell stories of having their positions marginalized and ignored by provincial and federal governments.[147] This culminated in Indigenous groups being entirely shut out of the Meech Lake Accord negotiations.[148] This, in turn, led to the famous filibuster by Cree Manitoba MLA, Elijah Harper, which was the undoing of the Meech Lake.[149] While the negotiations leading to the Charlottetown Accord on Indigenous issues were more productive and would have provided important details on the content and implementation of Aboriginal and treaty rights, particularly the inherent right to self-government,[150] the defeat of the Accord following a national referendum in 1992 signalled how challenging constitutional amendment could be. There has been no political appetite to pursue constitutional amendment negotiations since.

Short of constitutional amendment, there have been several calls for governments to legislate to implement Aboriginal and treaty rights. A 1983 House of Commons *Special Report on Indian Self-Government in Canada* ("Penner Report") suggested that constitutional entrenchment of the right to self-government was the "surest way to achieve permanent and fundamental change," but did not see this as the only route to recognition and implementation of inherent rights.[151] Notably, the Report proposed several legislative measures—to occur irrespective of constitutional entrenchment—to immediately begin implementing self-government in a flexible manner and at a pace suitable to the needs and capacities of each First Nation.[152]

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[143] Erasmus, *supra* note 139 at 25.
[144] See *Constitution Act, 1982*, s 37 (expired after one year of coming into force – April 17, 1983).
[145] See *Constitution Act, 1982*, s 37.1 (repealed on April 18, 1987).
[146] For a history, see Mary Dawson, "From the Backroom to the Front Line: Making Constitutional History or Encounters with the Constitution: Patriation, Meech Lake, and Charlottetown," (2012) 57:4 McGill LJ 955 – 1000.
[147] Erasmus, *supra* note 139 at 21-25. See also National Film Board, *Dancing Around the Table*, Part 1 and Part 2.
[148] Erasmus, *ibid* at 26-28.
[149] Dawson, *supra* note 146 at 988.
[150] See Mary-Ellen Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change," in The Charlottetown Accord, the Referendum, and the Future of Canada, K McRoberts and P Monahan eds. (Toronto: University of Toronto Press, 1993).
[151] Canada, House of Commons, Report of the Special Committee on *Indian Self-Government in Canada*, First Session of the Thirty-second Parliament, 1980-81-82-83 ("Penner Report") at 44.
[152] *Ibid* at 46-50.

Similarly, the 1996 Report of the Royal Commission on Aboriginal Peoples ("RCAP"), acknowledged that a constitutional amendment to recognize the right to self-government within s 35 would bring "greater certainty,"[153] but was not necessary for the recognition of self-government by the courts and governments.[154] The RCAP urged that "significant and wide-ranging change with respect to Aboriginal self-government was possible within the existing constitutional framework."[155] RCAP firmly asserted that the inherent right to self-government was guaranteed in Canadian law based on s 35 of the *Constitution Act, 1982*,[156] and proposed national legislation recognizing the right of Indigenous peoples to organize themselves collectively and govern themselves in core areas of jurisdiction as they saw fit. This would be complemented by a suite of legislation to support the transition to self-government, as well as facilitate broader land claim and treaty negotiations.[157]

Neither proposals in the Penner Report nor RCAP were implemented.[158] There is a lack of legislative frameworks to guide the implementation of s 35 rights, which is in contrast to how Canadian governments respond to *Charter* rights.[159] Governments in Canada have seen little role for themselves to date in proactively implementing Aboriginal and treaty rights in their policies and legislation. While it is true that some implementation has occurred through bipartite and tripartite negotiated agreements between Indigenous groups and governments, these have been critiqued as being 'piecemeal', benefiting only a small percentage of Indigenous peoples and being long and expensive to negotiate.[160] In general, governments in Canada have largely abdicated their responsibilities of implementation to the courts. In a 2020 decision, the SCC seems to confirm this, noting, "defining [s 35] rights is a task that has fallen largely to the courts."[161]

At various times, the SCC has taken pains to point out to Canadian governments their ability to proactively address Aboriginal and treaty rights. In the 1996 *R v Adams* case, the SCC signaled

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[153] *Report of the Royal Commission on Aboriginal Peoples* ("RCAP"), Vol. 5, *Renewal: A Twenty-Year Commitment*, (Ottawa: Supply and Services Canada, 1996) at 114.
[154] *Ibid*, Vol 2, *Restructuring the Relationship* at 191.
[155] *Ibid* at 108.
[156] *Ibid* at 201-203.
[157] For more on this, see Metallic, "Returning to RCAP" in *Renewing Relationships*, *supra* note 6 at 245-251.
[158] *Ibid* at 244.
[159] For example, the federal *Department of Justice Act* requires the Minister of Justice to ensure that proposed legislation conforms with the *Charter:* see Janna Promislow and Naiomi Metallic, "Realizing Administrative Aboriginal Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 3rd ed (Emond Publishing: Toronto, 2017) at 109. For a further discussion on the lack of legislation to protect Indigenous rights, see John Borrows, "Legislation and Indigenous Self-Determination in Canada and the United States" in Patrick Macklem & Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 474.
[160] See Metallic, "Returning to RCAP" in *Renewing Relationships*, *supra* note #; Promislow & Metallic 2017, *supra* note 6 at 115; and Jennifer E. Dalton, "Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claim Agreements?" (2006) 22 WRLSI 29 at 69–70.
[161] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam),* 2020 SCC 4

that governments should be accommodating s 35 rights in legislation when it suggested that an unstructured regulatory regime that failed to accommodate Aboriginal or treaty rights could constitute an unjustified infringement.[162] This was reiterated again in the 1999 *R v Marshall* decision.[163] In the 1996 *R v Côté* case, the SCC also spelled out that its pronouncements on Aboriginal rights are only *minimum* standards and that "governments may choose to go beyond the standard set by s. 35(1)."[164] In several duty to consult cases, the SCC has said it is open to governments to set up regulatory schemes to address the duty to consult.[165] However, Canada has only recently legislated, on a couple of occasions, to accommodate and implement Aboriginal and treaty rights,[166] and, the provinces have been even less active.[167]

b. A narrow approach by the courts

Over the past 30 years, the contents of the 'empty box' have mainly been determined through a series of decisions by the SCC. Since 1990, the Court has decided over 30 decisions interpreting s 35 and this jurisprudence recognizes rights to hunt, fish and gather for food, social and ceremonial purposes,[168] and some rights to engage in commercial trade of fish and some other harvested items.[169] The SCC has also defined the nature and content of Aboriginal title and even declared it to exist for lands of the Tsilhqot'in Nation in the interior of British Columbia.[170] The SCC has also found that governments must consult and accommodate when authorizing or engaging in activities that will impact these rights even if they have not been proven but are credibly asserted.[171] While articulating the test for proving these rights, the Court has also found that governments can infringe such rights, but such infringement must meet a justification test.[172]

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[162] *R. v Adams*, [1996] 3 SCR 101 paras 53-54.
[163] *R. v Marshall*, [1999] 3 SCR 456 at para 64.
[164] *R. v Côté,* [1996] 3 SCR 139 at para 83.
[165] *Haida Nation v British Columbia (Minister of Forests),* [2004] 3 SCR 511 at para 51; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council,* [2010] 2 SCR 650 at paras 55-65*; Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, [2017] 1 SCR 1069 at para 21.
[166] These are the *Indigenous Languages Act*, *supra* note 69, and *An Act respecting First Nations, Inuit and Métis children, youth and families, supra* note 7.
[167] Some provinces have passed laws in relation to promoting Indigenous languages, as well as promoting Indigenous customary adoptions. See Naiomi Metallic, "Governments' efforts on Aboriginal language revitalization: Largely a portrait of inaction," National Observatory on Language Rights, August 30, 2016; and Celeste Cuthbertson, "Statutory Recognition of Indigenous Custom Adoption: Its Role in Strengthening Self-Governance Over Child Welfare," (2019) 28 Dal J Leg Stud 1.
[168] *R. v Van der Peet*, [1996] 2 SCR 507; *R. v Côté*, *supra* note 164; *R. v Adams*, *supra* note 162, *R. v Powley*, [2003] 2 SCR 207; and *R. v Sappier; R. v Gray*, [2006] 2 SCR 686.
[169] *R. v Gladstone*, [1996] 2 SCR 723 and *R. v Marshall*, *supra* note 163.
[170] *Haida, supra* note 165; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388; *Rio Tinto Alcan Inc., supra* note 165; *Clyde River (Hamlet), supra* note 165.
[171] *Delgamuukw v British Columbia,* [1997] 3 SCR 1010*; Tsilhqot'in Nation v British Columbia*, 2014 SCC 44
[172] *R. v Sparrow*, *supra* note 140; *R. v Gladstone*, *supra* note 169; *R. v Badger*, [1996] 1 SCR 771, *Tsilhqot'in Nation v British Columbia*, *ibid.*

