



Preface

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In Canada, implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹ is an opportunity to explore and reconceive the relationship between international law, Indigenous peoples' own laws and Canada's constitutional narratives.

In May 2016, Indigenous and Northern Affairs Minister Carolyn Bennett addressed the Permanent Forum on Indigenous Issues at the United Nations and officially endorsed UNDRIP² — without the qualifications attached by the previous government, which considered the declaration to be aspirational and not legally binding. While this announcement did not change the legal relevance of UNDRIP in Canada, it did express the political will to begin implementation and signalled that Canada might be on a path toward reconciliation with Indigenous peoples. Thus, the announcement also raised legal and policy questions about how the federal government intends to adopt and implement this human rights instrument.³

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

2 Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th Session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016).

3 See e.g. Gib van Ert, "Three Good Reasons Why UNDRIP Can't Be Law — and One Good Reason Why it Can" (2017) 75:1 Advocate 29.

The minister's words — "We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution" — were somewhat ambiguous, raising questions as to whether they simply recognized that no Canadian government could operate outside the Constitution, acknowledged that implementation of UNDRIP would require action by the provinces and territories as well as the federal government, or implied that Canada's Constitution will act as a constraint on UNDRIP implementation. The language of section 35 of Canada's Constitution, which provides that "The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed,"⁴ arguably is broad enough that interpreting the Constitution in light of implementation of the declaration could lead to an expansive view of inherent rights and treaty rights. Bennett seemed to acknowledge this when she stated, in the same speech, "By adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada."⁵ Subsequent developments, however, as discussed below, may suggest that the federal government views UNDRIP implementation as being subject to Canada's Constitution, which is seen as paramount over UNDRIP. This approach would suggest that the Canadian Constitution would prevail if UNDRIP rights are found to conflict or be inconsistent with it.

Since the Government of Canada's "embrace" of UNDRIP at the United Nations Permanent Forum of Indigenous Peoples in May 2016, much has happened to set the stage for an ambitious implementation agenda. Yet progress remains haltingly slow and arguably more illusory than real. It is fair to recognize the numerous positive steps taken by the federal government. In February 2017, Prime Minister Justin Trudeau announced that his government would form a working group of ministers to "examine relevant federal laws, policies, and operational practices to help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples; and supporting the implementation of the Truth and Reconciliation Commission's Calls to Action."⁶ The federal Department of Justice articulated 10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples, noting that "The implementation of the United Nations Declaration on the Rights of Indigenous Peoples requires transformative change in the Government's relationship with Indigenous peoples."⁷ As well, the Department of Justice issued a complementary Directive on Civil Litigation Involving Indigenous Peoples⁸ aimed at promoting an approach to conflict resolution between the Crown and Indigenous peoples that is consistent with reconciliation. The old department of Indigenous and Northern Affairs was dissolved and replaced by two new departments: Crown-Indigenous Relations and Northern Affairs Canada; and Indigenous Services Canada.

4 *Constitution Act, 1982*, s 35(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

5 Bennett, *supra* note 2.

6 Prime Minister of Canada, News Release, "Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples" (22 February 2017), online: <<http://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>>.

7 Canada, Department of Justice, "Principles respecting the Government of Canada's relationship with Indigenous peoples", online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

8 Canada, Department of Justice, "Directive on Civil Litigation Involving Indigenous Peoples", online: <www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

In September 2017, on the occasion of Canada's 150th anniversary, Trudeau made an impassioned speech to the UN General Assembly in which he acknowledged that Indigenous peoples on this continent had a history that stretched back many millennia before the arrival of Europeans, and that the nation called Canada was best seen as "a work in progress."⁹ He referred to Canada's colonial legacy, the broken promises and the harms that racist policies have inflicted on Inuit, Métis and First Nations peoples, and he renewed promises to use domestic implementation of UNDRIP as "a way forward" to correct past wrongs, support nation-to-nation, government-to-government and Inuit-Crown relationships, and achieve reconciliation.

