



# THE INTERNATIONALIZATION OF INDIGENOUS RIGHTS

UNDRIP in the Canadian Context

SPECIAL REPORT



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Cover photo: Chief Ovide Mercredi (in headdress) of the Assembly of First Nations speaking at a ceremony held in the General Assembly Hall marking the start of the International Year of the World's Indigenous People in 1992. UN Photo/Eskinder Debebe.

Back cover photo: Inukshuk in silhouette at sunset. iStock.



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# PREFACE

Terry Mitchell

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The emergence of an international rights regime is a matter of both national and international importance that points to a critical yet oft-ignored governance issue. In 2012, the Centre for International Governance Innovation funded a collaborative research grant on the internationalization of indigenous rights. The project examined the emergence and uptake of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Internationalization of Indigenous Rights Research Group is organized by Terry Mitchell, Indigenous Rights and Social Justice Research Group, Wilfrid Laurier University, in conjunction with Ken Coates, Johnson/Shoyama Policy Institute, University of Saskatchewan, and William Coleman, Balsillie School of International Affairs, in partnership with Six Nations Polytechnic. The research group is comprised of an interdisciplinary, indigenous and non-indigenous network of local, regional, national and international scholars and indigenous leaders. The research group's work to date has included the development of a Pan-American Research Group, policy research on the awareness and uptake of UNDRIP, a policy brief on the monitoring of indigenous rights in Canada, academic papers on the relevance and impact of the internationalization of indigenous rights within Canada and South America, as well as the development of a metric for conducting regional comparisons on the implementation of UNDRIP and the convening of an international meeting of indigenous scholars on the topic of resource extraction in a global economy. This special report, a final output of the collaborative research grant, considers Canada's relationship to the development, uptake and implementation of UNDRIP.

The United Nations (UN) reports that indigenous peoples around the world are facing serious and protracted struggles to assert their most basic human rights. In 1982, UN Special Rapporteur of the Sub-commission on the Prevention of Discrimination and Protection of Minorities

José R. Martínez Cobo released a study about the systemic discrimination faced by indigenous peoples. The UN Economic and Social Council responded to these findings by creating the Working Group on Indigenous Populations. Responses to the 1982 report on the discrimination of indigenous peoples, and several decades of consultation and negotiation among indigenous and state leaders, resulted in the signing of UNDRIP. In 2007, after more than two decades of drafting, UNDRIP was formally brought before the UN and passed with 144 votes. The declaration sets "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (United Nations 2008, article 43).

With the adoption of UNDRIP, states formally recognized the distinct status of indigenous peoples, as well as the international obligation to protect and promote their human rights (Stavenhagen 2009). The adoption of UNDRIP serves to reinforce the fundamental rights and protections of indigenous peoples that were already recognized by international law, but often denied by states. At the time of the adoption of UNDRIP, four countries — Australia, New Zealand, the United States and, significant to this report, Canada — voted against the declaration. In November 2010, the Government of Canada reversed its position on UNDRIP as a means of reaffirming its commitment to strengthening relations with the indigenous peoples of Canada. The Canadian statement of support for UNDRIP was qualified, however, with the Government of Canada emphasizing that it remained concerned with the meaning and interpretation of certain provisions of the declaration. Accordingly, it was endorsing the declaration as an aspirational document rather than a document of customary international law.

In September 2014, Canada gained international profile in relation to the matter of indigenous rights and its standing as a signatory to UNDRIP. The outcome document of the



Dalee Sambo Dorrough, an Inuit from Canada, chair of the WCIP and a member of the Permanent Forum on Indigenous Issues, addresses a press conference on the opening of the forum's twelfth session, which took place in New York from May 20 to 31, 2013. UN Photo/Evan Schneider.

inaugural meeting of the UN World Council of Indigenous Peoples (WCIP) advanced the position that states should actively engage in the implementation of UNDRIP. The Canadian government's representatives took exception to references to free, prior and informed consent in the WCIP document and reminiscent of their refusal to sign the declaration in 2007, refused to endorse the WCIP document, stating that "free, prior and informed consent, as it is considered in paragraphs 3 and 20 of the WCIP Outcome Document, could be interpreted as providing a veto to Aboriginal groups and in that regard, cannot be reconciled with Canadian law, as it exists" (Government of Canada 2014). In an interview, the chair of the WCIP, Dalee Sambo Dorrough, characterized the Canadian government's position on UNDRIP as "highly disturbing, absolutely regressive" and said that Canada "doesn't meet the mark" for good governance (Deutsche Welle 2014). Canada's recent reiteration of the aspirational nature of the declaration and the failure to acknowledge the principle of free, prior and informed consent, highlights the disjuncture, as outlined in this report, between indigenous and state perspectives on the relevance and utility of UNDRIP in the Canadian context.

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# INTRODUCTION

Terry Mitchell

An international indigenous rights regime has emerged over the last 30 years in response to the serious and protracted struggles that indigenous peoples globally experience in asserting their most basic human rights. A 2014 report confirmed that Canada, despite its strong legal frameworks, provides little exception to the human rights issue, which the United Nations (UN) special rapporteur on indigenous rights called a crisis situation (Anaya 2014). Indigenous peoples globally have developed and advanced, after decades of dialogue and debate within the UN system and beyond, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The declaration now exists as an important international consensus document that sets “the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world” (United Nations 2008, article 43). Significantly, however, at the time of the adoption of UNDRIP in 2007, four countries voted against the declaration — Canada was one of them.



James Anaya, United Nations special rapporteur on the rights of indigenous peoples, speaks to journalists on October 19, 2009. UN Photo/ Paulo Filgueiras.

This special report is comprised of 11 papers, which provide reflections on the internationalization of indigenous rights and the relevance and positioning of UNDRIP within and by Canada. The papers were written by indigenous and non-indigenous scholars from a variety of disciplines including history, political science, law, psychology, sociology and Native studies. Contributors discuss the historical importance of the declaration and the conflicted nature of Canada’s relationship to it. Several authors, including Andrew Thompson, Terry Mitchell, and Ken Coates and Carin Holroyd, provide a review of Canada’s role in the emergence and implementation of an international indigenous rights regime with consideration of the legal, political and cultural ramifications of being signatories to UNDRIP. As a whole, the collection provides insight into the political stalemate between the federal government and indigenous communities in Canada. The discussion of the development and uptake of UNDRIP provides a rights-based context for understanding the grassroots mobilization of the Idle No More movement and the increasing tensions around resource extraction and territorial rights.

Thompson’s paper reveals what perhaps only a few Canadians, mostly Aboriginal leaders, know: that the Canadian government has acted, across various leaderships and despite the nation’s international human rights status, with hostility toward the emergence of an international indigenous rights movement. He discusses how the Canadian government actively blocked efforts of the Permanent Forum on Indigenous Issues and refused to sign the declaration at its adoption in 2007, eventually

signing in 2010 with a qualified endorsement of UNDRIP as a non-legally binding, aspirational document.<sup>1</sup>

In contrast to the Canadian government's recorded positioning in relation to indigenous advances regarding state-to-state relations and the international declaration of political, cultural and territorial rights, Bonita Beatty, Thierry Rodon, Mitchell, and Coates and Holroyd discuss the active, and persistent, role of Canadian indigenous leaders as advocates of state-to-state relations and the internationalization of indigenous rights. Rodon further outlines the very active and successful transnational efforts of the Inuit in the formation of and participation in the Inuit Circumpolar Council, which is a permanent member of the Arctic Council, and the effective reframing of the Arctic spaces by bringing the concept of Inuit Nunangat — a space based on a culture and a way of life that includes not only the concept of land but also both sea and ice. Rodon cites the Circumpolar Inuit Declaration on Sovereignty, adopted in April 2009, as a form of internationalization in which the Inuit advance the position that Inuit sovereignty co-exists with state sovereignty. Recent international successes have been made in the Inuit's participation in Arctic governance, through which they have advanced a unified position on the status of the polar bear hunt. The recent cross-nation successes of the Inuit parallel long-standing efforts by First Nations. Beatty asserts that indigenous political activism and international collaboration are indigenous traits, citing the 1919 League of Indians in Canada as an early example of nation-to-nation relations. Mitchell points to the early international efforts of Canadian indigenous leaders Deskaheh (in 1923) and George Manuel (in 1975) in advancing the internationalization of indigenous rights and the ongoing role of Canadian indigenous leaders in the development and implementation of UNDRIP. Coates and Holroyd discuss the significance of UNDRIP to indigenous peoples in Canada and the enthusiastic and empowering reception of UNDRIP within Canadian Aboriginal communities.

The report therefore outlines a polarization of perspectives and engagement with UNDRIP both historically and in the present between the Canadian government and indigenous leaders within Canada. The papers elucidate the consistently oppositional positions on indigenous rights and sovereignty and clarify the ongoing divide between the active engagement with UNDRIP by Aboriginal groups and the passive, dismissive response of the Canadian government.

The conflicting positions of Canadian Aboriginal peoples and the government of Canada on the relevance,

importance, meaning and, therefore, implementation of UNDRIP are perhaps best summarized in the opposing position on the legal standing of the declaration. While UN declarations, unlike conventions, are not legally binding documents, debate still persists regarding the legal standing and influence of UNDRIP. Yvonne Boyer, a lawyer and indigenous rights scholar, challenges the current government's position that UNDRIP is only an aspirational document. She argues that "UNDRIP can be regarded as equivalent to already established principles of international law. This fact alone implies the existence of equivalent and parallel international obligations that states are legally bound to comply with." Boyer goes on to quote Canadian Supreme Court rulings, and those of foreign courts, that have endorsed UNDRIP and relied on its provisions to interpret their own domestic law as well as the application of UNDRIP within the Inter-American Court of Human Rights. Her position is that UNDRIP falls into the realm of customary law and is increasing in legal weight with each additional application and precedent within domestic and international courts. Boyer, therefore, views UNDRIP as a useful tool to promote and protect inherent indigenous rights. While Beatty states that UNDRIP is not a panacea, she concurs that UNDRIP is an important tool that can hold nation-state governments more accountable for honouring indigenous rights and treaties.

Despite the unprecedented level of indigenous participation in the drafting of UNDRIP, and the historic importance of an international indigenous rights consensus document that attends to the particular cultural, territorial and political rights that have been excluded from, or inadequately addressed, in previous human rights documents, UNDRIP has been criticized as a state-centric document embedded in Western liberal rights frameworks. Rhoda Howard-Hassman, an international human rights expert, deconstructs the critiques advancing the position that UNDRIP is bound to assimilate Aboriginals into liberal, individualist society. She asserts that the international human rights agenda has expanded indigenous rights globally by promoting cultural distinctiveness and land rights. However, referring to the legal status of UN treaties and conventions, she states that "until the declaration becomes a treaty, the international human rights regime will not have done all it could to protect indigenous peoples' rights." In keeping with the view that UNDRIP, as a declaration, is not legally binding, historian Coates and political scientist Holroyd present a tempered view of UNDRIP's benefit as a political and legal tool, viewing the declaration as "more than aspirational but less than a plan of action." Nevertheless, Coates and Holroyd assert that UNDRIP has proven to be extremely empowering for indigenous peoples in Canada, in large measure because the international consensus document provides global validation for the indigenous understanding of Canadian history and contemporary realities and is therefore of

<sup>1</sup> See the Assembly of First Nations' press release following Canada's endorsement of UNDRIP at [www.afn.ca/uploads/files/10-11-12\\_und\\_press\\_release\\_fe\\_%282%29.pdf](http://www.afn.ca/uploads/files/10-11-12_und_press_release_fe_%282%29.pdf), and Canada's statement of support on UNDRIP at [www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142](http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142).

fundamental importance in terms of political recognition and cultural empowerment. Coates and Holroyd make the bold assertion that “UNDRIP is one of the most significant international political achievements of this generation,” discussing the remarkable consensus achieved through extensive participation and decades of dialogue and debate involving hundreds of indigenous peoples from across the planet. This emphasis on empowerment supports Robert Maciel and Jeffrey Corntassel’s perspectives on the importance of recognition. The reception of UNDRIP by indigenous communities, and its importance to them, has been based, according to Coates and Holroyd, on the recognition of their lived experiences, perspectives on history and cultural relationships to land. The empowerment of indigenous peoples is realized through the recognition of their world views and their diverse, yet parallel, histories of strength and oppression. However, significant to the reconciliation process in Canada, the state, according to Maciel, is challenged to recognize and accept the distinctiveness and the unique and added value of indigenous peoples, as recognition of cultural distinctiveness would require state actions that are currently inconceivable to the Canadian government.