Despite leading to positive development for some Indigenous communities, these are the cases the TRC has diagnosed as failing to achieve meaningful reconciliation. Academic scholarship also provides several critiques of the case law. For example, the test for proving Aboriginal rights has been criticized as being unduly narrow and freezing Indigenous rights by casting them as practices "integral and distinctive" to pre-contact cultures.[173] The tests for Aboriginal rights, treaty rights, and Aboriginal title have also been charged with placing a heavy onus of proof on Indigenous claimants, who must prove each right on a case-by-case basis.[174] The SCC has also been conservative in its approach to recognizing commercial Aboriginal rights associated with the harvest of natural resources.[175] Further, the SCC has been reluctant to recognize self-government as a right protected by s 35 and has said that, if it is indeed a s 35 right, the right cannot exist in general and must be linked to a pre-contact practice that was integral and distinctive to a pre-contact culture.[176] Such an approach to self-government has been criticized as far too restrictive.[177] Finally, the case law on the duty to consult and accommodate has been charged with leading to more litigation and uncertainty rather than encouraging meaningful negotiations and resolution,[178] since, while seeming to provide some procedural protections to Indigenous groups, the case law ultimately provides Canadian governments with the final say over development and other decisions.[179] As Cree scholar, Darcy Lindberg, has put it, "The duty to consult has been ineffective in fostering relationships based upon fairness and trust between Indigenous nations and the Crown."[180]

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[173] See John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8:2 *Constitutional Forum Constitutionelle* 27; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 *McGill Law Journal* 993; Kenji Tokawa, "Van der Peet Turns 20: Revisiting the Rights Equation and Building a New Test for Aboriginal Rights" (2016) 49 *University of British Columbia Law Review* 817 – 833; and Brenda Gunn, "Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law in CIGI, *Weaving, supra* note 134 at 135-144.

[174] On this, see Hoehn, "Back to the Future" *supra* note 6.

[175] Ian Keay and Cherie Metcals, "Aboriginal Rights, Customary Law and the Economics of Renewable Resource Exploitation," (2004) 30 Canadian Public Policy 1.

[176] *R. v Pamajewon*, [1996] 2 SCR 821.

[177] See Bradford Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v Pamajewon*" (1997), 42 *McGill Law Journal* 1011; Vicaire, "Two Roads Diverged" *supra* note 6; Jennifer Dalton, "Exceptions, Excuses and Norms: Aboriginal Self-Determination in Canada: Protections Afforded by the Judiciary and Government" (2006) 21:1 CJLS 11 at 19-20; McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments", *supra* 136, at 13-14; and John Borrows, "Aboriginal and Treaty Rights and Violence Against Women" (2013) 50 *Osgoode Hall Law Journal* 699 – 736.

[178] See Michael J. Bryant, "The State of the Crown-Aboriginal Fiduciary Relationship: The Case for an Aboriginal Veto" in Patrick Macklem & Douglas Sanderson's, *From Recognition to Reconciliation* (Toronto: University of Toronto Press, 2016) at ch 9; Hamilton and Nichols, "Reconciliation and the Straightjacket…", *supra* note 6 at 240-242.

[179] See Joshua Nichols and Robert Hamilton, ""In Search of Honourable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution," (2020) 70:3 U of Toronto LJ 341"; and Robert Hamilton, "Asserted vs. Established Rights and the Promise of UNDRIP" in UNDRIP Implementation – More Reflections on the Braiding of International, Domestic and Indigenous Law – Special Report (Waterloo: CIGI Press, 201) at 103-109.

[180] Darcy Lindberg, "Judicial Expertise, UNDRIP & the Renewed Application of Indigenous Laws," in *The UN Declaration on the Rights of Indigenous Peoples in Canada: Lessons from B.C.*, A Special Report of the Yellowhead Institute, December 2020, 21 at 23.

2) Factors contributing to these problems

While there are surely more factors that contribute to the problems I have identified above, there are two factors which I believe the UN Declaration, in particular, can help address. I identify these first and then explain how the Declaration helps in subsection 3.

a. Lack of specificity in s 35

One of the sources of the problems with s 35 has been its open-ended nature with no details on what constitutes Aboriginal rights. Judges have had to identify principles and develop legal tests on Aboriginal and treaty rights without much to draw on. The SCC has sometimes looked to precedents from other former British colonies[181] (which are often subject to critique from Aboriginal law scholars in their home jurisdiction[182]) as well as scholarship, but often the test and standards crafted suggest a fair degree of judicial improvisation. One issue with this is that judicial imagination can be constrained by judges' Euro-Canadian worldview, as discussed next. Granted, the SCC has counselled repeatedly that the Aboriginal perspective must be considered alongside the common law perspective in deciding s 35 cases,[183] Karen Drake argues that, given rules of evidence and other challenges, this rarely happens in practice.[184] In general, s 35 has mainly resulted in successful findings of hunting, fishing and some gathering rights, with not much beyond that.[185] As noted earlier, the recognition of economic rights has been limited, as has the recognition of Indigenous self-government jurisdiction and laws. The jurisprudence has also been criticized for privileging the cultural rights of Indigenous men over women.[186] Socio-economic rights, such as rights to housing, drinking water and other essential services have not been seen as Aboriginal or treaty rights.

Section 35 also does not reference any particular government obligations in relation to s 35 rights. Proposed amendments in the Charlottetown Accord would have provided some clarity in this regard.[187] Instead, the identification of governments' obligations vis-à-vis these rights again

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[181] For example, the SCC relies on *Johnson v Mc'Intosh*, 8 Wheat. 543 (US 1823) in both *Calder v British Columbia (Attorney General),* [1973] SCR 313 and *Guerin v The Queen*, [1984] 2 SCR 335*;* and *Mabo v Queensland [No. 2]* (1992), 175 C.L.R. 1 in *Van der Peet, supra* note 168 at paras 38-39.

[182] See, for example, Matthew L.M. Fletcher, The Iron Cold of the Marshall Trilogy, (2006) 82 N.D. L. Rev 627; Lisa Strelein, *Compromised Jurisprudence: Native Title Cases Since Mabo* (Canberra: Aboriginal Studies Press, 2009).

[183] See, for example, *Van der Peet*, *supra* note 168 at paras 49-50; *Delgamuukw*, *supra* note 171 at paras 147-149.

[184] See Karen Drake, "Indigenous Oral Traditions in Court: Hearsay or Foreign Law?" in Karen Drake & Brenda L Gunn, *Renewing Relationships, supra* note 6, c11 at 281 to 308. See also Brenda L. Gunn, "The Federal Court Aboriginal Bar Liaison Committee as a Mode of Reconciliation: Weaving Together Indigenous Law, Common Law, and International Human Rights Law," in *Renewing Relationships, ibid,* c12 309-336, at 310-317.

[185] There have been a handful of lower court cases that have also recognized customary adoption and marriage, as well as the right to use tobacco for particular Indigenous communities: see *CED Aboriginal Law II. 5.(a).(ii).C.4*.

[186] See Borrows, "Aboriginal and Treaty Rights and Violence Against Women," *supra* note 177.

[187] See Coordinating Committee, *Consensus Report of the Constitution: Final Text,* Doc CP22-45/1992E (Charlottetown: 28 August 1992), art 45 (federal and provincial duty to negotiate in good faith on implementation of self-government, lands and resources and fiscal agreements), art 48 (duty to participate in good faith in treaty

largely fell to courts. In developing s 35 law, the SCC has mostly employed two overarching principles, the fiduciary duty and the honour of the Crown, from which it has drawn standards and rules to assess government conduct. However, the contours and content of these doctrines have often been uncertain. While suggesting a broad fiduciary relationship between the Crown and Indigenous peoples early on in *Sparrow*, the SCC has more recently taken a fairly restrained approach to the fiduciary duty concept seeming to prefer the honour of the Crown as the governing standard of government conduct.[188] Further, while the SCC has said the honour of the Crown informs the entire Crown-Indigenous relationship, it has also said that the standard only gives rise to specific obligations in certain instances, and when and how the honour of the Crown manifests beyond these instances is still not entirely clear.[189] These overarching standards have been criticized as being too narrow, but at the same time opaque in their application, as well as showing too much deference to the Crown.[190]

b. Interpretations of s 35 through a Eurocentric lens

Another overarching explanation for the narrow approach to s 35 taken by the judiciary is the (largely non-Indigenous) Canadian judiciary's Euro-Canadian worldview. I am not suggesting that judges in Canada have been actively hostile to Aboriginal rights (though there have been some instances of this[191]). Rather, I am suggesting that bias happens at a subconscious or implicit level. Specifically, Canadian jurists' approach to s 35 is often steeped in a colonial mentality and liberalism. A colonial mentality is the internalized belief in the ethnic or cultural inferiority of a people as a result of colonization. Much of the literature focuses on this as an internalized attitude of colonized people,[192] however, it has also been written about as a settler mindset.[193] Below I explain two manifestations of this worldview that have affected the existing s 35 jurisprudence.

i. Absolute Crown sovereignty through the doctrine of discovery

From the outset of Canada's modern Aboriginal rights jurisprudence, the SCC has assumed that the British Crown and Canada, as its successor, gained absolute dominion over the lands that now comprise Canada and over Indigenous peoples through the doctrine of discovery, as the

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negotiations), and art 50 (commitment to provide Aboriginal governments with fiscal or other resources to assist in governing their affairs).