In February 2018, Trudeau announced "that the government will develop — in full partnership with First Nations, Inuit, and Métis people — a new Recognition and Implementation of Indigenous Rights Framework that will include new ways to recognize and implement Indigenous Rights."¹⁰ This was to include "new recognition and implementation of rights legislation" and going forward he asserted, "recognition of rights will guide all government relations with Indigenous Peoples," with the contents of the framework being built together "through a national engagement, led by the Minister of Crown-Indigenous Relations and Northern Affairs, with support from the Minister of Justice."¹¹ According to the government website, this "will ensure that the Government of Canada recognizes, respects and implements Indigenous rights, including inherent and treaty rights, and provides mechanisms to support self-determination. The framework will support Indigenous peoples' rights as recognized and affirmed in section 35 of the Constitution Act, 1982, while also aligning with the articles outlined in the United Nations Declaration on the Rights of Indigenous Peoples. It will also be consistent with the Principles Respecting the Government of Canada's Relationship with Indigenous Peoples."¹² However, the initiative seems to be stalled, with little buy-in from Indigenous peoples. In September 2018, a Cabinet Committee on Reconciliation was formed to replace the ministerial working group, build on what it had accomplished and "strengthen the relationship with Indigenous peoples and advance the commitment to a renewed nation-to-nation, Inuit-Crown, and government-to-government relationship with First Nations, Inuit and the Métis Nation based on recognition of rights, respect, co-operation, and partnership."¹³ Meanwhile, other federal departments have taken initial, tentative steps to work with Indigenous peoples in the development of policy on such matters as climate change, environmental assessment reform, international trade, intellectual property law reform and protection of traditional knowledge, and preservation and revitalization of Indigenous languages.

9 "Prime Minister Justin Trudeau's Address to the 72nd Session of the United Nations General Assembly" (21 September 2017), online: <<https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeaus-address-72th-session-united-nations-general-assembly>>.

10 "Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework" (14 February 2018), online: <<https://pm.gc.ca/eng/news/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights-framework>>.

11 *Ibid.*

12 Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Overview of a Recognition and Implementation of Indigenous Rights Framework" (14 February 2018), online: <www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>.

13 Prime Minister of Canada, News Release, "Prime Minister announces changes to the Cabinet committees" (28 August 2018), online: <<https://pm.gc.ca/eng/news/2018/08/28/prime-minister-announces-changes-cabinet-committees>>.

In May 2018, Bill C-262, introduced as a private member's bill by Member of Parliament Romeo Saganash, passed in the House of Commons (206 votes in favour, 79 against)¹⁴ and proceeded to the Senate where it has passed first reading.¹⁵ The bill, if passed into law, would affirm UNDRIP "as a universal international human rights instrument with application in Canadian law," require the Government of Canada to "take all measures necessary to ensure that the laws of Canada are consistent with" UNDRIP, "in consultation and cooperation with indigenous peoples, [to] develop and implement a national action plan to achieve the objectives of" UNDRIP and to report annually to Parliament for 20 years on progress with implementation. In February 2019, the government introduced new legislation to protect Indigenous languages, timed with the International Year of Indigenous Languages.¹⁶ Acknowledging "the extraordinary work done by the Assembly of First Nations, the Inuit Tapiriit Kanatami and the Métis National Council" to reclaim, revitalize, strengthen and maintain Indigenous languages in Canada, the Honourable Pablo Rodriguez, Minister of Canadian Heritage and Multiculturalism, introduced Bill C-91, the Indigenous Languages Act, in the House of Commons.¹⁷ The federal government has also introduced Bill C-92, an Act respecting First Nations, Inuit and Métis children, youth and families. The preambles of these bills affirm a government commitment to implementation of UNDRIP.¹⁸