Beatty, Maciel and Corntassel suggest that the gaps between how indigenous leaders and the Canadian government view UNDRIP are based in fundamental differences in world view: the ontological chasm between indigenous nations and the Canadian government. Maciel posits that the state’s response to UNDRIP is based on the perspective of the distribution of rights and resources versus the recognition of cultural distinctiveness as acknowledged in the declaration. Maciel maintains that the language of UNDRIP incorporates a recognition-based approach into a distributivist framework in which states are required to recognize indigenous people as valuable and distinct peoples. Corntassel describes the importance of indigenous perspectives on sustainability embedded within UNDRIP, which further characterize the challenge of recognition that Maciel refers to in his analysis of distributivist or recognition-based stances to UNDRIP. The tension — the dissonance — between the indigenous perspective on rights and resources and the state’s view may be, as Maciel suggests, rooted in a profound dissonance between world views and the failure, or unwillingness, to acknowledge the cultural distinctiveness and worth of indigenous values, worldview and “lifeworld.” This tension is further exacerbated by articles 19 and 20 of UNDRIP, which call for free, prior and informed consent where development is planned on indigenous territories. This point is further expanded on by Gonzalo Bustamante and Thibault Martin, who discuss the significance of UNDRIP in terms of gaining social licence for research extraction through the authentic consultation, negotiation and consent toward benefit-sharing for both industry and communities. Finally, Roberta Rice provides an international comparative in which she discusses Bolivia, the first country to adopt

UNDRIP within its constitution. The implementation of UNDRIP in Bolivia reveals concerning limitations to the right of free, prior and informed consent in a country that has sped to embrace UNDRIP. In discussing an international case, the paper provides lessons for Canada in bridging the distance between the state and indigenous leaders’ positions on the relevance and importance of an international indigenous rights framework.

The report provides diverse interdisciplinary perspectives on Canada’s role in the historical development of UNDRIP, with reflections on the current and contrasting engagement of indigenous and state leaders. The collection of papers provides further reflections on the emergence of an indigenous rights regime within the Canadian context, which has brought into focus the issue of indigenous sovereignty and land struggles, centred around resource governance, in contemporary resource-based economies.

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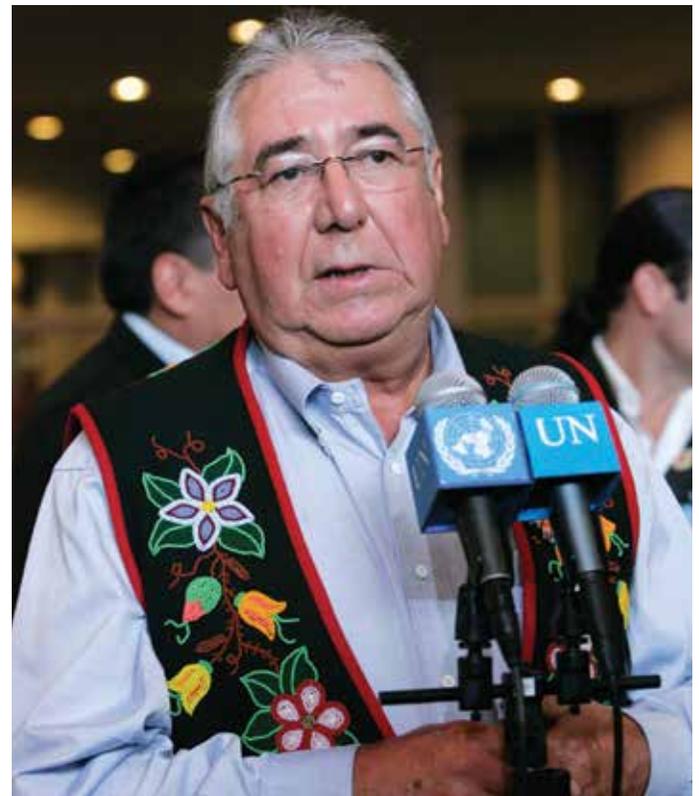


# INDIGENOUS INTERNATIONALISM AND THE EMERGING IMPACT OF UNDRIP IN ABORIGINAL AFFAIRS IN CANADA

Ken Coates and Carin Holroyd

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is one of the most significant international political achievements of this generation. Over 20 years in development, UNDRIP required both the coordination of indigenous groups from around the world and the preparation of a declaration that could secure the support of the General Assembly of the United Nations (UN). Against formidable odds, the proponents of UNDRIP secured the necessary multi-level agreements, convincing the community of nations that indigenous peoples had special rights, needs and aspirations that could not be accommodated within existing UN documents. Canada, to the surprise of many observers, was a reluctant participant in the UNDRIP process, voting against the declaration in the General Assembly in 2007 and holding out until 2010 before finally signing on to the accord.

UNDRIP transformed international understanding of indigenous historical and contemporary realities and aspirations and has had a profound impact on Canadian politics. In contrast to the low priority the Government of Canada has assigned to the declaration, indigenous peoples enthusiastically embraced the document. For the First Nations, Inuit and Metis in Canada, UNDRIP recognized and affirmed their historical experiences, political claims and cultural understandings. It did more than remind indigenous peoples in Canada that they were not alone in their encounter with colonial powers and national governments — UNDRIP outlined a political strategy and



Tony Belcourt, minister of international affairs of the Métis National Council, speaks to journalists after the adoption of UNDRIP by the General Assembly, at UN Headquarters in New York on September 13, 2007. UN Photo/Jenny Rockett.

set of demands that resonated with Aboriginal activism in Canada.

UNDRIP was a remarkable achievement, largely because a consensus emerged among indigenous groups living under a variety of political regimes and with widely varying circumstances. As a piece of political literature, UNDRIP tells a compelling tale of colonization, marginalization, racism and dispossession. What makes this document particularly gripping is not the literary quality of the text — the language is as dry and uninspiring as any international accord — but rather the symmetry of experiences. That so many indigenous peoples had very similar encounters with colonizing powers and national governments was, for Aboriginal participants in the process, extremely empowering. As their discussions and negotiations demonstrated, to the satisfaction of the UN General Assembly and the indigenous organizations involved, Aboriginal people had a commonality of historical and contemporary experiences that warranted the high-level intervention of the world's leading international governance organization. For indigenous communities used to being ignored or mistreated within their countries and, until the 1970s, attracting little interest from outside organizations and supporters, UNDRIP was an affirmation of historical realities and Aboriginal aspirations.

Canada has long been at the forefront of the internationalization of indigenous rights. Leaders from Six Nations, a Mohawk group from central Canada, sought membership in and the attention of the League of Nations in 1923, only to be rebuffed. The post-World War I emergence of the Fourth World movement is often connected to the work of George Manuel, a member of the Shuswap First Nation, who helped establish the World Council of Indigenous Peoples in 1975, and served as its first leader. The Inuit from Canada's Far North played a pivotal role in the establishment of the Inuit Circumpolar Conference, an organization devoted to raising the profile of Inuit rights and political aspirations. For many years, prominent First Nations, Inuit and Metis leaders from across Canada travelled widely to support indigenous rights and to promote indigenous activism. The country's indigenous peoples had a significant role in developing a global understanding of political, legal and treaty rights, and worked extremely hard to secure government and subject support, often grudgingly, for their aspirations.

Indigenous peoples in Canada, in turn, have been influenced by global developments in Aboriginal rights. The American Indian Movement (AIM), in the 1960s, politicized and radicalized indigenous demand for self-determination, and attracted adherents in Canada. While Canadian Aboriginal peoples generally avoided the confrontational tactics used on occasion by AIM, the realization that indigenous peoples had to be assertive and forthright in their demands for real political change resonated north of the border. Indigenous leaders,

similarly, followed developments in Australia and New Zealand closely, as the political and legal traditions of these countries, arising out of a shared British heritage, paralleled Canadian systems. As in Canada, Maori and Aborigine activists favoured negotiations, legal challenges and high-level discussions, generating experiences that were shared across the Pacific Ocean in both directions.

The situation facing indigenous peoples in Canada remains far from ideal, with systematic problems of poverty, social marginalization and serious social pathologies running through many remote reserve communities and urban centres. The country is not without its political and legal achievements, however, all generated by the persistence and forcefulness of several generations of indigenous leaders. The Canada Act (1982), the country's Constitution, recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada" (Government of Canada 1982). Over the last 40 years, Canada restarted the treaty process, producing a series of impressive modern treaties. Aboriginal self-government agreements, including those developed within the modern treaty process, are, once signed, constitutionally protected. An Inuit-dominated jurisdiction, the territory of Nunavut, was created in the Far North, giving the 35,000 Inuit effective control over the government. Through a series of major court decisions, Aboriginal people secured recognition of their harvesting rights, for both subsistence and, in some instances, commercial purposes. The Supreme Court of Canada established a "duty to consult and accommodate" in their decisions on Haida and Taku River, both in 2004, for governments (which typically delegated the responsibility to corporations wishing to pursue resource developments on indigenous territories). In 2008, the Government of Canada delivered a formal apology for Indian residential schools, providing several billion dollars in compensation for students who faced a concerted assault on their values and cultures in the facilities, with extra payments for those subjected to physical and sexual abuse. The Truth and Reconciliation Commission that followed the apology sought to create a national conversation about the full effects of the residential schools and other cultural intrusions on Aboriginal peoples.

By global standards, the array of legal, political and administration accommodations with Aboriginal people in Canada is striking. While discussion in Canada often misrepresents the CDN\$7-8 billion in annual expenditures on Aboriginal people (much of the spending represents money allocated to standard government services, such as schooling, health care and economic development, that are provided to all Canadians), the reality is that Canada provides a substantial amount of money specifically for indigenous communities and the needs of their communities. The outcomes do not match the fiscal commitment, a source of frustration for the Government of Canada and dismay for indigenous governments, which

point to the high cost of program delivery in isolated and northern communities and the legacy of historical mistreatment as the primary cause for the level of expense. In global terms, however, the Canadian commitment to Aboriginal affairs is, on the surface, substantial. The few countries with better indigenous socio-economic outcomes, principally Scandinavia and New Zealand, actually have less well developed legal or self-determination frameworks for Aboriginal peoples.

As indigenous peoples from around the world gathered through the 1980s and 1990s to discuss their historical experiences, rights and political aspirations, Canada expected to be held up as something of an exemplar — for inputs and legal-political arrangements, if not for outcomes. To the dismay of consecutive federal governments, Aboriginal leaders from Canada played a high-profile and vocal role, highlighting Canada's shortcomings more than acknowledging collective achievements. When Matthew Coon Come, then national chief of the Assembly of First Nations, addressed the UN Educational, Scientific and Cultural Organization Conference on Racism, held in Durban, South Africa in 2001, and delivered a blistering attack on racism in Canada and in government policies, many Canadians and government officials were offended. While indigenous Canadians lived with the consequences of historic racism and contemporary inequalities and injustice, the country was of the mind that the annual expenditures, combined with major agreements on constitutional rights, self-government and modern treaties, provided an appropriate measure of compensation.

It is ironic but not surprising, therefore, that Canada emerged as one of the four reluctant signatories to UNDRIP. Since the founding of the United Nations in 1945, the country has been a strong supporter of the international organization, through political engagement, military support and substantial financial contributions. Perhaps most importantly, Canada has historically demonstrated a moral (it not always practical) commitment to key international agreements, such as the UN Declaration on Human Rights. Indeed, the country has long prided itself on being an exemplar of social justice and the protector of human rights inside its boundaries and historically encouraging the United Nations to address shortcomings in other countries. Moreover, through its membership in groups as diverse as the Commonwealth of Nations, the Organisation internationale de la Francophonie and, more recently, the Arctic Council, Canada has engaged extensively in international problem solving, collaboration and policy development. While the support for and engagement with the United Nations has declined under the government of Prime Minister Stephen Harper — with the promotion of international trade replacing social justice and the alleviation of poverty as top national commitments — the reality is that Canada has long been a stalwart

defender of the United Nations and internationalism generally.

The Government of Canada's opposition to UNDRIP, shared by the Liberal Party before 2006 and the Conservatives thereafter, did not rest on an antipathy to indigenous rights, although it was perceived in that fashion. The official concern — admittedly, some Canadians objected strenuously to the idea of giving Aboriginal peoples more legal or political authority, as growing concern about treaty and legal rights in the resource sector revealed — was more specific. UNDRIP, as a declaration of the General Assembly, is not a binding document. Instead, it stands as a collective statement of understanding and intent. The understanding comes from the summary of historical injustices and grievances, documented and shared by indigenous peoples in many countries. The intent comes from the clear and powerful call to governments to review international procedures and legal systems, remove any violations of human and indigenous rights, and seek a more equitable and sustainable future with Aboriginal peoples. For countries such as those in Sub-Saharan Africa, Russia, South and Southeast Asia and other places where indigenous rights are poorly or insufficiently recognized, UNDRIP is a more direct call to action, and a re-enforcement of earlier UN declarations and conventions related to human rights abuses and the mistreatment of minorities.

