

**Committee on the Elimination of Racial Discrimination  
80<sup>th</sup> Session**

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**Response to Canada's 19<sup>th</sup> and 20<sup>th</sup> Periodic Reports:  
Consolidated Indigenous Alternative Report**

**Joint Report by the International Indian Treaty Council,  
Confederacy of Treaty 6 First Nations, the First Nations  
Summit, Dene Nation and Assembly of First Nations Regional  
Office (Northwest Territories), Assembly of First Nations,  
Union of British Columbia Indian Chiefs, Samson Cree Nation,  
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*Witness our being, our existence  
See that we are careful to hold tight our identity  
Hear that we continue to sing our songs, intone our stories  
Reaching into the past and the future, touching the spirit(s) each to the other  
Earth, water, air, fire  
Feel our words, feel our intention  
Witness with your whole being, with your eyes, your ears,  
the work in your hands, the openness of your heart.*

**Hai Hai, Thank You**

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## OVERVIEW

### ***About This Report***

We recognize the important role of international human rights instruments in the assertion and implementation of Indigenous Peoples' rights, as well as in the anti-racism and anti-oppression agenda at the domestic level. While Canada is recognized internationally as a humanitarian country and policies and initiatives of the Canadian government have routinely been adopted by other countries, Indigenous Peoples are all too aware of the real struggles we face within Canada.

*[m]any Canadians would concur that Indigenous peoples of Canada have faced social injustices by the state. Yet in a developed, pluralistic country the relations of oppression are less glaringly oppositional, awash with pastel hues rather than primary colors.<sup>1</sup>*

Despite official representations, the Canadian government does not give full regard to international treaties and conventions that it has signed on to. The Canadian government continues to pass laws and engage in practices that are in clear violation of international human rights laws, International Convention on the Elimination of Racial Discrimination (ICERD) and the United Nations *Declaration on the Rights of Indigenous Peoples*.

We welcome the opportunity to provide the Committee on the Elimination of Racial Discrimination (CERD or the Committee) with a collective Indigenous perspective on the status of compliance by the government of Canada with ICERD. This submission represents a collective effort whereby Indigenous Peoples, Non-Governmental Organizations (NGOs), Indigenous representative organizations, First Nations, individuals and others were invited to submit a document that covers a range of major issues of concern regarding the rights of Indigenous Peoples and racism/discrimination against Indigenous Peoples in Canada and in countries impact by Canadian activities.

We urge the Members of the Committee for the Elimination of Racial Discrimination to examine all the supporting documentation provided further to this submission in their deliberations.

Throughout the Report, we use different terminology interchangeably to describe our constituencies. The most common term in international law, "Indigenous Peoples" will be used and is intended to encompass terminology found in Canada. This includes the term "Aboriginal Peoples", which is intended to include all original inhabitants of Canada as recognized by the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c.11, s.35 [*Constitution Act, 1982*] at s.35(2), meaning Indian, Metis, and Inuit Peoples in Canada. The term "First Nation" is used to refer to those Peoples who were established on reserves under the *Indian Act* RSC c.I-5, as well as other First

Nations communities and territories. We prefer the term Indigenous Peoples, while other terms are used when we are quoting from another source.

## ***Executive Summary***

The relationship between Indigenous Peoples of Canada and the Crown<sup>2</sup> has been described through Canadian law – in the *Constitution*, various statutes, policy and jurisprudence.

We endeavor in this Alternative Report to ensure that Members of CERD are made aware of Indigenous perspectives on these relationships, and that these varied and diverse perspectives encompass different knowledge systems and Indigenous legal orders based on custom and tradition. The nation-to-nation relationship upon which all other relations are built are recognized and affirmed in the Treaties that continue to be legally binding on the successor Government of Canada concluded between Indigenous Peoples and the Crown. The spirit and intent of Treaties is found not only in the written text, but in the oral histories and Indigenous understandings. As stated in preambular paragraph 15 of the UN Declaration:

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and the States,

There are rights that flow from our Creator, our sacred laws and Indigenous legal orders, our relationship to lands and territories, as well as from Treaties and constructive arrangements that have established the terms and obligations of our relations with the Crown.<sup>3</sup> Implementation of Treaties is of vital importance in ensuring the relationship between Indigenous Peoples and the Crown continues in a spirit of justice, partnership and mutual respect.

Based on these principles, the signers to this submission have raised urgent concerns for presentation to the 80<sup>th</sup> Session of CERD regarding Canada's 19<sup>th</sup> and 20<sup>th</sup> Periodic Reports, including the following.

Aboriginal title is recognized under Canadian law, and yet the Government of Canada persists in making every attempt to “extinguish” Aboriginal title through onerous negotiations and terms of modern land claims and self-government agreements, as well as through a narrow and reductionist reading of historical Treaties, agreements and other constructive arrangements. CERD has made recommendations in the past to Canada respecting this matter, and yet nothing in the policy approach of Canada has changed.

On November 12, 2010, the Government of Canada issued a “Statement of Support for the UN Declaration on the Rights of Indigenous Peoples”<sup>4</sup>. This Statement of Support endorses the United Nations Declaration as an aspirational document and in a manner “fully consistent with Canada's Constitution and laws”. All of the concerns enumerated

in this Alternative Report represent a failure of Canada to implement the UN Declaration in good faith and in conjunction with Indigenous Peoples.

The imposed development of Indigenous lands and territories has severely impacted the life ways and livelihoods of Indigenous Peoples. Free, Prior and Informed Consent (FPIC) is a recognized principle of law describing the right of Indigenous Peoples to provide or withhold consent respecting activities or actions that affect their lands, territories and resources. The Government of Canada has directly refuted the applicability of international standards respecting FPIC in Canada, which is of great concern, particularly in the context of rampant, unsustainable developments such as the Tar Sands and extraction in Alberta.

The issue of FPIC may be seen to extend to another major issue of concern presented in this Alternative Report, being Indigenous Children in State Care or Custody. There are more Aboriginal children in Canada in care today than there ever was during the infamous era of residential schools. This is partially due to the legacy of residential schools, but it is also due to the pervasiveness of racism and discrimination against Aboriginal families and communities in Canada. Whether you consider the issue of funding provided to Aboriginal child and family services authorities compared to similarly situated provincial child and family services authorities; or if you look at the absence of support for cultural or community cohesion; the outcome is the same. Greater apprehensions of Aboriginal children, the continued practice of tearing apart Aboriginal families and communities (perpetrated by government policy and programs), and life-long / intergenerational impacts of the institutionalization of Indigenous children in Canada.

Finally, Canada has demonstrated discriminatory practices against Indigenous Peoples within Canada and beyond the borders of Canada – whether that is through representations regarding Indigenous rights under other international treaties, or Canada’s complete lack of regard for upholding the human rights of Indigenous Peoples in other countries where Canadian companies operate.

Canada’s actions, detailed in this Alternative Report, are discriminatory and violate the rights of Indigenous Peoples as affirmed in the ICERD. As Indigenous Peoples, we face exclusion, restriction and distinction based on our Indigenous identity not only “on occasion” but in our daily lives – we experience the full impact and effect of discrimination as individuals and as collective nations, Peoples, tribes and communities. In spite of **the previous recommendation** of the Committee in CERD/C/CAN/CO/18 in paragraph 27 that Canada support the immediate adoption of the UN Declaration, Canada voted against the Declaration at the United Nations General Assembly on September 13, 2007 and was the second to last country to finally express support (with qualifications).

Additionally, Canada has continued to fail to implement the UN Declaration in good faith and in conjunction with affected Indigenous Peoples. Canada failed to implement the previous recommendation of the Committee in CERD/C/CAN/CO/18 in paragraph 17 regarding take appropriate legislative or administrative measures to prevent human rights

violations by corporations licensed in Canada. This Alternative Report contains several examples of human rights violations suffered by Indigenous Peoples in other countries as a result of Canadian mining activities.

We are concerned by a lack of follow up and implementation regarding previous recommendations in CERD/C/CAN/CO/18. For example, disproportionate violence against Indigenous women continues, as well as government cutbacks on funding to Indigenous organizations who are trying to address this issue. Canada has continued to fall far short in implementation of the UN Declaration and ICERD in a range of areas. These will be further described in the body of the alternative report.

We respectfully call the attention of CERD Members to the following section on Questions and Recommendations to raise during their review of Canada's 19<sup>th</sup> and 20<sup>th</sup> Periodic Reports in February of 2012.

We are grateful for this opportunity to assist the Members of CERD in fulfilling a mandate set out in the International Convention on the Elimination of Racial Discrimination, within the context of other human rights instruments, including the United Nations *Declaration on the Rights of Indigenous Peoples* and a range of international standards and laws. It is our hope that international law may be flexible enough so as to accommodate and affirm the full scope and nature of the rights of Indigenous Peoples, most specifically with respect to the implementation of ICERD in Canada.

## **SUGGESTED QUESTIONS AND RECOMMENDATIONS**

Based on extensive materials submitted by First Nations in this report, we are making the following recommendations and proposed questions to be posed to Canada during their Review.

### ***PROPOSED QUESTIONS***

- 1. There are a number of racial disparities and inequities that persist in Canada that can be attributed to the legacy of the residential school policies. What is the Canadian government doing to work in collaboration with Indigenous Peoples to effectively resolve the disproportionate rates of suicide, incarceration, sexual exploitation, language loss and continued removal of Indigenous children from their homes and communities?**
- 2. Taking into consideration that the principle of Free, Prior and Informed Consent is a legal principal found in the United Nations Declaration on the Rights of Indigenous Peoples, as well as in General Recommendation XXIII, as well as in legally binding Treaties between Indigenous Peoples and the Crown, what is Canada doing to fully implement this minimum standard? What types of mechanisms for redress will be provided (further to Article 6 of ICERD)?**
- 3. Given the continuing situation of disproportionate violence against Indigenous women, what is Canadian Government doing to support Indigenous representative organizations, and in particular Indigenous women's organizations to resolve and reverse this situation? What does Canada plan on doing in the next two years to ensure the full and active participation of Indigenous nations, tribes, communities and representative organizations in any proposed initiatives?**
- 4. Recognizing the wide and adamant opposition of Indigenous nations and communities to the development of the tar sands, as expressed through the Mother Earth Accord<sup>5</sup> and various related resolutions by Indigenous Peoples in Canada, how can the Canadian government justify continuing the expansion of these projects in Alberta, Canada – as well as the many types of human rights violations that are resulting from such development(s)?**
- 5. What mechanism or process does Canada plan to implement in order to ensure follow up or monitor implementation of the CERD Recommendations in conjunction with Indigenous peoples impacted by Canadian mining activities in other countries?**

6. Given Canada's "Statement of Support" for United Nations Declaration on the Rights of Indigenous Peoples, as well as treaty obligations held by Canada as a successor state, how does the Canadian Government justify the removal of jurisdiction of First Nations to Provinces / Territories further to devolution of powers?

## **RECOMMENDATIONS**

1. Regarding the Northwest Territories Lands and Resources Devolution Agreement-in-Principle (AIP)<sup>6</sup> the Committee recommends that Canada revisit this issue as being between the First Nations and the Crown by virtue of existing and applicable Treaties (8 and 11). The Committee recommends that Canada reverse or suspend the proposed devolution process involving the Territorial government, and implement the jurisdiction, existing and inherent rights held by Indigenous Peoples further to Treaty in the areas of land, water, minerals, and oil & gas.<sup>7</sup>
2. Further to General Recommendation XXIII and the United Nations Declaration on the Rights of Indigenous Peoples, free prior and informed consent is the internationally accepted minimum standard, as is the right to participate in decision making. Most importantly for the purposes of this Review, FPIC is also a Treaty principle. The Committee finds that Canada is bound through the operation of international and domestic law further to Treaty principle and the United Nations Declaration on the Rights of Indigenous Peoples.
3. Given the high proportions of Aboriginal youth in prison, foster care, removed from community for the purposes of adoption, or in the system of child and family services in Canada generally, such circumstances constitute a clear violation of ICERD on the part of Canada, in particular Article 2.1 (a),(b),(c) and (d), as well as Article 2.2, Article 5 (d) and (e), Article 6 and Article 7. We recommend that Canada take immediate steps to address funding inequities for child and family services provided to Aboriginal Peoples, and ensure that culture, language and community remain a priority when considering the best interests of an Indigenous child.
4. We request the Committee to continue to encourage the promotion and respect for Indigenous Peoples' rights under Treaty, agreements or other constructive arrangements with regard to climate change impacts, adaptation and mitigation and the protection of the rights of Mother Earth. With respect to Indigenous knowledge, climate change may contribute to intergenerational knowledge transmission breakdown, further restricting culture and expression of identity. Adaptation mechanisms must account for the need to maintain integrity of Indigenous knowledge systems.

5. We recommend that Canada provide financial and other support for the full and active participation of Indigenous Peoples, in particular from the north, in the international climate change negotiations processes, and ensure compliance with existing requirements for reporting further to the UNFCCC. In order to participate in a meaningful and substantive way in climate change negotiations, dialogue and commitments, greater financial support and technical expertise is required by Indigenous communities in general and Indigenous women in particular.
6. The design, composition and implementation of climate change laws, policies, processes and initiatives at the national, regional and local levels of nation-states must ensure the free, prior and informed consent of Indigenous Peoples.
7. In regard to Indigenous Peoples' genetic resource rights, it is recommended that Canada:

Be advised that the distinction in the Protocol between "established" and other customary rights of Indigenous Peoples is discriminatory and is incompatible with the central objective of "fair and equitable" sharing of benefits;

Respect fully the ruling of the Supreme Court of Canada that engaging in such distinctions is "not honourable";

Redress immediately this serious issue in a manner that eliminates all discrimination and fully respects their customary rights.

1. The Committee recommends that Canada, in conjunction with impacted Indigenous Peoples, establish and implement an effective regulatory framework and monitoring mechanism to hold corporations registered, domiciled, licensed and/or carrying out activities in Canada accountable for their human rights impacts in and outside Canada in accordance with international human rights obligations of both Canada and the States where activities are taking place. Canada is requested to report to the Committee on its progress in the implementation of this recommendation within one year.
2. The Committee recommends that Canada, in conjunction with impacted Indigenous Peoples, establish and implement an effective consultation process respecting Bill S-2, as well as address outstanding issues of concern regarding on-going discrimination against Indigenous women in Canada further to legislation and policy. Canada is requested to report to the Committee on its progress in the implementation of this recommendation within one year.

3. That the Committee consider **re-iterating the previous recommendation** of the Committee in CERD/C/CAN/CO/18 in paragraph 21, **with the modification that the implementation of the Final Report and Recommendations of the Royal Commission on Aboriginal Peoples meet the 20 year commitment.**

## MAJOR ISSUES OF CONCERN

### **RIGHTS AND OBLIGATIONS: TREATIES, AGREEMENTS AND OTHER CONSTRUCTIVE ARRANGEMENTS**

Relevant Articles of the UN <i>Declaration on the Rights of Indigenous Peoples</i> Preambular paragraphs 8, 15 and 24, and Articles 37 and 45
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Treaties between the Crown and Indigenous Peoples of the land are a fundamental part of Canadian history and the legal relation between Indigenous Peoples and the rest of the population. They provided the framework for peaceful relations. They also serve as the basis for mutually beneficial historical commitments between Indigenous Peoples and the Crown.<sup>8</sup>

Treaties are, amongst some Indigenous peoples of Canada, regarded as being sacred agreements because they brought Canada into existence within Indigenous territories, and were negotiated and interpreted using Indigenous laws and legal traditions in many instances. The laws surrounding Canada's formation in many Treaty territories are profound because they are meant to encourage the spiritual, moral and legal capacities of all the people who would come to live in Canada.<sup>9</sup>

However, there are many different kinds of Treaties, agreements and other constructive arrangements in Canada. Some Indigenous nations entered into agreements of alliance with the Crown.<sup>10</sup> Others, such as some Indigenous nations in the Province of British Columbia, experienced other people moving into their territories and establishing governments without their formalized participation and legal consent.

For the most part, Treaties constitute a nation-to-nation partnership, and the development of inter-societal law that contributes to the pluralist legal system of Canada today. The Special Rapporteur Mr. Miguel Alfonso Martinez, in his *Study on Treaties, Agreements and Other Constructive Arrangements between States and indigenous populations*, found that Treaties negotiated between Indigenous Peoples and the British Crown are international agreements.<sup>11</sup> Indigenous interpretation is inclusive of this understanding, as well as the “spirit and intent” of such Treaties based upon the oral histories and Indigenous laws surrounding Treaty interpretation and implementation. Treaties represent recognition of Aboriginal Title and rights of Indigenous Peoples over their territories – there are Treaty nations who argue that such title was never ceded or surrendered<sup>12</sup> - and which endure “so long as the sun shines, the grass grows and the rivers flow”. Treaty interpretation can be problematic from a certain Canadian government perspective, particularly when government lawyers argue for the narrowest

possible technical interpretation of Treaties in order to give the Crown more authority relative to Indigenous Peoples.<sup>13</sup>

At a recent Crown-First Nations Gathering held in Ottawa, Ontario, with the attendance and participation of the Prime Minister of Canada (amongst other Canadian and First Nations representatives) the National Chief of the Assembly of First Nations, Shawn A-In-Chut Atleo, stated as follows:

Her Majesty Queen Elizabeth has affirmed our Treaty relationship. She said, “You may be assured that my Government of Canada recognizes the importance of full compliance with the spirit of your Treaties”. Justice Lord Denning, during the constitutional patriation debates, affirmed the integrity and durability of the First Nation - Crown relationship. The 1982 Constitution Act again underlined this historic partnership, including the recognition and affirmation of treaty and inherent rights, as the supreme law of the land. This year marks the 30th anniversary. Rather than an empty box, the Supreme Court of Canada has affirmed section 35 as a “solemn commitment that must be given meaningful content”. It is imperative that we move forward on this basis – the basis of recognition and affirmation not denial and extinguishment.<sup>14</sup>

The Treaties are seen today as proof that Canadian law is built on the assumption that the Aboriginal Peoples have rights and title in the lands of their territories, and rights to adhere to customary law within Indigenous communities, unless and until they are, by lawful means, altered with the free, prior and informed consent of the Peoples concerned.

LeBel J. of the Supreme Court observed:

The Robinson Treaties, the Numbered Treaties, and the entire treaty system.... evince the Crown's recognition that Aboriginal Peoples possess certain rights in the land even if many of them were nomadic at the time.<sup>15</sup>

We believe that Canada must honour the spirit and intent of Treaties. Our ancestors in some areas have secured our traditional ways and food systems in Treaties. Treaties are not only the framework for good relations between Indigenous and non-Indigenous Peoples of Canada, they are also a potential solution to many of the challenges facing Indigenous nations and communities in Canada, provided that the interpretation and implementation of such Treaties is done with the full, active and equal participation and partnership of Indigenous Peoples.

Many Treaties contain specific rights and obligations that are also referenced in the *International Convention on the Elimination of Racial Discrimination* (ICERD) – namely, those rights described under Article 5 and Article 7.

The need to protect Treaty rights also follows from the fact that although many Treaties are written documents, they are open to more expansive interpretation in light of their

historical nature, the presence of oral promises, and language barriers that existed at the time that many Treaties were negotiated.<sup>16</sup>

Accordingly, Treaties are not interpreted in the same manner as other contracts. They are to be construed liberally, and doubtful expressions resolved in favour of Indigenous Peoples.<sup>17</sup> Treaties are to be interpreted “in a flexible way that is sensitive to the evolution of changes in normal” practice<sup>18</sup>. Treaties contain express rights, rights that must be implied to give effect to express rights, and rights reflecting the “common intention” that best reconciles the interests of Indigenous Peoples and the Crown.<sup>19</sup> Thus, the express provisions of a Treaty’s text are not the sole source of Treaty rights.

Further, Treaties are to be interpreted as living documents. In *Sundown*<sup>20</sup>, the Supreme Court of Canada confirmed that courts should not use a “frozen-in-time” approach to interpreting Treaty rights, a principle that was affirmed and applied by the Supreme Court of Canada in the case of *Marshall*.

There are particular matters of concern respecting Treaties and Treaty implementation that must be highlighted for the consideration of the CERD Members. The following examples have been provided by the Confederacy of Treaty 6 First Nations in the Province of Alberta and the Dene Nation in the Northwest Territories.<sup>21</sup>

## **GOVERNANCE UNDER TREATIES: BILL C-27 “FIRST NATIONS FINANCIAL TRANSPARENCY ACT”**

The Nations of Treaty No. 6 have always supported accountability of the leadership to the citizens of the Indigenous Treaty Peoples that they represent, however, it seems that more and more in the past few years and in particular during the tenure of the present federal government Treaty No. 6 leadership has been forced to account more to the Indian Affairs and Health Canada bureaucracies. This needs to change in light of the fact that the expense of providing goods and services to our Nations is becoming a very expensive proposition and with less resources and an ever-growing population.