[188] See *Sparrow*, *supra* note 140 at 1108; *Manitoba Metis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14 at 46-95.

[189] *Manitoba Métis Federation, ibid*.

[190] See Senwung Luk, "Not So Many Hats: The Crown's Fiduciary Obligations to Aboriginal Communities since Guerin" (2013) 76:1 Sask L Rev 1; Hamilton & Nichols, "Reconciliation and the Straightjacket," *supra* note 6.

[191] For example, Robin Ridington, "Fieldwork in Courtroom 53: A witness to *Delgamuukw v B.C.*" (1992) 95 BC Studies 12, about the trial judge in Delgamuukw.

[192] For example, see Warwick Anderson, Deborah Jenson and Richard Charles Keller, *Unconscious Dominions: Psychoanalysis, Colonial Trauma, and Global Sovereignties* (Durham, NC: Duke University Press, 2011).

[193] For Taiaiake Alfred, "For Indigenous nations to live, colonial mentalities must die," in *Policy Options*, October 13, 2017.

TRC has pointed out.[194] This has its roots in the 1973 *Calder* decision, the first decision to recognize the existence of Aboriginal title (though the SCC was split on whether it had been extinguished).[195] Drawing on the US Supreme Court's 1823 decision in *Johnson v McIntosh*,[196] Hall J. affirmed that Aboriginal rights survived discovery by Europeans, but the fact of discovery meant the 'discoverer' (Britain) could limit those rights in important ways, including by extinguishing such rights.[197] This approach to Aboriginal rights and title was confirmed by a majority of the SCC in *Guerin v The Queen* in 1984.[198] Since this time, absolute Crown sovereignty has been the underpinning of s 35 jurisprudence without the SCC ever questioning how a doctrine based on racial superiority of Europeans over Indigenous peoples can form the backbone of Canadian Aboriginal law.[199] This can be seen in the first case to interpret s 35, *R v Sparrow*, where, while setting out the framework for justified infringement of Aboriginal rights, the SCC stated "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown; see *Johnson v. M'Intosh*… ."[200]

Often, references to the doctrine of discovery and absolute Crown sovereignty are not explicit in the cases,[201] but, as suggested by the TRC, their presence can be detected in the tests and onuses applied by the SCC. For example, Felix Hoehn has attempted to identify the many ways in which the doctrine of discovery has affected the development of Aboriginal title under s 35, including that the Indigenous interest in land is reduced from sovereignty to a property interest, the Crown assumes the power to justifiably infringe upon Aboriginal title in the general

[194] TRC, *supra* note 1 at 202-207.
[195] *Calder, supra* note 181.
[196] *Johnson v Mc'Intosh*, *supra* note 181.
[197] Note that in the US, the USSC's position in *Johnson* would be attenuated significantly in *Worcester v Georgia,* 6 Pet. 515 (US 1832), where C.J. Marshall clarified that tribal sovereignty was nonetheless largely left in tact despite the doctrine of discovery. This has led to significant greater recognition of tribal sovereignty in the US. On this, see Vicaire, *supra* note 6. Curiously, while *Worcester* forms part of what is recognized as a trilogy in the US, our SCC has largely only focused on *Johnson*. In an early case on treaty interpretation, *R v Sioui*, [1990] S.C.J. No. 48, the Court cites *Worcester* to support the assertion that "Indian nations were regarded in their relations with the European nations … as independent nations," in support of finding a valid treaty. However, the recognizing of Indigenous nations as possessing a robust power of self-government akin to that found in *Worcester*, has yet to be embraced by the SCC.
[198] *Guerin v The Queen*, *supra* note 181.
[199] In *Tsilqot'in*, *supra* note 171 at para 69, the Court stated that the doctrine of *terra nullius* never existed in Canada. However, John Borrows points out how this statement entirely overlooks that doctrine's connection to the doctrine of discovery, which remains application to s 35 jurisprudence and is reflected within the decision itself: see John Borrows, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) 48:3 UBC L Rev 701.
[200] *R. v Sparrow*, *supra* note 140. For academic discussion of the problem with SCC's approach in *Sparrow*, see Hamilton and Nichols, "Reconciliation and the Straitjacket…," *supra* note 6.
[201] Note, however, that strong reliance was expressly placed on Parliamentary sovereignty as recently as 2018 in *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 to deny a duty to consult in the context of legislation. For a dissection of the reasons and deep systemic problems underlying them, see Joshua Nichols and Robert Hamilton, "In Search of Honourable Crowns and Legitimate Constitutions: Mikisew Cree First Nation v Canada and the Colonial Constitution," (2020) 70:3 U of Toronto LJ 341.

public interest, and the burden of proof is placed on Indigenous peoples in litigation.[202] The doctrine also underlies the SCC's acceptance of pre-1982 Crown unilateral extinguishment of s 35 rights, when no other constitutional rights are similarly subject to extinguishment.[203] Scholars have identified many other ways the doctrine of discovery shapes s 35 case law.[204]

ii. Liberalism and Aboriginal rights as 'special rights'

The other main feature of the Euro-Canadian worldview that has influenced s 35 jurisprudence is liberalism, the political and social philosophy that prioritizes individual rights and civil liberties.[205] Those who strongly espouse liberal values may perceive Aboriginal rights, which emphasize collective rights and responsibilities, as in conflict with individual rights, and therefore to be approached cautiously and less robustly than individual rights.[206] Such an approach can be seen in the SCC's explanation of the purpose and nature of Aboriginal rights in its 1996 *Van der Peet* case. In this case, Lamer CJ distinguished Aboriginal rights from other rights in the *Charter*, suggesting they are different in kind because they are assured only to Aboriginal people:

> In the liberal enlightenment view, reflected in the American Bill of Rights and, more indirectly, in the *Charter*, rights are held by all people in society because each person is entitled to dignity and respect. Rights are general and universal; they are the way in which the "inherent dignity" of each individual in society is respected…
>
> Aboriginal rights cannot, however, be defined on the basis of the philosophical precepts of the liberal enlightenment. Although equal in importance and significance to the rights enshrined in the Charter, aboriginal rights must be viewed differently from

[202] Hoehn, "Back to the Future" *supra* note 6; and Hoehn, "*Tsilhqot'in Nation v British Columbia* Judgment*"* in *Judicial Tales Retold, supra* note 9 at paras 191-212.
[203] For a detailed discusses of the problems with this doctrine Paul Joffe and Mary Ellen Turpel, *Extinguishment and the rights of Aboriginal peoples: problems and alternatives* (Ottawa: Royal Commission on Aboriginal Peoples, 1995).
[204] See Hamilton and Nichols, "Reconciliation and the Straightjacket," *supra* note 6 discussing how colonialism underlies the SCC's approach to Aboriginal rights, particularly in regard to justified infringement and the duty to consult. See also Borrows, *Canada's Colonial Constitution, supra* note 6, discussing how colonialism underlies the SCC's approach to provincial governments powers to infringe Aboriginal rights.
[205] For an excellent discussion on this, see Drake, "*R v Pamajewon Judgment*,*" supra* note 134 at 79-81.
[206] This tension should not be overstated. It is misleading and unhelpful to assume the protection of individual rights is necessarily in conflict with the protection of Indigenous peoples' collective rights, including their right to self-govern. As highlighted in Chapter 2 of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls, Indigenous legal orders have always had concepts of both individual and collective rights,roles and responsibilities. The Report emphasizes that the revitalization of Indigenous legal orders informed by these concepts will go a long way towards rebuilding and strengthening conditions of peace, safety, dignity and justice in Indigenous communities. See Canada, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a, c2 (Ottawa, 2019) (Chief Commissioner: Marion Buller) at 129, 139-180.