The Government of Canada, along with the United States, Australia and New Zealand to greater or lesser degrees, worried that UNDRIP would upset the carefully developed balance of indigenous and newcomer rights in the country. The difficult negotiations over modern treaties, the implementation of court rulings and Aboriginal self-government had, over some 30 years, created a political, constitutional and legal equilibrium that Canadians had grown to accept. Indigenous peoples had gained significant rights and powers within the Canadian political and legal system, and the Government of Canada recognized its continuing fiduciary and treaty responsibilities for Aboriginal peoples. UNDRIP, in the eyes of many government officials, was too sweeping and open-ended. Many of the elements, particularly those relating to consultations with indigenous peoples, access to and control over indigenous lands, and Aboriginal control over education and other programs, appeared to go beyond what was currently in place and seemed, in fact, to place few limits on what indigenous peoples might expect from a revitalized relationship with the national government and non-Aboriginal peoples. The prospect of extending indigenous rights beyond the hard-won status quo — or of having to reopen existing agreements because they ignored the spirit or letter of UNDRIP held little appeal for the Canadian government.

After the passage of UNDRIP by the General Assembly, there were immediate calls for the Government of Canada

to sign on to the declaration, pressure that did not convince the government to act. That Canada, Australia, New Zealand and the United States — the four nations with, arguably, among the best legal, political and financial relationships with indigenous people — were reluctant to agree to the accord gave Canada's resistance greater authority. Had Canada's opposition been matched by, for example, Iran, Myanmar and China, the country would have faced a different response. As it was, there was general acceptance that Canada's opposition was principled rather than racially motivated and that the government's concern about the potential interference with existing legal and political arrangements had merit. When Australia and New Zealand shifted their position, leaving Canada and the United States as outliers, the debate started once again.

Canada signed on in 2010, declaring UNDRIP to be an aspirational document. Indigenous organizations across the country, dismayed by the government's earlier reticence, cheered the decision. The government continued to argue that the letter of the declaration was at odds with Canadian constitutional and treaty arrangements and was, therefore, not useful or enforceable in Canada in any substantial way. By acknowledging the aspirational power of the document — a statement of indigenous goals and of the need of all governments to reconcile their laws with the human and indigenous rights of Aboriginal peoples — the Government of Canada was able to set aside its opposition and sign the document, while simultaneously making it clear that it anticipated no substantial change in policy or legal arrangements. Aboriginal leaders were pleased to have Canada become a signatory to UNDRIP, but stated that they saw the declaration as a substantial document that recognized their rights and outlined a set of goals for Canada and Aboriginal people to reach.

UNDRIP quickly assumed a prominent place in indigenous political language and positioning across the country. From 2010 to the present, Aboriginal politicians have repeatedly cited the declaration as a source of both inspiration and authority. While they recognize that many indigenous peoples around the world have much less than Canadian First Nations, Inuit and Metis can claim in terms of political and legal rights and government support, they also realize that the Canadian circumstances end far short of the ideals for consultation, negotiation, respect and cooperation laid out in UNDRIP. At the 2013 Assembly of First Nations convention in Whitehorse, Yukon, most of the speeches made specific reference to UNDRIP as a key part of the political and legal strategy of Aboriginal peoples in Canada. National and regional leaders repeatedly refer to UNDRIP as a sign to unresolved claims against the Government of Canada and unclaimed rights that have yet to be realized. The declaration has been used to support indigenous political demands, as context (if not yet as legal authority) in court proceedings. The terms and statements in UNDRIP have become, in less than four

years, a growing part of the political lexicon of Aboriginal political leaders across the country.

If the Government of Canada expected that UNDRIP would sit on a shelf as an “aspirational” statement — a sort of wish list of political “might be” achievements, it was soon apparent this would not occur. During the Idle No More movement that swept across Canada in 2012-2013, speakers routinely cited UNDRIP as a cornerstone of their vision for the future of Aboriginal peoples in Canada. Indeed, indigenous peoples in Canada have — like their counterparts around the world — found common cause in a document that is based on shared experiences, similar degrees of socio-economic isolation and systematic attacks on their cultures, values and traditions. UNDRIP has, in a very short time, proven to be extremely empowering for indigenous peoples in Canada, in large measure because the document provides global validation for the indigenous understanding of Canadian history and contemporary realities. Furthermore, that the document represents an international consensus, produced by representatives from the world's national governments, gives moral and ethical validity to political processes that previously existed largely in isolation from international conditions.

UNDRIP is, like all international governance documents, intended to be a point of departure for international and domestic law and policy, not an end point. No one involved in the UN processes that produced the document believed that their collective work was finished with the 2007 passage of the declaration. The opposite is the case — in many instances urgently so. Hundreds of indigenous populations, in particular those in non-democratic, poorer nations, face intense discrimination and marginalization. Many are literally fighting for their land, or experience mass dislocation because of government policies or resource developments. State oppression, hostility from the dominant society, and a wide variety of attacks on Aboriginal cultures, languages and customs are distressingly commonplace. In these countries, indigenous peoples and their international supporters have used UNDRIP to pressure national governments to adhere to the global consensus and to stop the systematic erosion of the rights and life ways of Aboriginal communities. Indigenous groups in Canada, incidentally, have been active in supporting Aboriginal peoples in severe distress in other nations and have shared their experiences in legal and political empowerment with other indigenous societies and national governments, in the hopes of improving conditions for them. In other countries, including Bolivia, which elected an indigenous man, Evo Morales, as president in 2005, discussion of UNDRIP has become commonplace, providing a rough guideline for the reform of national policies.

On a comparative basis, Aboriginal peoples in Canada have many of the rights, powers and freedoms that

other indigenous communities seek. They have, in comparative rather than absolute or ideal terms, many of the constitutional, political and legal rights that UNDRIP indicates should be available to all indigenous peoples. While the lived reality of indigenous peoples remains far removed from that of the bulk of the Canadian population, at least some of the major political and legal underpinnings of great equality and recognition of Aboriginal rights have been implemented. This does not mean, however, that UNDRIP does not have very real significance for indigenous peoples in Canada.

The greatest contribution that UNDRIP makes to Canadian debates is that it demonstrates the ubiquitousness of the indigenous struggle. In Canada, as in most countries, there is a tendency to see Aboriginal demands and frustrations within a national context, as an outgrowth of a specific history or set of legal and political circumstances. The powerful outline in UNDRIP of the historical challenges faced by indigenous peoples the world over — the vast majority of which resonate as strong in Canada and Australia as they do in Japan, Russia or India — highlights the fundamental point that indigenous peoples have faced comparable levels of marginalization, discrimination and domination around the globe. In a similar vein, UNDRIP makes it clear that the aspirations of First Nations, Inuit and Metis people are not out of step with international expectations. That Aboriginal people in Canada seek control over education and language, proper health care, a say in the development of traditional territories, political autonomy and the right to be consulted on legislation is clearly shown to be part of a global campaign for indigenous cultural survival. Aboriginal demands in Canada that once seemed extraordinary, if not outrageous, are now more clearly seen to be reasonable claims for people damaged by generations of oppression and seeking to regain a substantial measure of control over their lives. UNDRIP is not a road map, but rather a guidebook. It provides a lengthy and complex list of possible areas of political emphasis and legal priority, recognizing that each indigenous situation will be somewhat unique. In this, the declaration is more than aspirational, but something less than a plan of action.

UNDRIP is unlikely to become the disruptive political and legal force that the Government of Canada anticipated. Unless the courts make a radical departure in the use and interpretation of international governance documents, particularly a legally and politically more limited declaration, it is difficult to imagine a scenario in which indigenous people use UNDRIP to full legal effect, upsetting Canadian constitutional, legal and negotiated arrangements in the process. While those indigenous political thinkers and leader who argue for full Aboriginal sovereignty have found new strength in UNDRIP, it is not likely to upset or redefine the law of the land.

This does not mean that UNDRIP does not have real and substantial power, however. The declaration has changed the conversation about Aboriginal rights, in particular inside indigenous communities and organizations. Always confident in the assertion of Aboriginal and treaty rights under British and Canadian law, indigenous peoples have found incremental authority and conviction in knowing that the world community understands their historical circumstances and, in general terms, supports their struggles for self-determination, autonomy and cultural survival. UNDRIP makes it clear, more strongly than informal connections and formal indigenous alliances could ever do, that indigenous rights and aspirations are legitimate in the eyes of the global community.

After generations of being shunned and ignored, and decades of fighting for legitimacy within individual nation states, indigenous peoples learned through their successful campaign for UNDRIP that there is broad support for their aspirations and, even more fundamentally, their survival as peoples. UNDRIP may be of small and incremental benefit as a legal and political tool; however, it is, in Canada, of fundamental importance as a means of political recognition and cultural empowerment.

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# USING THE UN FRAMEWORK TO ADVANCE AND PROTECT THE INHERENT RIGHTS OF INDIGENOUS PEOPLES IN CANADA

Yvonne Boyer

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## INTRODUCTION

The United Nations (UN) framework of treaties and covenants guarantees equality rights, self-determination of peoples, respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, religion and conditions of economic and social progress and development.<sup>1</sup> These are basic rights that all human beings share by virtue of being human.

Canada, as a signatory to a number of international treaties and covenants, has acknowledged its international obligations toward indigenous peoples. In addition to the 1945 Charter of the United Nations, these instruments include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Optional Protocol; and the Vienna Declaration and Programme of Action's International Convention on the Elimination of All Forms of Racial Discrimination.<sup>2</sup> These instruments affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political

status and freely pursue their economic, social and cultural development. These (and other UN instruments) provide the human rights standards that bind Canada with regard to all Canadians inclusive of the indigenous population (Anaya, Falk and Pharand 1995).

The Canadian Crown/Aboriginal fiduciary obligation is also seen as an aspect of Canada's obligations as a party to the Charter of the United Nations — “the most important multilateral treaty establishing the parameters of world public order” (Anaya 1996, 2). The charter integrates the key principles of “equal rights and self-determination of peoples” (ibid.) Anaya explains the charter's acceptance by the international community: “The charter's general requirement to uphold human rights attaches to all human rights norms whose contents become generally accepted by the international community. As indicated by contemporary developments, norms concerning Indigenous peoples are a matter of human rights whose core elements are generally accepted today” (ibid).

International law principles are seen in agreements or through the formal constitutional procedures and practices of states. The practices are “the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold close to home,

1 See United Nations (1945, art. 1, para. 1–3, art. 55). See also Anaya (1996).

2 See United Nations (1945; 1961); United Nations General Assembly (1966a; 1966b; 1966c).

we shall look in vain for progress in the larger world” (Roosevelt quoted in Henderson 2008, 31).<sup>3</sup>

First Nation elders, leaders and organizations saw the UDHR as a critical tool for decolonizing indigenous peoples as it affirmed human rights in international law (Henderson 2008, 21). Law Professor Sákéj Henderson notes: “Along with the Universal Declaration, other declarations have reformed the customary law of the colonial era and generated post-colonial customary law, conventional law, and pre-emptory norms in international law. As well, the General Assembly of the United Nations, by binding conventions and multilateral treaties, sustained an international consensus that moved the inherent rights of humans into an internationally protected code of human rights, one to which all nations can subscribe and to which all people can aspire” (ibid.).

Many regional systems of human rights codes have been created and states have developed their own domestic human rights codes. Canada has fully implemented international law domestically through the enactment of the Canadian Human Rights Act (CHRA) in 1977 where “all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have” (Government of Canada 1976-1977) free from discrimination. It is key human rights principles found in the international instruments that form the basis for the CHRA. The UN Charter and the UDHR provide models for human rights protections in the CHRA. The UDHR has 30 articles; each article details freedoms that people are guaranteed. It is prefaced by a preamble, which includes the statement: “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (ibid.). The name of the document is a direct reflection that it applies to *all* people (including indigenous people).