While these are steps in the right direction, many of the contributors to this collection explain that more is needed to effect actual change on the ground for First Nations, Inuit and Métis peoples in Canada. UNDRIP represents the concerted efforts of Indigenous leaders from around the world to stem the destructive and disempowering effects of colonialism and to create conditions for Indigenous peoples to reclaim their social, cultural, linguistic, spiritual, political, economic, environmental and legal autonomy. As such, its embrace by the Government of Canada should create opportunities to make substantial progress in recognizing Indigenous peoples' rights in Canada. Yet many of the contributors to this book — much like the authors of the Yellowhead Institute's report on Canada's Indigenous Rights Framework¹⁹ — express concern that Canada's vision of Indigenous jurisdiction over lands and resources remains too narrow, and may be little more than a modified version of the status quo.

14 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, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

15 As of the time of writing, the bill had passed through first reading in the Senate and was proceeding slowly through second reading. Indigenous organizations were urging the Senate to expedite the bill's passage.

16 Canada, Canadian Heritage, News Release, "Government of Canada introduces historic legislation on Indigenous languages" (5 February 2019), online: <www.canada.ca/en/canadian-heritage/news/2019/02/government-of-canada-introduces-historic-legislation-on-indigenous-languages.html>.

17 Bill C-91, *An Act respecting Indigenous Languages*, 1st Sess, 42nd Parl, 2016 (first reading 5 February 2019), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-91/first-reading>. In response, Natan Obed, president of Inuit Tapiriit Kanatami, expressed disappointment with the proposed act, and his organization is seeking amendments to make Inuktitut an original language throughout Inuit Nunangat (Inuit homeland), so that Inuit would be entitled to obtain federal services in their own language: Amber Bernard, "Inuit leaders ask for amendments to language act at committee", *APTN News* (25 February 2019), online: <<https://aptnnews.ca/2019/02/25/inuit-leaders-ask-for-amendments-to-language-act-at-committee/>>.

18 Bill C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, 1st Sess, 42nd Parl, 2016 (first reading 28 February 2019), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-92/first-reading>.

19 Hayden King & Shiri Pasternak, *Canada's Emerging Indigenous Rights Framework: A Critical Analysis*, Yellowhead Institute, Special Report, 5 June 2018, online: <<https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>>.

International declarations such as UNDRIP are not binding in international law, but are solemn and significant instruments that embody principles of great and lasting importance. While in the legal form of a non-binding declaration, UNDRIP is widely recognized as expressing the minimum standard for the rights of Indigenous peoples around the world. It reaffirms that all the existing human rights treaties apply to Indigenous peoples, extending “the existing corpus of individual human rights to a collective” as well.²⁰ UNDRIP builds from other human rights treaties and is grounded in a broader context of self-determination than is found in other human rights agreements, recognizing a wealth of political, social, economic, cultural and environmental rights of Indigenous peoples. We need to understand UNDRIP in part through the lens of those human rights treaties, but also take note of its significant difference in explicitly drawing on Indigenous peoples’ own legal traditions, customs and institutions. The preamble of UNDRIP tells a great story of the recognition of Indigenous peoples as part of the humanity of the world, with equal but different rights. UNDRIP provides guidance for how dominant political orders should relate to Indigenous peoples based on justice, equality and good faith.

Canada generally takes a dualist approach to international treaties, meaning that such treaties operate as commitments between sovereign nations, and do not automatically impact domestic law or the rights of individuals within Canada. With this dualist approach for treaties, the most obvious way for international law to become part of domestic law is for the legislature with jurisdiction over the subject matter to enact implementing legislation.²¹ Customary international law, meaning norms that are recognized and followed in practice by the community of nations as legally binding,²² can seep into Canadian law through judicial decisions²³ under the common

20 Megan Davis writes, “According to the Special Rapporteur on the rights of Indigenous peoples, S James Anaya: ‘[t]he Declaration does not attempt to bestow Indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of Indigenous peoples.’ These rights are considered to be the extension of the existing corpus of individual human rights to a collective.” Megan Davis, “To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On” (2012) 19 *Austl J Intl L* 17 at 27, referring to S James Anaya, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/9/9 (11 August 2008) 24 [86], online: <www.austlii.edu.au/au/journals/AUIntlLawJl/2012/3.pdf>.