> Charter rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are aboriginal. … [207]

Lamer CJ uses this distinction to emphasize the '*Aboriginal*' nature of Aboriginal rights which leads him to ground them in pre-contact practices, customs and traditions,[208] which many have argued problematically essentializes Indigenous cultures.[209] He further uses this distinction to conclude that Aboriginal rights cannot be general or universal in nature, but rather have to be proven on a case-by-case basis by each specific Indigenous group claiming a right:

> Courts considering a claim to the existence of an aboriginal right must focus specifically on the practices, customs and traditions of the particular aboriginal group claiming the right. … the existence of an aboriginal right will depend entirely on the practices, customs and traditions of the particular aboriginal community claiming the right. As has already been suggested, aboriginal rights are constitutional rights, but that does not negate the central fact that the interests aboriginal rights are intended to protect relate to the specific history of the group claiming the right. Aboriginal rights are not general and universal; their scope and content must be determined on a case-by-case basis. The fact that one group of aboriginal people has an aboriginal right to do a particular thing will not be, without something more, sufficient to demonstrate that another aboriginal community has the same aboriginal right. The existence of the right will be specific to each aboriginal community.[210]

The approach of the SCC to s 35 rights differs significantly from its approach to *Charter* rights. Charter rights are assumed to exist, and judicial interpretation then focuses on whether the rights have been engaged, the scope of those rights, and whether the government action in question has infringed the right. By contrast, the existence of Aboriginal rights is not assumed and must be proven on a case-by-case basis.[211] Paired with the high cost of litigation, as well as dispossession from traditional territory and identity by colonialism, the case-by-case requirement has rendered it extremely challenging for different groups of Indigenous peoples to prove and practice Aboriginal rights.[212] This has also led to governments taking the adversarial position that Aboriginal rights do not exist unless and until they are proven in court

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[207] *Van der Peet, supra* note 168 at paras 18-19 [emphasis in original].
[208] *Ibid* at paras 19-20 and 27-32.
[209] See John Borrows, "(Ab)Originalism and Canada's Constitution," (2012), 58 SCLR (2d) 351; Constance MacIntosh, "From Judging Culture to Taxing "Indians": Tracing the Legal Discourse of the "Indian Mode of Life," (2009) 47 Osgoode LJ 399; and Brian Slattery, "The Generative Structure of Aboriginal Rights" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation* (Toronto: University of Toronto Press, 2016) 100; and Walers, "Promise and Paradox…," *supra* note 6.
[210] *Van der Peet, supra* note 168 at para 69 [double underline mine; single underline is my emphasis].
[211] For more on this, see Promislow & Metallic 2017, *supra* note 159 at 109.
[212] See Naiomi Metallic, "Searching for 'Superchief' and Other Fictional Indians: Case Comment on *R v Bernard*, 2017 NBCA 48" (2020) 57:1 OHLJ 230; and Karen Drake, "*R v Hirsekorn*: Are Métis Rights a Constitutional Myth?" (2013) 91:1 Can Bar Rev 149.

or set out in a statute.[213] Even where one community within an Indigenous nation succeeds in proving a right in court, some governments have maintained, based on the case-by-case requirement, that other communities within the same nation would nonetheless have to prove their own independent right.[214] This has seriously undermined timely implementation and respect of Aboriginal rights.

I now turn to examine how provisions within the UN Declaration and *UN Declaration Act* can be used to advance new interpretations of s 35 in these problem areas.

3) Breathing new life into s 35

a. Preliminary issues

Before diving into this discussion, however, there are a couple of preliminary issues lingering from the discussion in Part 1 on the impact the UN Declaration can have on Canadian law. Accepting that the UN Declaration benefits from the presumption of conformity as analyzed in Part 1, these are (1) how the limited 'supporting and confirming role' for international law, discussed in *Quebec (Attorney General) v 9147-0732 Québec inc.* applies to using the UN Declaration to interpret s 35, and 2) whether the UN Declaration's application as an interpretive guide is limited to actions of Canada only, or if it applies to provinces as well.

i. <u>UN Declaration an exception to the limited supportive and confirming role of international law</u>

The majority in *Quebec (Attorney General) v 9147-0732 Québec inc.* said that international law instruments (even those that benefit from the presumption of conformity) should play a more limited 'supporting and confirming role' to a textual and purposive interpretation of a provision. In the circumstances, this would call for giving primacy to the text of s 35 and a purposive interpretation of it. However, this is challenging, given the open-ended nature of s 35, the fact that its creation was marked more by political struggle than any grand design, and the problematic nature of the 'purpose' given to s 35 in *Van der Peet* on account of Lamer CJ's preoccupation with the *'Aboriginal'* in Aboriginal rights, as discussed above. However, there may be exceptions to this general guidance. The judges were not categorical in setting this parameter, using the qualifier 'typically' when laying it out.[215] The constitutional provision in

[213] On this, see Kerry Wilkins, "Reasoning with the Elephant: The Crown, Its Counsel and Aboriginal Law in Canada" (2016) 13 Indigenous LJ 27 at 46-49. Wilkins, a former federal Department of Justice lawyer, explains that without recognition of 'Indigenous peoples' jurisdiction in legislation, many of his colleagues are reticent to accept that s 35 provides a sufficiently firm legal foundation for inherent rights, and counsel their client against executive initiatives supporting the exercise of greater Indigenous control unless clearly authorized by a statute.
[214] For a discussion on reluctance by courts to see Indigenous nations as rightsholders see, for example, Metallic, "Searching for 'Superchief,'" *supra* note 212.
[215] *Quebec (Attorney General) v 9147-0732 Québec inc*., *supra* note 18 at para 22.

issue in *Quebec* was s 12 of the *Charter*, which has a very different origin and history than s 35. There is a strong argument that the text and history of s 35 warrant a different approach.

While the Supreme Court has identified several purposes for s 35, the two most prominent purposes were recently restated in *Desautel* as "to recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them."[216] At its core, this is about recognizing and reconciling Indigenous peoples' inherent rights with *de facto* Crown sovereignty. But this purpose statement does not identify which inherent rights are to be reconciled, or government obligations in relation to them. As the previous subsection attempted to make clear, the approach to identifying which inherent rights are worthy of constitutional protections chosen by Lamer CJ in *Van der Peet* is highly problematic. An alternative approach is needed and the use of international law, particularly the UN Declaration is more appropriately suited to this task. As argued by Paul Joffe,

> It is appropriate to draw on international human rights concepts and standards when interpreting and implementing the Aboriginal and treaty rights of Indigenous peoples in Canada. As stated by Chief Justice Beverley McLachlin of the Supreme Court of Canada, emerging international norms guide both governments and the courts, and cannot be ignored:
>
> > Aboriginal rights from the beginning have been shaped by international concepts… More recently, emerging internal norms have guided governments and courts grappling with aboriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past. Whether we like it or not, aboriginal rights are an international matter.[217]

As the comments of retired Chief Justice McLachlin suggest, perhaps more than with respect to any other Canadian constitutional provisions, there is a need to resort to the evolving concepts of Indigenous peoples' rights in international law in interpreting Aboriginal rights domestically. In this regard, the UN Declaration ought to be seen as the pinnacle international document informing the interpretation of Indigenous peoples' rights in Canada. This is clear from the text of the Declaration, which states it responds to the "urgent need to respect and promote the inherent rights of indigenous peoples," and is focused on elaborating minimum international human rights standards for the "survival, dignity and well-being of the indigenous peoples of the world."[218] The Declaration has been heralded as a reference document on the nature and content of Indigenous rights of "unparalleled legitimacy."[219] It was also created through

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[216] *R. v Desautel,* 2021 SCC 17 at para 22.
[217] Joffe, *supra* note 16 at 72 quoting Beverley McLachlin, "Aboriginal Rights: International Perspectives," (Speech delivered at the Order of Canada Luncheon, Canadian Club of Vancouver, 8 Feb. 2002) [emphasis added].
[218] UN Declaration, *supra* note 11 at art 43.
[219] Baldwin and Morel, *supra* note 28 at 122.

extensive collaboration between Indigenous peoples and state actors, with Canada playing a leading, long-time role in the drafting of the instrument. Thus, the history of s 35, and the history and purpose of the UN Declaration, both provide strong reasons to argue that the case of s 35 and Indigenous peoples' rights should be an exception to the more limited approach suggested in *Quebec (Attorney General) v 9147-0732 Québec inc.*

ii. UN Declaration as an interpretive guide applies to all law – both federal and provincial

On the second question of whether the UN Declaration, as an interpretive guide for s 35, is limited to actions or laws of Canada only, the answer is no. The presumption of conformity is a judge-made interpretive principle that applies to all laws; it does not distinguish between provincial and federal laws. There have already been cases where under the presumption of conformity, the UN Declaration has been used to interpret provincial laws and policies.[220] This is also supported by the different terminology used in the *UN Declaration Act*: "laws of Canada" is used when speaking of Canada's obligation under s 5 to ensure the federal government's laws are consistent with the UN Declaration, whereas "Canadian law" is used in the preambular clause and provisions referencing the Declaration as an interpretive guide.[221] The provisions on the Declaration's application to "Canadian law" as an interpretive guide merely affirm what is already the state of the law. It is therefore not a federal attempt to impose the Declaration on provinces, as some have argued.[222] Clearly, the federal government did not intend to do that, as the implementation provisions are squarely aimed at the actions of the federal government.[223]

Even if the *UN Declaration Act* was aimed at imposing (rather than affirming) the UN Declaration as an interpretive guide on the provinces, this would be permissible given the nature of Aboriginal law doctrine. The SCC has confirmed on multiple occasions that Aboriginal law represents "a distinct species of federal common law rather than a simple subset of the common or civil law or property law operating within the province."[224] In *Desautel*, a majority of the Court noted that "[s] 35 of the *Constitution Act, 1982*, operates uniformly across Canada. … This Court has explicitly rejected a province-by-province approach to Aboriginal title and other Aboriginal rights which would "create an awkward patchwork of constitutional protection for aboriginal rights across the nation…""[225] Thus, it would be within federal jurisdiction, under s 91(24) of the *Constitution Act, 1867*, to legislate that the UN Declaration applies as an interpretive guide in relation to Aboriginal law. But, as I argue above, this is simply a function of the application of international law to domestic law and the *UN Declaration Act* does nothing other than affirm this.