## UNDRIP

On September 13, 2007, 370 million indigenous people in 70 countries applauded the adoption of UNDRIP as an important step in addressing human rights violations against them. The vote was 144 states in favour and four (Canada, the United States, New Zealand and Australia) opposed. Canada did not sign UNDRIP, even though it was involved in the 22-year drafting process. The Canadian government stated that UNDRIP “might not fully accord with the norms and precedents that have been established through judicial decisions and negotiations on land claims and self-government” (Canadian Human Rights Commission 2010). The government also noted that its decision to oppose UNDRIP was the “right one” and

it had “principled and well-publicized concerns”<sup>4</sup> while dealing with indigenous issues “openly, honestly and with respect” (Strahl 2008). However, on March 3, 2010, the Speech from the Throne stated that the Government of Canada would now endorse UNDRIP in a manner consistent with Canada’s Constitution and laws.

The Office of the High Commissioner for Human Rights (OHCHR) has noted that UNDRIP “provides the foundation — along with other human rights standards — for the development of policies and laws to protect the collective human rights of Indigenous peoples” (OHCHR n.d.).

The rights of indigenous peoples and individuals are human rights and are addressed as such by the international system. Article 1 of UNDRIP affirms: “Indigenous peoples have the right to full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law” (United Nations 2008).

UNDRIP affirms the “minimum standards for the survival, dignity and well-being of the indigenous people of the world” (ibid., preambular para. 7 at art. 43). These promote a human rights-based approach to addressing issues faced by indigenous peoples and provide a just legal framework for “achieving reconciliation, redress and respect.”<sup>5</sup> The declaration has been described as a “just document” that “expresses minimum standards of human rights” (Henderson 2008, 75). “It is an interpretive document that explains how existing human rights are applied to Indigenous peoples and their contexts. It is a restatement of principles for postcolonial self-determination and human rights. In Indigenous legal traditions, it embodies some of our teachings about human rights and being human in a complex world” (ibid.).

4 See “Letter from Minister of Indian Affairs and Northern Development, Chuck Strahl to Assembly of First Nations National Chief Phil Fontaine (December 10, 2007).” In *From Development to Implementation, An Ongoing Journey*, edited by Jackie Hartley, Paul Joffe and Jennifer Preston. Saskatoon: Purich Publishing Ltd.

5 Ibid.

3 See also Lennox and Wildeboer (1998, 7).



Indigenous leaders and human rights advocates brief journalists on the status of UNDRIP on December 12, 2006. From left to right: Alison Graham, International Service for Human Rights; Roberto Borrero, Indigenous Peoples' Caucus; Elsa Stamatopoulou, Chief, Secretariat of the UN Permanent Forum on Indigenous Issues and moderator; and Phil Fontaine, National Chief, Assembly of First Nations. UN Photo/Marie Gandois.

UNDRIP acknowledges a range of international legal instruments that provide for self-determination and the internal right of self-government.<sup>6</sup> Together, the UDHR and UNDRIP form self-determination in international law to all people. For indigenous peoples in Canada, UNDRIP principles are not only reflected in the CHRA, but the Supreme Court of Canada has also held that international declarations should be used to interpret the Charter of Rights and Freedoms. The following are some useful ways of implementing the standards set out in UNDRIP.

## IMPLEMENTING UNDRIP

The Government of Canada has argued that UNDRIP is not legally binding and is only political in nature, that it does not create any procedural or substantive rights and that it is not customary international law. Canada also claims that “UNDRIP is a non-legally binding aspirational document” (Aboriginal Affairs and Northern Development Canada n.d.). While it is true that a declaration alone does not create binding legal obligations, other assessments have found that the key provisions of UNDRIP can be regarded as equivalent to already established principles of international law. This fact alone implies the existence of equivalent and parallel international obligations that states are legally bound to comply with. It is also clear from several Supreme Court of Canada decisions that international law informs the interpretation of domestic law and assumes conformity with domestic law.<sup>7</sup> UNDRIP sets out minimum standards of the collective and individual rights of indigenous people. The scope of UNDRIP is broad and covers almost all aspects of indigenous lives and is a highly relevant international human rights instrument informing the inherent right of self-determination through articles 19, 21 and 43:

<sup>6</sup> See Articles 2, 4, 9, 33–35, 38, 43–44.

<sup>7</sup> *R. v. Hape*, 2007 SCC 26 at para. 53–55.

### Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

### Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocation training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

### Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Many communities endorse UNDRIP as an important tool of self-determination to promote self-governance and have found it useful when drafting their own laws and policies to meet the collective standards set out in UNDRIP.<sup>8</sup>

Reliance upon the standards in human rights cases, conventions and judicial decisions may also be put forward before the decision makers in domestic Canadian court cases to guide an interpretation of Aboriginal and treaty rights as protected by section 35 of the Constitution Act, 1982. Chief Justice Brian Dickson confirmed that the Charter of Rights and Freedoms held “the various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for the interpretation of the Charter’s provisions.”<sup>9</sup> It

<sup>8</sup> See, for instance, the Assembly of First Nations at [www.afn.ca](http://www.afn.ca).

<sup>9</sup> See Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at para. 80.

logically follows that if the Supreme Court of Canada uses international declarations to interpret the charter, then section 35 of the Constitution Act may similarly be interpreted using international declarations. This line of reasoning may be considered when drafting domestic pleadings.

It should also be noted that the Supreme Court of Canada relied on UNDRIP to interpret Aboriginal rights even prior to its endorsement by Canada in *Mitchell v. Minister of National Revenue*.<sup>10</sup> Since Canada has endorsed UNDRIP, the Federal Court has accepted that UNDRIP applies to the interpretation of domestic human rights legislation.<sup>11</sup> Courts around the world that have endorsed UNDRIP have relied on its provisions to interpret their own domestic law. The Chief Justice in *Cal v. Attorney General (Belize)*, elaborated on his finding of a violation of customary international law, and held that “this Declaration, embodying as it does general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it.”<sup>12</sup>

It is also noteworthy that Bolivia made a 2009 constitutional change that allows for collective rights to language, community justice and land. Bolivia’s National Law 3760 of November 7, 2001, incorporates UNDRIP without change. Regionally, in 2007, the Organization of American States’ Inter-American Court of Human Rights (IACHR) in *Saramaka People v. Suriname*<sup>13</sup> affirmed the existence of an indigenous people’s collective right to its land. The IACHR *Saramaka* referred specifically to article 32 (2), the consultation and cooperation requirement in order to obtain indigenous peoples’ free, prior and informed consent with respect to any project affecting their lands and resources. In the Philippines, UNDRIP has already formed the basis for domestic legislation in the Indigenous People’s Rights Act.<sup>14</sup>

Although Canada claims that it merely “supports” UNDRIP, the government may be persuaded to use similar logic as the IACHR, Belize, Bolivia and Philippines and recognize and apply UNDRIP in Canada based on the fact that they endorsed the declaration. UNDRIP alone, however, may not be enough to protect or promote Aboriginal and treaty rights within the Canadian

Constitution. With the implementation of UNDRIP, a dovetailing approach may be utilized within the Canadian legal framework of Aboriginal and treaty rights. In addition, the process for accessing the international courts is cumbersome — domestic avenues must be exhausted before the international courts can be accessed. However, once an international ruling has been garnered, then the domestic courts may be obliged to implement the use of UNDRIP. Once cited, the courts are bound to use a flexible and generous approach when applying it, as they would when interpreting any constitutional documents.<sup>15</sup>

A multi-faceted approach to implementing the principles of UNDRIP should be utilized. Law professor Brenda Gunn (2011) notes that there should be ongoing legal academic consideration of how principles symbiotically fit within the Canadian legal landscape. It would also be useful to expand into other areas of academia and policy making. For instance, education on what UNDRIP is and how the principles may be applied to government policy may provide for interesting workshops and education plans for civil servants. Education for the public and, in particular, for indigenous peoples would provide a useful venue for exploring how these important principles may be implemented to improve the position of indigenous peoples in Canada.

Canada has stated that UNDRIP is not representative of customary international law. While it is true that a declaration alone does not create binding legal obligations, other assessments have found that the key provisions of UNDRIP can be regarded as equivalent to already established principles of international law. This fact alone implies the existence of equivalent and parallel international obligations that states are legally bound to comply with. The scope of UNDRIP is broad and covers almost all aspects of indigenous lives. It is also an important document for advancing inherent rights for indigenous peoples in Canada and should be used in all legal strategies, agreements and negotiations involving First Nations, Metis and Inuit when advancing and protecting inherent rights.

10 *Mitchell v. Minister of National Revenue*, [2001] 1 SCR 911.

11 See *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 at paras. 351–54, aff’d 2013 FCA 75.

12 *Cal v. Attorney General (Belize)*, 18 October 2007, Claim Nos 171 and 172 of 2007 at para. 132.

13 *Case of the Saramaka People v. Suriname*, Judgment, IACHR Series C, No. 172 (November 28, 2007).

14 See the Office of the President of the Philippines (2011).

15 See *R. v. Sparrow* [1990] 1 S.C.R. 1075.

Implementing UNDRIP will take a concerted effort from legal practitioners (domestically and internationally), academics, policy makers, educators and the indigenous and non-indigenous public. The goal is to have these principles used in agreements, negotiations and in all jurisprudence dealing with Aboriginal and treaty rights. These principles may also be useful as an evaluation method to assist in determining if the laws and policies that affect indigenous peoples are improving or denigrating their position. UNDRIP is an excellent and useful tool to promote and protect inherent indigenous rights.

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# INUIT DIPLOMACY: REFRAMING THE ARCTIC SPACES AND NARRATIVES

Thierry Rodon

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## INTRODUCTION

Inuit people live in four countries: Russia, the United States, Canada and Greenland (Denmark). As has been the case for many Aboriginal peoples, colonial borders were imposed on their traditional territories as a result of being integrated into the various nation-states. The Inuit, however, have been arguably one of the most successful Aboriginal groups in leveraging this transnational position to put forward their agenda. With colonization, the Inuit were de facto a transnational people, but they have developed a common identity and an Inuit space (Inuit Nunangat<sup>1</sup>) and acquired an international status, and they are actively reframing Arctic spaces and redefining Arctic narratives.

## FROM COLONIAL RULE TO THE INUIT CIRCUMPOLAR CONFERENCE

Arctic people have slowly moved from the far east Arctic coast of Siberia to the North American Arctic and finally Greenland over the last 4,000 years, through various waves of migration. The last migration, known as the Thule people, ancestors of the present day Inuit, moved from Siberia to Alaska, Arctic Canada, Greenland and Labrador. During this migration, they encountered the Dorset people, and also the first Europeans in Greenland as early as the tenth century. The next encounters with European explorers took place on Baffin Island with the Frobisher

trip in 1576 and later the Hudson voyage through Baffin Strait and Baffin Bay (1610-1611).

The formal incorporation of the Inuit into the nation-states was quite slow. In Alaska, the Inupiat and Yupik mostly encountered Russian traders and American whalers and were only formally integrated into the United States with the purchase of Alaska in 1867. In Canada, most of the Inuit lands were part of Rupert's Land, named in honour of Prince Rupert, cousin of King Charles II. In 1670, the king granted the land to the Hudson's Bay Company (HBC). That grant gave HBC exclusivity in fur trading but did not involve treaties with the Inuit. In Canada, the Inuit were formally integrated in the country with the purchase of Rupert's Land from HBC in 1870 and the transfer of the High Arctic Archipelago to Canada from Great Britain in 1880.

In Greenland, after the Vikings were cut off from Europe by the Little Ice Age, a pastor, Hans Egede, set out in 1721 to find the lost Greenlandic Norse colonies, but instead found an Inuit population. Greenland was officially incorporated into the Danish kingdom in 1814. In Siberia, only a small Inuit population, known as the Yuit/Yupik, remained on the coast of the Arctic Ocean and was incorporated into the Russian Empire in the eighteenth century.

Thus, by the end of the nineteenth century, all the Inuit had been incorporated into a nation-state. At that time, Inuit groups were mostly in contact with neighbouring groups. Knud Rasmussen, a Greenlandic ethnologist, established the idea that the Inuit people shared a common ancestry and culture through his famous fifth Thule expedition (1921-1924). Rasmussen travelled by dog sled team and boat from Greenland to Alaska and was able to ascertain

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<sup>1</sup> Inuit Nunangat refers to all land, ice and sea occupied by Inuit people. It replaces the term Inuit Nunaat, which only refers to the Inuit land.

that all the dialects spoken in the North American Arctic were related, as well as the myths and religious beliefs and practices of these Arctic peoples. He was also able to show that they had originated from Siberia. At this time, “Eskimo” was the term used to describe this culture. The Inuit people were scattered over the vast expanse of the North American Arctic and there was very little contact between the different Inuit regions. Colonization had established a north-south axis, while the Inuit were living along an east-west axis. To date, it is still quite difficult to travel on an east-west route in the Arctic and one has to go back down south in order to travel between Inuit regions.