The government of the day expects us as leaders to provide more with less and that is just not possible and they continue in their attempts to deflect the blame and discredit the Indigenous leadership when in fact their own Auditor Generals have been telling them that they continue to fund us to fail. The recent situation in Attawapiskat First Nation<sup>22</sup> is only the tip of the iceberg and it is well known amongst the Indigenous leadership that at the rate our populations are growing and the refusal of the federal government to lift the caps on funding and the recent clawing back and slashing of the limited funding for First Nations it is only a matter of time before many First Nations reach the breaking point.

As for the much touted “silver bullet” known as Bill C-27 not only will it not fix the current problems that exist it could potentially make a very volatile situation much worse. The stated purpose of Bill C-27 is to enhance the financial accountability and

transparency of First Nations. It requires the preparation and public disclosure of their audited consolidated financial statements and of the schedules of remuneration paid by a First Nation or by any entity that it controls, as the case may be, to its chief and each of its councilors, acting in their capacity as such and in any other capacity, including their personal capacity (section 3). This information must be made available to the members of the First Nation in question, without a doubt. However, the Bill requires that the information be made available to the general public and the Canadian government. Monies flowing to First Nations further to contribution agreements as between First Nations and the Government of Canada are, in whole or in part, due to First Nations as a result of a Treaty relationship or similar Crown-First Nation relationship. This means that the funds may not be equated to “public funds” or taxpayer dollars but are rather due to implementation of Treaty, Agreement or other constructive arrangement.

This type of reporting adds even more pressure on First Nations, who in return for inadequate funding for on-reserve and community core programs and services, are already over-burdened by reporting requirements, as cited by the Auditor General of Canada in 2002 and in 2006.

In 2002, the Auditor General estimated that four federal organizations required at least 168 reports annually from First Nations communities—many with fewer than 500 residents. The Auditor General also found that many of these reports were unnecessary and, moreover, were not used by the federal government. As of 2006, meaningful action by the federal government was still needed to reduce the unnecessary reporting burden placed on First Nations communities and to develop more efficient procedures for obtaining information required.

Officials told the Auditor General that Indian and Northern Affairs Canada alone obtains more than 60,000 reports a year from over 600 First Nations.<sup>23</sup>

**The idea that what is required is more reporting in the form of audited financial statements, to address shortfalls in budgets or inadequate funding of reserve programs and services is reprehensible. Simply attempting to characterize First Nations leadership and staff as the offenders in a systemic crime of inadequate funding is discriminatory and violates ICERD Articles 2, 5 (a) (c) (d) and (e), and in particular Article 7.**

The one-size fits all approach that has been embraced by this government has never worked and will probably never work for the First Nations of this country. Recognizing the diversity, the different cultural, economic, political and social situations that exist across the country and working with the First Nations instead of working against them would probably be a lot more efficient and effective to deal with the poverty that plagues the Indigenous Nations. One good precedent that was considered but never followed through is the failed *Kelowna Accord*<sup>24</sup> whose sole purpose was to provide a real stimulus for the First Nations of the country by attempting to put a major dent in the accumulated shortfall in funding caused by the cap in funding imposed by the government during the 1980s.

## TREATY AND ABORIGINAL RIGHTS TO WATER

Rights held within the current system of water law and governance by Indigenous Peoples are limited by the fragmentation of different jurisdictions and interests - local, regional, provincial and federal. Limitations on First Nation participation under current regimes do not permit Indigenous Peoples to place their relationships within their communities, with other governments or other Canadian citizens on a sustainable foundation. The artificial separation of the environment from science and people from the environment does not facilitate the application or use of Indigenous structures and processes of knowledge and legal traditions.

Currently, the *Indian Act* provides extremely limited powers of regulation respecting water management. The *Act* generally provides for its administration by band councils, governance authorities that have specific powers set out under the *Act*. The *Act* codifies rules regarding membership in First Nations, leadership selection, administration of programs and services provided in accordance with the *Act*, and financial management and accountability.<sup>25</sup> Band councils are empowered to make by-laws on specific matters set out in the *Act*, which must then be approved by the Minister of the Department of Indian and Northern Affairs Canada (the Department is generally referred to as 'INAC'). Band councils are empowered to make by-laws for the health of residents and drinking water facilities.<sup>26</sup>

However, these powers are negligible in the face of inadequate federal government funding on reserves (that include cumbersome funding mechanisms and arrangements), impoverished economic conditions and other barriers to development.<sup>27</sup>

While the provinces through operation of law control water allocations to reserve lands,<sup>28</sup> First Nations capacities with respect to water quality, supply or distribution has remained a federal matter. Band councils or other forms of community governments have had to negotiate with the federal government for funding for operations and management of the provision of safe drinking water to their members on reserve and in communities.

“Beginning in the 1980s, and coinciding with efforts to devolve governance activities to First Nations, Canada introduced agreements – contracts – under which First Nations would be responsible for operating and maintaining capital facilities on their reserves, such as water treatment plants. These contracts began the introduction of non-judicial protocols and quality guidelines. The protocols are typically based on ‘best practices’. However, like the contracts, the protocols provide no chain of lawful accountability for reserve residents to call upon, nor do they ensure a remedy if water is unsafe or the infrastructure shows signs of failure....By 1995, INAC had come to describe its role in ensuring safe drinking water ‘as primarily that of a funding agency’.”<sup>29</sup>

As such, First Nations have largely been left to their own devices, and at the mercy of funding negotiations with INAC, respecting the provision of safe drinking water in their communities. They have fallen through the cracks of jurisdiction between the provinces and territories and the federal government.

At the same time, provinces are under no legal obligation to ensure that provincial standards of water quality, supply and distribution are implemented on reserves. Furthermore, in provinces where new or amended regimes are brought into being, provincial and local governments have not been responsive to the interests of First Nations. For example, in Alberta, historic Treaties cover the entirety of the province. General water use and access through water licenses and water allocations under the *Alberta Water for Life Strategy* can have significant impact on the Indigenous communities, traditional territories, sacred sites, and other uses of land such as hunting, fishing, gathering (to use the language of the Treaties) and agriculture. While Treaty rights provide benefits to Indigenous Peoples while they are on reserve, Treaty rights also comprise rights to livelihood, and life-ways connected to the lands and territories of those nations who entered into Treaty. Treaty rights (and other Aboriginal rights) may be exercised off-reserve or outside of the community and when it comes to activities like hunting and fishing, often are exercised elsewhere within the boundaries of the Treaty. As such, the use, allocation and management of lands and waters off-reserve or outside of the boundaries of community have very real and immediate impacts on the ability of First Nations to exercise Treaty and Aboriginal rights.

In Alberta, the main question at issue with respect to the water management planning processes implemented pursuant to the *Water Strategy* was:

- striking a balance between protection of the environment and habitat (fundamental to the exercise of Treaty fishing and hunting rights); and
- allocation of water (clearly relevant to the Treaty right to use reserve land and water rights, use and access by First Nations) to meet the needs of a province whose population and industrial base was expanding explosively.<sup>30</sup>

Clearly, one way or the other, the Indigenous rights relating to the use of their reserve lands and territories to hunt and fish would probably be adversely affected by a water management process that did nothing to include their voice in terms of its development, nor did the process itself include a clear role for First Nations. Alberta Environment has acknowledged indirectly and directly in their documentation that First Nations were not really active in the lead up or implementation of the *Strategy*, mainly due to the fact that at that time, Alberta had no First Nation “consultation policy”, and secondly that it was not their role as a province to consult with First Nations - it was the role of the Federal Government.

Provincial management regimes may purport to invite the participation of Aboriginal Peoples, but these invitations happen within the context of over-arching issues of legal requirements for consultation on constitutionally protected Aboriginal and Treaty rights. It may be the case that First Nations communities are concerned about the implementation of their water rights. At the same time, local and provincial governments

don't want to enter into the expense of leading the way in resolving the constitutional / jurisdiction dilemma.

Other actors which fail to properly address Indigenous water issues include Health Canada and Environment Canada. Health Canada has developed *Guidelines for Canadian Drinking Water Quality*, that is intended to provide guidelines for water quality on reserves, while Environment Canada is responsible for a range of programs to protect First Nations (on federal and Aboriginal lands) from the effects of pollution and waste.<sup>31</sup> However, despite the possibility of action by federal and provincial governments, First Nations are left without much recognition or protection for their water.

As a result of this incoherent set of policy, law and regulation, many First Nations communities in Canada have lived with and suffered from unsafe drinking water in their daily realities. **In terms of on-reserve water, as of November 30, 2011<sup>32</sup>, there were 131 First Nations communities across Canada under a Drinking Water Advisory.** In 2005, Kashechewan First Nation was evacuated after the water supply caused impetigo and other skin diseases, and the plight of the community raised national attention. Canada then faced public criticism for the glaring disparities in the quality of life between First Nations and non-Aboriginal Canadians.<sup>33</sup>

These challenges, having existed for many years in Canada, have previously been recognized in the work of the Royal Commission on Aboriginal Peoples (RCAP) which issued its Final Report in 1996. In that Report, shared management of resources was recommended:

2.4.77 Federal and provincial governments revise their water management policy and legislation to accommodate Aboriginal participation in existing management processes as follows:

(a) the federal government amend the Canadian Water Act to provide for guaranteed Aboriginal representation on existing inter-jurisdictional management boards....and establish federal/provincial/Aboriginal arrangements where non currently exist; and

(b) provincial governments amend their water resource legislation to provide for Aboriginal participation in water resource planning and for the establishment of co-management boards on their traditional lands<sup>34</sup>

In 2006 a *First Nations Water and Wastewater Plan of Action* was initiated by the federal government, requiring the creation of a *Protocol for Safe Drinking Water in First Nations Communities*. INAC has so far provided three "Progress Reports" on the implementation of this Protocol, based on a short list of First Nations who qualify as what INAC characterizes as "high risk systems". In addition, an *Expert Panel on Safe Drinking Water for First Nations* was struck in 2006 and travelled across the country soliciting comments and concerns of First Nations on the issues around drinking water. The final report of the *Expert Panel* recommended three possible solutions: simply apply the existing provincial / territorial water law(s) on reserves; create new legislation especially for First Nations and water; or empower the Customary and Traditional legal orders of

Indigenous Peoples respecting water. The last option is the least discriminatory option for Indigenous Peoples in Canada.

In 2007, the Standing Senate Committee on Aboriginal Peoples issued a Final Report entitled “*Safe Drinking Water for First Nations*”<sup>35</sup> This Report also supports the empowerment of Indigenous legal orders, custom and tradition respecting water law and regulation.

As a result of this recent activity, INAC had began a process of creating enabling legislation with a regulatory regime for water and wastewater on First Nations reserves in Canada. The title was the *Proposed Legislative Framework on Drinking Water and Wastewater in First Nation Communities*.<sup>36</sup> It did not acknowledge, recognize or affirm Aboriginal and Treaty rights. INAC has instead proposed to “incorporate by reference” provincial/territorial regulations and standards, so as to simply extend their application on reserves in Canada.

This is unacceptable because it does not accord with broader constitutional principles, nor with Indigenous legal traditions. The approach simply mirrors provincial regulations and standards without any guarantee that First Nations will have the financial or technical capacity to reach those standards. Some First Nations are worried that they will be opened up to new liabilities and additional costs for which they are unprepared, **leading to even greater discrimination under the laws of Canada.**

In the INAC Discussion Paper, the elements of the proposed framework were to be discussed throughout a consultation process with First Nations. The consultation process was later renamed as “engagement sessions”<sup>37</sup> as a result of a vociferous backlash from First Nations, who criticized the process as insufficient for proper consultation under the laws of Canada. Thirteen (13) engagement sessions were held from February to March 2009 with 544 First Nation individuals across the country.<sup>38</sup> Those not able to attend sessions were invited to submit written comments on the proposed legislative framework. The engagement sessions did not include a discussion of Indigenous customary or traditional management or governance frameworks. Instead, the elements to be addressed under the engagement sessions were issues like appeals mechanisms for regulatory decisions, compliance, and design approvals.

The framing of the consultation process firmly rejected consideration of Indigenous forms of water management and valuation, in spite of the fact that there were two reports (one from the Expert Panel and one from the Senate) suggesting otherwise. Under the current Canadian approach, any water rights will be effectively changed into access matters, predicated and dependent upon purposes derived from provincial statutes and regulations, and common law. The derogation of Aboriginal and Treaty water rights under provincial laws is unacceptable and unconstitutional.

As a result of this history, Bill S-11, an *Act to Provide Clean Drinking Water for First Nations*, was introduced in a previous Session of Parliament. This Bill has not yet been re-introduced in the current Session of Parliament, but it has been indicated by the

Government of Canada that it is their intention to re-introduce the legislation soon. The concern of First Nations is that the legislation will be re-introduced in much the same format and content, without any acknowledgment of Indigenous concerns.

Based on this understanding and inherent belief the Nations of Treaty No. 6 have stated in previous position papers that there are many problems with the proposed water legislation including but not limited to:

- Bill S-11 was a direct violation of the Treaty Rights of the Indigenous Peoples of Treaty No. 6 in terms of how it would impact Treaty No. 6 Nations water reserves, water rights and water resource management. This flawed legislation is expected to be reintroduced as a different bill and will have the same effect on the Indigenous Nations of Treaty No. 6 if there are no substantial changes.
- The long term negative impacts associated with the proposed legislation undermines the inherent rights of the Indigenous Nations of Treaty No. 6 and would impair their ability to properly manage their own water resources which were not relinquished under Treaty.
- The proposed federal regulations called for in the legislations could actually put the Nations of Treaty No. 6 at risk. If they are made responsible for meeting the requirements set out therein without being provided the means (resources, infrastructure & training) to do so they are being set up to fail.
- “Incorporation by Reference” will allow provincial water law to apply to the Indigenous Nations of Treaty No. 6 with the same force of federal law, at the sole discretion of the federal cabinet.
- The groundwater changes are key due to the historic fact that Groundwater Rights were attached to land at the time reserve lands were set aside in Treaty No. 6. The federal Crown never asserted any control or ownership over groundwater before 1930. When Canada transferred water to Alberta in 1938 by amending the Natural Resources Transfer Act (NRTA) of 1930, only ownership of surface water was transferred to Alberta. This was done unilaterally and was done so without the free, prior and informed consent of the Indigenous Treaty Nations.
- A similar initiative is currently underway in the Northwest Territories, called the Northwest Territories Lands and Resources Devolution Agreement-in-Principle (AIP).<sup>39</sup> This AIP proposes to transfer authority from the Government of Canada’s Minister of Aboriginal and Northern Affairs to the Government of the Northwest Territories (NWT) – it will change who makes decisions about how natural resources including land, water, oil & gas, and minerals are used and developed. Many First Nations, including approximately 30 First Nations of the Dene Nation<sup>40</sup>, are opposed to this devolution process due to lack of consultation or consent in the lead-up to the AIP and subsequent to the AIP being ratified. The Federal government, through these actions, are devolving Indigenous lands, waters and resources to a territorial government, which are properly under the jurisdiction of the Treaty First Nations further to Treaties 8 and 11. Negotiations are continuing without the participation of the 30 First Nations of the Dene Nation.
- In 1962 Alberta added to its provincial water legislation their first assertion to ownership over ground water. However, provincial law cannot extinguish

Indigenous Treaty Nation's rights or interests in land (ground water rights are tied to land ownership).

Water is very Sacred to the Nations of Treaty No. 6 and the Dene Nation as it is one of the sacred elements and sources of life that was depended upon by our ancestors to measure how long the numbered Treaties would last. Water is life and as long as there is water there will be life and it is based on that premise that our ancestors did not include the source of this sacred element during the discussions at Treaty time and that is why they reserved the Sacred Mountains for themselves and all future generations. According to our Elders it is because of the reverence and utmost respect that our ancestors held for the sources of the great rivers that they did not even discuss sharing the mountains with the settlers or the Queen's people.

The following is an Elders Testimony for the purposes of submission of a Stakeholder Communication respecting Human Rights and Access to Water, submitted to the Office of the High Commissioner for Human Rights in April of 2007:<sup>41</sup>

*Our indigenous peoples' belief states that "Aski" ("The Earth") is our mother and was "ekih iynamah" ("Given to us as indigenous people of the land by The Creator".) Our History of Creation stories tell us that she is a living being and has manifested a part of herself to nurturing all life forms of her children upon her body. These children of hers, have in turn, manifested themselves from their spiritual "Creator's image" form, into plant, animal and other life giving forms as we see them. The Creator gave us these life forms to be in direct relations with as "our older siblings" as we were the last sibling that was Created within this interconnected family link. The greatest teaching from this being that the Creator's Natural Law dictates to us that we take care of our mother Askiy ("The Earth") in the same compassionate manner that she takes care of us. She constantly nurtures us in this compassionate manner as newborn infants nursing from "Otohtosapom" ("Her Breast Milk") which is the water that She provides us with. Since time immemorial we as First Nations people have maintained the purity and the natural flow of Her Breast Milk (as our gesture of compassion) for our succeeding generations. This Law states that there should always be a conscientious effort in continuity of taking care of the interlinked balance of His Creation upon our "Mother Earth" as She provides for our required sustenance and livelihood. The sacred doctrines of our History of Creation Stories tell us that we were Created upon this island to maintain our oneness with our "Mother Earth." We have always followed this Law as "Mother Earth's" caretakers until this balance was subsequently tainted from us from the time of "contact." On being Placed as the caretakers of our Mother Earth, our First Nations people wanted to have as Stewards, the overall, or at the very least, equal voice as to how and where She was going to be utilized. Our Plains Cree Elder Kisikaw Kiseyin states in the etymological reference to our term for water ("Nipiy"), "Ni" derives from the term "Niyah" which means "I Am", and "Piy" derives from the term "Pimatisowin" which means "The Life", which reads as "I Am The Life".*

*Another Plains Cree Elder Mary Alice Whitecalf (who had a mother that was 123 years old), stated that "Water was the Creator's Own Flesh and Blood." <sup>42</sup>*

**The Indigenous Value of Water is exemplified above, and serves as potent testimony to the fact that the impacts of privatization in terms of assessment encounters serious obstacles when the question is damage to Indigenous subsistence based cultures, which may be described as “cultural and spiritual loss”.** This requires a definition of those obstacles and the creation of alternative legal theories and valuation methods – but most of all, it requires that if new legislation is introduced, that Indigenous Peoples in Canada are properly consulted, and that such legislation be drafted (with the full participation of Indigenous Peoples) to empower the Indigenous legal orders across Canada respecting the protection and management of water.<sup>43</sup>

## **LANDS MANAGEMENT UNDER TREATY: THE CASE OF TREATY NO. 6 AND THE “PUBLIC LANDS ADMINISTRATION REGULATION” (PLAR) IN ALBERTA, CANADA**

The Confederacy of Treaty Six First Nations (CT6FN) has always taken the stand that Treaty No. 6 is a Sacred Covenant and guarantees to the Nations of Treaty No. 6 certain pre-eminent rights that are not negotiable and maintains that it is our collective responsibility to ensure that our prior interests are at the forefront in opposing this type of invasive legislation.

The Department Sustainable Resource Development (SRD) in Alberta is responsible for managing and regulating Alberta’s public lands.

*Public Lands Act* amendments that came into force on April 1, 2010, and the Public Lands Administration Regulation (PLAR) include provisions to enable responsible use of public lands for a variety of uses. These include time-limited use of public lands for a listed set of activities and uses (collectively defined as recreational uses) Access permits and closures are among the tools in PLAR for managing use of vacant public land. Part 2 of PLAR provides the right to all persons to enter and occupy vacant public land or recreational purposes as defined. Recreational purposes include any of the activities listed in section 30 of PLAR (hunting within the meaning of the Wildlife Act, camping, fishing, etc) undertaken for a purpose other than a commercial purpose.

PLAR is a provincial law of general application that applies to all persons including Indians and Métis. However, the Province of Alberta does recognize to a limited extent, the constitutionally protected rights of Aboriginal peoples under the Constitution of Canada (s.35). As such, Alberta has created a “Standard Operating Procedure” (SOP L01)<sup>44</sup> respecting the application of PLAR to “Indians and Metis”.