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[220] See, for example, *Catholic Children's Aid Society of Hamilton v H. (G.)*, *supra* note 97 at para 66 and *Inglis v British Columbia (Minister of Public Safety)*, *supra* note 97 at paras 363-64.
[221] *UN Declaration Act, supra* note 13 at s 5 versus preambular clause 18 and ss 2(3) and 4(a).
[222] See Bankes, *supra* note 72 at 989.
[223] See *UN Declaration Act, supra* note 13 at ss 5-6. See also Hamilton, "The United Nations Declaration on the Rights of Indigenous Peoples and the Division of Powers…," *supra* note 59.
[224] *R. v Côté*, *supra* note 164 at para 49. See also *Roberts v Canada,* [1989] 1 SCR 322.
[225] *Desautel, supra* note 216 at para 64.

Having now addressed these preliminary issues, I turn to some of the ways the UN Declaration can breathe new life into s 35.

b. Providing alternatives to Eurocentric ways of thinking about s 35

i. Challenging the doctrine of discovery

As discussed in subsection 2(b)(i) above, the doctrine of discovery and the notion of absolute Crown sovereignty underlie existing s 35 jurisprudence and affect the legal tests for Aboriginal and treaty rights that have been developed. The UN Declaration and the *UN Declaration Act* are powerful tools to deal with this problem.[226] First, as discussed below, specific provisions within the UN Declaration can be used to help in the evolution of specific existing doctrines. Second, the values and principles expressed in the UN Declaration and the *UN Declaration Act* provide a persuasive context to challenge mainstream thinking on the doctrine of discovery and Crown sovereignty. In this regard, numerous provisions within the UN Declaration, including Indigenous peoples' rights to their lands and resources[227] and right to self-determination, directly challenge the assumptions of absolute Crown sovereignty.[228] A clause in the preamble of the UN Declaration also specifically says: "all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust." A preamble clause in the *UN Declaration Act* contains similar language and further names the doctrines of discovery and terra nullius as racist doctrines.[229]

These statements can be used to argue that any existing legal doctrines that incorporate the doctrine of discovery are illegitimate and must be revisited. They provide important context for why certain precedents tied to the doctrine of discovery should be overturned under the

[226] These are not the only tools, however. Scholars have long argued that the earlier relationship between the British and Indigenous peoples, evidenced in the Royal Proclamation, Treaty of Niagara and other earlier treaties, enshrine self-government as a part of our Constitutional architecture, and can be basis for a new relationship marked by treaty federalism and shared sovereignty. For more on this, see Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) McGill LJ 308; James Sákéj Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 Sask L Rev 241; Borrows, "Canada's Colonial Constitution," *supra* note 6; Brian Slattery, "The Aboriginal Constitution" (2015) 67 SCLR (3d) 319.

[227] See, for example, article 25 (right to maintain distinctive spiritual relationship with traditional owned or otherwise occupied and used lands, waters and resources) and article 26 (right to land, territories and resources traditionally owned, occupied or otherwise used and acquired, the right to own, use, develop and control such lands).

[228] These are unpacked further below at subsection 3(c)(i).

[229] *UN Declaration Act, supra* note 13, preambular clause 9: "Whereas all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and terra nullius, are racist, scientifically false, legally invalid, morally condemnable and socially unjust" (emphasis added).

Bedford/Carter test. Challenging the doctrine of discovery as the basis of Canadian sovereignty does not equate to questioning Canada's existence as a country. This fear should not stop governments or courts from meaningfully addressing this problem.[230] Although the majority of its jurisprudence to date has leaned too heavily on preserving absolute Crown sovereignty, in its first decision on Aboriginal rights, the SCC affirmed a quote stating that s 35 "renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."[231] Further, the RCAP report and various scholars have outlined credible proposals for more just frameworks that can be harnessed to inform a more equitable sharing of power and lands between the Crown and Indigenous peoples in Canada.[232] The rights and obligations outlined in the UN Declaration are also such a framework, which the TRC as well as the preamble of the *UN Declaration Act* assert is key to achieving meaningful reconciliation.[233]

ii. Challenging the liberal notion of Indigenous rights as 'special rights'

The UN Declaration and *UN Declaration Act* also provide strong grounds to challenge the idea that Aboriginal rights are 'special' or exceptional rights, exercisable by specific Aboriginal groups only after lengthy court battles or negotiations. The UN Declaration emphasizes that these are fundamental human rights that all Indigenous peoples are generally entitled to and that governments are bound to respect. As noted earlier, one of the driving purposes of the UN Declaration was to make it clear that fundamental international human rights laid down in existing covenants and treaties apply to Indigenous peoples. Article 43 emphasizes that rights in the UN Declaration "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."[234] Several of the preambular provisions of the UN Declaration emphasize the fundamental nature of the rights contained in it, and the urgent needs for states to respect these, including preambular clauses 7 and 22:

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

[230] For a recent case where a judge indeed appeared flummoxed by this issue, see *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15 at paras 201-204.
[231] *Sparrow, supra* note 140 at 1105-1106.
[232] See, for example, Hamilton "Asserted vs. Established Rights and the Promise of UNDRIP," *supra* note 179; Hoehn "Back to the Future…", *supra* note 6; Hoehn, "Judgment in Tŝilhqot'in Nation v British Columbia," in *Judicial Tales Retold, supra* note 9; McNeil, "Shared Indigenous and Crown Sovereignty…,"*supra* note 6. For a summary of RCAP's proposals, see Metallic, "Ending Piecemeal Recognition…," *supra* note 6.
[233] *UN Declaration Act, supra* note 13 at preambular clause 1; TRC, *supra* note 1 at 189-191.
[234] UN Declaration, *supra* note 11 at art 43 (emphasis added).

> Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,[235]

Section 4(a) of the *UN Declaration Act* also describes the UN Declaration as "a universal international human rights instrument… ."[236] These provisions can be used to challenge the holding in *Van der Peet* that Aboriginal rights are not universal or general in nature, but rather must be proved, right by right and group by group. They support overturning *Van der Peet* on this point based on the *Bedford / Carter* test because they demonstrate "a change in circumstances … that 'fundamentally shifts the parameters of the debate.'"[237] This is the change to seeing Aboriginal rights as general, fundamental human rights in both international and domestic law. These arguments are also complemented by Canadian scholars who argue that s 35 is already moving in this direction,[238] as well as a recent Quebec Court of Appeal decision where the panel was persuaded that the right to self-government is a generic right.'[239]

c. Providing new content for s 35

i. A full box of rights

By comprehensively detailing the specific rights, both collective and individual, that Indigenous peoples are entitled to, and emphasizing that these are the minimum human rights standards, the UN Declaration and the *UN Declaration Act* should furnish the sparsely filled s 35 box with a far more robust recognition of rights.[240] For example, the UN Declaration contains specific guarantees of Indigenous peoples' rights:

Guaranteed rights of Indigenous Peoples	Article(s)
Non-discrimination	2
Life, physical and mental integrity, liberty and security of the person	7(1)
The right not to be subjected to any act of genocide or any act of violence, including forcibly removing children of the group to another group, or forced assimilation or destruction of culture	7(2), 8(1)
The right to belong to an Indigenous community or nation	9, 33
Rights to lands, territories and resources traditionally or otherwise owned,	10, 25, 26(1)-