In North America, the 1960s were marked by activism for civil and minority rights and young Inuit took part in this movement, fighting for the recognition of Inuit rights. The first modern treaty, the Alaska Native Claim Settlement Agreement was signed in 1971 with the Aboriginal peoples of Alaska; it was followed by the James Bay and Northern Quebec Agreement signed in 1975 by the Inuit of northern Quebec. The Inuvialuit of Western Canada signed their land claim treaty in 1984.

Greenland was the first Inuit region to obtain real political autonomy with “home rule” status in 1979. More recently, in 2008, Greenlanders approved self-government in a referendum and could be on their way to obtaining independence. The Inuit of Nunavut signed the Nunavut Land Claim Agreement in 1993, which led to the creation of the Nunavut government in 1999. Finally, the Inuit of Nunatsiavut signed their land claim in 2003 and the Nunatsiavut government was inaugurated in 2005. The Yupik of Siberia have not been able to move toward more autonomy, as a result of their very small numbers and the fact that they are a minority among more populous indigenous groups in Chukotka in the Russian far east.

The first pan-Inuit meeting organized by Inuit was held in Barrow, Alaska in 1977,<sup>2</sup> at the invitation of Eben Hopson, a visionary Inuit leader who used money from oil development to assemble Inuit living throughout the circumpolar region. Inuit from Alaska, Canada and Greenland were present, as well as Saami<sup>3</sup> representatives invited as observers. The decision to create a transnational organization was made during this seminal event. The Inuit Circumpolar Conference (ICC) was officially incorporated in 1980 at the Nuuk General Assembly. The choice of the name “Inuit” was a clear indication of the will to generate a common identity among the different groups that use a variety of denominations: Yupik and Inupiat in Alaska, Inuvialuit and Inuit in Canada, and

2 Two pan-Inuit meetings were previously held in France in 1969 (Rouen) and 1973 (Le Havre), but were initiated by a French researcher, Jean Malaurie.

3 The Saami, which used to be called Lapps, are the Aboriginal people of Northern Europe. They are present in Norway, Sweden, Finland and Russia.

Kalaallit in Greenland. The Inuit (Yupik) of Siberia were always invited, and were finally able to join the ICC General Assembly in 1989 following the Glasnost, the policy of openness and transparency launched by Mikhail Gorbachev, the last leader of the former Union of Soviet Socialist Republics (USSR) (Jull 1989). The ICC has now become an international non-governmental organization (NGO) representing approximately 155,000 Inuit from Alaska, Canada, Greenland and Chukotka (Russia). The ICC is a very decentralized organization. There is an ICC national office in every country and every three years the delegates elect an executive council and a chair at the UN General Assembly.

## REFRAMING SPACES AND REDEFINING NARRATIVES

With the creation of the ICC, the Inuit were able to move to the international scene, first by seeking the recognition as an NGO by the United Nations and later by lobbying very effectively for the construction of an Arctic space through the creation of the Arctic Council.

The ICC was at first mostly concerned about issues facing Inuit, namely gas and oil development, protection of language and culture, settlement of land claims, and political autonomy. However, the Inuit had to face international problems, such as the participation of the Inuit of Siberia, global environmental problems that greatly affect their territory (ozone layer depletion, persistent organic pollutants and, more recently, climate change), the activities of global animal right movements that threaten their hunting economy (based on seal and, more recently, polar bear hunting) and the establishment of maritime boundaries in the Arctic.

The first step toward gaining international status for ICC has been its recognition as an NGO by the United Nations, where it was granted a special consultative status (category II). The ICC has also been a very active member at the UN Working Group on Indigenous Peoples and has played a key role in drafting the Universal Declaration on the Rights of Indigenous Peoples.

## PROMOTING COOPERATION DURING THE COLD WAR

Upon the foundation of the ICC, the delegates made it clear that the Yupik of Siberia should be included and the organization repeatedly requested the USSR government to allow Siberian Inuit to travel to ICC meetings. In order to advance on this front, the Inuit set out to mobilize their national governments, mostly Canada and Denmark, to press their case to the USSR (Jull 1989; Lyng 1992).

This strategy was finally fruitful and a first delegation of Yupik from Chukotka was able to travel to the

Sisimiut General Conference in 1989 and they became full ICC voting members in 1992. This gain was clearly facilitated by the Glasnost, but the ICC was the first circumpolar organization with a USSR membership and even if it was mostly symbolic, it paved the way for more formal cooperation with the USSR, and later Russia, on circumpolar issues.

## REFRAMING THE ARCTIC SPACE

The biggest contribution of Inuit people is their effort to build an Arctic region through the environmental issues they face. Ozone layer depletion and persistent organic pollutants, which originated from southern industries, were greatly affecting the Arctic region and international action was needed to foster a solution. The ICC was instrumental in promoting Arctic cooperation, signalling that the environmental problems were of a global nature and required global solutions (Shadian 2006).

The ICC was the first to adopt an Arctic environmental policy: the Inuit Regional Conservation Strategy (1985). This strategy followed guidelines set by the United Nations Environment Programme (UNEP) and the ICC received the UNEP award for its work (Lynge 1992). This initiative paved the way for the first international cooperation strategy in the Arctic. Called the Arctic Environmental Protection Strategy (AEPS), it was adopted by the eight Arctic states (Russia, Finland, Sweden, Norway, Denmark, Iceland, Canada and the United States). The agreement included three Arctic Aboriginal organizations (the ICC, the Nordic Saami Council and the Russian Association of Indigenous People of the North) with a permanent participant status.

The Inuit leaders were also present alongside the state representatives in the discussion concerning the Arctic Council (Huebert 1998; Axworthy 2013). The Arctic Council was created in 1996 to replace the AEPS; however, the ICC and the other Arctic indigenous organizations were able to keep their permanent participant status at the Arctic Council. The Arctic Council is an intergovernmental forum that has no formal power, and decisions are made through consensus of the eight state members, but the permanent participants are allowed to express their opinion during the debates, indicating that Arctic cooperation could only occur with the participation of the Arctic indigenous organizations.

Canadian Inuit have also been very active in reframing an Inuit space, first by using the term Inuit Nunaat to encompass all the Inuit territories that are divided by provincial and territorial jurisdiction. Recently, they have chosen to replace the term with Inuit Nunangat, a term with a broader meaning, not only linked to land, but to all the Inuit space, including ice and sea.



Secretary-General Ban Ki-moon (left) presents the 2007 UNDP Mahbub ul Haq Award for Excellence in Human Development to Sheila Watt-Cloutier, advocate on Arctic climate change, political leader representing indigenous communities in Canada, Alaska, Greenland and Russia and nominee for the 2007 Nobel Peace Prize, at UN Headquarters in New York on June 20, 2007. UN Photo/Mark Garten.

## REDEFINING CLIMATE AS AN INUIT RIGHT

Inuit Nunangat is one of the regions most affected by climate change, with the highest warming prediction. However, the Inuit have decided to redefine the concern from an environmental issue to an Inuit rights issue.

The ICC started an international campaign targeting climate change, which was based on its right to a cold climate, thus linking climate change to the Inuit right to maintain a way of life based on a cold environment. That led the ICC to file a petition to the Inter-American Commission on Human Rights in 2005. In this petition, the ICC charged the United States with human rights abuses for not addressing climate change — a move that was quite interesting since the president of the ICC and 62 Inuit hunters launched a formal complaint against a nation-state that placed emphasis on the social impact of climate change.

## REDEFINING SOVEREIGNTY

The ICC has been a clear vehicle toward fostering Inuit autonomy, first through the exchange of information among the Inuit, but also through a clever tactic where, to avoid direct confrontation between Inuit and their southern government, Inuit from other regions were in charge of questioning government policies (Forest and Rodon 1995).

However, one of the best examples of the capacity of the Inuit to challenge the Arctic states is shown by the Circumpolar Inuit Declaration on Sovereignty in the Arctic adopted in Kuujuaq, Nunavik in April 2009. This declaration was the Inuit answer to the Illulissat meeting, where the five Arctic coastal states met in May 2008 to discuss a way to settle the unresolved maritime claims of the Arctic Ocean. This process, known as the “Arctic five,” excluded the other Arctic Council participants, namely the three Arctic states without borders on the Arctic Ocean — Iceland, Finland and Sweden — as well as the permanent participants of the Arctic Council, including the ICC. The Inuit answer was to hold a pan-Inuit meeting in Kuujuaq to reframe the debate over sovereignty. In the Circumpolar Inuit Declaration on Sovereignty in the Arctic, the Inuit stated that Inuit sovereignty coexists with state sovereignty and that they have a right to participate in Arctic governance:

4.2 The conduct of international relations in the Arctic and the resolution of international disputes in the Arctic are not the sole preserve of Arctic states or other states; they are also within the purview of the Arctic’s indigenous peoples. The development of international institutions in the Arctic, such as multi-level governance systems and indigenous peoples’ organizations, must transcend Arctic states’ agendas on sovereignty and sovereign rights and the traditional monopoly claimed by states in the area of foreign affairs. (ICC 2009)

This is clearly a challenge to the classical views on sovereignty. It is difficult to measure the impact of this declaration, but at the subsequent meeting of the Arctic five in March 2010, Hillary Clinton, then US Secretary of State, said in her remarks at the end of the meeting that “significant international discussions on Arctic issues should include those who have legitimate interests in the region [and] I hope the Arctic will always showcase our ability to work together, not create new divisions” (Clinton quoted in Sheridan 2010). Her comments clearly echo the Inuit declaration.

## OF SEALS AND POLAR BEARS

Since the 1980s, animal rights groups have threatened the Inuit way of life with the campaign against industrial sealing activities. Even if the Inuit were not the focus of these campaigns, the collapse in the seal fur market had a significant impact on hunting activities — the revenue gained from the seal pelts allowed the Inuit hunters to fund their activities by enabling them to buy hunting supplies and equipment. The Inuit quickly organized to counteract this international campaign; however, in spite of gaining some degree of success in convincing Greenpeace that

their seal hunt was sustainable and not unethical, they could not prevent the collapse of the seal fur market due to negative publicity.

The issue resurfaced in 2009 with the European Parliament adoption of a regulation on trade in seal products. This regulation is in effect a ban on the trade of seal parts and even if the Inuit hunters are exempted, it is now very difficult to sell seal parts (either meat or fur) in Europe. This decision was quite surprising at a time when the EU had been seeking observer status at the Arctic Council. Nonetheless, lobbying by animal rights groups and the sensitivity of urban populations pressured the members of the EU Parliament to adopt the ban even if it was incoherent with the EU efforts to be accepted as an observer on the Arctic Council (Pélaudeix and Rodon 2013).

The Inuit have had more success in preventing an international ban on the trade of polar bear parts. Animal rights groups and the United States were actively lobbying to have the polar bear listed in Appendix I<sup>4</sup> of the Convention on International Trade in Endangered Species (CITES) during a meeting in Bangkok, Thailand in March 2013. If this motion had been accepted, it would mean that polar bear would be considered as a species threatened with extinction and that their fur, as well as any other part, could no longer be traded, thereby putting an end to a source of revenue for Inuit guides who organize polar bear hunting trips. In September 2012, Inuit representatives, mostly from Canada, travelled to Washington, DC to try to convince the US government to withdraw its motion, but were not successful. The next step was to go to Brussels to meet members of the European Parliament to convince them to not support the US motion (Inuit Tapiriit Kanatami [ITK] 2012), and resulted in an abstention on the part of the EU representative on this issue.

The Inuit organizations came in numbers to the CITES meeting to make certain that the status of the polar bear remains unchanged. They argued that the polar bear hunt is well managed by a quota system, polar bear populations are stable and some Inuit communities benefit greatly from guiding southern hunters. The United States, backed by Russia, introduced a motion to move the polar bear issue to Appendix I, but was defeated 38 to 42 (ITK 2013). The European Union abstained on the vote, a somewhat surprising choice after their ban on the trade of seal parts. It could be interpreted as a sign that the European Union was not opposed to the interests of Canada and the Inuit in order to facilitate its acceptance as an observer on the Arctic Council.

<sup>4</sup> Appendix I is the list of species that are threatened with extinction and, as such, commercial trade of any parts of this animal is illegal.