21 Canadian courts have taken a more liberal approach through the presumption of conformity to develop Canadian law in line with the values and principles underlying Canada’s human rights obligations. See *R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292 [*Hape*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2364/index.do>>.

22 International Committee of the Red Cross, “Customary IHL”, online: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin>: “It is generally agreed that the existence of a rule of customary international law requires the presence of two elements, namely State practice (*usus*) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (*opinio juris sive necessitatis*). As the International Court of Justice stated in the *Continental Shelf* case [(*Libyan Arab Jamahiriya v Malta*) [1985] ICJ Rep 13 at para 27]: ‘It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.’”

23 In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1717/index.do>>, the Supreme Court of Canada (SCC) considered whether Canada’s obligations under the International Convention on the Rights of the Child could influence interpretation of the Immigration Act. Justice Claire L’Heureux-Dubé for the majority quoted Ruth Sullivan at para 70: “[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.” In *Hape*, *supra* note 20, the SCC stated: “Every principle of customary international law is binding on all states unless superseded by another custom or by a rule set out in an international treaty.... These principles must also be drawn upon in [interpreting] the Charter” (at para 46); “In interpreting the scope of application of the Charter, the courts should seek to ensure compliance with Canada’s binding obligations under international law where the express words are capable of supporting such a construction” (at para 56); “Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law” (at para 39). Importantly, scholars have also concluded that many, if not most, of the principles in UNDRIP reflect international customary law principles already established, notwithstanding the non-legally binding status of a UN declaration itself: see Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (London: Routledge, 2014).

law. For international human rights obligations, the Canadian practice has been to conduct an internal governmental review of laws and policies to determine whether they already meet the international standard and, if they do, proceed to ratification. This internal legal review is not normally tabled in Parliament or the provincial legislatures, or otherwise made public, and there may be no obvious implementing legislation, especially if officials conclude that an existing law provides rights equivalent to those in the treaty under review.

After years of uncertainty, the SCC now seems to be coalescing around the notion that the Canadian Charter of Rights and Freedoms should encompass all of Canada's binding international human rights obligations.²⁴ Whether this clarification will have an impact on how section 35 of the Constitution Act, 1982 is interpreted in light of UNDRIP has yet to be seen. In particular, questions remain about how the rights declared in UNDRIP will influence the interpretation of section 35 of the Constitution Act, 1982 as well as the Charter, and what this will mean for the future relationship between international law, Indigenous peoples' laws and Canadian constitutional law. In a 2015 Federal Court case,²⁵ Justice Cecily Strickland seemed to adopt the notion that UNDRIP could be used contextually to reinterpret domestic law so as to favour an interpretation that respected relevant international law values, but drew the line at reinterpreting constitutional language, making a curious interpretative distinction between different parts of the Constitution. In a 2016 decision, the Canadian Human Rights Tribunal cited Canada's international obligations (referring to UNDRIP earlier in its decision) to find that First Nations children on-reserve must be provided child and family services of comparable quality and accessibility as those provided to Canadians off-reserve.²⁶ However, most notable in recent Canadian jurisprudence is the absence of a mention of UNDRIP in the SCC's decision in *Mikisew Cree First Nation v Canada (Governor General in Council)*, in which the question of whether the duty to consult Indigenous peoples applies to the law-making process was addressed.²⁷ One can hope that if Bill C-262 passes into law, both future case law and legislation will be developed and interpreted through an UNDRIP lens.