[235] *Ibid* at preambular clauses 7 and 22. See also preambular clauses 8, 16, 19, and 22.
[236] *UN Declaration Act, supra* note 13 at s 4(a).
[237] For a tentative sketch of this argument, see Gunn, "Beyond *Van der Peet*," *supra* note 134.
[238] See Brian Slattery, "The Generative Structure of Aboriginal Rights" (2007) 38 SCLR (2d) 593. See also Hamilton "Asserted vs. Established Rights and the Promise of UNDRIP," *supra* note 179 at 103-109.
[239] QCCA decision, *supra* note 7 at 48, 58, 59, 268, 302, 359, 422, 454, 486-488, 494.
[240] It is also possible that other constitutional provisions could be interpreted to support the broader rights recognized in UNDRIP, such as s 2(a) (freedom of religion) or s 7 (life, liberty and security) in the *Charter*, or possibly these provisions plus s 35 could be argued together to capture the Indigenous collective dimension of these rights.

occupied or used, waters, coastal seas and other resources	(2), 28, 29, 32
The right to practice and revitalize culture and customs, including protecting artifacts, archeological sites, ceremonies, arts and literature	11(1)
The right to manifest, practice, develop and teach spiritual and religious traditions, customs and ceremonies	12(1)
The right to revitalize, use, develop and transmit histories, languages and oral traditions	13(1)
The right to establish their own media in their own languages	16(1)
The right to the improvement of economic and social conditions including in areas of education, employment, vocational training, housing, sanitation, health and social security	21(1)
The right to traditional medicines and health practices	24
The right to maintain contact and relations with group members where divided by international borders	36(1)
The right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements with governments	37(1)-(2)
All rights and freedoms are equally guaranteed to male and female Indigenous individuals	44

As noted in subsection 2(a), s 35 jurisprudence has primarily focused on land-based rights (Aboriginal title, hunting, fishing and some harvesting of timber), to the detriment of other collective and individual rights of Indigenous peoples. These detailed articles ought to help courts and governments see that Indigenous rights can encompass a much larger swath of areas, and the above Declaration articles can be used to interpret the scope s 35 and fill important 'gaps' in the existing law.

Crucially, a major effect of the UN Declaration will be to put the Indigenous rights to self-determination, self-government, and Indigenous laws at the forefront of the discourse on Aboriginal rights. It was because of the UN Declaration's emphasis on self-determination that the TRC called for the UN Declaration to be the framework for reconciliation in Canada.[241] The right to self-determination is expressed in article 3 of the UN Declaration, but its basic premise—that Indigenous peoples should control their destinies and participate in any decisions that affect them—is reflected in several articles, including:

Guaranteed rights of Indigenous control / self-determination	**Article(s)**
Right to self-determination – the right to determine their political status and freely pursue their economic, social and cultural development	3
The right to autonomy or self-government in matters relating to their internal and local affairs	4
The right to distinct political, legal, economic, social and cultural institutions	5
The right to control their education systems and institutions	14(1)
The right to participate in all government decisions that impact Indigenous rights, with governments seeking to obtain their free, prior and informed consent	18, 19

[241] *TRC Final Report, supra* note 1 at 29, 187-191 and Calls to Action #43-44.

The right to maintain and develop their political, economic and social systems or institutions	20(1)
The right to determine and develop priorities for development, particularly in areas of health, housing and economic and social programmes affecting them	23
The right to control lands and resources	26(2)
The right to maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions, and their intellectual property over same	31(1)
The right to determine and develop priorities and strategies for the development and use of their lands, territories or other resources	32(1)
The right to control identity and citizenship	33(1)
The right to determine the structures and to select the membership of their institutions	33(2)
The right to promote, develop and maintain their institutional structures, their distinctive customs, spirituality, traditions, practices, and juridical systems in accordance with international human rights standards	34
The right to determine the responsibilities of individuals to their communities	35

In this vein of self-determination, the UN Declaration also grounds Indigenous peoples' rights in their own legal traditions. Brenda Gunn identifies how many of the rights articulated in the Declaration specifically mention the role of Indigenous laws: "Many of the rights articulated in the *UN* Declaration specifically mention the role of Indigenous legal orders and constitutions. For example, Indigenous peoples' customs, laws and traditions are referenced in relation to identifying and providing redress for violation of cultural rights [article 11], land rights [article 26(3)], and membership [article 33]." [242] Gunn also underscores how Indigenous peoples laws ought to inform Indigenous peoples' positions in all areas of consultation, cooperation and decision-making recognized in the Declaration:

> There are also many references to consultation and participation in decision-making [articles 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 38, 40, 41]. These provisions make it clear that the rights are defined according to Indigenous peoples' own laws, that remedies for past violations should be identified in relation to Indigenous peoples' laws [article 40], and that going forward consultation should be carried out in accordance with Indigenous peoples' own laws. The grounding of Indigenous peoples' rights in Indigenous legal traditions should be followed in Canada to promote reconciliation in Canada.[243]

Finally, Gunn emphasizes how the UN Declaration not only calls for use of Indigenous legal traditions but also their legal institutions:

[242] Brenda Gunn, "The Federal court Aboriginal Bar Liaison Committee as a Mode of Reconciliation: Weaving Together Indigenous Law, Common Law, and International Human Rights Law," in *Renewing Relationships*, *supra* note 6 at 318-319 (emphasis added).
[243] *Ibid* (emphasis added).

> It is not just Indigenous laws that are acknowledged and protected under the *UN Declaration*, but also Indigenous legal institutions. Several articles reference Indigenous legal institutions as appropriate venues for the expression or exercise of Indigenous peoples' rights. In fact, article 5 explicitly sets out "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[244]

John Borrows has written about how Canada's Constitution necessarily includes Indigenous legal orders and that our country's legal system will continue to be incomplete, and ultimately unjust, while Indigenous orders continue to be largely ignored and undermined:

> It is a mistake to write about Canada's constitutional foundation without taking account of Indigenous law. You cannot create an accurate description of the law's foundation in Canada by only dealing with one side of its colonial legal history. When you build the structure on an unstable base, you risk harming all who depend upon it for security and protection. ... Acknowledging the traditional and contemporary place of Indigenous law in this country -- alongside the common law and civil law -- is a necessary step in the process [of putting Canadian law on a stronger footing]. It is crucial to creating a healthier and more accurate conception of Canada's broader constitutional order.[245]

Thus, the legal and moral force that the UN Declaration and the *UN Declaration Act* combined can add to the calls for greater recognition and implementation of Indigenous laws and institutions will, in addition to breathing life into our living tree, also serve to strengthen our constitutional roots.

ii. A full box of government responsibilities

Another shortcoming of s 35 that the UN Declaration and the *UN Declaration Act* promise to substantially remedy is expressly and directly setting out the responsibilities of governments in relation to Indigenous rights, including their obligation to take active steps to implement the UN Declaration into their policies, laws and decision-making. Numerous provisions of the UN Declaration specify what actions governments are expected to take to respect specific Indigenous rights. I attempt to categorize these below:

Government responsibilities	Article(s)
Economic obligations	
Provide for the ways and means for financing Indigenous peoples' autonomous functions (self-government)	4
Take effective, and where appropriate special measures, to ensure continuing improvement in Indigenous peoples' economic and social conditions	21

[244] *Ibid* at 319.
[245] Borrows, *Canada's Indigenous Constitution, supra* note 14 at 15-16.

Establish and implement assistance programmes for the conservation and protection of Indigenous peoples' lands, territories and resources	29(1)
Provide financial and technical assistance to Indigenous peoples for the enjoyment of the rights in the Declaration	39
Consultation and consent obligations	
No removal or relocation from lands or territories without free, prior and informed consent	10
Consult and cooperate in good faith in order to obtain free, prior and informed consent for legislative and administrative measures affecting Indigenous peoples	19
No storage or disposal of hazardous materials on Indigenous lands and territories without their free, prior and informed consent	29(2)
Effective consultation prior to using Indigenous lands or territories for military activities	30(2)
Consult and cooperate in good faith in order to obtain free, prior and informed consent for the approval of any project affecting their lands, territories or other resources	32(2)
Obligations re non-discrimination	
Provide redress for dispossession from lands, forced assimilation, forced population transfer, and propaganda designed to incite discrimination against Indigenous peoples	8(2)
Take effective measures to combat prejudice and eliminate discrimination against Indigenous peoples, and ensure Indigenous people are appropriately reflected in education and public information	15(1), (2)
Take effective measures to reflect Indigenous cultural diversity in public media and encourage it in private media	16(2)
Protect Indigenous women and children against all forms of violence and discrimination	22(2)
Obligations re education, health and socio-economic rights	
Take effective measures to ensure Indigenous individuals, particularly children, have access, when possible, to education in their own culture and language	14(3)
Protect Indigenous children from economic exploitation and from hazardous or otherwise deleterious work	17(2)
Provide just and fair redress when Indigenous peoples are deprived of their means of subsistence and development	20(1), (2)
Take necessary steps to ensure Indigenous individuals achieve the highest standards of physical and mental health	24(2)
Take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of Indigenous peoples affected by hazardous materials are duly implemented	29(3)
Obligations re lands, territories and resources	
Recognize and protect Indigenous peoples' lands, territories and resources	26(3)
Provide a fair, independent, impartial, open and transparent process to recognize and adjudicate rights to lands, territories and resources	27
Provide restitution or, when not possible, just, fair, and equitable compensation for lands, territories and resources taken without free, prior and informed consent	28(1), (2)
Assist Indigenous peoples with conservation and protection of their lands	29(1)
Provide just and fair redress for approval of any projects affecting Indigenous	32(3)