As identified by the CT6FN Consultation Policy Analyst some areas of serious concern to the Nations of Treaty No. 6 include but are not limited to the following:

- The permit system proposed by these Regulations is impractical for the Indigenous Peoples of Treaty No. 6 who permanently reside on so-called “crown lands” such as Smallboy Camp and others. Regardless of what position the Alberta Government takes in respect of crown lands they are still our traditional territories. For the Indigenous Peoples living a traditional lifestyle and maintaining a connection to our traditional territories such regulations would impose an additional difficulty not only administratively but more so from a traditional livelihood perspective.
- The permit system proposed under PLAR is in many ways a modern version of the paternalistic regime applied during the time of our ancestors when they needed a permit to leave the reserve for any purpose.
- The Treaty No. 6 perspective of this permit concept is that it further exacerbates the hierarchal, authoritative relationship that the governments have imposed on us to perpetuate their perceived authority over us. With this initiative they continue to challenge our credentials as Treaty Peoples and are once again attempting to redefine and control critical elements of our identity as the original Indigenous Peoples of this land.
- The Nations of Treaty No. 6 must never allow any government to relegate or confine any aspect or principle of our Treaty to Provincial authority or as acts of legislation
- PLAR fails to recognize one of the most important principles we embrace as Indigenous Peoples with respect to the land itself and that is our “ancient and present relationship” and our “ancient and present connection” to our land of origin. Traditional practices and our annual ceremonies involve the land itself so that in a sense our religious freedoms are being infringed upon as well. For the Indigenous Peoples of Treaty No. 6, ceremony is a way of life and should never be considered a “recreational” activity and as such is not properly accounted for or respected in PLAR.
- Treaty No. 6 ancestral heritage and inherent Indigenous Rights are not addressed nor accommodated as part of the process under PLAR.
- The process proposed under PLAR for the protection and management of the lands in question is grossly inadequate and appears to accommodate industrial interests and favor development over protection of the lands.
- Finally it must be noted that PLAR is a regulated process and as such the Nations of Treaty No. 6 should never allow any government to “regulate” any aspect of our rights under the terms of Treaty No. 6
- The Dene Nation is experiencing a similar circumstance with the proposed development of the Mackenzie Valley Resource Management Act (2000) established the Mackenzie Valley Land and Water Board, which is proposed to be replaced with a proposed framework that will “Fast Track” regulatory compliance requirements, report amongst other functions of the regulatory regime in the north, without the free, prior and informed consent of the Dene Nation and other First Nations (see supporting documentation).

## TREATY AND ABORIGINAL RIGHTS: THE TAR SANDS DEVELOPMENT(S) IN ALBERTA, CANADA

Another glaring abuse of Indigenous Peoples rights related to fossil fuel extraction is taking place through the government of Canada's and the Province of Alberta's support for and licensing of corporations to carry out oil extraction from "tar sands" in Northern Alberta Canada. Tar sands extraction currently covers 4.3 million hectares (10.6 million acres). Leases sold by Alberta and Saskatchewan cover 140,000 square kilometers of boreal forest, muskeg peat bogs and northern prairie ecozones, an area as large as the state of Florida.<sup>45</sup> The deposits are estimated to hold 1.7 trillion barrels of crude oil. In 2010, oil sands production comprised 55% of western Canada's total crude oil production, and is projected to grow from 1.3 million barrels/day in 2009 to approximately 3.5 million barrels/day by 2025.<sup>46</sup>



Source: Wikipedia/Created by Norman Einstein, May 10, 2006

Extracting the oil from sand and clay is a highly industrialized process that requires strip mining large areas, resulting in destruction of entire ecosystems. It requires large amounts of fresh water and produces large amounts of toxic wastes.

Two distinct approaches are being used to mine/extract the crude bitumen from the oil sands - open-pit mining of the shallow deposits that involves the use of waste tailings ponds, and *in-situ* recovery or in place drilling methods which do not use tailings ponds.<sup>47</sup> *In-situ* extraction or Steam Assisted Gravity Drainage (SAG-D) involves heating the bitumen through the injection of pressurized steam, and then recovering flow. Open-pit mining requires approximately 2-5 barrels of fresh water for each barrel of oil produced, while SAG-D currently requires an average of half a barrel of fresh water for each barrel produced.<sup>48</sup>

One of the major concerns around toxins is the potential contamination of drinking water – with arsenic.<sup>49</sup>

The Athabasca River system and some of its tributaries flow through the Athabasca oil sands deposits near Fort McMurray. The river originates from the eastern slopes of the Rocky Mountains in Alberta, flows northeast and drains an area of approximately 160,000 km<sup>2</sup>, eventually flowing through the Peace-Athabasca Delta and discharging into Lake Athabasca. The main environmental concerns regarding water quality, quantity and ecosystem health related to oil sands development are focused in the lower portions of the Athabasca River, primarily downstream of Fort McMurray. This lower portion of the Athabasca River drains an area of approximately 58,000 km<sup>2</sup> and includes the Clearwater, Christina, Steepbank, MacKay, Muskeg and Ells river watersheds.

Tar sands mining are a major source of greenhouse gas emissions and a major contributor to climate change and global warming. Some of the toxic-tailing ponds are located next to the Athabasca River.

In 2007, Alberta approved withdrawal of 119.5 billion gallons of water for tar sands extraction. An estimated 82% of this water comes from the Athabasca River, the source of life and subsistence for the Mikisew Cree First Nation, the Athabasca Chipewyan First Nation at Fort Chipewyan, the Fort McMurray First Nation, the Fort McKay First Nation, and to the south, the Chipewyan Prairie First Nation, and many downstream First Nations.

The tar sands development around Fort McMurray and Fort McKay are located upstream along the Athabasca River basin. Current tar sands development has completely altered the Athabasca delta and watershed landscape, impacting the health and subsistence rights of many Indigenous Peoples who live downstream. It has caused deforestation of the boreal forests, open-pit

*“Without adequate water quality or quantity in the river system, we cannot access our important cultural, spiritual, and subsistence areas and we cannot sustain the health and well-being of our families on the traditional foods that we have always obtained from it... When we were children we still drank the water from the river channel flowing out from the Delta... The abundant fish, game and waterfowl of the Delta fed our families... Today, we will not allow our loved ones to drink the water from the river. The abundance of the past is now only a memory... As water levels continue to decline and water quality and health concerns continue to grow, we wonder what has happened to our Treaty Rights and the sharing agreement we entered into with the Crown so many years ago.”*

Chief Allan Adam, ACFN and Chief Roxanne Marcel, Mikisew Cree First Nation, In: Craig Candler, Steven DeRoy, Rachel Olson, and the Firelight Group Research Cooperative with the Athabasca Chipewyan First Nation (ACFN) and the Mikisew Cree First Nation (MCFN), *As Long as the Rivers Flow: Athabasca River Knowledge, Use and Change, Executive Summary*, November 2010. pp.4&5

mining, drying of water systems and watersheds, toxic contamination, disruption of habitat and biodiversity, and disruption of the indigenous Dene, Cree and Métis trap line and hunting cultures.

The results are devastating for Indigenous Peoples. A recent health study commissioned by the Nunee Health Board Society of Fort Chipewyan has empirical evidence that the governments of Alberta and Canada are ignoring the toxic contamination of downstream Indigenous communities and their resultant deteriorating health. Peoples most at risk are those whose means of subsistence is based on their lands and water. Dene, Cree and Métis communities maintain a subsistence diet of fish and wild game.



**Whitefish** TOP: from the Athabasca Delta, collected by Robert Grandjambe Jr., May 2010; BOTTOM: from Lake Athabasca, collected by Ray Ladouceur, Dec. 2009. Photo credit: John Ulan, EPIC Photography. Note the tumour plainly visible on the bottom fish, and the lurid red color of the top fish which is supposed to be a healthy cream color. As stated in a recent report by the Green Party of Canada: “Deformed fish have been found in nearby Lake Athabasca and drinking water has been contaminated. Internationally renowned water expert Dr. David Schindler, University of Alberta, states, “6-7% of the fish caught at Fort Chipewyan have skin or lip carcinomas.” Timoney states, “Mercury levels in the fish present a serious concern for human consumption”. The commercial fishery of Fort Chipewyan (located on the northwestern tip of Lake Athabasca) is effectively dead.<sup>50</sup>

The Fort Chipewyan community has an 80% subsistence diet. Its residents identify tar sands mining and water polluted by its toxins as the cause of the alarming increases in rates of death and chronic illnesses including previously unknown cancers. *"The river used to be blue. Now it's brown. Nobody can fish or drink from it. The air is bad. This has all happened so fast,"* says Elsie Fabian, 63, an elder in a Native Indian community along the Athabasca River.<sup>51</sup>

Indigenous Peoples' have stated that Inherent and Treaty Right to Food includes the need to:

1. Affirm that our Right to Food is an Inherent Right affirmed in Treaties, and that Food Sovereignty is an essential aspect of our Sovereignty as Treaty Nations.
2. Affirm that our traditional foods are essential to our physical, cultural and spiritual health, identity and survival.
3. Recognize that the Creator placed us on our traditional lands and provided clean food and water for our health and survival and that we have a inherent and Treaty

- right and responsibility to care for and protect the land, plants, animals and water, and our sacred Mother Earth as a whole, from destruction and contamination.
4. Affirm that any attempt to restrict or curtail our rights to hunt, fish, grow or gather our traditional foods and to use the water on our Treaty lands by federal, provincial or municipal government laws, regulations or ordinances are fundamental violation of our human rights and Treaty rights, including our Treaty Right to Food.
  5. recognize the negative impacts of imposed development such as mining, damming, drilling, Tar Sands extraction and clear cutting, as well as climate change and environmental contamination on our traditional foods and water sources. We recognize our Inherent and Treaty rights and responsibilities to care for and protect the food and water sources that have been the basis of our survival since time immemorial.
  6. Recognize that we continue to have the traditional knowledge and wisdom within our Nations about how to use and protect our traditional foods, and that our elders, spiritual leaders and other traditional practitioners carry this knowledge as passed down from our ancestors.
  7. Recognize the urgent need to make sure that our children, young people and future generations learn about our Treaty Rights, including our Treaty Right to Food and how to use and care for our traditional subsistence foods, waters and medicines. This is fundamental for our continued survival.
  8. Recognize the importance of re-establishing the traditional trade relationships that always existed between our Nations as part of our Indigenous development, Nation- to- Nation relations, and food sovereignty; we recognize the importance of re- establishing these Indigenous trade relations that include the exchange of traditional foods and knowledge as a response to the urgent situations now facing many of our Nations as their traditional foods become more scarce (such as urbanized areas).
  9. Call upon all of our Treaty Nations to assert and put into practice these rights and responsibilities, to exercise their Inherent and Treaty Right to Food and Food Sovereignty on their traditional and Treaty lands, to protect these resources from contamination and destruction, and to accept this responsibility for the survival of our Nations, especially our children, grandchildren and future generations.<sup>52</sup>

Food sovereignty is a major issue for northerners and Albertans who live near or downstream from the Tar Sands.

The Tar Sands not only impacts specific species of animal, but also impacts and permanent changes the landscape and ecosystems such that a fundamental change due to Tar Sands development may be a permanent severance of Indigenous Peoples from their life-ways, lands, territories, and livelihoods. This constitutes a significant violation of Article 5 and Article 2 of ICERD.<sup>53</sup>

This issue was submitted as a violation of Indigenous Peoples human rights and the international human rights obligations of Canada, including the right to Free Prior and Informed Consent, to the UN CERD Committee for its review of the Canada's periodic

report in 2007. It was also included in a “Civil Society” submission to the UN Human Rights Council for its Universal Periodic Review (UPR) of Canada in February 2009. A statement by Ronald Lameman, Beaver Lake Cree Nation and Executive Director, Confederacy of Treaty 6 First Nations in the Shadow Report submitted to the CERD, also confirmed this situation and its impacts on Indigenous Peoples Human Rights:

*“Tar sands extraction has had and continues to have a massive destructive environmental impact which I have recently seen with my own eyes. Vast areas of traditional subsistence hunting and fishing territories have been desecrated, contaminated and destroyed, and more are being threatened. Treaty Six supports the call made earlier this year [2007] by Grand Chief Herb Norwegian of the Dehcho First Nation, for a moratorium on tar sands extraction. This call needs to be upheld and enforced by the Canadian government until the long term impacts can be fully understood and rights of the Indigenous Peoples, including their free prior informed consent and right to subsistence can be guaranteed.*

*The Canadian government does nothing to uphold its obligation to enforce and protect our rights under Treaty No 6, starting with the requirement to obtain our free prior informed consent. Instead, the government of Canada gives a free rein to these corporations to extract, exploit and destroy our mineral resources, our forests, mountains, water ways, our fish and game, and the other natural resources we require to maintain our cultural practices, survival and subsistence way of life. They do this in violation of the solemn agreements and mutual understandings that were entered into by the ancestors of both parties to Sacred Treaty No. 6 and also the rights and obligations affirmed in international agreements they have entered into, including the CERD.”*

This area of north-eastern Alberta within the Treaty No. 6 and Treaty No. 8 territories known as the “Tar Sands” continues to be a national sacrifice area as it pertains to the Indigenous Peoples affected by this, the most destructive project on earth. Although the Chiefs of Treaty No. 6, Treaty No. 7 and Treaty No. 8 (Alberta) through their All Chiefs Assembly known as the AoTC (Assembly of Treaty Chiefs) have called for a moratorium on any further expansion of this development, the government of Alberta continues to grant leases, licenses and permits to the extraction companies.

Our Treaty partner, the federal Crown, sits back and does nothing to support the actions and concerns of the Indigenous Treaty Nations of this part of Canada. There is growing opposition locally, nationally and globally to any further expansion until such time the multinational and transnational corporations can show the world that this resource can be extracted in a sustainable manner that does not threaten the very delicate ecosystem in the affected area. At present there are numerous problems that have been attributed to continued unabated extraction activities of a majority of the oil companies that have converged on this sensitive ecosystem from all parts of the globe. The following are a few examples of the destructive nature of the tar sands extraction:

- Rare forms of cancer and an increasing number of cancer cases amongst the Indigenous Peoples downstream from the project, in particular Fort Chipewyan, Alberta.
- Huge toxic tailings ponds that leach undetermined amounts of poison every day into the Athabasca River and downstream, impacting the life-ways of Indigenous peoples and Non-Indigenous peoples, as well as impacting the implementation of modern land claims agreements and Treaties in the north of Canada.<sup>54</sup>
- Huge amounts of water diverted from the Athabasca River on a daily basis for use in the Tar Sands extraction process with no thought about the short or long term effects on the health of one of the most pristine rivers in the world.
- Destruction of wildlife habitat, pollution of lakes and streams by the ever expanding nature of the exploration and extraction activities of the oil companies, 24 hours a day, 7 days a week, 365 days a year.
- Total disregard for the Treaty Rights to fish, gather, hunt and trap of the Indigenous Treaty Peoples within the Tar Sands area as this activity is going ahead without the free, prior and informed consent of the Indigenous Treaty Nations concerned.
- Further threats to the traditional territories of many Indigenous Nations south and west of the Tar Sands area as a result of the proposed pipelines to carry the bitumen to Gulf of Mexico and Pacific ports and on to markets in other parts of the world.

On September 16<sup>th</sup>, 2011 the Dene Nation<sup>55</sup> along with other First Nations, tribal leaders and property owners from the United States and Canada worked together to draft the *Mother Earth Accord*, attached hereto as a supporting document. The *Mother Earth Accord* has over 60 pages of supporting documentation representing endorsements from individuals, non-governmental organizations, Indigenous Peoples' representative organizations, Aboriginal peoples including First Nations communities, Canadian political parties (including the Green Party of Canada), amongst many others.

The Accord lays out reasons for opposing the proposed Keystone XL pipeline, which would transport tar sands crude oil from Alberta to refineries in the southern US. Among other things, the Accord calls for a moratorium on tar sands developments, full consultation under the principles of Free, Prior and Informed Consent, and a rejection by the Whitehouse of the Presidential Permit required to construct the pipeline. On January 18, 2012, the Department of State recommended that the President deny the presidential permit for the proposed Keystone XL Pipeline. President Obama has accepted this recommendation. However, on January 23, 2012 TransCanada Corp., author of the proposal that would link the Canadian Oil Sands with the U.S. Gulf Coast, said it accepted a request by the Obama Administration to reapply for a permit.<sup>56</sup>

Recently, documents obtained by Greenpeace Canada under the Access to Information Act revealed that the federal government had, in an internal "FOI\_OilSandsAdvocacyStrategy-1" document. This document details that the federal government has labeled Aboriginal Peoples and "green groups" or environmental non-governmental organizations as "adversaries" of the Canadian government with respect to

the Tar Sands developments – this is a violation of ICERD Articles 2 and 5, as well as UN Declaration Articles 1, 2, 7, 8, 10 and 21.<sup>57</sup>

## **TREATY RIGHTS AND SACRED SITES/BURIAL SITES – THE CASE OF TREATY NO. 6 IN ALBERTA, CANADA**

The Nations of Treaty No. 6 have always had the utmost respect for our Mother the Earth that is why no matter where our Indigenous Peoples have travelled in the past and in the present we walk softly on our mother. The reason is because of the nomadic nature of our Nations historically we followed the dictates of the seasons and the movements of the wildlife always being mindful to leave the land as undisturbed as possible and allowing Mother Earth to regenerate and rejuvenate herself. That is why in times past our ancestors put the people to rest wherever they passed on to the spirit world and that is why we as Indigenous Peoples have such a close connection to the land because the bones of our ancestors are literally all over this land and when our people travel they pray to Mother Earth and to the ancestors and make an offering where and when appropriate.

However, recently the Confederacy of Treaty Six First Nations and the Treaty No. 6 Nations themselves have encountered much difficulty in obtaining the assistance and cooperation of the governments regarding sacred sites, Indigenous burial sites and other culturally sensitive areas that are disturbed or otherwise impacted by development. The Confederacy has intervened on behalf of Treaty No. 6 Nations with respect to sites within their traditional territories that have Indigenous graves, buffalo skulls, encampment/ceremonial sites where arrowheads and spear points have been discovered.

A majority of these sites are in “freehold” or “fee simple” lands and the biggest stumbling blocks have been that our concerns are being handed from one government department to another citing various legislative restrictions. When we finally did file it to the Alberta Environmental Appeals Board in one particular case their official response was:

- They are bound by the *Administrative Procedures and Jurisdiction Act* RSA 2000 c.A-3 and its regulations that strictly prohibits the appeals board from dealing with or ruling on legal “duty to consult” issues.
- They are bound by the *Designation of Constitutional Decision Makers Regulation* Chapter/Regulation 69/2006 that strictly prohibits them from dealing with “constitutional issues”.
- They have no jurisdiction under the *Historical Resources Act* RSA 2000 c. H-9

All of these references are to provincial legislation that are not paramount to the sacred Treaties covering the province of Alberta.

Two specific cases among others that we have dealt with recently are; Thorhild Class II Landfill and Sharphead Reserve, both of which involve sacred burial sites. In the case of the Thorhild Class II Landfill there were also other artefacts proving that the site in

question was one of substantial historic significance for the Indigenous Treaty Nations affected.

Regarding the Sharphead Reserve file it is a long standing issue of the repatriation and reburial of human remains that were removed from the original site of interment. Although this particular case has been on the table of the Government of Alberta for quite some time the rights of the Sharphead descendants of “today” are for the most part ignored and the rights of the current landowner is allowed to supersede the matter on all counts.

It is very disturbing that industry and individual land holders seem to have free reign in such situations and the government has demonstrated that they have no cause for concern on the part of the Indigenous Treaty Peoples. Protecting our heritage and the sanctity of these sacred sites is not a priority for industry or government, it falls in the hands of the Indigenous Nations of Treaty No. 6. to do what we can so that our ancestors can rest in peace.

## **ABORIGINAL TITLE AND EXTINGUISHMENT**

Relevant Articles of the UN *Declaration on the Rights of Indigenous Peoples* Articles 8, 9, 10, 11, 19, 25- 29, 32

In its concluding observations on Canada's seventeenth and eighteenth period reports in 2007 the Committee found that:

"[W]hile acknowledging the information that the "cede, release and surrender" approach to Aboriginal land titles has been abandoned by the State party in favour of "modification" and "non-assertion" approaches, the Committee remains concerned about the lack of perceptible difference in results of these new approaches in comparison to the previous approach. The Committee is also concerned that claims of Aboriginal land rights are being settled primarily through litigation, at a disproportionate cost for the Aboriginal communities concerned due to the strongly adversarial positions taken by the federal and provincial governments (art. 5 (d)(v)).