## CONCLUSION

Inuit diplomacies have clearly had an impact on the Arctic and the international scene, quite an achievement for a group of 155,000 people. The Inuit have shown impressive diplomacy in the decolonization of Inuit regions through the treaty processes in Canada and Alaska, and the political devolution occurring in Nunavut, Nunatsiavut and Greenland.

They have actively reframed the Inuit and the Arctic spaces through the concept of Inuit Nunangat, a space based on a culture and a way of life. They have also actively participated in the construction of the Arctic region, first around environmental issues, but now also around the Arctic people and Inuit rights. This process has been institutionalized through the Arctic Council.

The Inuit have also actively redefined the narrative on climate change from an environmental issue to one that includes Inuit rights and shared sovereignty between states and the Inuit.

Finally, the Inuit have had to fight a global animal rights movement that has threatened their way of life. Their actions on this front have been less successful, but the recent success on the status of the polar bear is a sign of the efficiency of their international diplomacy.

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# A DEFENCE OF THE INTERNATIONAL HUMAN RIGHTS REGIME

Rhoda E. Howard-Hassmann

## INTRODUCTION

A common criticism of the international human rights regime is that it is overly Western and liberal. Often this is phrased as a “third world” or “southern” critique of human rights, or as an “African,” “Asian” or “Muslim” critique (Howard 1995, 86–101). Some scholars of indigenous societies and their interactions with the international human rights regime also believe this: the arguments made by one such Canadian scholar, Peter Kulchyski, are analyzed in this paper.<sup>1</sup>

## HUMAN RIGHTS AS “WESTERN” RIGHTS: COMMON CRITIQUES

Critics of human rights as “Western” rights usually argue that individual human rights are foreign to the way their societies live, as their societies are more community-oriented than individualist, and stress responsibilities over rights. Leaving aside the fact that the individuals or politicians making these statements often have personal interests in so doing (Zakaria 1994), these critics demonstrate a misunderstanding of the origins and meaning of human rights.

One standard criticism is that the human rights regime was drawn up by Westerners. In fact, however, half of the 18 individuals involved in the drafting of the most basic document of the international human rights regime, the 1948 Universal Declaration of Human Rights (UDHR),

were from countries from what was then known as the “Third World,” while another four were from the Eastern bloc, leaving only five from Western countries (Samnøy 1993, 142). Moreover, many nationalist anti-colonial leaders lobbied for the UDHR, although some may have done so only as a means toward decolonization (Burke 2010). Since then, there has been international consultation on the drafting of the many subsequent human rights documents. And most countries of the world have now ratified the major United Nations (UN) human rights treaties, suggesting that at least in principle they accept the human rights found therein.



Eleanor Roosevelt, chairman of the Human Rights Commission, and Charles Malik, chairman of the General Assembly’s Third Committee (second from right), during a press conference after the completion of the UDHR on December 7, 1948. UN Photo.

<sup>1</sup> This paper was originally published in *The Indonesian Journal of International and Comparative Law* 1 (2): 627–636 (2014). Reprinted by permission.

Some critics might argue that some of the people involved in drawing up these documents were, nevertheless, “Westernized,” assuming that individuals who believe in the equality of women with men or in the rule of law have abandoned their traditional cultures. This is an argument that can also be made against indigenous individuals who are feminists or who believe in the rule of law. The argument assumes that cultures are static and that they should not be changed, even if women are not equal to men or if governance principles seem manifestly unfair. It also assumes that indigenous individuals cannot think for themselves, and cannot decide that certain principles, which might originally have developed from Westerners’ centuries-long struggles to be free from the rights-abusive powers of their rulers (Ishay 2004), are not relevant to them.

The criticism that human rights are “Western” is also an example of what philosophers call the genetic fallacy. This fallacy assumes that the origins of a principle or a practice determine its applicability. Yet one would not say this of, for example, a medical discovery. Similarly, even if the principles of human rights included in the UDHR and elaborated on in many subsequent documents had been drafted only by Westerners, this does not necessarily mean that they are applicable only to Westerners. In many years of working on human rights, I have asked critics of the international human rights regime exactly which rights in the UDHR they think should not apply to, variously, Muslims, Asians or Africans — and now indigenous peoples. Usually there is no answer to this question.

The fundamental principle of human rights is that individuals are protected, qua individuals, against violations by the state (and, increasingly, against violations by other bodies such as transnational corporations). This does not mean that individuals must behave in an individualistic manner, nor do they all do so in practice. Human rights do not automatically destroy communal societies such as those of indigenous peoples. Observers of “Western” societies (meaning advanced capitalist societies) often do not realize that there are complex webs of community within them. These communities, however, are based far more on choice, interest and geography, rather than kinship. This is so because Westerners are geographically mobile, and some Western societies are products of centuries of immigration (Howard 1995). Many people in Western societies devote much of their time to caring for their families, while others volunteer their time within civic organizations to care for people outside their immediate kin group — sometimes to others in the same religious or ethnic group, other times to complete strangers (Howard-Hassmann 2003).

Some critics argue that human rights are essentially a liberal construct. They are correct. The fundamental principles of civil and political rights derive from the history of the Western world, from citizens’ struggles against arbitrary,

demeaning and violent state authority (Hunt 2007; Ishay 2004). Some critics, however, conflate political liberalism with economic “neo”-liberalism, the specific application of free-market principles to world economies in the 1980s and 1990s. Scholars of indigenous rights, therefore, worry about rampant free-market liberalism that would, for example, leave mining companies free to extract resources without restriction from the lands occupied by indigenous peoples. But the liberal political principles underlying the international human rights regime are not neo-liberal: they are centuries old. Moreover, they are supplemented by principles of economic, social and cultural rights emanating from communist and social democratic thinking. These latter rights are found in the UDHR itself and in all subsequent human rights documents.

Critics of the liberal basis of human rights worry especially about the right to own property, as found in article 17 of the UDHR, which states: “Everyone has the right to own property alone as well as in association with others” and “No one shall be arbitrarily deprived of his property” (UN General Assembly 1948). This principle has never been elaborated in subsequent international human rights documents, perhaps because of suspicion of the power of Western-based transnational corporations. Certainly, advocates of indigenous rights are correct to worry about property rights. Many indigenous peoples have lost their traditional lands after centuries of invasions by states and settlers. Treaty rights are frequently not honoured, and indigenous peoples are obliged to spend massive amounts of money, and sacrifice resources of personnel and time, to assure their rights are respected. Property rights are frequently vested in documents that indigenous peoples do not possess. In a world in which “you are what you carry,” indigenous peoples lack the documents that permit them to enjoy many human rights (De Soto 2000; Commission on Legal Empowerment of the Poor 2008).

But it might be possible to make the right to property work in favour of indigenous peoples. Indeed, the 2007 Declaration on the Rights of Indigenous Peoples (UNDRIP) contains several articles (26, 2, and 28) that refer directly to indigenous peoples’ property rights, especially noting that they have property rights by virtue of traditional occupation or use (article 26, 2). I have proposed, for example, that no collectivity may be deprived of property because of its ethnic, national or racial identity, or on discriminatory grounds, or without due process of law. I have also argued “traditional possession and use of property must be taken into account when deciding who has rights — individual or collective — over a particular property.” I have also noted, especially regarding indigenous peoples, that massive expropriation of property in land can cause famine, and have argued that when this occurs it constitutes a crime against humanity or even a crime of genocide, and that perpetrators of these crimes could therefore be tried in the International Criminal Court. These proposals, if they

were implemented, could protect indigenous peoples against loss of property (Howard-Hassmann 2013).

Another criticism of the international human rights regime is that it ignores the rights of groups. Groups, here, are defined inadequately. If groups mean aggregates of individuals, then one can argue that such aggregates — for example, women or religious minorities — are adequately protected by the extant human rights regime. If, however, by groups one means collectivities, that is a different matter. I define a collectivity as “a group of people that shares a particular culture, language, religion and lifestyle, connected to its occupation of a particular territory and to a historical memory of being a group” (Howard-Hassmann 2003, 157). Aboriginal societies are collectivities. To be protected as collectivities, as entities whose members’ identities, world views, sense of belonging and security (social, economic and political) require that the society be able to continue as an entity, requires a different set of rights than found in the international human rights regime. That is the set of rights in UNDRIP.

## ARE ABORIGINAL RIGHTS HUMAN RIGHTS?

The inclusion of the declaration in the international human rights regime does not satisfy Peter Kulchyski (2013), author of *Aboriginal Rights Are Not Human Rights*. In claiming that Aboriginal rights are not human rights, Kulchyski means that they are a separate category of rights and ought to be recognized as such. Aboriginal rights, he says, are rooted in Aboriginal land title and Aboriginal customs, which he defines as “bush culture” as opposed to contemporary Canadian “mall culture” (ibid., 162). Aboriginal rights, he argues, are a form of “embodied practice” (ibid., 48). Leaving aside the question of whether all Canadian Aboriginals engage in a hunting and gathering “bush” culture, Kulchyski’s larger point is that rights as such — universalist, individualistic, liberal and property-oriented — are foreign to the traditional Aboriginal way of life.

Kulchyski’s major objection is to Aboriginal rights having been included within the international human rights framework through the 2007 declaration. Like earlier “third world” or “southern” critics, he considers the UN human rights system to be Eurocentric. Kulchyski also argues human rights are individualistic and tend to be asserted in urban environments. If this is so, it is because most people the world over live in urban areas. Aboriginal Canadians living off-reserve in urban areas need human rights protections even more than non-Aboriginal Canadians do. In any case, many indigenous rural groups also assert their human rights either as individuals or as collectivities (see, for example, articles in Johnston and Slyomovics 2009).

Kulchyski considers the universality of human rights to be a totalizing framework that would erase Aboriginals’ cultural differences, using culture in the broad sense to include Aboriginals’ political and economic systems. Universalism, for him, implies assimilation. He believes the international human rights project is bound to assimilate Aboriginals into liberal, individualist society, destroying their collective way of life. He considers that liberalism’s chief object is to promote the interests of capital, especially via the human right to own property. As discussed above, this right is indeed problematic, but it could be used by Aboriginal peoples to claim their property — their lands — by right of possession.

I looked for examples in Kulchyski’s book that would illustrate why he is worried about the totalizing, assimilative influence of human rights, and could find only three.

The first is the unfortunately named 1969 Canadian White Paper on Aboriginals, which proposed abolishing the Indian Act and integrating Aboriginal Canadians as equal individuals into mainstream Canadian life (Indigenous Foundations n.d.). After protests from Aboriginal leaders the federal government withdrew this proposal, which would have deprived Aboriginal people of their treaty rights. Kulchyski is correct that the white paper was deeply assimilative. It was proposed before recognition and identity became an important aim of civil rights movements. There would be an uproar if anyone in Canada proposed an equivalent of the white paper nowadays.

Kulchyski’s second fear is that a universal approach to human rights might mean the end of special programs like affirmative action, or, as he calls it, positive discrimination (Kulchyski 2013, 58). But special programs to remedy past inequalities are permitted by the Convention on the Elimination of Racial Discrimination, article 4, as long as they are eliminated when they are no longer necessary.

Kulchyski’s last example is the case of a young Aboriginal man who was isolated from his community without food for several days as part of an initiation ritual; Kulchyski does not specify when this case occurred or what its legal ramifications were, but he does note “his human rights were clearly violated, in the interests of the aboriginal rights of his nation” (ibid., 67). He seems to think there should have been no debate about this case, as it was part of “bush culture,” but if the young man was under the age of 18, then leaving him in the bush alone for several days was a violation of his right to life under the Convention on the Rights of the Child (article 6, 1). Only if participants in such rituals are over the age of 18 and take part in them on a voluntary basis can Aboriginal custom conform to human rights.

Kulchyski also objects to what he sees as the state “giving” rights; in his view, rights are taken from below. He is quite

right when it comes to practice: rights require struggle from below, states do not simply grant them. But the 2007 UNDRIP is a quasi-legal document, which may someday become a convention, a treaty to be signed by states. Everyone in the world lives in a state and the purpose of human rights treaties is to encourage states to live up to their obligations.

Conversely, Kulchyski dislikes what he considers the 2007 declaration's portrayal of Aboriginal peoples as weak victims of states (Kulchyski 2013, 71). But all human rights documents are premised on individuals' need for protection against the state. The fact that in some situations you might be a victim of the state's denial of your rights does not mean that your identity is that of a victim: it simply means that in particular instances laws have been broken or norms violated, and you are a victim of those violations.