peoples' lands, territories or other resources, and appropriate measures to mitigate adverse impacts	
Obligations regarding cultural rights	
Provide restitution in relation to cultural, intellectual, religious and spiritual property taken without free, prior and informed consent	11(2)
Provide access and/or repatriation of ceremonial objects and human remains through fair, transparent and effective mechanisms	12(2)
Take effective measures to protect Indigenous rights to revitalize and use histories, languages and oral traditions	13(2)
Take effective measures to protect Indigenous languages and oral traditions	14(3)
Take effective measures to recognize and protect Indigenous peoples' cultural rights to control and develop cultural heritage, traditional knowledge and traditional cultural expressions, and their intellectual property over same	31(2)
Other obligations	
Pay particular attention to the needs of elders, women, youth and persons with disabilities in implementation	22(1)-(2)
Facilitate the exercise and implementation of the right of Indigenous peoples divided by international borders to develop contacts and relations with their members across those borders	36(2)
Honour and respect treaties, agreements and other constructive agreements between governments and Indigenous peoples	37(1)-(2)
Take appropriate measures, including legislative measures, to implement the ends of the Declaration	38
Ensure Indigenous peoples have access to and prompt decisions through just and fair procedures for the resolution of conflicts between them and governments	40
Provide effective remedies for all infringements of Indigenous peoples' individual and collective rights	40

These detailed precisions on government obligations with respect to Indigenous peoples' rights give significantly more clarity than the existing standards of fiduciary duty and honour of the Crown, discussed in subsection 2(a) above. Governments should look to these standards to guide their conduct in relation to Indigenous peoples, and Canadian courts ought to hold governments accountable to these standards. These standards should inform the interpretation of government duties and remedies under s 35.

Finally, unlike in the case of s 35, article 38 of the Declaration makes it clear that states must proactively implement the rights and duties contained in it, including through legislative measures. Canada has taken the first major step in committing to do this through ss 5-6 of the

UN Declaration Act.[246] British Columbia has done this as well, and other provincial and territorial governments should follow suit.[247]

d. Providing a basis for challenging existing content of s 35

As discussed in subsection 2(b) above, scholars have been critical of specific elements of the existing content of the s 35 jurisprudence, often due to the influence of the doctrine of discovery, the courts' acceptance of absolute Crown sovereignty, or the belief that collective Aboriginal rights are not fundamental human rights. An existing body of scholarship has begun to develop explaining how certain elements of s 35 case law is out of sync with specific provisions in the UN Declaration, and we can anticipate more writing along such lines given the *UN Declaration Act's* affirmation of the Declaration's application to Canadian law.[248] Such scholarship can be harnessed to argue, drawing on the *Bedford/Carter* test, that these elements of the s 35 jurisprudence must evolve.

4) No constitutional amendment is necessary

Using the UN Declaration to breathe life into s 35, by expanding its content, and modifying existing law developed by the SCC, is simply a matter of constitutional interpretation, not constitutional amendment. As has been argued above, the UN Declaration is a reference document on Indigenous rights of "unparalleled legitimacy" from which to fill the 's 35 box'. This is sorely needed given s 35's inauspicious birth out of political struggle, with little thought given to its contents at the time by its framers and the subsequent efforts by Indigenous groups to advance a meaningful process to give s 35 real content being unsuccessful. The SCC's efforts to give meaning to s 35 now appear out of step with some key values and norms contained within the UN Declaration. Evolution in the meaning of constitutional provisions has long been recognized as a normal part of constitutional law, as part of the 'living tree' interpretive approach.[249]

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[246] *UN Declaration Act*, *supra* note 13 at ss 5-6. See also Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples," in *Braiding Legal Orders*: *Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds. (Waterloo: Centre for International Governance Innovation, 2019) c2, 21-28, at 23.

[247] *Declaration on the Rights of Indigenous Peoples Act*, *supra* note 58.

[248] On the duty to consult, see Hamilton, "Asserted vs. Established Rights and the Promise of UNDRIP," *supra* note 179; Nagy, *supra* note 32 at 203-205; Wilkins, *supra* note 59 at 1234; Joshua Nichols & Sarah Morales, "Finding Reconciliation in Dark Territory: Coastal Gaslink, Coldwater, and the Possible Futures of DRIPA" (2021) 53:4 UBC L Rev 1185 at 1227-1231; On Aboriginal title Felix Hoehn, "Judgment in Tŝilhqot'in Nation v British Columbia," in *Judicial Tales Retold, supra* note 232. On Aboriginal rights/*Van der Peet*, see Wilkins, *ibid* at 1264-65, Gunn, "Beyond Van der Peet," *supra* note 134. On the *Sparrow* justified infringement test, see Nagy, *ibid* at 203-205; Bankes, *supra* note 72 at 1014; Wilkins, *ibid* at 1277. On self-government / *Pamajewon*, see Drake, *supra* note 134 at 89; and McNeil, "The Inherent Indigenous Right of Self-Government," *supra* note 134.

[249] See *Edwards v Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at 136; *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 22-26; *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, 2005 SCC 56 at para 9; and *Canadian Western Bank v Alberta,* 2007 SCC 22 at para 23.

Quebec is currently challenging federal legislation that recognizes, in accordance with the UN Declaration, that all Indigenous governing bodies in Canada have the right to self-government over child and family services.[250] Quebec argues that this amounts to an unlawful attempt to unilaterally amend the Constitution. It claims that the inclusion of self-government in s 35 was hotly contested at the time of the creation of the *Constitution Act, 1982*, and the efforts to specifically enshrine this right in the Constitution through the Charlottetown Accord failed. Thus, Canada is prevented from legislating on self-government without meeting the formula to amend the constitution, which requires significant provincial support.

The first problem with this argument is that "debates or correspondence relating to constitutional amendment[s] … are not conclusive as to the precise scope of [constitutional provision]."[251] Second, the SCC has already interpreted ss 35 and 91(24) to include subjects that were previously subject to failed constitutional negotiations. For example, whether Aboriginal title was recognized by s 35 was also a hotly contested issue in the constitutional conferences in the 1980s and was never further clarified by amendment.[252] Nonetheless, the SCC confirmed that Aboriginal title was indeed part of the broad spectrum of Aboriginal rights recognized by s 35 in *Delgamuukw*, because Aboriginal title existed at common law.[253] Similarly, adding "Métis" to s 91(24) was contemplated by the Charlottetown Accord negotiations.[254] The failure of the Charlottetown Accord did not preclude the SCC from confirming in *Daniels* that the Métis fall within the jurisdiction of s 91(24).[255]

If successful, Quebec's argument would freeze the contents of s 35 to that which was contemplated by the framers of the *Constitution Act, 1982* (which we know from the discussion in subsection 2(a) to be very little), or, more likely it seems, to the existing content determined by the SCC to date.[256] It would seem that Quebec's argument would restrict the extent to which the SCC could interpret s 35 beyond the current doctrine, preventing the UN Declaration—or anything else—from influencing evolution of the provision. It appears that Quebec assumes that whatever rights have not been affirmed by the SCC to date fall in the constitutional

[250] See discussion on *An Act respecting First Nations, Inuit and Métis children, youth and families* above, *supra* note 7.
[251] *Reference re Employment Insurance Act (Can.), ss. 22 and 23*, *supra* note 249 at para 9. This argument was also implicitly rejected in *Supreme Court Act Reference, ss. 5 and 6*, 2014 SCC 21 at paras 96-101.
[252] Renée Dupuis, *Le statut juridique des peuples autochtones en droit canadien* (Carswell, Scarborough, 1999), p 128.
[253] *Delgamuukw, supra* note 171 at 133-139.
[254] Consensus Report on the Constitution, *supra* note 187 at s 55.
[255] *Daniels v Canada (Indian Affairs and Northern Development),* 2016 SCC 12 at paras 22-46.
[256] Note that Quebec recognizes that there are already self-government agreements, as well as s 35 case law recognizing the ability of Indigenous groups to establish a right to self-government. One would think this would end their argument (because the right is *already* recognized in Canadian law), but Quebec persists in arguing that the existing mechanism of negotiation and litigation to establish the right to self-government have become part of our constitutional architecture, and now prevents Canada from legislation to recognize Aboriginal rights.

amendment category, outside the acceptable realm of constitutional interpretation.[257] This would trap s 35 in a jurisprudential purgatory.