**In line with the recognition by the State party of the inherent right of self-government of Aboriginal peoples under section 35 of the Constitution Act, 1982, the Committee recommends that the State party ensure that the new approaches taken to settle Aboriginal land claims do not unduly restrict the progressive development of Aboriginal rights. Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts. Treaties concluded with First Nations should provide for periodic review, including by third parties, where possible.**<sup>58</sup>

Canada's "modification" and "non-assertion" approaches continue to breach ICERD Articles 2 (1)(d), 4, 5 & 6; and the UN *Declaration on the Rights of Indigenous Peoples* Articles 10,11,19,32.

Human rights are inherent and inalienable. Indigenous Peoples' human rights are not subject to extinguishment or destruction. Both international human rights Covenants make clear that nothing in the Covenants can be construed as permitting the "destruction" of human rights.<sup>59</sup> Also, the UN *Declaration on the Rights of Indigenous Peoples* affirms: "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire".<sup>60</sup>

The Canadian approaches may be characterized as a violation of human rights. These approaches allow for the outright denial of rights and title to lands and resources, while allowing legislative, policy and development to proceed in lands and territories with no respect or acknowledgement of existing Aboriginal rights and title. This has been pointed

out in the United Nations human rights mechanisms many times in over the past decade or so, most notably beginning in 1998. The United Nations Committee on Economic, Social and Cultural Rights stated in their concluding observations in 1998 that Canada had to stop the extinguishment of Aboriginal rights and title:

18. The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by RCAP, and endorses the recommendations of RCAP that policies which violate Aboriginal Treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. The Committee is greatly concerned that the recommendations of RCAP have not yet been implemented, in spite of the urgency of the situation.<sup>61</sup>

Canada responded through the use of a similar approach under a different name, called a “modified rights model” and “non-assertion model”:

185. In the past, the Government of Canada required Aboriginal groups to “cede, release and surrender” their undefined Aboriginal rights in exchange for a set of defined Treaty rights. This approach requires Aboriginal groups to give up all their Aboriginal rights, which many groups consider to be unacceptable by today’s standards.

186. In recent years, new approaches to achieving certainty have been developed as a result of comprehensive land claims negotiations. These include the “modified rights model” pioneered in the Nisga’a negotiations, and the “non-assertion model”. Under the modified rights model, Aboriginal rights are not released, but are modified into the rights articulated and defined in the Treaty. Under the non-assertion model, Aboriginal rights are not released, and the Aboriginal group agrees to exercise only those rights articulated and defined in the Treaty and to assert no other Aboriginal rights.<sup>62</sup>

The Committee on Economic, Social and Cultural Rights in their concluding observations in 2006 observed that the modified rights model and the non-assertion model did not differ from extinguishment and surrender approach.

16. The Committee, while noting that the State party has withdrawn, since 1998, the requirement for an express reference to extinguishment of Aboriginal rights and titles either in a comprehensive claim agreement or in the settlement legislation ratifying the agreement, remains concerned that the new approaches, namely the “modified rights model” and the “non-assertion model”, do not differ much from the extinguishment and surrender approach. It further regrets not having received detailed information on other approaches based on recognition and coexistence of rights...<sup>63</sup>

Even when a right has been heavily regulated, to the point that its very exercise has been prohibited by regulation, this is not sufficient to extinguish the right: *Gladstone*, *supra*, at para. 31, *Sparrow*, *supra*, at para. 36. In *Gladstone*, even though regulation under the *Fisheries Act* prohibited the Aboriginal harvest of herring spawn from 1869 to 1974, the Supreme Court found the test for extinguishment had not been met: *supra*, at paras. 34, 167-68.

CERD has made similar recommendations in other State party reviews, notably the 2005 periodic report of New Zealand respecting the Court of Appeal's decision in the Ngati Apap case, which provided the backdrop to the drafting and enactment of legislation in the form of the Foreshore and Seabed Act of 2004:

...the legislation appears to the Committee, on balance, to contain discriminatory aspects against the Maori, in particular in its extinguishment of the possibility of establishing Maori customary titles over the foreshore and seabed and its failure to provide a guaranteed right of redress, notwithstanding the State party's obligations under articles 5 and 6 of the Convention.

In his Closing Remarks at a recent Crown-First Nations Gathering with the Prime Minister of Canada and other political representatives in Ottawa, National Chief Shawn Atleo stated: "Canada and First Nations agree to work to reform comprehensive claims policies to reflect recognition and affirmation of Aboriginal and Treaty rights. Advancing certainty should be based on these principles as well as expeditious resolution and self-sufficiency"<sup>64</sup>

The First Nations Summit of British Columbia provided the following important information and analysis for the purpose of addressing this issue in particular:

Comprehensive and Specific Claims processes in Canada are of vital importance to the assertion and implementation of Aboriginal Title, Aboriginal rights and Treaty rights. Historically, Canada engaged in the process of treaty-making and land claims for the purpose of "extinguishing" the broad and undefined rights and title claims of Indigenous peoples in Canada in exchange for a set of rights and benefits set out in the text of agreements. In the 1970s, Canada still required the explicit "cede, release and surrender" of Aboriginal rights and title prior to the resolution of settlement, which from the Crown's perspective constituted the best way to attain the political and economic "certainty" required to satisfy the state's interest in opening up Indigenous territories to further economic investment and capitalist development.<sup>65</sup>

Although the State party no longer requires the formal "extinguishment" of Aboriginal rights and title as a precondition to reaching an agreement, the purpose of the process has remained the same: to facilitate the "incorporation" of Indigenous peoples and territories into the capitalist mode of production and to ensure that alternative "socioeconomic visions" do not threaten the desired functioning of the market. The protection of Indigenous culture under these agreements generally is seen through a reductionist lens, to the exclusion of life ways or customary political organization. The UN Declaration on the Rights of Indigenous Peoples attempts to prevent such an instance of discrimination

against Indigenous economies and forms of political authority, as does the ICERD amongst other Human Rights mechanisms.

To date, Canada has been selective in choosing which human rights it will respect and protect. The Canadian government has been unwilling to acknowledge the existence of Indigenous Peoples' rights as human rights. During its three-year term, the Canadian government pursued the lowest standards of any Human Rights Council (HRC) member within the Western European group of States. Furthermore, Canada has failed to incorporate and implement key international human rights frameworks with regard to Indigenous peoples into its domestic legislation and policies.

As one of the original signatories to the United Nations Charter, Canada has a legal duty to uphold the purposes and principles of the Charter, which include,

“To achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction...”<sup>66</sup>  
Canada also has a duty to:

“take joint and separate action in cooperation with the [United Nations] for the achievement of the purposes set forth in Article 55” [to promote] “universal respect for, and observance of human rights and fundamental freedoms for all without distinction”<sup>67</sup>

In a number of key cases<sup>68</sup> the Supreme Court of Canada (SCC) established that Aboriginal title, which pre-dates and survived the assertion of sovereignty, exists as a legal right, independent of Crown recognition. Further, that section 35 of the *Constitution Act, 1982* is directed towards “the reconciliation of pre-existing Aboriginal claims to the territory that now constitutes Canada, with the assertion of British sovereignty over that territory”.<sup>69</sup> Yet, the federal and provincial governments have historically and continue to deny the existence of Aboriginal peoples' title and rights. For example, in *Haida Nation v. HMQ B.C. and AG Canada* the provincial Crown submits, “that the Plaintiffs' claim of Aboriginal title is incompatible with Crown sovereignty and thus such a title claim cannot be capable of recognition at common law.”<sup>70</sup>

Canadian common law is intended to provide a legal framework to guide the development of state mechanisms for recognition of Aboriginal title, consultation, and participation by First Nations. A series of SCC decisions, including *Delgamuukw*, confirms that Aboriginal title encompasses a right to land itself. It is based on First Nations' long-standing, historic use and occupation of the land. Furthermore, Aboriginal title and rights are protected by the Canadian constitution. Yet, key legal principles established by the courts are routinely ignored by government negotiators in modern-day treaty and other negotiations with First Nations.<sup>71</sup>

The SCC has stated that negotiation (rather than litigation) is the preferred method for achieving the reconciliation of the pre-existence of Aboriginal societies with the

sovereignty of the Crown. Once First Nations find themselves back in negotiations, the Crown resumes its strategy of denial and key legal principles established by the Courts are routinely ignored by Crown negotiators. In fact, the Crown attempts to pre-determine the outcome of negotiations by insisting that any resolution fit within their existing unilaterally developed negotiation policies and mandates, which are largely designed to preserve its own interests and the status quo.<sup>72</sup> Since 1993, many First Nations have entered into modern Treaty negotiations with Canada and BC. Currently, 60 negotiation tables (representing over 120 of the 203 First Nations in BC) are at various stages of negotiations. However, modern-day Treaty negotiations have yet to achieve reconciliation due to the unreasonable negotiating mandates of Canada and BC. Even after historic Treaties (e.g. Douglas Treaties and Treaty 8) as well as modern agreements (e.g. Nisga'a, Tsawwassen, and Maa-nulth) are concluded, First Nations have expressed serious concerns about full and proper implementation of those Treaties.

Despite its domestic and international obligations, Canada continues to frequently deny Aboriginal title and rights rather than advancing reconciliation based on recognition of title and rights.<sup>73</sup> While courts do not question the validity of Canada's title and sovereignty, Canada constantly puts First Nations to proof and forces them into lengthy, expensive litigation to defend their inherent rights. In court, First Nations are pitted against the substantial resources of the Crown, and in many cases, entire industry groups. First Nations have gone before the Supreme Court of Canada over 40 times, but to date, no declaration of Aboriginal title has been made by Canadian courts. This creates an "implementation gap" in Canada regarding Aboriginal title and rights – that is, there is a vacuum between constitutional rights, Canada's obligations under international human rights law and Canada's administrative, legal and political practice, such that effective legal remedies are not available to First Nations.

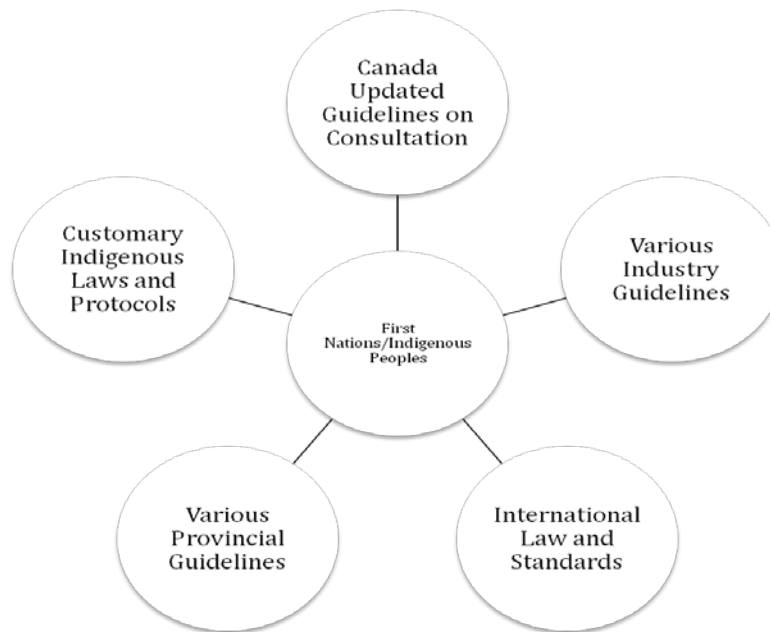
Underlying this implementation gap is the fact that First Nations have been precluded from sharing in the wealth generated by the exploitation of their lands, territories and resources by the Crown's continued denial of their existing Aboriginal title and rights.<sup>74</sup>

**We recommend that the requirement to include First Nations in the state's decision-making concerning land and resources in Canada flows from political, constitutional, and legal imperatives, which stem from recognition of the existence of Aboriginal title and the inherent right of self government– within which is embedded Aboriginal jurisdiction, authority and responsibility.<sup>75</sup>**

## ***FREE, PRIOR AND INFORMED CONSENT***

Relevant Articles of the UN *Declaration on the Rights of Indigenous Peoples* Articles  
10, 11, 19, 28, 29, 32

The basic framework and context for consultation, accommodation and Free, Prior and Informed Consent of Indigenous Peoples in Canada can be demonstrated as follows:



As demonstrated by this graph, Indigenous Peoples in Canada face a complex web of policy and law respecting consultation, accommodation and Free, Prior and Informed Consent. It can be extremely difficult to navigate for individual First Nations and Indigenous communities in Canada, as well as for Indigenous Peoples' representative organizations. Often, the interpretation and structure of various guidelines on consultation, accommodation and FPIC differ, depending on jurisdiction, applicable Treaties, agreements and other constructive arrangements or unique political, environmental or societal circumstances.

FPIC of Indigenous Peoples:
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|---|
| <ul style="list-style-type: none"><li>• The right to say ‘yes’ or ‘no’ to proposed developments on peoples’ lands and territories;</li><li>• Consent which is determined in conformity with, or respect for, peoples’ cultures, customary systems and practices;</li><li>• According to peoples’ own representative organizations / institutions;</li><li>• Drawing on past experience and history. Carefully negotiated, not hurried or one – off;</li><li>• Without coercion or duress (‘Free’)</li><li>• Before the initiation of activities (‘Prior’);</li><li>• After the complete sharing of available information on the proposed activities and their implications, according to an agreed process and with adequate time (‘Informed’).</li></ul> |
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The Minister of Aboriginal Affairs and Northern Development (formerly the Minister of Indian Affairs and Northern Development) released *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* in March 2011.<sup>76</sup> These guidelines replaced the former *Interim Guidelines* of 2008. In this new set of federal guidelines, the Minister cited Canada’s *Statement of Support for the United Nations Declaration on the Rights of Indigenous Peoples*, but also went on to explicitly state:

Canada has concerns with some of the principles in the Declaration and has placed on record its concerns with free, prior and informed consent when interpreted as a veto. As noted in Canada’s Statement of Support, the Declaration is a non-legally binding that does not change Canadian laws. **Therefore, it does not alter the legal duty to consult.** (emphasis added).

The decision to clearly set out an instance of non-compliance with the UN Declaration is a clear violation of ICERD Articles 2, 5 and 7. In this regard, we support the Grand Council of the Crees (Eeyou Istchee), Canadian Friends Service Committee (Quakers) *et al.*, “Response to Canada’s 19<sup>th</sup> and 20<sup>th</sup> Periodic Reports: Alternative Report on Canada’s Actions on the *UN Declaration on the Rights of Indigenous Peoples*”, UN Committee on the Elimination of Racial Discrimination (January 2012).

Furthermore, the guiding principles set out in the *Updated Guidelines* firmly place the authority for deciding whether the duty to consult / accommodate is triggered or required in the hands of the government of Canada. In fact, the guiding principles seem to suggest that constitutionally-protected Aboriginal and Treaty rights and title may be subject to abrogation or derogation in the interests of “other partners” such as industry, governments, or even broader Canadian society (in the context of achieving economic stability or growth).

In the *Updated Guidelines*, Aboriginal Peoples have a “reciprocal duty” under Guiding Principle #4 to participate in “reasonable processes” established by the Crown. First Nations and Indigenous Peoples in general find themselves having to advocate and

express their identities and rights “where they can”, and to attempt to break down barriers where they are excluded or silenced.

In the face of inadequate federal government funding on reserves (that include cumbersome funding mechanisms and arrangements), impoverished economic conditions and other barriers to development effectively prevent Indigenous Peoples from effective participation and consultation.<sup>77</sup> This impedes the ability of First Nations to engage in planning processes – the result is that they are unable to create their own consultation or development planning processes and are unlikely to participate in existing Crown or regional consultation and planning processes (unless such participation is properly funded).<sup>78</sup>

Indigenous communities operate in a kind of limbo. The federal funding they receive depends upon their ability to estimate their true needs, negotiate and express the challenges facing their communities to the Crown. Regardless of what they are able to accomplish within their own communities, it remains without the benefit of any real statutory accountability. Furthermore, none of the funding amounts negotiated from year to year have amounts earmarked for events like consultations. Often, First Nations get into situations where they operate with a deficit from year to year. As such, when an opportunity for consultation or accommodation arises, they are unable to independently fund their participation or input.

The issue of capacity is really an underlying theme to the entire discussion of Aboriginal participation in consultation/accommodation in Canada. The issue of capacity goes beyond funding. If a First Nation is unable, in a consultation process, to engage in a manner that is cognizable or understandable to the development proponent, Crown representative, public or other Aboriginal participants, the likelihood of their (the First Nation) interests being properly recognized and included is low. Issues like language (not only Indigenous language barriers experienced by Elders, but also vocabulary and technical language barriers experienced by other First Nation individuals and communities), culture<sup>79</sup> and demographics come in to play.

There is a great need to be responsive to the unique interests of First Nations in order to characterize their participation in consultation as “meaningful”, “prior” and “informed”. Land management regimes, environmental assessment processes and approaches can have significant impact on the Indigenous communities, traditional territories, sacred sites, and other uses of land such as hunting, fishing, gathering (for food and medicine) and agriculture.

While Aboriginal and Treaty rights provide benefits to Indigenous Peoples while they are on reserve, these rights also comprise rights to livelihood, and life-ways connected to the traditional territories of Indigenous nations in Canada. Aboriginal and Treaty rights may be exercised off-reserve. When it comes to activities like hunting and fishing, rights often are exercised elsewhere within the boundaries of traditional territories. As such, the use, allocation, development and management of lands and waters off-reserve have very real

and immediate impacts on the ability of First Nations to exercise Treaty and Aboriginal rights.

While the *Updated Guidelines* do suggest “contacting” Aboriginal groups when attempting to identify whether the duty to consult has been triggered, for the most part the Updated Guidelines recommend internal canvassing of existing and varied government departments and agencies for the purposes of discerning whether an Aboriginal right, Treaty right or Aboriginal title may exist and be potentially impacted.<sup>80</sup> This seems counter-intuitive, as it is the Indigenous Peoples themselves who will know what their rights, claimed or existing are, as opposed to remotely situated government departments and agencies.

<b>FPIC and Customary Rights:</b>
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| <ul style="list-style-type: none"><li>• UN <i>Declaration on the Rights of Indigenous Peoples</i>, particularly Articles 19 &amp; 32</li><li>• International Labor Organization 169, sections 6(2), 7(1)</li><li>• Convention on Biological Diversity, Article 8(j)</li><li>• Jurisprudence: UN Committee on Human Rights, CERD, Inter-American Commission and Court of Human Rights</li></ul> |
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Development projects initiated which trigger the duty to consult may purport to invite the participation of Aboriginal Peoples, but these invitations happen within the context of capacity issues faced by Aboriginal Peoples, and the over-arching issues of legal requirements for consultation on constitutionally protected Aboriginal and Treaty rights. In the case of *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, the court found that First Nations must be equitable partners in such processes while recognizing the rights and title that require accommodation by the Crown (whether that Crown is federal or provincial).

The complexity of interactions between policies, laws and guidelines respecting this issue carries into the Canadian jurisprudence, leading to contradictory and inconsistent rulings by Canadian courts.

## **FPIC IN CANADA**

The Supreme Court of Canada has repeatedly decided that one of the Aboriginal and Treaty rights constitutionally protected by s. 35(1), is the right to consultation and accommodation when such rights are impacted by the actions of the Crown.

The duty to consult was recognized by the Supreme Court in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (“*Sparrow*”):

When the Crown’s actions (in this case, a fishing net length regulation) have infringed upon an Aboriginal or Treaty right protected by s.35(1)...Then, infringement can only be justified if four requirements have been satisfied, one of

which is to determine whether the Aboriginal group in question has been consulted.

In *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010, the Supreme Court of Canada set out the fundamental principles of the duty to consult and stressed that the duty to consult is grounded in the honour of the Crown and must be understood generously in order to achieve “the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown”.

Since *Sparrow* and *Delgamuukw*, the duty to consult is no longer simply one element of a four part test that is applied by the Courts after an Aboriginal or Treaty has been infringed upon by a Crown action. The duty to consult with and accommodate First Nations is now a requirement that must be satisfied by the Crown before it makes a decision or takes an action that may impact Treaty or Aboriginal rights.