The origins of this book go back several years. At a round table on UNDRIP Implementation and the Extractive Industry, organized by Terri Mitchell²⁸ and David Dewitt in Waterloo in December 2014, former Prime Minister Paul Martin and former National Chief for the Assembly of First Nations Ovide Mercredi urged the Centre for International Governance Innovation (CIGI) to help address the overwhelming governance challenges in the relations between the federal, provincial and territorial governments and Indigenous peoples of Canada, challenges that are exacerbated by the pressure to develop natural resources when land claims

24 Early on in jurisprudence under the Charter, SCC Chief Justice Brian Dickson, in a dissenting opinion in *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 59, stated: "I believe that the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified." It took another 20 years for the court to embrace this principle with some degree of confidence. In *Divito v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 at para 23 (quoting *Health Services and Support — Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at para 70), the SCC stated, "the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified."

25 *Nunatukavut Community Council Inc v Canada (AG)*, 2015 FC 981 at paras 101–06.

26 *First Nations Child and Family Caring Society of Canada v Canada (AG)*, 2016 CHRT 2 at para 455, [2016] 2 CNLR 270.

27 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40.

28 See also Terry Mitchell, ed., "The Internationalization of Indigenous Rights: UNDRIP in the Canadian Context" CIGI, Special Report, 4 December 2014, online: <www.cigionline.org/publications/internationalization-indigenous-rights-undrip-canadian-context>.

are unresolved and many Indigenous peoples, Métis and Inuit are living in developing world conditions without access to justice or enjoyment of basic human rights.

CIGI's International Law Research Program (ILRP) saw this invitation as a matter of international and domestic human rights that cut across its research on international economic, environmental and intellectual property law. The ILRP was interested in responding to the Truth and Reconciliation Commission's Calls to Action²⁹ by providing a forum for exploring important international law and governance questions related to Indigenous peoples' rights. The ILRP research project commenced in earnest with discussions in 2016 in Victoria with John Borrows, Brenda Gunn, Joshua Nichols, Larry McDermott, Risa Schwartz and Oonagh Fitzgerald.

The metaphor of braiding international, domestic and Indigenous laws emerged from a conversation in the garden café at the University of Victoria, where young turtles were basking in the late May sunshine. The braiding metaphor was seen as relevant to many Indigenous traditions in Canada. For example, the various strands of the braided Métis sash represent different Métis values and experiences (and is like a record of Métis constitutionalism in that respect).³⁰ The braiding of sweetgrass indicates strength and drawing together power and healing. A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre, but from the many fibres woven together. Imagining a process of braiding together strands of constitutional, international and Indigenous peoples' own laws allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship justly encompassing these different legal traditions might mean.

Under John's leadership, CIGI invited Indigenous legal academics and policy leaders to write short essays exploring UNDRIP implementation and using the metaphor of braiding international, constitutional and Indigenous peoples' own laws to provide insight, analysis and recommendations to policy makers. The contributing authors then met in Tucson, Arizona, in December 2016 to discuss their draft papers at a CIGI symposium, warmly hosted by Robert A. Williams, Jr., and the University of Arizona's Indigenous Peoples Law and Policy Program. Graduate students from the University of Arizona's Indigenous Peoples Law and Policy Program also participated in these discussions.

A first collection of papers marked the tenth anniversary of the adoption of UNDRIP, which also happened to coincide with the 150th anniversary of Canada, providing an opportunity to reflect on the history of treaty making with Indigenous peoples and to envision what the future might hold for this country and its relationship with its Indigenous peoples. A second phase of research on the theme of braiding international, constitutional and Indigenous laws was developed in partnership with the Wiyasiwewin Mikiwahp Native Law Centre at the University of Saskatchewan College of Law, beginning with a workshop in Saskatoon to discuss draft papers and culminating with several contributors presenting their research at the annual conference of the Indigenous Bar Association in the fall of 2018. The present book is the result of these two research projects.

²⁹ Truth and Reconciliation Commission of Canada, "Calls to Action" (2015), online: <http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf>.

