

**Committee on the Elimination of Racial Discrimination
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**Response to Canada's 19th and 20th 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, Ermineskin Cree
Nation, Native Women's Association of Canada, Indigenous World
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Executive Summary

The relationship between Indigenous Peoples of Canada and the Crown¹ 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.² 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 80th Session of CERD regarding Canada's 19th and 20th 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

¹ 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.

² *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.

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”³. 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

³ Available online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861>

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 19th and 20th 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 Accord⁴ 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?**

⁴ Attached hereto

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)⁵ 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.⁶**
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**

⁵ www.executive.gov.ct/initiatives/Devolution

⁶ See attached supporting documentation

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.**