Kulchyski objects to the declaration's being one among many human rights documents; he wants it to be outside the human rights framework, so that the individualist nature of human rights does not undermine the collective nature of Aboriginal rights. The declaration, however, does recognize that collective rights are necessary; that is its major thrust. The few articles not specifically on indigenous rights are reaffirmations of rights that everyone ought to enjoy, such as freedom from genocide (articles 7 and 2); it is common to put these reaffirmations in human rights documents pertaining to particular groups of people.

Kulchyski (2013, 73) argues that "a human rights agenda must inevitably dismiss aboriginal cultural distinctiveness and align...with a totalizing state." Because of this fear, he prefers the 1982 Canadian Charter of Rights and Freedoms to UNDRIP. Clause 25 of the Canadian Charter limits its application so as not to undermine Aboriginal (collective) rights, stating specifically "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada...[including] any rights or freedoms that now exist by way of land claims agreements or may be so acquired" (Government of Canada 1982). Kulchyski claims that no such clause can be found in the 2007 declaration, despite article 45, which states explicitly that "Nothing in this declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future" (UN General Assembly 2007).

There is no evidence so far that the human rights agenda has undermined indigenous peoples' rights; rather, it has been expanded to promote the cultural distinctiveness — and land rights, on which that distinctiveness is based — that Kulchyski prizes. Some strict advocates of the preservation of indigenous cultures might, however, worry about article 44 of the declaration, which states that all the rights and freedoms enumerated in the declaration

are equally guaranteed to males and females, which could undermine some indigenous customs. Or they could worry about article 9, which states that "no discrimination of any kind" may arise from "the right to belong to an indigenous community or nation." This latter article could undermine indigenous customs that discriminate among members on the basis of their gender or the gender of their immediate indigenous ancestors. Equally, strict advocates of the preservation of indigenous cultures could be concerned about article 34, stating that indigenous judicial systems must accord with international human rights standards.

Finally, Kulchyski notes that the 2007 declaration does not confer sovereignty on indigenous peoples; it refers only to their "right to self-determination, exercised in conformity with international law" (preamble, par. 17). Kulchyski is correct that this still leaves Aboriginal communities subject to the authority of the state. The United Nations is a collection of member states, and it is very unlikely that any UN document would allow secession by any group from the authority of the state. The most that Aboriginal collectivities are likely to obtain by way of "sovereignty" is political arrangements analogous to municipal or provincial style authority, and there will continue to be quarrels over "national" resources such as subterranean and ocean resources in Canada's North. Self-determination does not mean sovereignty.

Kulchyski does not argue that Aboriginal people do not "need" the human rights that he claims are liberal, individualistic and characteristic of capitalist societies. He recognizes that qua individuals, Aboriginal people need such rights. He does not, however, attempt to resolve the difficult question of what to do when individual Aboriginals' rights conflict with what might be seen to be the cultural rights of Aboriginal groups. Such cases have arisen in Canada. In 1992, for example, the Native Women's Association of Canada (1992) objected to the practice of expelling women who complained about abusive husbands from their reserves. The declaration itself seems to favour indigenous rights only within the context of the entire international human rights regime, implying that in some cases, there may be contradictions between the rights of indigenous collectivities and the rights of their individual members.

## CONCLUSION

UNDRIP is one small step toward protecting the rights of indigenous peoples. It is not totalizing, it is not Eurocentric and it is not individualist. It takes a significant step back from the liberal project of undermining non-capitalist, especially indigenous, collectivities. But it is not enough. Until the declaration becomes a treaty, the international human rights regime will not have done all it could to protect indigenous peoples' rights.

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# THE SLOW “EVOLUTION OF STANDARDS”: THE WORKING GROUP ON INDIGENOUS POPULATIONS AND UNDRIP

Andrew S. Thompson

## INTRODUCTION

The Working Group on the Rights of Indigenous Populations, established by the United Nations (UN) Economic and Social Council (ECOSOC) Resolution 1982/34 of May 1982, was a subsidiary of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. At the time, its broad mandates were “to review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations” and to “give special attention to the evolution of standards concerning the rights of Indigenous populations” (ECOSOC 1982a). These were no small tasks. Perhaps more than any other set of group rights, indigenous peoples’ rights encompassed political and civil rights; economic, social and cultural rights; and land and resource rights, as well as anti-colonialism and the right to self-determination. Indigenous groups from around the world responded favourably, treating the working group as a forum for airing their grievances to an international audience. As Julian Burger (1988, 108) explains, they turned en masse to the United Nations, with the working group quickly becoming “the single most important forum for Indigenous Peoples.” But this was not an inevitable outcome. Indeed several states, particularly in the Americas, responded by attempting to obstruct the work of the working group, and thereby limit its ability to carry out its functions. Drawing extensively on the

Canadian experience, this paper provides an account of the events and diplomacy during the initial years of the working group and then assesses its role in facilitating the drafting of the Declaration on the Rights of Indigenous Peoples (UNDRIP) specifically, and advancing indigenous rights more broadly.

## CANADIAN EFFORTS TO WEAKEN THE TERMS OF REFERENCE

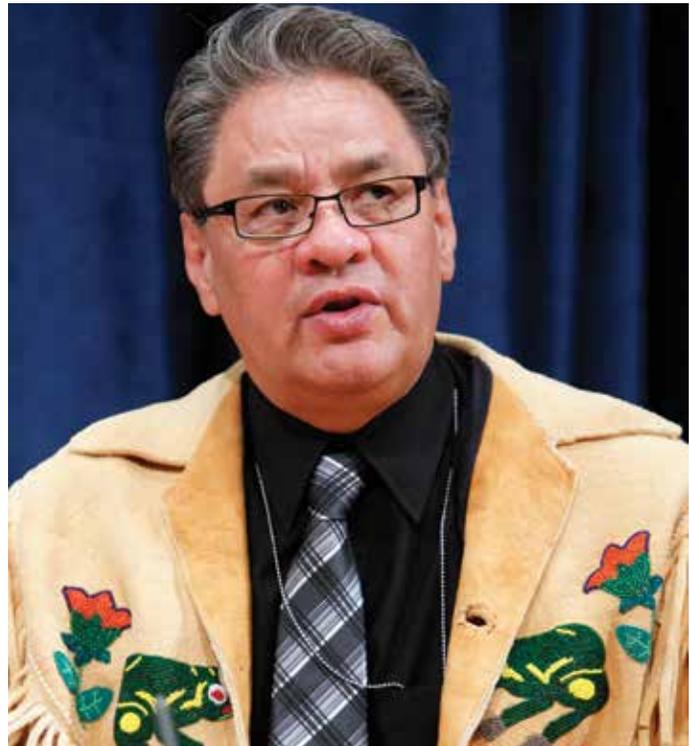
The first meeting of the working group took place in early June 1982. The five members of the group hailed from Norway, Sudan, Panama, Syria and Yugoslavia; the rights of indigenous peoples were not a major concern in any of these countries. At the time, several states feared that the working group would press for a bold plan of action, rather than a cautious or measured approach. Its suspicions were confirmed when officials learned that the group had discussed whether it should act as a “de facto tribunal” with the authority to conduct fact-finding investigations.<sup>1</sup>

1 Library and Archives Canada (LAC), Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Telegram from GENEV to EXTOTT: DTS de l’homme: Sous-Commission: Pops Autochtones,” June 9, 1982.

Hoping to prevent this from occurring, Canadian officials met with Asbjorn Eide of Norway, the lone Western representative, whom many believed would be named chair of the group, to discuss their concerns. The feeling at the time, however, was that this was by no means a foolproof solution. Officials based in New York cautioned, “we ought not to expect that Eide will always share [the Canadian] perspective. Recent contacts with [the] Norwegians (Amb Sverre) and Nordics generally on [the subject of] Native peoples have frequently revealed [a viewpoint] considerably different from our own. [Canadian delegations] have on occasion been obliged to exert [a] forcefully restraining influence (especially on [the] Norwegians) to turn aside initiatives on Native peoples which we did not regard as helpful.”<sup>2</sup>

Several countries had strong reservations about the working group and its potential program of work. One concern was that even if the working group did not operate in a quasi-judicial manner, indigenous groups would nonetheless use it as a platform to denounce the actions of member states. A second was that the working group might draft a treaty — perhaps even one that was legally binding — that recognized indigenous peoples as a distinct category of rights bearers. A third was that the working group would endorse the principle of the right to self-determination for indigenous peoples.

The Canadian reaction is particularly telling. With respect to the first concern, Ottawa knew that there was little it could do to prevent criticism, particularly if it wanted to appear supportive of the working group. But it did oppose the other two items. In late July 1982, officials at External Affairs contended that Canada should adopt the position that existing national and international human rights law, specifically the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provided sufficient protections to indigenous peoples. While Canada was “not absolutely opposed to the drafting of an international instrument that would focus specifically on indigenous populations, the Government is not in favour of the elaboration of new Conventions for the protection of every disadvantaged group within society.” Its preference was that “existing instruments” be strengthened in order



Grand Chief Edward John of Canada, chair of the UN Permanent Forum on Indigenous Issues, briefs correspondents on the forum’s high-level event on May 17, 2012, marking the fifth anniversary of UNDRIP. UN Photo/JC McIlwaine.

that they might become “more effective tools for the protection of these disadvantaged groups.”<sup>3</sup>

The government was even more hostile on the question of the right to self-determination. In a strongly worded briefing statement for the working group prepared by the Department of Northern and Indian Affairs for the UN Social and Humanitarian Affairs Division of External Affairs, officials wrote, “Canada does not want to see the traditional concept of self-determination used to attack the territorial integrity of a sovereign, non-colonial state. Since Canada is such a state, it does not agree that the concept of self-determination is applicable to Indigenous Populations within Canada.”<sup>4</sup> To bolster their position, they referenced the newly acquired constitutional protections, specifically article 25 of the Canadian Charter of Rights and Freedoms, which protects the rights recognized in the Royal Proclamation of 1763, article 35, which affirms the existing

2 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Telegram: From PRMNY to EXTOTT: WG on Indigenous Peoples,” June 9, 1982, 2.

3 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Letter Re: Sub-Commission Working Group on Indigenous Populations, no. CMS-0827,” July 28, 1982.

4 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Briefing for Statement – Working Group on Indigenous People,” August 2, 1982.

treaty rights, and article 37, which calls for the convening of a conference between the prime minister, the provincial premiers and indigenous leaders to identify and define special rights for Aboriginal peoples in Canada.

Canadian officials stationed in Norway met with Eide on August 6, 1982. They left the meeting feeling reassured. According to their report back to Ottawa, Eide, who would be named chair four days later, did not intend to “give free rein to pressure groups seeking audience” with the working group but rather to “strike a balance” between the “concerns of governments and of indigenous peoples.” As chair, his first priorities would be to set procedures and guidelines for reporting by member states. Moreover, his view was that the working group would serve as the “public conscience of member states containing indigenous peoples,” but that was where its authority would end.<sup>5</sup>

## NAMING AND SHAMING

“Balance” meant allowing indigenous peoples to be heard, which was one of the innovations of the working group (Stamatopoulou 1994, 68). Several of the indigenous activists who attended the meetings were based in Canada. As anticipated, they used the opportunity to level charges of discrimination, and it was reported that the government observers deliberately chose not to challenge many of the charges against them for fear that the session would “deteriorate into confrontational and unproductive arguments.” The result of this approach was a working group report that was, at least in the minds of those who followed the proceedings, “unbalanced.” Officials feared that the sub-commission would be given a false impression of the situation facing indigenous peoples.<sup>6</sup>

The working group released its first draft report on August 13, 1982. It listed countries that engaged in the “exploitation of indigenous lands and natural resources,” as well as several in Central and South American that were accused of having committed forced displacement and even genocide against their indigenous populations. The bulk of the report focused on broad definitional questions (although it reached no definitive conclusions), and the extent to which the various rights that indigenous peoples sought were already codified in international human

rights law. But more importantly, the working group determined that, while it would be “open and accessible” to indigenous peoples, it would “not become a quasi-judicial body or a ‘chamber of complaints’ but should examine developments pertaining to indigenous populations in order to elucidate whether existing or emerging standards are adhered to.” Furthermore, it would “discuss the possibility of drafting one more declaration on the rights of indigenous populations,” but would not contemplate a binding convention at this particular time (Working Group on Indigenous Populations 1982). Several states, including Canada, nevertheless still believed that the document was skewed too much in favour of the views of indigenous peoples. They refuted the findings of the report, including those that suggested that indigenous peoples were not adequately consulted on economic development projects. Worried about the attention devoted to the principle of the right to self-determination, they also made it known that they favoured “self-management” instead.<sup>7</sup>

The overall assessment, which was shared by Australia and the United States, was that it could have been much worse. But the report still had to be presented to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and then to its the parent body, the UN Human Rights Commission. According to a cable from Geneva to Ottawa, the “consensus” among the three countries was that government statements “should be short and not give the impression that [governments] are on[the] defensive (i.e. [a] positive statement designed to assist in [the] future work of [the Working Group]).” Moreover, the Australians suggested that if the discussion of the report “is balanced,” which they believed it would be thanks to Eide, they should “keep [a] low profile on [the subject] of indigenous people.”<sup>8</sup>

But taking a “low profile” was not a permanent solution. The first session of the working group had settled a number of procedural questions, but none of the substantive issues, which suited several states just fine. The concern with a passive strategy was that any future standards would reflect the contributions and inputs of indigenous peoples and sympathetic non-governmental organization (NGO) activists, not state concerns.