Both *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 were cases brought by judicial review and involved the potential infringement of Aboriginal title, which had not yet been proven. In both cases the province argued (relying on *Sparrow*) that it had no duty to consult and accommodate prior to or before a final determination of the existence and scope of an asserted or claimed Aboriginal right. The Court found that the duty to consult applies *prior* to the government taking an action that might adversely affect an Aboriginal right, even if that right is as yet unproven. (Therefore, the duty does not just apply to justifications of government action after the infringement of a proven Aboriginal or Treaty right). The Court also found that the duty to consult applies to both the federal and provincial Crowns. The Court further found that although the duty rests with the Crown it may, in certain circumstances, delegate procedural aspects of consultation to third parties. However, even where procedural aspects of consultation are delegated, the obligation remains with the Crown.

Binnie J. (Supreme Court of Canada)<sup>81</sup> stated that reconciliation is the fundamental objective of Treaty and Aboriginal rights, and:

The duty to consult is grounded in the honour of the Crown, and it is not necessary for present purposes to invoke fiduciary duties. The honour of the Crown is itself a fundamental concept governing Treaty interpretation and application that was referred to by ...this Court as a Treaty obligation as far back as 1895, four years before Treaty 8 was concluded... The honour of the Crown exists as a source of obligation independently of treaties ....In *Sparrow*, *Delgamuukw*, *Haida Nation* and *Taku River*, the “honour of the Crown” was invoked as a central principle in resolving Aboriginal claims to consultation despite the absence of any Treaty...

*Mikisew* held that Treaties give rise to both substantive right and obligations, and to procedural rights and obligations:

As stated at the outset, the honour of the Crown infuses every treaty and the performance of every treaty obligation. Treaty 8 therefore gives rise to Mikisew procedural rights (e.g. consultation) as well as substantive rights (e.g. hunting, fishing and trapping rights). For the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its procedural obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's substantive treaty obligations as well.

The procedural right to be consulted is a right that exists independently of, and may be breached regardless of the outcome of, the government's decision. This point is made by the Supreme Court of Canada in *Haida*:

Should the government misconceive the seriousness of the claim or impact of the infringement, this question of law would likely be judged by correctness. Where the government is correct on these matters and acts on the appropriate standard, the decision will be set aside only if the government's process is unreasonable. The focus, as discussed above, is not on the outcome but on the process of consultation and accommodation.

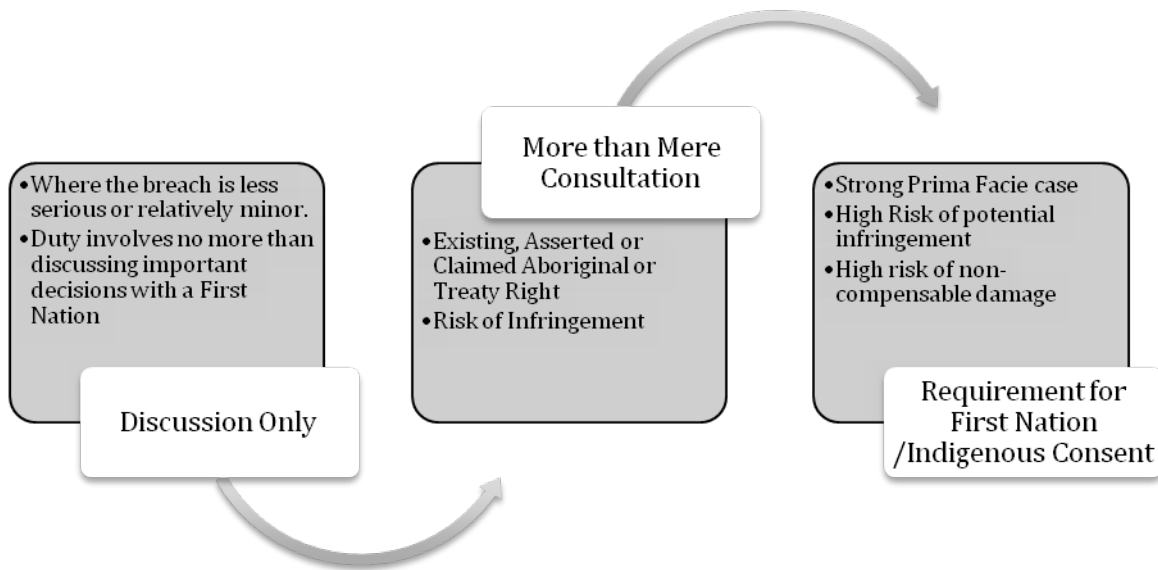
The issue for First Nations in various provinces which have guidelines or policy in place respecting consultation and accommodation is in determining who pays for assessments where procedural aspects of the duty to consult is concerned, since those aspects of the duty may be delegated by the Crown.

States are required to "Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent." General recommendation No. 23 (1997) on Indigenous Peoples (CERD/C/51/Misc.13/Rev.4), art. 4, para. (d).

When does the Duty to Consult and Accommodate Arise?<sup>82</sup>

- The duty not only arises *prior* to a Crown decision, but at the early stages of the decision making process and as soon as the Crown knows or ought to know of a potential adverse impact on an existing or claimed right.
- The Crown cannot wait until the final decision is at hand, or has already been made.
- The Crown must act in a spirit of reconciliation through consultation, and ensure that the right to be consulted is a procedural as well as a substantive right.
- The duty arises not only in relation to the ultimate decision at issue, but even in relation to decisions about the process itself, and in relation to interim decisions which do not grant final approval at all.

According to Canada’s highest court, “full consent” is required on “very serious issues”.<sup>83</sup> It is clearly a serious issue, when the human rights, cultures and well-being of Indigenous Peoples are at stake in such contexts as biodiversity, environment and resource development. The Canadian government deals selectively with the rule of law and its constitutional obligations, at the expense of Indigenous Peoples’ rights. See Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), where any reference to Aboriginal “consent” has been omitted.



We note that in its concluding observations on Canada’s seventeenth and eighteenth period reports in 2007, CERD/C/CAN/CO/18 at paras. 15 and 25, the Committee called upon Canada to carry out consultations with Indigenous Peoples on matters affecting their rights and interests.

## **INDIGENOUS CHILDREN IN CARE OR STATE CUSTODY**

Relevant Articles of the UN <i>Declaration on the Rights of Indigenous Peoples</i> Preambular Para. 13, Articles 7, 14, 17, 21, 22,
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As of 2010, there were over 27,000 Aboriginal children in care in Canada, which is more than there ever were in Residential Schools.

Human rights considerations pertaining to Indigenous Children in State Custody are multi- faceted, inter- related and mutually- reinforcing. They encompass the collective rights of Indigenous Peoples, the individual rights of Indigenous children in need of special care and intervention, or who have already been removed from their families and/or communities under state programs and policies, and the needs of societies at large to ensure the best possible outcomes for children, respecting the rights of all concerned.<sup>84</sup> Unfortunately, the violence that Aboriginal children experienced in residential schools continues today, albeit in a new form: children in state care or custody.

Primarily, we will provide information on the situation in Canada. We will follow that with a brief overview of international law and standards in this area, and some information on the compliance of Canada with those standards.

In Canada, although provincial governments provide child welfare services for the general population, the federal government has jurisdiction over “Indians, and Lands reserved for the Indians” as per section 91(24) of the *Constitution Act, 1867*,<sup>328</sup> and provides funding for First Nations child and family services agencies under Directive 20-1.

These agencies provide culturally sensitive services to children on-reserve and are under First Nations control; however, they are mandated in accordance with provincial standards and legislation. Some First Nations child and family services agencies have expanded to provide services to First Nations children living off-reserve, but otherwise First Nations children living off-reserve receive services from provincial authorities. Aboriginal children living off-reserve are under the jurisdiction of provincial authorities with respect to child care and protection, although some First Nations child and family services agencies have also expanded to encompass off-reserve Aboriginal children living in particular areas within their scope.

In 2007, the First Nations Child and Family Caring Society (Caring Society) and the Assembly of First Nations (AFN) filed a human rights complaint against the Government of Canada. The complaint alleges that the Federal Government’s failure to provide equitable and culturally based services to First Nations children on-reserve amounts to discrimination on the basis of race and ethnic origin. On March 14, 2011, Chair Chotalia dismissed the human rights complaint on a legal technicality. Chair Chotalia ruled that the Human Rights Act does not allow complaints comparing services by different

providers or levels of government. Since child-welfare off-reserve is provided by the provinces and child-welfare on-reserve is provided federally, the Chair said discrimination could not be determined. The ruling contradicts previous decisions by both the CHRC and the Federal Court. The judgment is available online at: [www.fnwitness.ca/tribunal-timeline](http://www.fnwitness.ca/tribunal-timeline) The Caring Society, AFN and the CHRC have each filed a judicial review of Chair Chotalia's decision in Federal Court.<sup>85</sup>

On December 12, 2007, Jordan's Principle passed unanimously in the House of Commons. Member of Parliament, Jean Crowder (NDP) tables Private Members Motion 296 in support of Jordan's Principle. Jordan's Principle is a child first principle to resolving jurisdictional disputes within and between federal and provincial/territorial governments. It applies to all government services available to children, youth and their families. Examples of services covered by Jordan's Principle include but are not limited to: education, health, child care, recreation, and culture and language services. Where a jurisdictional dispute arises around government services to a Status Indian or Inuit child, Jordan's Principle requires that the government department of first contact pays for the service to the child without delay or disruption. The paying government can then refer the matter to intergovernmental processes to pursue repayment of the expense.

In May 2008, the Auditor General Report specifically addressed the First Nations Child and Family Services Program, delivered under the Department of Aboriginal and Northern Affairs Canada (formerly called the Department of Indian and Northern Affairs Canada). The Auditor General made a very relevant conclusion about the state of the Program in Canada:

#### Conclusion

4.92 Our audit found that Indian and Northern Affairs Canada does not have assurance that the First Nations Child and Family Services Program funds child welfare services for on-reserve First Nations children and families that are culturally appropriate and reasonably comparable with those normally provided off reserves in similar circumstances. In most provinces we visited, many on-reserve children and families do not always have access to the child welfare services defined in relevant provincial legislation and available to those living off reserves.

4.93 We also found that INAC obtains insufficient assurance that the child welfare services funded under the First Nations Child and Family Services Program are delivered in accordance with relevant provincial legislation and standards.

4.94 Finally, INAC does not have sufficient and appropriate information to monitor the program's results and costs for purposes of both program management and accountability.

4.95 This program was established to implement a federal government policy. It is linked to provincial legislation and has direct impact on the safety and well-being of on-reserve children and families. In our view, the program needs to be better supported, managed, and overseen. It also requires better information on results and on the outcomes for children. Although the solutions to some of the problems

faced by on-reserve children and families do not depend entirely on the availability and quality of child welfare services, steps need to be taken to address the management deficiencies noted in this audit.<sup>86</sup>

The number of Aboriginal youth admitted to sentenced custody increased between 2002-2003 and 2003-2004 – from 22% to 28% for Aboriginal males, and from 28% to 35% for Aboriginal females, of the total number of youth sentenced to custody. Not only is the higher number of Aboriginal females significant, but it should also be kept in mind that according to testimony before our Committee, Aboriginal youth make up only 5% of the total youth population in Canada. The number of Aboriginal youth in custody, and of Aboriginal female youth in particular, is disproportionately high. As well, despite improvements, the fact remains that Canada continues to have a higher rate of detention than most other developed countries, and as a result, it stands in clear violation of its obligations to children under the *Convention on the Rights of the Child*.<sup>87</sup>

Existing international human rights norms and standards provide an important framework for addressing a range of relevant concerns. These include:

- 1) the rights of Indigenous Peoples to make decisions, based on the principles of self-determination and free prior informed consent, regarding matters which affect them, including, specifically and profoundly, the care and custody of children and future generations;
- 2) the rights of Indigenous Peoples to develop, control and manage policies, programs and institutions affecting their own communities and members, based on their right to autonomy and self-government ;
- 3) the rights of Indigenous Peoples to transmit their cultures and languages from generation to generation, (a right seriously impacted by systematic removal of children from their communities and families for any reason);
- 4) “legacy” impacts of past state policies and practices which, although no longer in practice in some cases, nevertheless continue to have ongoing human rights repercussions that may require special remedies or corrective measures carried out in conjunction with states and impacted Indigenous Peoples;<sup>88</sup>
- 5) the rights of Indigenous children and youth to have care which supports and respects their rights, needs and development including their right to maintain their Indigenous identities and to participate in and learn their own cultures, spiritual practices and languages;
- 6) the rights of indigenous parents, families and communities vis a vis their children; and
- 7) in conjunction with Indigenous Peoples, the obligation of States to implement, promote and monitor the enjoyment of these and other related rights, including development of effective solutions, remedies and mechanisms.

Indigenous children have the right to be Indigenous. The effective implementation of these international norms and standards are critical to this goal. Article 43 of the UN Declaration on the Rights of Indigenous Peoples speaks to the minimum standards for the “survival, dignity and well being” of Indigenous Peoples. Some of the most relevant

human rights standards that should be considered by the Committee in addressing impacts, assessing responses and developing effective solutions, include the following. The fundamental international normative framework for the Rights of Indigenous Peoples, and all Peoples, to maintain Jurisdiction, Control and Decision – making authority to determine actions that should be taken to ensure the well being of Indigenous Children is the Right to Self- Determination, as affirmed in Article 1 in common of the two International Human Right Covenants (International Covenant on Civil and Political Right – ICCPR - and the International Covenant on Economic, Social and Cultural Rights - ICESCR):

*1. All peoples have the right of self- determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

The United Nations Declaration on the Rights of Indigenous Peoples further affirms this right for Indigenous Peoples in this key area of self- determination and autonomy, right to develop and control programs and institutions, as well as the relevant rights of the Indigenous children. In addition, the UDRIP in many of its preambular paragraphs and operative articles (listed above) affirm the principle of non- discrimination as well as the overarching necessity for Indigenous Peoples to maintain their cultural identity and integrity. These rights have been directly threatened and violated, both individually and collectively, by state policies which continue to support the removal of Indigenous children from their families, communities and cultures, often without the agreement of the impacted Indigenous Peoples, families and individuals. Some of the relevant preambular provisions of the UNDRIP which should be taken into account, followed up and implemented by UN members states (as per Article 42).<sup>89</sup>

Canada signed the *Convention on the Rights of the Child* on 28 May 1990 and ratified it on 13 December 1991. Yet, the Committee’s study clearly demonstrated that consecutive federal governments have not kept the promises that were made upon ratification. At the ground level, children’s rights are being pushed to the side and even violated in a variety of situations – one only needs to take a brief survey of the issue of child poverty, or the situation of Aboriginal or special needs children to realize that this is true. Most recently, and International Expert Group Meeting on Combating violence against indigenous women and girls: article 22 of the United Nations Declaration on the Rights of Indigenous Peoples met from 18 - 20 January 2012 in New York:

In the preamble of the Convention of the Rights of the Child, State parties take “due account of the importance and cultural values of each people for the protection and harmonious development of the child”. While all the rights contained in the Convention apply to all children, the Convention on the Rights of the Child was the first core human rights treaty to include specific reference to indigenous children in a number of provisions. The specific reference to indigenous children is indicative of the recognition that they require special measures in order to fully enjoy their rights. Several articles in the Convention refer specifically to special protection measures including children in armed conflict and refugee children, economic exploitation and sexual exploitation and

trafficking. The Committee on the Rights of the Child, the body responsible for reviewing progress made by States in implementing the Convention, has consistently taken into account the situation of indigenous children in its reviews of periodic reports of States parties to the Convention. The Committee has observed that indigenous children face significant challenges in exercising their rights and has issued specific recommendations to this effect<sup>90</sup>

The UN Committee on the Rights of the Child (UNCRC), in consultation with the Working Group on the Rights of Indigenous Children and Youth, developed General Comment 11 released in January 2009 on indigenous children and their rights under the Convention on the Rights of the Child.<sup>91</sup> The General Comment is meant to guide States on implementation of the Convention with respect to indigenous children and to outline specific provisions requiring particular attention in relation to the rights of indigenous children.

In accordance with Articles 3, 5, 18, 25, and 27 (3), States are expected to respect and safeguard the integrity of indigenous parents, extended families, and communities in their child-rearing responsibilities and duties.

- Policies relating to the alternative care of indigenous children should be developed in culturally sensitive ways and should always ensure that the best interests of the child are of primary consideration, as required by article 3.
- Alternative care placements should strive for continuity in the indigenous child's ethnic, religious, cultural, and linguistic upbringing, as outlined in article 20 (3).
- The cultural identity of indigenous children should be ensured when out-of-home placements are required.

Canada filed two reservations and a statement of understanding with respect to the Convention's applicability in Canada. The first of these reservations and the statement of understanding concern article 21 of the Convention, which refers to domestic and inter-country adoption.<sup>92</sup>

The Standing Senate Committee made the following recommendations to the Government of Canada based on the findings of the report.

**Recommendation 9: Pursuant to articles 9, 12, 19, 20, and 25 of the *Convention on the Rights of the Child*, the Committee recommends that the federal government organize federal- provincial-territorial consultations with respect to child protection issues and children in the care of the state. These consultations should focus on whether the Convention has been implemented in the following areas:**

- The need to involve youth more fully in the child protection process;
- Working towards a uniformly legislated age of 18 for cut-off from protection; and
- The need for continuing support for youth exiting the child protection system.

**Recommendation 10: Pursuant to articles 5, 18, 20 and 21 of the *Convention on the Rights of the Child*, the Committee calls on governments across Canada to recognize and address the adoption crisis in this country,**

particularly in the case of Aboriginal children. The Committee recommends that the federal government organize consultations with its provincial and territorial counterparts with a view to:

Increasing federal funding to promote the placement of children in permanent homes and to provide support services aimed at keeping children within their families;

Streamlining the adoption process; and Reviewing Canada's adherence to the *Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*.

**RECOMMENDATION 18 – Aboriginal Children (page 191)** Pursuant to articles 2 and 30 of the Convention on the Rights of the Child, the Committee recommends that:

- Section 67 of the *Canadian Human Rights Act* be repealed;<sup>93</sup>
- The federal government target funding as a priority for “least disruptive measures” with respect to child welfare, accompanied by an increased emphasis on prevention and early intervention;
- The federal government make housing a top priority and develop enhanced initiatives to promote economic development on-reserve;
- The federal government provide more funding to ensure that support services continue for Aboriginal children living off-reserve;
- The federal government review the services that it provides to Aboriginal communities to ensure that the approach and content are effectively tailored to meet the specific needs of Aboriginal children, youth, and families; this includes working directly with Aboriginal communities in the development of programs and services designed to meet their needs;
- The federal government expand the ability of health services to provide in- home supports, and to get involved early and work with children in their homes;
- The Department of Indian Affairs and Northern Development provide our Committee with an update on the results of the youth engagement strategy on suicide, as well as the status of the National Aboriginal Youth Suicide Prevention Strategy – this Strategy should be implemented as swiftly as possible;
- The federal government accelerate work with provincial and territorial ministers of education to discuss ways in which Aboriginal people can be encouraged to become teachers and to work on reserves;
- While recognizing the need for Aboriginal teachers on-reserve, the federal government work with provincial and territorial ministers of education to remove barriers to facilitate the employment of Aboriginal teachers off-reserve if they so desire;
- The federal, provincial, and territorial governments work with Aboriginal leadership to carefully examine policies that have an impact on Aboriginal children's lives through the framework of the Convention on the Rights of the Child; and

- All federal policies and legislation with respect to Aboriginal children place particular emphasis on the need to take the cultural needs of Aboriginal children into account.

Given the high proportions of Aboriginal youth in prison, foster care, removed from community for the purposes of adoption, or in the system of child and family services in Canada generally, such circumstances constitute a clear violation of ICERD on the part of Canada, in particular Article 2.1 (a),(b),(c) and (d), as well as Article 2.2, Article 5 (d) and (e), Article 6 and Article 7. We recommend that Canada take immediate steps to address funding inequities for child and family services provided to Aboriginal Peoples, and ensure that culture, language and community remain a priority when considering the best interests of an Indigenous child.

Notwithstanding the positive impacts of the court ordered government apology and Truth and Reconciliation Commission, what is the Canadian government doing to work in collaboration with Indigenous Peoples to effectively resolve the disproportionate rates of suicide, incarceration, sexual exploitation, language loss and continued removal of Indigenous children from their homes and communities as examples of the many racial disparities and inequities that persist in Canada which can be attributed to the legacy of the residential school policies?