³⁰ While there are some variations on the meaning of the colours of the sash, depending on location and community, this is a general guide: red is for "the blood of the Métis that was shed through the years while fighting for our rights"; blue is for "the depth of our spirits"; green is for "the fertility of a great nation"; white is for "our connection to the earth and our creator"; yellow is for "the prospect of prosperity"; black is for "the dark period of the suppression and dispossession of Métis land": Métis BC Nation, "Métis Sash", online: <www.mnbc.ca/pdfs/order_of_the_sash.pdf>.

The focus of this book is less on the legal character of UNDRIP and more on the normative content of its principles which, over time through implementation, are expected to imbue Canadian constitutional and domestic law and Indigenous peoples' own laws with legal force. UNDRIP provides a normative language to inspire hope and replace despair. UNDRIP implementation provides an opportunity for scholars to draw on Indigenous peoples' own laws to shape future law and governance in Canada. UNDRIP provides an opportunity to decolonize Canadian law and rediscover and promulgate Indigenous peoples' own laws.

The doctrine of discovery³¹ seems to be a suitable target for UNDRIP-inspired law reform. UNDRIP highlights the fact that Canadian constitutional jurisprudence is built on a fallacy. The SCC has acknowledged that it can revisit issues and come to different conclusions, most recently in reversing the prohibition on assisted suicide. This is indicative that the scope of Aboriginal and treaty rights can also be reconsidered. Many scholars agreed that the decision in *R v Van der Peet*³² needs reconsideration, and perhaps a place to start is the dissent in that decision. Rather than seeing Aboriginal rights as frozen in time, the dissent in *Van der Peet* recognized that Aboriginal rights must maintain contemporary relevance so that practices, customs and traditions can continue to evolve. Aboriginal rights are inherent rights, grounded in Indigenous legal traditions. Therefore, the SCC might be persuaded to rethink Aboriginal and treaty rights in light of UNDRIP.

UNDRIP is also a linguistic tool, with language that is much more consonant with how Indigenous peoples think of themselves. It could provide new ways of talking and teaching, with everyone having a responsibility to implement UNDRIP domestically, internationally and within Indigenous law. Implementation of UNDRIP should contribute to reconciliation. The Canadian constitutional concept of the duty to consult is a framework for infringement of rights, without safeguards, whereas there are safeguards in UNDRIP's numerous requirements for "free, prior and informed consent." Instead of treating consultation as a burden under constitutional law, UNDRIP describes governance partnership and participation in decision making. UNDRIP shows that the framework for reconciliation needs to be shaped by Indigenous peoples' own beliefs, laws, languages and governance approaches. Thus, UNDRIP and international law form one segment of the braid, with domestic constitutional law and Indigenous laws providing the other two segments to create a strong braid of legal reconciliation.

The contributors to this book explain how Indigenous peoples' own laws offer world views that must be given an opportunity to develop and flourish. Implementation of UNDRIP into both the international and domestic legal landscape will require legal change to recognize and accommodate different legal orders. With the metaphor of braiding, contributors to this book examine the potential opportunities and risks entailed in trying to bring coherence and harmony into the strands of international law, domestic constitutional law and Indigenous peoples' own laws, while taking seriously nation-to-nation relations and reconciliation.

31 The doctrine of discovery has its origins in common law in the United States (*Johnson v M'Intosh*, 21 US [8 Wheat] 543 [1823]) and can also be seen in Canadian law (*St Catherine's Milling and Lumber Co v R*, [1888] UKPC 70, 14 App Cas 46). The effect of the doctrine is that upon "discovery" of North America by Europeans, they gained absolute right to the lands. Europeans thereby acquired sovereignty, legislative power and underlying title, which left Indigenous peoples as occupants on the land, with only some rights of possession and use that could be unilaterally revoked. Underlying the doctrine's foundation were papal bulls from the fifteenth century that gave Christian explorers the right to claim lands they had discovered on behalf of their monarchs. Non-Christian inhabitants of those lands were treated as "savages" who could be converted, or killed.

32 [1996] 2 SCR 507.