A victory for Quebec would mean the federal government could not legislate pursuant to its jurisdiction under s 91(24) of the *Constitution Act, 1867* to recognize rights that the SCC has yet to affirm are Aboriginal rights.[258] Such a result would run contrary to the principles of Parliamentary sovereignty.[259] While this concept needs to evolve to make space for Indigenous self-determination,[260] the doctrine ought to aid in federal efforts at 'legislative reconciliation' to recognize and protect Indigenous rights. Crucially, it would prevent Canada from fulfilling the specific commitments it has made to implement the UN Declaration in the *UN Declaration Act*, particularly to undertake legislative measures towards implementation.

Quebec's arguments also posit the courts as the sole legitimate interpreter of s 35. However, on several occasions Parliament has implemented its own interpretation of *Charter* rights prior to any court confirming this interpretation. The late Peter Hogg has called the legislated recognition of rights prior to court review part of the principle of "dialogue" between the courts and legislatures.[261] The SCC has affirmed the "dialogue" theory as a legitimate part of law-making in the *Charter* context.[262] To take a different view of Parliament's ability to interpret and implement s 35 presents a troubling double standard.

Finally, Quebec's argument assumes that the SCC's s 35 jurisprudence creates Aboriginal rights through their decisions. But the Court has said that "s. 35(1) did not create the legal doctrine of aboriginal rights," and merely recognizes and affirms common law Aboriginal rights and gives them constitutional protection.[263] As explained by Mark Walters, courts play an important role in interpreting these rights, but they are not the only actor "in the struggl[e] to give proper expression to the ambitious ideal of an intersocietal law of aboriginal rights in Canada":

> One thing that should be clear is that the law that judges are trying to identify and expound is not of their own making. They are merely participants in a process of interpretation that seeks to give shape and texture to an unwritten constitutional law of intercultural relations in Canada. Judges play a critical role in that process, but there are

[257] See *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, SCC (Factum of the Appellant at para 85).
[258] *Ibid*.
[259] Parliamentary sovereignty recognizes that representatives of elected legislative assemblies have broad freedom to craft the content of laws: see Peter Hogg, Constitutional Law of Canada, 5th ed. (loose-leaf) (Toronto: LexisNexis, 2019), Chap. 12, "Parliamentary Sovereignty" at section 12.2, "Sovereignty in Canada".
[260] See Ryder, *supra* note 226 at 315.
[261] Hogg, Peter W., and Allison A. Bushell. "The Charter Dialogue Between Courts and Legislatures" (1997), 35 Osgoode Hall LJ 75; and Hogg, Peter W., Allison A. Bushell Thornton and Wade K. Wright. "Charter Dialogue Revisited — Or 'Much Ado About Metaphors'" (2007), 45 Osgoode Hall LJ 1.
[262] *R. v Mills,* [1999] 3 SCR 668 at paras 20, 56-57; and *Sauvé v Canada (Chief Electoral Officer),* [2002] 3 SCR 519 at paras 8, 17.
[263] *R. v Van der Peet*, *supra* note 168 at para 28.

> other participants too, and in the end the judicial contribution only serves to inform, not determine our understanding of the law itself. … the law of indigenous rights must be seen as a 'law' that transcends the positive legal expressions found in judicial decisions… As an intersocietal law, the law of indigenous rights must lay beyond the control of any single writer or expounder of the law.[264]

Conclusion

In Part 1 of this paper, I explained how the UN Declaration applies to Canadian law, and how the federal *UN Declaration Act* affirms the Declaration's status in Canadian law, as well as commits the federal government to future substantive implementation of the Declaration, including the review of existing laws and policies to ensure conformity with the Declaration. Crucially, the *UN Declaration Act* affirms the Declaration's use by courts to interpret domestic law. This has already been happening, but the affirmation in the *Act* removes any lingering doubt that previously dogged courts' application of the UN Declaration to Canadian law. The UN Declaration benefits from the presumption of conformity with international law, under the framework recently developed by the SCC in *Quebec (Attorney General) v 9147-0732 Québec inc*., because it is an instrument which both the Canadian executive and Parliament have affirmed their commitment to.

In Part 2, I argued that, in the case of s 35 of the *Constitution Act, 1982*, the UN Declaration, now buoyed by the *UN Declaration Act*, holds significant promise to address long-standing problems in the SCC's approach to s 35 by filling the sparse s 35 'box' with a detailed elaboration of Indigenous individual and collective rights, and concomitant government obligations. It also supplies key context, values and principles and specific provisions to overcome the long-lasting impacts the doctrine of discovery has had on our law, as well as situate Indigenous collective rights as universal fundamental human rights that all Indigenous groups in Canada are entitled to.

The UN Declaration supplies a detailed basis to push for greater recognition and protection of Indigenous peoples' rights by governments, acting proactively to implement the UN Declaration through legislation, policies and agreements, and by courts, interpreting existing law to be in conformity with the Declaration. Rather than the implementation of the UN Declaration largely being at the mercy of governments,[265] the fact that courts are now empowered—if not required—to read Canadian law, including s 35, up to the minimum standards in the Declaration, will result in a mutually enforcing symbiosis between these two crucial forums for change. Courts interpreting domestic law to be consistent with the UN Declaration will encourage, if not mandate, action by governments. The inverse is also true: the actions of governments recognizing rights in the UN Declaration can embolden courts to push the limits of the status quo. In fact, this is what has happened in the Quebec Court of Appeal's decision on

[264] Walters, "Promise and Paradox…" *supra* note 6 at 49.
[265] For one scholar who takes this position, see Wilkins, *supra* note 59 at 1241.

the constitutionality of *An Act respecting First Nations, Inuit and Métis children, youth and families*.[266] In addition to upholding the constitutionality of most of the *Act*, the Court of Appeal held that s 35 affirms the inherent right to self-government, at least in the area of child and family services, and is a generic (general) right belonging to all Indigenous people.[267] The Court of Appeal relied on the UN Declaration, among other sources, to confirm and support this finding.[268] While such symbiosis was possible under s 35, the key difference is that the UN Declaration gives comprehensive and precise direction to governments and courts on how our law needs to evolve, where s 35 did not.

The evolution of Canadian law to fully implement the UN Declaration will not happen overnight, nor will it be seamless. Where the federal government has already legislated to implement specific provisions of the Declaration, there are arguments that these early efforts do not go far enough.[269] Such critiques are to be expected and should be welcomed, as we go down the road of making the Canadian legal system consistent with the UN Declaration. British Columbia has faced criticism for failing to adhere to the spirit of its new law in some of its legislative projects.[270] Some interpretations of the Declaration will be weak or faulty. As discussed herein, colonial mentalities are deeply baked into the fabric of Canadian law and most likely will be seen in governments' and courts' responses for some time to come. Reform will take sustained education and advocacy over the long-term by Indigenous peoples and their allies. It is going to be hard work and will take time. It will be important for Indigenous communities, their advocates and allies to hold Canada's and provinces' feet to the fire on implementation, including by continuously raising problems with poor implementation and taking governments to court for their failures when necessary.[271] Court decisions that are weak in their interpretation of the UN Declaration must continue to be critiqued. By challenging colonial and weak interpretations, the law will evolve and improve over time.[272] Therefore, criticism and

[266] QCCA decision, *supra* note 7.
[267] *Ibid* at paras 356-491.
[268] *Ibid* at paras 506-512.
[269] Regarding the *Indigenous Languages Act, supra* note 69, see Karihwakeron Tim Thompson, "Strengthening The Indigenous Languages Act – Bill C-91," Policy Brief for Yellowhead Institute, February 27, 2019, (online); and Lorena Sekwan Fontaine, David Leitch and Andrea Bear Nicholas, "How Canada's Proposed Indigenous Languages Act Fails To Deliver," Policy Brief for Yellowhead Institute, May 9, 2019, (online). Regarding, *An Act respecting First Nations, Inuit and Métis children, youth and families*, see Naiomi Metallic, Hadley Friedland, and Sarah Morales, "The Promise and Pitfalls of C-92: An Act respecting First Nations, Inuit and Métis Children, Youth and Families" (2019) Yellowhead Institute (online).

[270] Judith Sayers, "What the BC Govt is doing without First Nations" (23 July 2020), *First Nations in BC Knowledge Network* (blog).
[271] Provinces are not bound by the requirements to develop an action plan for implementation for the UN Declaration, or to review their existing laws and policies for compliance with the Declaration: see note 59 above. Thus, at the provincial and territorial levels there is also work to be done to lobby governments to pass their own UN Declaration implementation law.
[272] We will also have interpretations of the UN Declaration from UN bodies (see note 42 above), as well as other countries, to draw from to argue for the most just interpretations.

challenges to governments and courts' interpretations of the UN Declaration are crucial and will drive the evolution of Canadian law.