## ***CANADIAN REPRESENTATIONS CONCERNING OTHER INTERNATIONAL TREATIES – CLIMATE CHANGE AND BIOLOGICAL DIVERSITY***

### **KYOTO PROTOCOL**

The natural resources of the ancestral lands of Indigenous Peoples are integral beings within a web of relation(s) that are identified through Indigenous knowledge, situated in history and the environment. Indigenous Peoples have not divided aspects of the natural environment into coffers of economic utility. When there is biodiversity loss, there are also cultural and linguistic losses. Stories, songs, dance, medicinal knowledge, and other forms of culture, knowledge and law may be lost.

Moreover, the reductionist approach adopted within domestic and international environmental law and policy serves to exclude Indigenous Peoples on many levels of implementation and regulation. In creating artificial divisions or categories of the environment, opportunities for Indigenous Peoples to effectively participate and express a holistic view of the environment are few and far between. Indigenous Peoples should be able to participate on a partnership level in decision-making processes that impact them and their life-ways.

Indigenous Peoples are the most vulnerable population when it comes to the impact of climate change.

Canada announced their decision to withdraw from Kyoto Protocol<sup>94</sup> on December 11, 2011. There is a provision for formal withdrawal from the [Kyoto Protocol](#), in Article 27, which states that Canada has to give one year's notice, in writing, to withdraw. As a result of this notice requirement, the window for withdrawal closed on Dec. 31 of 2011. Canada's Kyoto obligations cover the years 2008-2012, so withdrawal would only be meaningful if it were initiated before the end of December, 2011, so as to take effect before the end of the compliance period.

Our concern is whether withdrawal from Kyoto implies that Canada is withdrawing from the United Nations process for negotiation of a global climate change agreement, as well as from supporting any Indigenous participation in such negotiations.

While Article 27 of the Kyoto Protocol also states that, "any Party that withdraws from the (UN Framework Convention on Climate Change, or UNFCCC) shall be considered as also having withdrawn from this Protocol," by withdrawing from Kyoto, Canada would not necessarily be withdrawing from the international process for negotiating a global climate change accord. Withdrawal would not affect requirements for annual emissions inventory reporting under the UNFCCC.

The money that Canada is saving by withdrawing from Kyoto Protocol should go to First Nations for adaptation purposes with respect to climate change impacts in Canada's

north.<sup>95</sup> For example, Indigenous Peoples must develop a northern plan or a national approach in partnership with Canada, the provinces and territories respecting the current challenges faced by northern Indigenous Peoples in Canada such as winter roads.

While Canada may continue to allocate financial resources for the purposes of the UNFCCC or international climate change negotiations, those financial resources may not be earmarked for the purpose of alleviating discrimination faced by Indigenous Peoples, and in particular may not satisfactorily address the need to ensure the full right to participation<sup>96</sup> of Indigenous Peoples in Canada and in other parts of the world to address concerns respecting Canada in the climate change negotiations processes.

Treaties and Treaty Principles can be a part of the solution in addressing climate change. Honouring and implementing Treaties, agreements or other constructive arrangements within the context of the UN *Declaration on the Rights of Indigenous Peoples* offers a legal and political framework for partnerships, better relationships, and the management and preservation of natural resources and the environment.

The Expert Mechanism on the Rights of Indigenous Peoples conducted a Study on the Indigenous Peoples and corporations which recognizes this important perspective:

40. Indigenous peoples have pointed out that they are “holders of collective rights, *including sovereign and inherent rights to land and treaty rights, covenants and agreements*. Protecting these rights also strengthens the capacity and resilience of indigenous peoples and local communities to respond to climate change”. They have asserted their jurisdiction to make laws and policies to respond to climate change.

We support the conclusion of the Secretariat with respect to the engagement, participation and the free, prior and informed consent of Indigenous Peoples, which referenced in particular Indigenous Peoples’ rights under Treaty, agreement and other constructive arrangements:

80. Drawing on indigenous peoples’ experiences in the past, situations where the right to free, prior and informed consent is likely to arise include, inter alia and non-exhaustively, where the following interests could be impacted:
- Indigenous peoples’ lands, territories and resources, including their environment
  - *Indigenous peoples’ rights under a Treaty, agreement or other constructive arrangement*
  - Activities in indigenous peoples’ areas, especially relating to extractive industries, development, tourism and dams
  - Indigenous peoples’ traditional knowledge.

We also support gender equality with respect to climate change and recognize the important roles to be played by Indigenous women regarding keepers of traditional knowledge, climate change negotiations processes or related international initiatives.

We endorse the conclusions and recommendations of the *Results of the Copenhagen meeting of the Conference of the Parties to the United Nations Framework Convention on Climate Change; implications for indigenous peoples' local adaptation and mitigation measures* as reported by Special Rapporteurs Victoria Tauli-Corpuz and Lars-Anders Baer.

**We request the Committee to continue to encourage the promotion and respect for Indigenous Peoples' rights under Treaty, agreements or other constructive arrangements with regard to climate change impacts, adaptation and mitigation and the protection of the rights of Mother Earth.**

**We recommend that Canada provide financial and other support for the full and active participation of Indigenous Peoples, in particular from the north, in the international climate change negotiations processes, and ensure compliance with existing requirements for reporting further to the UNFCCC.**

## **NAGOYA PROTOCOL – CONVENTION ON BIOLOGICAL DIVERSITY**

The *Nagoya Protocol* is a new international agreement focusing on access and benefit sharing arising from the use of genetic resources and related matters.<sup>97</sup> In the *Convention on Biological Diversity* and the *Protocol*, the central objective of "fair and equitable sharing" of benefits requires that "all rights" to genetic resources be taken into account.<sup>98</sup>

Yet in regard to both *access* to and *use* of genetic resources in the *Protocol*, only "established" rights – and not other rights based on customary use – appear to receive some protection under domestic legislation. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination. Canada played a lead role in advocating such a prejudicial approach.

For example, in regard to Guyana's legislation distinguishing "titled" and "untitled" lands, the Committee "urges the State party to remove the *discriminatory distinction between titled and untitled communities* from the 2006 Amerindian Act and from any other legislation."<sup>99</sup> In the context of resource development, the Supreme Court of Canada had previously discredited Canada's proposed "established" rights approach as "not honourable".<sup>100</sup>

For an elaboration of this and other discriminatory actions by Canada, see the separate alternative report submitted to CERD for its 80<sup>th</sup> session.<sup>101</sup>

**In regard to Indigenous Peoples' genetic resource rights, it is recommended that Canada:**

**Be advised that the distinction in the Protocol between "established" and other customary rights of Indigenous Peoples is discriminatory and is**

**incompatible with the central objective of “fair and equitable” sharing of benefits;**

**Respect fully the ruling of the Supreme Court of Canada that engaging in such distinctions is “not honourable”;**

**Redress immediately this serious issue in a manner that eliminates all discrimination and fully respects their customary rights.**

## **LACK OF IMPLEMENTATION OF CERD RECOMMENDATIONS, 17<sup>TH</sup> AND 18<sup>TH</sup> PERIODIC REPORTS OF CANADA**

### ***ONGOING HUMAN RIGHTS VIOLATIONS BY CANADIAN TRANSNATIONAL MINING CORPORATIONS***

In its concluding observations on Canada's seventeenth and eighteenth periodic reports in 2007 the Committee expressed its concern over "reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside Canada by transnational corporations registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (article 2.1d), article 4 a) and article 5e))."

The Committee recommended that Canada

**"take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada. In particular, the Committee recommends that the State party explore ways to hold transnational corporations registered in Canada accountable. The Committee requests the State party to include in its next periodic report information on the effects of activities of transnational corporations registered in Canada on indigenous peoples abroad and on any measures taken in this regard."**<sup>102</sup>

This groundbreaking recommendation to Canada was made as a result of testimonies, resolutions and statements from Indigenous Peoples in the United States and Guatemala which were included in the Joint Shadow Report submitted by the International Indian Treaty Council and the Confederacy of Treaty 6 First Nations. Their submissions presented a pattern of human rights violations, including rights to traditional lands and resources, subsistence, health and free prior and informed consent by Canadian mining corporations operating in their traditional homelands

Unfortunately, Canada did not provide the requested information on the effects of activities by Canadian corporations, or on the steps it has taken in this regard in its current report to the CERD. However, information submitted to the International Indian Treaty Council by Indigenous Peoples in the United States and Guatemala, including those who had submitted information for the CERD's review in 2007, clearly indicates that Canada has failed to implement this recommendation. In fact, some of these situations have deteriorated even further since that time.

For example, the Western Shoshone in Nevada, USA have continued to suffer the impacts of mining carried out by Barrick Gold Corporation, based in Toronto Canada. Barrick is the largest gold producer in the world, with operations on several continents.

Of particular concern to the Western Shoshone has been the destruction and desecration of the sacred mountain Mt. Tenabo where a massive open pit gold mine is continuing to move forward despite their clear and consistent opposition.

The US and Canada as well as the CERD have been informed of the violations of freedom of religion and cultural practice, free prior and informed consent and other human rights resulting from Barrick's mining operations in Western Shoshone territories.

As Western Shoshone grandmother Joyce McDade stated at a protest by the Western Shoshone on January 18th 2009, "Denabo has special significance for Western Shoshone, it means the writing on the rocks walls of the mountain put there by our Creator. We go to pray to our Creator to give us strength to keep us going. How can we pray to our creator when the place is being blown up?"

Barrick has been engaged in gold mining operations in Western Shoshone Treaty Territory known as Nevada USA since 1965, producing massive environmental and cultural destruction. In November 2008, nearly two years after the CERD issued the recommendation to Canada regarding preventing human rights violations by Canadian Corporations, Barrick carried out a massive clear cut of pine trees to make way for a huge open pit gold mine known as the Cortez Hills Expansion Project. This took place on one side of Mt. Tenabo, a mountain in the centre of a sacred area called Newe Sogobia by the Western Shoshone used for sweat lodges and other ceremonies, as well as traditional food and medicinal plant gathering. Western Shoshone Elder Carrie Dann who visited the site after these pine trees (an important source of the traditional food called pinon nuts) were clear cut and viewed the destruction including piles of uprooted trees and unfenced polluted ponds. She called it a "war zone against the trees by the Barrick Gold Company".

In a written statement submitted to the International Indian Treaty Council on January 9th 2012, Larson Bill of the Western Shoshone Defense Project affirmed that this struggle is continuing and that no improvement has yet been seen in the behaviour of Barrick Gold corporation. Nor has the government of Canada taken any apparent steps to curtail these activities. He asserts that "this company has refused to accept its social responsibility to protect Indigenous Peoples' land, sacred areas, water, and air pollution."

Mr. Bill further states that: "On November 12, 2012 Canada supported the United Nations Declaration on the Rights of Indigenous Peoples. In doing so, Canada reaffirmed its commitment to promoting and protecting the rights of Indigenous Peoples at home and ABROAD. Shoshone Nation has not seen or heard any movement by Canada or their companies to properly address their Social responsibilities to the affected communities of the Shoshone People. Under the shadow of the U.S. policies and laws, the Canadian mines will continue to overlook the sacred connection of the Shoshone People to their lands and all living things upon it".

The CERD has received considerable documentation on the violations of the land and Treaty Rights of the Western Shoshone vis a vis the United States. However, the actions

of Barrick Gold as a Canadian mining company operating on Western Shoshone traditional and Treaty lands are of direct relevance to the CERD's recommendation regarding Canada and Canada's obligations in this regard.

The International Indian Treaty Council also received considerable information and documentation from Indigenous Peoples, communities and organizations in Guatemala who continue to be impacted by the activities of Goldcorp's Marlin 1 Mine, operated in Guatemala by Goldcorp subsidiary Montana Exploradora de Guatemala S.A. Goldcorp is the 2nd largest gold mining company in the world and is based in Vancouver Canada. Its shareholders include the Canada Pension Plan Investment Board, a federal Crown corporation.



*Photo Credit: Sipacapa and San Miguel Ixtahuacan, San Marcos Guatemala; This is an aerial shot of the mining company's operations, which cause destruction of biodiversity, contamination of water by cyanide, natural resources, etc..*

Marlin 1 open pit strip mine, which uses highly toxic sodium cyanide for ore extraction, is located in the Indigenous municipalities of Sipacapa and San Miguel Ixtahuacán and has been the focus of controversy and opposition by local communities since it was established in 2004.

The nearby Mayan Indigenous communities report contamination of ground water affecting food production, chronic illnesses among the children, persistent skin diseases and liver cancers, forced displacement of families and political repression of protesters. Communities have consistently expressed strong opposition through a number of formal and well-documented referendums which have been consistently ignored and disregarded by both the Guatemalan and Canadian governments.



*Photo Credit: Sipacapa and San Miguel Ixtahuacan, San Marcos Guatemala; This is a photo of a child with disease of the skin, similar to many women and children who live in proximity to the area of gold and silver exploitation.*

An update on this situation submitted to the International Indian Treaty Council on January 6th 2011 by the Centro Pluricultural para la Democracia (the Multi-cultural Center for Democracy based in Quetzaltenango Guatemala) states that *“Despite the recommendations of United Nations bodies such as the ILO and the CERD, the company continues operating and occasioning adverse impacts on the life of the communities and Indigenous Peoples in Guatemala.”* It further states that:

- a. *The Montana company is continuing its active operations, thus violating the rights of the Indigenous Peoples established in Convention 169 of the International Labor Organization, principally Articles 6 and 15 of the convention, regarding prior, informed Consultation with the participation of the affected communities and peoples.*
- b. *In Sipacapa and San Miguel Ixtahuacán, the rights to consultation and to Free, Prior and Informed Consent continue to be violated, since the indigenous Maya Mam and Sipakapense communities have never been consulted as to whether they are in agreement with the mining activity in their territories. Neither was there a process of providing real, prior, and informed information to the population of Sipacapa and San Miguel Ixtahuacán by the Marlin Mine.*
- c. *Under the influence and with the engagement of the Montana Company, the Constitutionality Court, in its Judgment issued in May 2007, declared that the consultation conducted by the communities indigenous of Sipacapa in the year 2005 was unconstitutional and without validity; arguing that consultation is the responsibility of the central government.*
- d. *Currently the adverse impacts continue to affect the life of the communities, principally in the form of destruction of the environment, contamination of rivers, and dermatological diseases.*
- e. *The Montana company has not complied with the recommendations of the ILO and of the CERD to suspend the mining exploitation in San Miguel Ixtahuacán until such time as the right to consultation and the Free and Prior Consent of the communities and Indigenous Peoples has been accomplished, in order to decide whether to continue the mining activity in their territories.*
- f. *The Montana company has not complied with the Precautionary Measures issued by the Inter-American Commission on Human Rights on 20 May 2010 in favor of*

- 18 communities of Sipacapa and San Miguel Ixtahuacán. These precautionary measures request the suspension of the mining exploitation in said municipalities as one of the fundamental protection measures for the life of the affected communities.*
- g. Currently, arrest warrants are outstanding against eight women and 4 men who are leaders of San Miguel Ixtahuacán. These warrants were requested by the Montana company based on denunciations made by that same company to the Guatemalan courts.*
  - h. The company continues to use large quantities of sodium cyanide to extract the gold from the rocks. Use of sodium cyanide has been prohibited in other countries of the world, principally in certain European countries.*

The IITC received information for this report from other communities and organizations in Guatemala, including the Council of Peoples of Western Guatemala (Consejo de los Pueblos de Occidente - CPO) and the San Miguel Defense Front (Frente de Defensa Miguelense, Ixtahuacán, San Marcos, Guatemala). They confirm the summary presented by the CPD, highlighting in particular the denial of free prior and informed consent and the repression of human rights leaders in the impacted communities. These statements have been translated and enclosed as additional attachments.

The Guatemalan government said in 2010 that it plans a suspension of Goldcorp's Marlin 1 mine to allow a full investigation of the health, environmental, and human rights impacts as called for by a number of international and regional human rights bodies and experts, including the CERD. The case is included in this report to provide an update of the detailed information submitted by communities in Guatemala for the CERD's review of Canada in 2007. It presents another clear and continuing example of the failure by Canada to implement the CERD's recommendation with regards to Goldcorp's activities as a Canadian mining company operating with impunity in Guatemala.

Another recent example of community opposition to Canadian mining company's activities and resulting repression occurred in Oaxaca, Mexico on January 18<sup>th</sup> 2012. It was confirmed that one Zapoteca Indigenous man died and at least one woman was wounded when a group of municipal police officers and other armed men reportedly opened fire on a group of community members in the municipality of San José del Progreso, Ocotlán. The community members had gathered to protest construction of a pipeline proposed by the mining company Cuzcatlán to channel community ground water for use by a controversial mine.

Cuzcatlán is a subsidiary of the Canadian mining company Fortuna Silver Mines, Inc. with corporate headquarters in Vancouver British Columbia. Cuxcatlan received a government permit to build the pipeline despite strong community opposition. Community members maintain that the mining permit should not have been issued by the government because they had not been consulted and their free, prior and informed consent had not been obtained. A blockade of the road to the mine by community members in April 2009 received international attention. Community members report ongoing conflicts as a result of the mine, which began its operations in San Jose del

Progreso in 2007. Fortuna also operates a mine in the southern highlands of Arequipa, Peru.

The following statement was received by the IITC from Saul Vicente Vasquez, Indigenous expert member of the UN Permanent Forum on Indigenous Issues (UNPFII) from Oaxaca Mexico, expressing his concern on behalf of the UNPFII:

*“Saúl Vicente Vázquez, member of the United Nations Permanent Forum on Indigenous Issues, hereby states his concern over the lamentable, violent occurrences of this past January 18 in the community of San José del Progreso, in which Abigaíl Vázquez Sánchez was wounded and Bernardo Méndez Vázquez lost his life the following day, January 19, on account of wounds incurred in that same incident. Both of these persons were members of the Coordinator of United Peoples of the Valley of Ocotlán (“la Coordinadora de Pueblos Unidos del Valle de Ocotlán, COPUVO).*

*The communiqué of the CPUVO indicates that “Municipal police and persons dressed in civilian clothing, alleged to be employees of the Mayor, Alberto Mauro Sánchez, started shooting point blank, critically wounding Bernardo and Abigail”.*

*Saúl Vicente Vázquez hereby indicates that the members of the CPUVO had stated to him a few days earlier, during an interview with him his role a member of the Permanent Forum, that “the Cuicatlán mining company, an affiliate of the Canadian mining company Fortuna Silver, maintains a paramilitary group in the community, and the mining company’s installations are guarded by the state police.” They indicated that they had thus requested a hearing with the governor of the State of Oaxaca in order to have this situation investigated; to demand that the mining concession be canceled and that the community’s agrarian problem be solved; and to discuss problems at a municipal level and demand the recall of the municipal councilman due to the poor governance climate.*

*This situation was related by the representative of the Permanent Forum to the Human Rights Commission of the Government of the State of Oaxaca.*

*The Permanent Forum states its concern, given that at a meeting held days earlier with the Department of the Economy, the authorities indicated that to date there is no provision in the law under which to potentially cancel the mining concessions, yet in the meantime, the conflicts are growing.*

*These incidents strike the attention of the Permanent Forum. They furthermore call for the Mexican government to thoroughly investigate what occurred and punish those responsible for these lamentable occurrences. It is also requested that the current mining law be revised in order to contemplate the rights of Indigenous Peoples to Consultation and to free, prior and informed consent, and that talks be opened between the representatives of the CPUVO and the state government. --- Saul Vicente Vasquez, January 20, 2012.”*

The ongoing and pervasive human rights violations produced by these and other mining activities and other forms of extractive industries in Indigenous Peoples' lands without their free prior and informed consent, including those carried out by Canadian mining companies in various parts of the world, are matters of ongoing international concern. UN Special Rapporteur on the Rights of Indigenous Peoples concluded that resource extraction and other major development projects in or near Indigenous territories constitutes “one of the most significant sources of abuse of the rights of Indigenous Peoples worldwide.”<sup>103</sup> In addition, the UN Expert Mechanism on the Rights of Indigenous Peoples is currently preparing a Study on Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries for its 5th session in July 2012 presented to the UN Human Rights Council.

The Government of Canada continues to actively promote resource extraction around the world with little apparent concern to prevent the corporations it licenses from violating its international human rights obligations including those under the ICERD. Regarding the activities of Canadian mining corporations in other countries, Canada consistently relies on national laws and mechanisms in the host country, and fails to carry out its own obligations under international human rights standards. These include provisions regarding State obligations to ensure free prior and informed consent as called for by General Recommendation XXIII of the CERD and a number of provisions of the United Nations *Declaration on the Rights of Indigenous Peoples*, *inter alia*, Articles 10, 12, 20, 29, 32, and 37.

In conclusion, regarding these concerns of vital importance to the human rights and survival of Indigenous Peoples both in and outside of Canada, the State Party has apparently failed to comply with the Committee's recommendations. We therefore encourage the Committee ask Canada to provide an update as requested regarding any steps it may have taken or any plans to begin implementation in this regard during the review of its report on February 22nd, 2012. Further we respectfully request that the CERD consider making the following recommendations to Canada:

**The Committee recommends that Canada, in conjunction with impacted Indigenous Peoples, establish and implement an effective regulatory framework and monitoring mechanism to hold corporations registered, domiciled, licensed and/or carrying out activities in Canada accountable for their human rights impacts in and outside Canada. These should be established and implemented in accordance with international human rights obligations of both Canada and the States where activities are taking place. Canada is requested to report to the Committee on its progress in the implementation of this recommendation within one year.**

**What steps has Canada taken since the last cycle of recommendations from CERD respecting this matter? Is there any form or mechanism for reporting on progress accomplished?.**

## **DISCRIMINATION AGAINST ABORIGINAL WOMEN IN CANADA**

In its concluding observations on Canada's seventeenth and eighteenth period reports in 2007 the Committee noted "with regret the lack of substantial progress made by the State party in its efforts to address residual discrimination against First Nations women and their children in matters relating to Indian status, band membership and matrimonial real property on reserve lands, despite its commitment to resolving this issue through a viable legislative solution (arts. 2 and 5 d))."<sup>104</sup>

The Committee recommended that Canada:

**The Committee urges the State party to take the necessary measures to reach a legislative solution to effectively address the discriminatory effects of the Indian Act on the rights of Aboriginal women and children to marry, to choose one's spouse, to own property and to inherit, in consultation with First Nations organisations and communities, including Aboriginal women's organisations, without further delay.**

Canada has unsuccessfully attempted to address this recommendation through various failed legislative and policy initiatives over the past 4 years.

Recently, National Chief Shawn A-In-Chut Atleo of the Assembly of First Nations stated the following in his opening address at a Crown-First Nations Gathering on January 24, 2012 in Ottawa Ontario:

It is well past time that we began to undo the damage that [the Indian] Act has inflicted on our peoples, and to our partnership. For, from it grew the reserve system, the tragedy of residential schools and offensive prohibitions on our cultural and spiritual practices, a breach of faith that has devastated families and communities ever since. As the Royal Commission on Aboriginal Peoples concluded over 15 years ago, this legislation has utterly failed our people – and failed Canada.

Bill S-2, currently before the Standing Senate Committee on Human Rights, has existed in various incarnations over these years. It began in 2008 as Bill C-47 during the 2<sup>nd</sup> Session of the 39<sup>th</sup> Parliament and was reintroduced as Bill S-8 in 2009 during the 2<sup>nd</sup> Session of the 40<sup>th</sup> Parliament. Both times, the Bill died on the Order Paper when Parliament was dissolved. It was then re-introduced for a third time in 2010 as Bill S-4, but again Parliament was dissolved in May of 2010. Finally, it was re-introduced for a fourth time during the current Session of Parliament as Bill S-2.<sup>105</sup>

The stated intent of this legislation is to provide for equitable division of matrimonial assets upon divorce for Indians (under the *Indian Act*, R.S.C. c.I-5) living on reserve. However, this legislation does not protect women from discrimination and violence, and may in fact promote such discrimination.

Throughout the various incarnations of this Bill, Indigenous women and Indigenous Peoples' representative organizations as well as various First Nations have objected strongly to the approach taken in the legislation. Most notably, there was a lack of consultation in the process leading up to the current version of this legislation; no recognition of the right of self-determination, self-government or jurisdiction of First Nations; the deep-seated challenges faced by First Nations in accessing the justice system to assert their rights; no existing or proposed alternative dispute resolution mechanisms; no attempt to address underlying or contextual issues such as family violence or social determinants such as racism and discrimination; and finally no commitment to initiate any supporting mechanisms for the implementation of such legislative developments, including the establishment of a specialized legal aid fund.<sup>106</sup>

We will expand on just two of these concerns for the purpose of this Report.

Primarily, there is no acknowledgment of First Nations jurisdiction over property and civil rights on reserve in Bill S-2. Instead, the legislation contains provisions that apply until such time as a First Nation is able to come up with their own version of such laws, which must comply with the legislative provisions (s.7(1) of Bill S-2). The First Nations law can be approved by as few as 25% of the eligible voters in the First Nation, and the law is then subject to the final approval of the Minister of Aboriginal and Northern Affairs Canada as well as the Attorney General of the applicable province. In a situation where most First Nations were not consulted or informed of this legislative development, the extreme laxity in ensuring that First Nations Peoples have a right of participation in the development of on-reserve laws is deplorable.

Secondly, the “check and balance” in a situation like this is supposed to be access to the judicial system so as to ensure protection of rights (protected as constitutional rights and/or human rights) of First Nations. While access to justice remains an outstanding issue faced by many Indigenous women in Canada, there is not much hope of ensuring that Indigenous women have the capacity and resources to assert and protect rights of identity, self-determination, rights further to Treaty or other constructive arrangement, Aboriginal rights and Aboriginal title. The Bill also creates new rights for non-Indians to have life-interests in reserve lands, which opens further the possibility of reserve lands being occupied and used by non-Indigenous Peoples who are not members of that particular Indigenous nation, culture and language group. This exacerbates the alienation, dispossession and estrangement of Indigenous Peoples and women in particular from their own communities, traditional lands and territories and families.

The potential impact of Bill S-2 is severe, and cannot be tempered by application of domestic law. Canada has international human rights obligations to ensure free prior and informed consent as called for by General Recommendation XXIII of the CERD and a number of provisions of the United Nations Declaration on the Rights of Indigenous Peoples, *inter alia*, Articles, 3, 4, 5, 7, 8(2)(b, c, d), 9, 10, 13, 18, 22, 25, 27, and 37. We therefore encourage the Committee ask Canada to provide additional phases of consultation with First Nations on the current Bill S-2, as well as to address in a

substantive manner the outstanding concerns of First Nations and Indigenous women respecting discrimination under Bill S-2 during the review of its report on February 22nd, 2012.

Further we respectfully request that the CERD consider making the following recommendations to Canada:

**The Committee recommends that Canada, in conjunction with impacted Indigenous Peoples, establish and implement an effective consultation process respecting Bill S-2, as well as address outstanding issues of concern regarding on-going discrimination against Indigenous women in Canada further to legislation and policy. Canada is requested to report to the Committee on its progress in the implementation of this recommendation within one year.**

## **THE ROYAL COMMISSION ON ABORIGINAL PEOPLES FINAL REPORT AND RECOMMENDATIONS – IMPLEMENTATION AND THE 20 YEAR COMMITMENT**

In its concluding observations on Canada's seventeenth and eighteenth period reports in 2007 the Committee noted that "the State party has yet to fully implement the 1996 recommendations of the Royal Commission on Aboriginal Peoples (art. 5 (e))." The Committee went on to recommend that:

**In light of article 5 (e) and of general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee urges the State party to allocate sufficient resources to remove the obstacles that prevent the enjoyment of economic, social and cultural rights by Aboriginal peoples. The Committee also once again requests the State party to provide information on limitations imposed on the use by Aboriginal people of their land, in its next periodic report, and that it fully implement the 1996 recommendations of the Royal Commission on Aboriginal Peoples without further delay.<sup>107</sup>**

The Royal Commission on Aboriginal Peoples was created in 1991 to fulfill a 16 point mandate set by the government of Canada. In 1996 the Final Report of the RCAP was released in the form of five (5) volumes of work and recommendations, the central message being that the assimilationist and discriminatory policies, which constituted "the main policy direction, pursued for more than 150 years, first by colonial then by Canadian governments, has been wrong."<sup>108</sup> RCAP provided a 20 Year Commitment for implementation.

The Royal Commission proposed four principles as the basis for a renewed relationship: recognition, respect, sharing and responsibility. The Commissioners proposed that Treaties be the mechanism for turning principles into practice:

Over several hundred years, Treaty making has been used to keep the peace and share the wealth of Canada. Existing Treaties between Aboriginal and non-Aboriginal people, however dusty from disuse, contain specific terms that even now help define the rights and responsibilities of the signatories towards one another.<sup>109</sup>

By 2016, the recommendations of the RCAP Final Report are to be implemented in Canada. However, much like the Millennium Development Goals of the United Nations, the end date is rapidly approaching without a substantive and measurable realization or implementation.

We encourage the Committee to ask Canada why they do not have an updated, current and accessible policy<sup>110</sup> on the implementation of RCAP Final Report, and consider **re-iterating the previous recommendation** of the Committee in CERD/C/CAN/CO/18 in paragraph 21, **with the modification that the implementation meet the 20 year commitment.**

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<sup>1</sup> Margaret Kovach, "Emerging from the Margins: Indigenous Methodologies" IN: *Research as Resistance: Critical Indigenous, and Anti-Oppressive Approaches*, edited by Leslie Brown and Susan Strega (Toronto: Canadian Scholars Press, 2005) pp. 19-36 at 23

<sup>2</sup> The *Constitution Act, 1867* established the jurisdiction and authority of the federal government respecting Indigenous Peoples, specifically under section 91(24): It shall be lawful for the Queen, by, and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, - 24. Indians, and Lands reserved for the Indians.

<sup>3</sup> *Constitution Act, 1982* s. 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, "aboriginal peoples of Canada" includes Indian, Inuit and Metis peoples of Canada (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

<sup>4</sup> Available online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861>

<sup>5</sup> Attached hereto

<sup>6</sup> [www.executive.gov.ct/initiatives/Devolution](http://www.executive.gov.ct/initiatives/Devolution)

<sup>7</sup> See attached supporting documentation

<sup>8</sup> Types of Treaties, Agreements and other Constructive Arrangements: Peace and Friendship Treaties, the historical "numbered treaties", being Treaties #1, 2, 3, 4, 5, 6, 7, 8, 9, 10, & 11 (1871-1921); the Robinson Huron and Robinson Superior Treaties of 1850; the Douglas Treaties (of Vancouver Island, 1850-1854); the Williams Treaties (1923) – see Map of Historical Treaties attached hereto.

<sup>9</sup> See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at page 29

<sup>10</sup> For example, the Haudenosaunee, who entered into agreement of alliance with the Crown while retaining their distinct status.

<sup>11</sup> See Generally M. Alfonso Martinez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations* E/CN.4/Sub.2/1999/20, in particular at the following paragraphs: 270. *This leads to the issue of whether or not treaties and other legal instruments concluded by the European settlers and their successors with indigenous nations currently continue to be instruments with international status in light of international law.* 271. *The Special Rapporteur is of the opinion that said instruments indeed continue to maintain their original status, and to be fully in effect and consequently, are sources of rights and obligations for all the original parties to them (or their successors), who shall fulfill their provisions in good faith.* 272. *The legal reasoning supporting the above Conclusion is very simple and the Special Rapporteur is not breaking any new ground in this respect. Treaties without an expiration date are to be considered as continuing in effect until all the parties to it decide to terminate them, unless otherwise established in the text of the instrument itself, or unless, its invalidity is declared. This is a nation that has been deeply ingrained in the conceptual development, positive normativity, and consistent jurisprudence of both municipal and international law since the times in which Roman Law was at its zenith more than five centuries ago, when modern European colonization began.* 273. *As a result of his research, the Special Rapporteur has ample proof that Indigenous peoples/nations who have entertained treaty relationships with non-indigenous settlers and their continuators, strongly argue that those instruments not only continue to be valid and applicable to their situation today but are a key element for their survival as distinct peoples. All those consulted --either directly in mass meetings with them, or in their responses to the Special Rapporteur's questionnaire, or by direct or written testimony-- have clearly indicated their conviction that they indeed remain bound by the provisions of those instruments that their ancestors, or they themselves, concluded with the non-indigenous peoples.* 274. *Competent authorities in some countries - e.g. Canada and New Zealand-- have also told the Special Rapporteur that their respective Governments too consider their treaties with Indigenous peoples to remain fully valid and in*

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effect (albeit, they differ radically from their Indigenous counterparts regarding construction of the contents).

<sup>12</sup> See *Paulette v. Registrar of Titles (No.2)* (1973), 42 D.L.R. (3d) 8 at 14, wherein the Supreme Court of the Northwest Territories recognized Treaty No.8 and Treaty No. 11 were “peace” treaties that did not effectively terminate or extinguish Aboriginal title. In fact, the treaties were found to have only dealt with issues of continuation of life-ways – hunting and fishing for example – and not a complete surrender of the land itself.

<sup>13</sup> See Report on United Nations seminar on treaties, agreements and other constructive arrangements, July 2010 A/HRC/EMRIP/2010/5, at paragraph 10: *As in previous discussions relating to treaties, agreements and other constructive arrangements between States and indigenous peoples, indigenous participants underlined the important role played by treaties in determining their relationship with the States in which they lived. The treaties were perceived by some of the experts as having a legally-binding character and were considered indispensable as a framework for the resolution of conflicts. It was noted that the history of treaty-breaking by Governments over the years had undermined confidence between the parties, and that this was compounded by differing interpretations or understandings of treaties. For example, speakers referred to the unwritten intent as expressed orally, which was to give indigenous nations the capacity to be self-determining and self-sufficient, while States and courts focused literally on the text of the treaty itself. The language the treaty was written in might also change the contents, as is the case of the Waitangi treaty between the British Crown and the Maori people of Aoteroa, New Zealand.*

<sup>14</sup> Opening Remarks, Shawn Atleo, National Chief Assembly of First Nations, Crown-First Nations Gathering Ottawa Ontario, January 24 2012 Available Online at: <http://www.afn.ca/uploads/files/ncspeakingnotescfng.pdf>

<sup>15</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 at para. 133

<sup>16</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 at paras. 9-12; *Badger*, *supra* at para. 52. (“*Marshall*”) The case law demonstrates that judicial interpretation of the scope and content of Treaty rights, as with Aboriginal rights, continues to evolve as First Nations people assert those rights. In *Marshall*, for example, an ambiguous term of a 1760 treaty was interpreted as providing for a limited commercial fishing right<sup>16</sup>. In *Simon v. The Queen*, [1985] 2 S.C.R. 387, at para. 31, the Supreme Court held that a Treaty hunting right also included a right to possess and transport a firearm. Similarly, in *R. v. Sioui*, [1990] 1 S.C.R. 1025, at paras. 56 and 71, the Supreme Court concluded that a right to teach a practice, custom and tradition to the next generation stemmed from an established Treaty fishing right. A right to build a cabin on Crown land in a provincial park was confirmed as being necessarily incidental to a Treaty hunting right in *R. v. Sundown*, [1999] 1 S.C.R. 393, at paras. 28-30. In *Claxton v. Saanichton Marina Ltd.*, [1989] 3 C.N.L.R. 46 (B.C.C.A.) the Court held that a Treaty fishing right in an 1852 treaty necessarily included a right of access to Saanichton Bay. Interpretation of a clause in a 1725 treaty resulted in confirmation of a Treaty right to harvest timber for personal domestic uses in *R. v. Sappier*, 2004 NBCA 56, at paras. 5-20.

<sup>17</sup> *Marshall*, *supra*; *R. v. Horse*, [1988] 1 S.C.R. 187).

<sup>18</sup> see *Simon*, *supra* at para. 29

<sup>19</sup> *Marshall*, *supra* at para. 14

<sup>20</sup> *Sundown*, *supra* at para. 32

<sup>21</sup> Alberta is covered entirely by treaty territories. In the green is Treaty 8, which extends into the Northwest Territories; in beige is Treaty 6; in Blue is Treaty 7:



*Historic Numbered Treaty Territories of the Province of Alberta*

<sup>22</sup> Attawapiskat First Nation in Ontario, Canada, declared a state of emergency this fall over a lack of suitable housing, and has been attracting national and international media attention since, as observers compare the conditions in the community to those found in the world's poorest countries. The Special Rapporteur James Anaya made a statement respecting the situation in Attawapiskat, which can be found online here: <http://unsr.jamesanaya.org/statements/special-rapporteur-on-indigenous-peoples-issues-statement-on-the-attawapiskat-first-nation-in-canada>

<sup>23</sup> [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200605\\_05\\_e\\_14962.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200605_05_e_14962.html) at paras. 5.37-5.39

<sup>24</sup> The *Kelowna Accord* is a series of agreements resulting from 18 months of negotiations, finalized in 2005 between the Government of Canada, First Ministers of the Provinces, Territorial Leaders, and the leaders of five national aboriginal organizations in Canada. The Accord sought to improve the education, employment, and living conditions for Aboriginal peoples through governmental funding (\$5 Billion over 10 years) and other programs. The Accord was endorsed by Prime Minister Paul Martin (Liberal Government), but has been largely ignored by his successor, Stephen Harper (Conservative Party of Canada). See Online at: <http://www.parl.gc.ca/Content/LOP/researchpublications/prb0604-e.htm>

<sup>25</sup> See generally the *Indian Act*, S.C. 1985 c. I-5. For a discussion of the matters contained within the *Act*, see John Borrows and Leonard Rotman *Aboriginal Legal Issues: Cases, Materials and Commentary* 3<sup>rd</sup> Edition (Butterworths, 2010)

<sup>26</sup> See *Indian Act*, s. 81(1)(a),(f),(l). See also Constance Macintosh, 'Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water Quality on First Nations Reserves' in 39 *Ottawa Law Review* 63 (2007-8) at 69-70: "[t]he only federal legislative gesture has been to grant band councils authority...to make by-laws respecting 'the construction and maintenance of watercourses'...and 'of public wells, cisterns, reservoirs and other water supplies'. Breach of the by-laws can result in a fine of up to \$100 or imprisonment for a term not exceeding 30 days or both, unless the Minister of Indian Affairs and Northern Development disallows the by-law. These powers are an inadequate basis for a regulatory framework to ensure the safety of drinking water."

<sup>27</sup> See Andrew Binkley, 'Improving the Effectiveness of Transfer Payment Programs on Canadian Reserves' in *Indigenous Law Journal*, Vol. 7 Issue 2 (2009) at p. 123

<sup>28</sup> See Ardith Walkem, 'The Land is Dry: Indigenous Peoples, Water and Environmental Justice' in Karen Bakker (ed) *Eau Canada: The Future of Canada's Water* (UBC Press, 2007) at p. 305: "In some cases, provinces have either refused to honor reserve water allocations and have cancelled them outright or issued licenses that reduce the amount available to these lands. Provincial failure to honor water allocations included in reserve creation remains a contentious issue."

<sup>29</sup> Macintosh, *supra* note 7 at 69-70

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<sup>30</sup> <http://www.waterforlife.ca>

<sup>31</sup> See *Canadian Environmental Protection Act* S.C. 1999, c.33 and *Fisheries Act* R.S.C. 1985 c.F-14.

<sup>32</sup> See “Drinking Water Advisories”, First Nations and Inuit Health Branch website, [http://www.hc-sc.gc.ca/fniah-spnia/promotion/water-eau/advis-avis\\_concern-eng.php](http://www.hc-sc.gc.ca/fniah-spnia/promotion/water-eau/advis-avis_concern-eng.php)

<sup>33</sup> See “Frequently Asked Questions” at the Government of Canada INAC website <http://www.ainc-inac.gc.ca/enr/wtr/h2o/faq/index-eng.asp> Approximately \$330 Million has been allocated in the 2008 budget over two years to address the water crisis faced by First Nations across the country. However, the amount will not be enough to ensure access to safe drinking water in all First Nations communities, many of which require new or up-graded infrastructure as well as training and certification.

<sup>34</sup> Canada. Royal Commission on Aboriginal Peoples. Report of the Royal Commission on Aboriginal Peoples (Canada Communication Group, 1996) at p. 665

<sup>35</sup> The Senate Report contained recommendations on how to proceed with legal reform in the area of drinking water and First Nations.

<sup>36</sup> Government of Canada, Drinking Water and Wastewater in First Nations Communities – Discussion Paper: Engagement Sessions on the Development of a Proposed Legislative Framework for Drinking Water and Wastewater in First Nations Communities, Winter 2009 [www.ainc-inac.gc.ca/enr/wtr/h2o/index-eng.asp](http://www.ainc-inac.gc.ca/enr/wtr/h2o/index-eng.asp) (hereinafter “Discussion Paper”).

<sup>37</sup> Ibid.

<sup>38</sup> See <http://www.inac-ainc.gc.ca>

<sup>39</sup> [www.executive.gov.ct/initiatives/Devolution](http://www.executive.gov.ct/initiatives/Devolution)

<sup>40</sup> The Metis and the Inuvialuit have agreed to move forward with the AIP with the Government of the Northwest Territories and the Government of Canada and devolution. This is divisive for Indigenous peoples of this region, and results in 30 First Nations being excluded from the process while the Governments of Canada are able to claim consultation with IP in the region.

<sup>41</sup> OHCHR study on human rights obligations related to equitable access to safe drinking water and sanitation - Contributions received, International Organization of Indigenous Resource Development. Available online: [http://www2.ohchr.org/english/issues/water/contributions/civilsociety/IOIRD\\_Alberta.pdf](http://www2.ohchr.org/english/issues/water/contributions/civilsociety/IOIRD_Alberta.pdf)

<sup>42</sup> Elder Jerry Saddleback, Samson Cree Nation, Testimony delivered April 14, 2007 at the Maskwacis Territory of Treaty No. 6

<sup>43</sup> See generally the *Water Declaration of the Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario, 2008*, Chiefs of Ontario, declared at the Garden River First Nation. Available Online at: <http://chiefs-of-ontario.org/Assets/COO%20long%20form%20declaration.pdf>

<sup>44</sup> Available online at:

<http://www.srd.alberta.ca/FormsOnlineServices/StandardOperatingProcedures/documents/SOP-L01-ApplyingPLARtoAboriginalIssues-Sep21-2011.pdf>

<sup>45</sup> <http://www.pembina.org/oil-sands/os101/alberta> See also Minister of the Environment online at <http://www.ec.gc.ca/pollution/default.asp?lang=En&n=E9ABC93B-1#s2>

<sup>46</sup> Canadian Association of Petroleum Producers, 2010

<sup>47</sup> As of August 2009, there were 91 active oil sands projects in Alberta. Of these, four were open-pit mining projects, while the remaining projects used various insitu recovery methods. (<http://www.energy.alberta.ca/OilSands/791.asp>)

<sup>48</sup> Minister of Environment, Supra note 38

<sup>49</sup> Ibid., there are currently two four-year (2008-2012) multi-partner (government, university and industry – but not Indigenous peoples) studies being conducted on arsenic as a priority toxic element resulting from oil sands development impacting sourcewater protection and drinking water treatment.

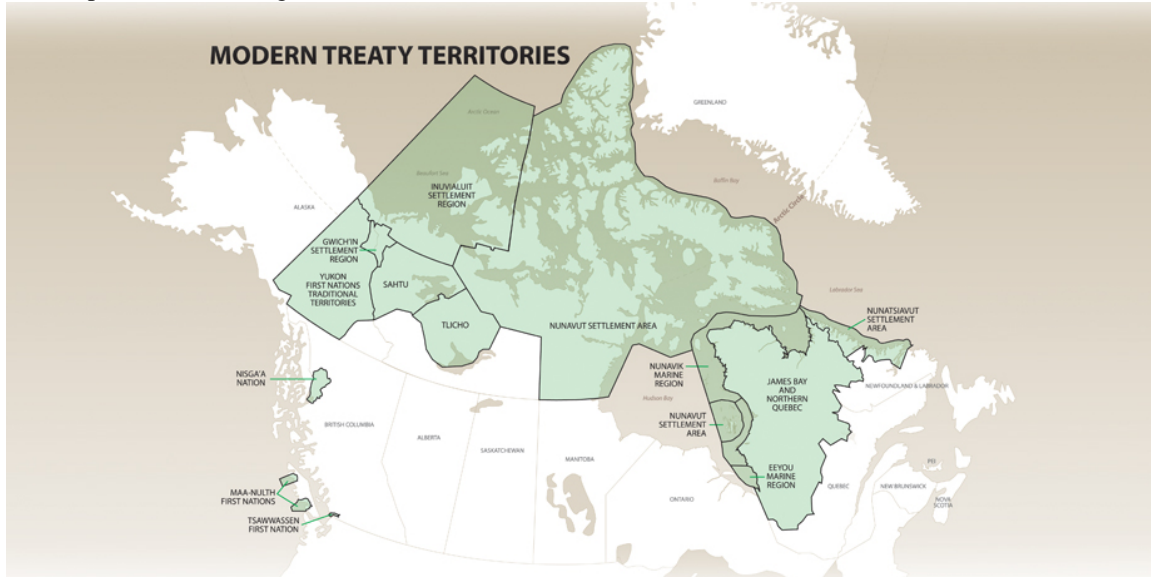
<sup>50</sup> The Green Party *A Comprehensive Guide to the Alberta Oil Sands*, ibid., at page 28.

<sup>51</sup> Excerpted from an informational handout of the Indigenous Environmental Network Indigenous Tar Sands Campaign, 2008 and an article written by Clayton Thomas Muller IEN CITSC Campaigner.

<sup>52</sup> See generally the International Indian Treaty Council [www.treatycouncil.org](http://www.treatycouncil.org)

<sup>53</sup> See generally the Official Resolution of Treaties No1-11 National Gathering, September 2011 #T1-11/2011-09-23-5 – please also refer to supporting documentation from contributing organization the Dene nNation, who have attached a series of resolutions respecting the caribou herd, Tar Sands and treaty rights.

<sup>54</sup> A map of the modern agreements:



Credit: Land Claims Agreements Coalition Available Online at: <http://www.landclaimscoalition.ca/>

<sup>55</sup> Dene Nation is a non-profit organization mandated to retain sovereignty by strengthening Dene spiritual beliefs and cultural values in Denendeh. Formed in 1970 as the National Indian Brotherhood-NWT, it represents more than 25,000 Dene living in 29 communities within the Gwich'in Settlement Area, the Sahtu Settlement Area, the Deh Cho, the Tlicho and Akaitcho territory, Athabasca Chipewyan First Nation and Tadoule Lake, Manitoba. It is the national voice of the Dene in Canada and addresses issues of vital importance for the preservation of Dene identity, culture and way of life. Since its establishment, Dene Nation has broadened its aims and objectives in response to the changing social, economic, environmental, and political challenges facing the Dene. Dene Nation has done so in a manner that reflects the emerging relationship between the Dene and the rest of the world.

<sup>56</sup> [http://www.csnews.com/top-story/keystone\\_xl\\_pipeline\\_proposal\\_still\\_progressing-60327.html](http://www.csnews.com/top-story/keystone_xl_pipeline_proposal_still_progressing-60327.html)

<sup>57</sup> See attached supporting documentation including the Greenpeace press release detailing how they obtained the document, as well as the document in question: FOI\_OilSandsAdvocacyStrategy-1

<sup>58</sup> CERD/C/CAN/CO/18 at para. 22

<sup>59</sup> Identical art. 5, para 1 of the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

<sup>60</sup> United Nations *Declaration on the Rights of Indigenous Peoples*, Article 44

<sup>61</sup> Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada 10/12/98, E/C.12/1/Add.32 (Concluding Observations / Comments) Principle Subjects of Concern at para 18

<sup>62</sup> Fifth Periodic Report of Canada (27 October 2004) further to Article 40 of the International Covenant on Civil and Political Rights, CCPR/C/CAN/2004/5 at paras 185 and 186.

<sup>63</sup> UN Economic and Social Council, E/C.12/CAN/CO/5, Committee on Economic, Social and Cultural Rights, 36<sup>th</sup> Session May 2006 at para 16.

<sup>64</sup> <http://www.afn.ca/uploads/files/nccclosingremarksfng.pdf>

<sup>65</sup> Gabrielle Slowey, *Navigating neo-liberalism: Self-Determination and the Mikisew Cree First Nation* (Vancouver: UBC Press, 2008)

<sup>66</sup> United Nations Charter Section XXX

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<sup>67</sup> Ibid., at sections xxx. See also Paul Joffe, “Global Implementation of the UN Declaration on the Rights of Indigenous Peoples – and Canada’s Increasing Isolation, September 2009”. The report is available online at: <http://www.cfsc.quaker.ca/pages/documents/UNDeclaration-2ndAnniversary-ReportFINAL-Sep2009.pdf>.

<sup>68</sup> *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313. See also: *Roberts v. Canada*, [1989] 1 S.C.R. 322 at para 340; *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 at para 114

<sup>69</sup> *R v Van der Peet*, [1996] 2 SCR 507 at para. 36

<sup>70</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at paragraph 25

<sup>71</sup> Grand Chief Edward John, “The First Nations Perspective on Clearing the Path to Justice”, A Public Forum hosted by the Law Society of British Columbia - Clearing the Path to Justice, January 28, 2009. This document may be accessed online at: [www.fns.bc.ca](http://www.fns.bc.ca)

<sup>72</sup> Grand Chief Edward John, “The First Nations Perspective on Clearing the Path to Justice”, A Public Forum hosted by the Law Society of British Columbia - Clearing the Path to Justice, January 28, 2009. This document may be accessed online at: [www.fns.bc.ca](http://www.fns.bc.ca).

<sup>73</sup> For example, in *Haida Nation*, the federal Crown similarly denies the existence of the plaintiff’s Aboriginal title at para. 3(g) of its Statement of Defence: “In answer to paragraphs 1 to 4 of the Statement of claim, ... Canada denies that, at any material time: ... (g) The Haida Ancestors – Contact or the Haida Ancestors – Sovereignty, or their ancestors or descendants, or the Haida Nation, held or hold aboriginal title to the Claim Area or any part thereof, as alleged or at all.” Similarly, in *Roger Williams v. HMQ BC, AG Canada*, the provincial Crown denies the existence of the plaintiff’s Aboriginal title in its Statement of Defence, see paras. 10(b) and 31(a). Furthermore, the federal Crown similarly denied the existence of the plaintiff’s Aboriginal title in its Amended Statement of Defence.

<sup>74</sup> Grand Chief Edward John, “The First Nations Perspective on Clearing the Path to Justice”, A Public Forum hosted by the Law Society of British Columbia - Clearing the Path to Justice, January 28, 2009. This document may be accessed online at: [www.fns.bc.ca](http://www.fns.bc.ca).

<sup>75</sup> Recognition Working Group, “Discussion Paper: Shared Decision Making”, All Chiefs’ Forum, November 2008. The Discussion Paper can be accessed online at: <http://www.fns.bc.ca/pdf/Doc3SDMDiscussionPaperFinal.pdf>

<sup>76</sup> Minister of the Department of Aboriginal and Northern Affairs *Aboriginal Consultation and Accommodation Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* March 2011, QS 7105-001-EE-A1, ISBN 978-1-100-17955-1 Available Online: <http://www.aadnc-aandc.gc.ca/eng/1100100014664>

<sup>77</sup> See Andrew Binkley, ‘Improving the Effectiveness of Transfer Payment Programs on Canadian Reserves’ in *Indigenous Law Journal*, Vol. 7 Issue 2 (2009) at p. 123

<sup>78</sup> See Winds and Voices Environmental Services Inc., *Determining the Significance of Environmental Effects: An Aboriginal Perspective* (Research and Development Monograph Series, 2000, accessible online at [http://www.ceaa.gc.ca/015/001/003/print-version\\_e.htm](http://www.ceaa.gc.ca/015/001/003/print-version_e.htm)) at 12-13: Aboriginal peoples have virtually unanimously indicated that insufficient financial resources, either from government and/or proponents, are available to them to participate in [consultations such as] environmental assessments (“EAs”). They have identified that without these financial resources, they are greatly hindered from the following:

- effectively participating in consultations with government and the proponent; carrying out internal consultations;
- translating documents and providing information in formats (visual, audio) that are more relevant to their communities;
- hiring experts; conducting research; reviewing the proponent’s EA report; and preparing submissions for government or panels

<sup>79</sup> The issue of culture and indigenous knowledge (also called Aboriginal knowledge or traditional ecological knowledge under the federal EA processes) is very significant. However, we chose to focus on the issue of the interaction of Aboriginal and treaty rights and consultation as opposed to entering into a discussion of how indigenous knowledge is brought into consultation, accommodation and consent in Canada. This is not to say that when a First Nation articulates their rights protected under the *Constitution Act 1982*, they don’t also enter into a dialogue that can potentially be inclusive of traditional knowledge systems and legal orders. Different ways of putting “value” on aspects of our ecosystems and environment can contribute to sustainable development and sustainable law. Creating a partnership between First

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Nations, a project proponent and a government of Canada can be a “value added” not only to the success of the project, compliance with environmental law and society at large – such a partnership can also contribute to data and information regarding that particular geographical location and landscape which go far beyond strict science. See “Theresa Ryan Diagram” in: Ryan, Theresa, *Science Renewal: Re-Constructing the Aboriginal Stewardship and Conservation Paradigm in the Context of Integration* (Assembly of First Nations, 2007) at 8.

<sup>80</sup> Ibid., page 18.

<sup>81</sup> In terms of Treaty rights, the case of *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* 2005 SCC 69, deals with consultation in the context of Treaty rights. In that case, the federal government had approved a winter road to go around the boundary of the Mikisew reserve in Treaty 8. The Mikisew applied to the Federal Court to quash the approval, objecting to the direct impact of proposed road to hunting and trapping in that corridor, and other negative impacts on their traditional lifestyle and other members of the community.

<sup>82</sup> *Haida* on when the duty arises: “[W]hen precisely does a duty to consult arise? The foundation of the duty in the Crown’s honour and the goal of reconciliation suggest that the duty arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it: see *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1997 CanLII 2719 (BC S.C.), [1997] 4 C.N.L.R. 45 (B.C.S.C.), at p. 71, per Dorgan J.” *Mikisew* on when the duty arises: The decision in *Mikisew* confirms that these principles also apply where where the potential impact is on a Treaty right, rather than an Aboriginal right. The Court quoted and agreed with the Trial Judge: “. . . it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation prior to making a decision that infringes on constitutionally protected treaty rights.”

<sup>83</sup> *Haida Nation v. British Columbia (Ministry of Forests)*, *supra*, para 24. See also *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para 168: “Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”

<sup>84</sup> Andrea Carmen, IITC and Ed John, First Nations Summit “Indigenous Children under State Custody: the International Normative Framework for a Human Right-based approach” January 31 2010, Submitted to the International Expert Group Meeting: Indigenous Children and Youth in Detention, Custody, Foster-Care and Adoption (Vancouver, Canada) Documents available online at: [http://www.un.org/esa/socdev/unpfii/en/EGM\\_ICYD.html](http://www.un.org/esa/socdev/unpfii/en/EGM_ICYD.html)

<sup>85</sup> First Nations Child and Family Caring Society, Winter Newsletter 2011

<sup>86</sup> The Auditor General also made the following recommendations:

4.26 Recommendation. Indian and Northern Affairs Canada, in cooperation with provinces and First Nations agencies, should

- define what is meant by services that are reasonably comparable,
- define its expectations for culturally appropriate services and standards, and

implement this definition and these expectations into the program.

4.67 Recommendation. Indian and Northern Affairs Canada, in consultation with First Nations and provinces, should ensure that its new funding formula and approach to funding First Nations agencies are directly linked with provincial legislation and standards, reflect the current range of child welfare services, and take into account the varying populations and needs of First Nations communities for which it funds on-reserve child welfare services.

<sup>87</sup> *Children: the Silenced Citizens: Effective Implementation of Canada’s International Obligations with respect to the Rights of Children* (Final Report of the Standing Senate Committee on Human Rights, April 2007)

<sup>88</sup> UNPFII Report on the Second Session “Indigenous Children and Youth”

19. The Forum, taking into account the large number of incarcerated indigenous children and youth and the need to assist them in reintegrating into society as soon as possible through socio-educational measures, recommends that the Economic and Social Council urge Governments to ensure greater protection and humane treatment of those children and youth while in prison and youth detention centres, and to provide them with socio-educational measures for their rehabilitation E/C.19/2003/22

<sup>89</sup> United Nations Declaration on the Rights of Indigenous Peoples: **Preambular Paragraphs:**

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*Affirming also* that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

*Affirming further* that 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,

*Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

*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,

*Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

***Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child, (Emphasis added)***

<sup>90</sup> At para 11, International Expert Group Meeting on Combating violence against indigenous women and girls: article 22 of the United Nations Declaration on the Rights of Indigenous Peoples PFII/2012/EGM 18 - 20 January 2012, New York

<sup>91</sup> UN Committee on the Rights of the Child. *General Comment No.11 (2009) Indigenous children and their rights under the Convention*. Fiftieth session, Geneva, January 12-30, 2009. Relevant Sections of the Convention Include: **Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989**

#### **Article 3**

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

#### **Article 4**

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

#### **Article 5**

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

#### **Article 8**

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

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2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

#### **Article 9**

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

#### **Article 21**

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

#### **Article 25**

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

#### <sup>92</sup> *Reservations*

(i) Article 21 With a view to ensuring full respect for the purposes and intent of article 20(3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada.

#### *Statement of understanding*

Article 30 It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.

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John Holmes of the Department of Foreign Affairs told the Committee in 2001 that the government adopted this approach to article 21 in order to ensure that recognition of customary adoption among Aboriginal peoples in Canada was not precluded by the Convention requirement that adoptions be authorized by competent authorities, in accordance with applicable laws and procedures.

<sup>93</sup> This has in fact been done, but the issue for Indigenous peoples in Canada is that the repeal has happened without any supports or framework for addressing the capacity of First Nations communities to meet the requirements for implementation.

<sup>94</sup> <http://news.nationalpost.com/2011/12/12/canada-formally-withdrawig-from-kyoto-protocol/>

<sup>95</sup> For example, Indigenous peoples must develop a northern plan or a national approach in partnership with Canada, the provinces and territories respecting the current challenges faced by northern Indigenous peoples in Canada such as winter roads.

<sup>96</sup> See UN Declaration Articles

<sup>97</sup> *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010, <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

<sup>98</sup> *Convention on Biological Diversity*, article 1; and *Protocol*, article 1.

<sup>99</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), para. 15. [emphasis added]

See also Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 27, where discrimination concerns are highlighted: "The Permanent Forum reiterates to the parties to the Convention on Biological Diversity, and especially to the parties to the Nagoya Protocol, the importance of respecting and protecting indigenous peoples' rights to genetic resources consistent with the United Nations Declaration on the Rights of Indigenous Peoples. Consistent with the objective of "fair and equitable" benefit sharing in the Convention and Protocol, all rights based on customary use must be safeguarded and not only "established" rights. The Committee on the Elimination of Racial Discrimination has concluded that such kinds of distinctions would be discriminatory." [emphasis added]

<sup>100</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 27: "The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests ... It must respect these potential, but yet unproven, interests. ... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable." [emphasis added]

At para. 33, the Court added: "To limit reconciliation to the post-proof sphere risks treating reconciliation as a distant legalistic goal, devoid of ... "meaningful content" ... It also risks unfortunate consequences. When the distant goal of proof is finally reached, the Aboriginal peoples may find their land and resources changed and denuded. This is not reconciliation. Nor is it honourable." [emphasis added]

<sup>101</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, "Response to Canada's 19th and 20th Periodic Reports: Alternative Report on Canada's Actions on the *Nagoya Protocol*", UN Committee on the Elimination of Racial Discrimination (January 2012).

<sup>102</sup> *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007). Para. 17.

<sup>103</sup> Human Rights Council. *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*. 11 July 2011. A/HRC/18/35. Para. 82.

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<sup>104</sup> CERD/C/CAN/CO/18 at paragraph 15. Please review all supporting documentation from the Native Women's Association of Canada respecting this issue.

<sup>105</sup> Parliament of Canada (Anna Gay and Marlissa Tiedemann), Legislative Summary of Bill S-2 Family Homes on Reserve and Matrimonial Interests or Rights Act, Publication No. 41-1-S2-E, 17 October 2011. Available Online:

[http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills\\_ls.asp?source=library\\_prb&ls=S2&Parl=41&Ses=1&Language=E&Mode=1](http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=S2&Parl=41&Ses=1&Language=E&Mode=1)

<sup>106</sup> Ibid.

<sup>107</sup> CERD/C/CAN/CO/18 at para.21

<sup>108</sup> Statement of the Commissioners, Canada, Royal Commission on Aboriginal Peoples. People to people, nation to nation: *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, ISBN 0-662-25044-3 Available online: <http://www.aadnc-aandc.gc.ca/eng/1100100014597>

<sup>109</sup> Ibid.

<sup>110</sup> Canada did, at one time in the past, have a policy entitled "Gathering Strength" which proposed an action plan for implementation. However, we could not access any part or portion of this past policy, nor could we find in the course of our research any evidence of a current policy based on or replacing the former "Gathering Strength" policy.