5 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Telegram: From OSLO to GENEV: Human Rights: SubComm WG on Indigenous People,” 6 August 1982; “Telegram: From GENEV to EXTOTT: Human Rights: SubComm WG on Indigenous People,” August 10, 1982, 1-2.

6 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Telegram: From GENEV to EXTOTT: Human Rights: SubComm on Indigenous People Preliminary Report,” August 16, 1982, 2-5.

7 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Telegram From GENEV to EXTOTT: Human Rights: Report of Sub-Commission Working Group on Indigenous People – Draft Text of Proposed Canadian Intervention,” August 20, 1982.

8 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 14, “Telegram From GENEV to EXTOTT: Human Rights: Report of SubComm WG of Indigenous People,” August 27, 1982.

Again, the Canadian response is quite telling. Ottawa had reason to be concerned heading into the second meeting of the working group in 1983. Earlier that year, the working group received correspondences from various indigenous groups in Canada accusing the government of, among other things, having inflicted “great atrocities,” including genocide and subordination through “tyrannical laws,” the most recent example of the abrogation of indigenous rights being Prime Minister Pierre Trudeau’s controversial White Paper of 1970, which advocated the abolishment of the Indian Act and treated Canada’s indigenous peoples as simply another “minority” group to be assimilated into Canadian society.<sup>9</sup> Moreover, a number of indigenous groups in Canada had already informed the working group that they sought the right to self-determination as currently defined in international human rights law, most notably article 1 of the ICCPR and ICESCR. Ottawa simply could not support this. As such, officials recommended to the working group that it avoid endorsing a broad principle and instead focus its attention on appropriate “self-government arrangements,” that would allow indigenous populations to advance and protect their political, economic, social and cultural rights.<sup>10</sup> They remained particularly leery of any “evolution of standards” in international law relating to the rights of indigenous peoples, and maintained the position that existing international human rights law, along with the treaty-monitoring bodies, provided sufficient opportunity for groups to seek redress for a host of abuses, ranging from violations of physical integrity and security to protection of religion and culture to discrimination of minorities, and that the working group should instead give consideration to the question of “the appropriate terms of interface between indigenous and non-indigenous populations of the national societies of which indigenous populations form a part, and to consider whether such terms of interface can be appropriately formulated as international

standards.”<sup>11</sup> But above all, they knew going into the meeting that the Canadian record had the potential to be scrutinized.

## THE “COBO REPORT”

There were other reasons why 1983 was a pivotal year. First commissioned by ECOSOC in 1970 in response to the rise of transnational indigenous right activism in the mid-to late-1960s and early 1970s,<sup>12</sup> the Study of the Problem of Discrimination against Indigenous Populations was the first comprehensive study undertaken by the United Nations to take stock of the human rights situations facing indigenous peoples around the world (Stamatopoulou 1994, 60, 67). Dubbed the “Cobo report” after José R. Martínez Cobo of Ecuador, the UN Special Rapporteur on the Rights of Indigenous Peoples, the sub-commission had received the “first” and “supplementary” parts of study in the summers of 1981 and 1982. Neither document was particularly controversial; both simply outlined the terms of reference, methodology and scope of the report.<sup>13</sup> Ottawa was well aware of the study. It had cooperated fully with Cobo’s requests for information (including submitting an 80-page report to the special rapporteur in October 1973), and had even seen early drafts of the study. And it knew that Canada did not come off well.

The “last” part of the report — which dealt with the question of land — was submitted on July 14, 1983. At 200 pages, it was a comprehensive survey of the “right to own land under the de jure and de facto circumstances prevailing in the countries covered by the study, and on

11 Ibid., 6–8. A separate but related issue was how to pay for the activities of the working group. One option was to establish a special voluntary fund, the principal purpose of which would be to cover the costs of travel to Geneva of indigenous peoples’ representatives. Canada had reservations about the proposal. Its position was that it was premature to create the fund on the grounds that administering it would be difficult with an agreed upon definition of indigenous peoples that would determine eligibility. Hoping to avoid invoking the ire of indigenous groups based in Canada, officials in Geneva recommended that the best course of action would be to indicate that the government had not yet determined its position. LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 15, “Telegram from GENEV to EXTOTT: Report of the WG on Indigenous Populations – Voluntary Fund/Resolution Proposed to Sub Commission by Indigenous Reps,” August 15, 1983.

12 One notable development was the creation of the World Council of Indigenous Peoples (WCIP) in 1972, which was founded by George Manuel, president of the National Indian Brotherhood (NIB). According to Chris Tennant (1994, 46, 52), the decision to organize the WCIP came following a resolution by the General Assembly of the NIB to obtain consultative status at the United Nations, which it obtained in 1974. Also in 1972, the NIB “endorsed the idea of an international conference on indigenous peoples.” Other significant advances included the 1977 International NGO Conference on Indigenous Peoples of the Americas, and the 1981 Conference on Indigenous Peoples and the Land.

13 See ECOSOC (1981; 1982b)

9 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol.15908, file 45-13-1-1, pt. 15, “Letter from the Maliseet Nation,” c. 1983.

10 Ibid., 4-5

the different factors affecting the effective enjoyment by indigenous populations of the right to own and benefit from their land” (ECOSOC 1983, 4). The report detailed the long historical relationship between indigenous and settler populations. Drawing largely on information provided by indigenous groups and academic studies, it highlighted the injustices and inequities of the land treaty system that dated back to the 1700s, including the creation of the reserve system, which began as an “instrument of protection” but “soon became the means of oppression.” Unsparing in his criticism, Cobo wrote that, “through the colonial-like legal framework created by the Indian Act for the administration of the reserve, the Indian communities were locked into a structure completely outside the mainstream of Canadian society. The Indian became the serf-like recipient of an all-powerful alien White bureaucracy which, playing the role of benevolent dictator, mercilessly, if unintentionally, debased and destroyed the rightful heritage of a proud and fine people” (ibid., 100).

Cobo also stressed that land appropriation was an ongoing problem in Canada, and noted that only recently had the Government of Canada begun to recognize Aboriginal title, forced to in part because of court rulings and the political mobilization of Aboriginal groups. Although the report did cite the James Bay and Northern Quebec Agreement of 1975 between the Grand Council of Crees, the Northern Quebec Inuit Association and the Canadian and Quebec governments as a positive example of partnership, Cobo indicated that most disputes over land development and mineral extraction were not nearly so equitable, and many involved situations in which groups had never signed a treaty relinquishing their claims to traditional lands (ibid., 100–09).<sup>14</sup> In addition to the federal and provincial governments, Canadian mining corporations were also singled out for violating indigenous peoples’ land rights. The charges against them ranged through inadequate consultation, land appropriation, displacement of communities and environmental damage, including the dumping of “toxic wastes into the river systems,” which threatened Aboriginal culture and economic livelihood (ibid., 140, 164–67). Understandably, Canadian officials were not impressed. Their position all along had been that the information in the report was dated, and not reflective of recent developments. One official likened the report to the “UN equivalent of [the] Dallas TV Series,” a popular soap opera at the time.<sup>15</sup>

14 The report did acknowledge that the Canadian government had provided approximately CDN\$55 million to Aboriginal groups to cover the costs or researching their treaty rights.

15 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 15, “Telegram from GENEV to EXTOTT: Report of Martinez Cobo on Indigenous Populations,” August 16, 1983.

Anticipating difficulties and hoping to “enhance [Canada’s] credibility” on the issue, the Department of Indian and Northern Affairs, which was responsible for leading and coordinating the interdepartmental consultations on all issues affecting indigenous peoples, determined that the best approach would be to acknowledge the seriousness of the challenges facing indigenous peoples in Canada while assuring the international community that it was not only taking concrete steps to rectify the situation, but that it wished to assist the group with its “important and very complex assignment.”<sup>16</sup> Specifically, it wanted delegates, who had observer status with the working group, to be ready to counter negative claims by Aboriginal representatives and demonstrate that suitable standards — such as the explicit recognition of Indian, Inuit and Metis in the Constitution and the 1983 Constitutional Accord on Aboriginal Rights, which “confirmed Canada’s recognition of the unique place of aboriginal peoples,” and committed all parties to continue “the process of identifying and defining aboriginal rights” in Canada — already existed and that positive steps were being taken that “should be taken into account by the Working Group.”<sup>17</sup>

Luckily for Ottawa, their fears were overblown, as the working group paid little attention to the report, and the meeting itself was largely uneventful. The working group had heard interventions from eight Aboriginal groups and NGOs based in Canada, including the Assembly of First Nations (AFN), a national advocacy association whose membership included indigenous bands across the country, which was represented by George Watts. Although quick to point out that indigenous peoples were neither in control of their destinies nor treated as equal partners and that Canada’s historical record left much to be desired, Watts nevertheless acknowledged the importance and success of the recent constitutional negotiations along with other initiatives, including discussions concerning “political sovereignty” through self-government, and told the working group that the AFN was optimistic that a “unique and historic relationship” with Canada was possible. Indeed, he even went so far as to suggest that

16 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 15, “Draft Introductory Statement: Working Group on Indigenous Populations, August 8-12, 1983”; “Memorandum with Respect to the United Nations Working Group on Indigenous Populations, Geneva, August 1983,” August, 1983, 3; “Telegram from GENEV to EXTOTT: WG on Indigenous Populations: GENEV AUG 8-12: Proposed Memorandum,” August 1, 1983.

17 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 15, “United Nations Working Group on Indigenous Populations,” 9 May 1983; “Letter to Asbjorn Eide from the World Council of Indigenous Peoples,” May 12, 1983; “Notes for presentation to the U.N. Working Group on Indigenous Peoples, August, 1983,” August 8, 1983, 2-3.

if the initiatives were sincere, Canada had a “magnificent opportunity to take exemplary international leadership in indigenous relations.”<sup>18</sup>

On the whole, officials also were pleased with Eide’s chairing of the meeting. Discussions of substantive rights had progressed but no definitive recommendations had been proposed, while question of the voluntary fund was deferred to a future session. No decision had been made about whether to draft a separate treaty recognizing the rights of indigenous peoples, and the sub-commission had paid “little attention” to the report of the working group.<sup>19</sup> Moreover, they thought that they had been able to demonstrate how recent developments at home were consistent with international objectives, and that the contributions of indigenous representatives had been generally “moderate and constructive,” particularly compared to those by representatives based in Australia and Latin America, who had engaged in “violent diatribes and recitation of historical as well as recent misdeeds by governments.”<sup>20</sup> Still, there was a sense among officials that Canada had gotten off easily, and that given the charged nature of the working group it was only a matter of time before this issue would pose real difficulties for them. They were not mistaken.

## THE SAKHAROV AFFAIR

Ottawa felt particularly vulnerable heading into the 1984 sessions of the working group and sub-commission. Eide was no longer the chair of the working group. He had been replaced by Erica Daes of Greece, who, according to one Canadian official, had no particular expertise on

18 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol.15908, file 45-13-1-1, pt. 15, “Presentation by George Watts on Behalf of the Assembly of First Nations, Canada to United Nations Working Group on Indigenous Populations, Geneva, August 8-12, 1983,” August 1983, 1-8; see also “Presentation by the Association of Metis and Non-Status Indians of Saskatchewan [Canada] to the Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Working Group on Indigenous Populations, Second Session,” August 11, 1983. Among the other groups to intervene were the Coalition of First Nations, Canadian Métis Council, and the Conne River Group.

19 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 15, “Telegram from GENEV to EXTOTT: WG on Indigenous Populations: Consideration of the Report by 36th Session of Sub Commission,” September 8, 1983.

20 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol. 15908, file 45-13-1-1, pt. 15, “Memorandum: Sub-Commission on the Presentation of Discrimination and Protection of Minorities: Working Group on Indigenous Populations, Second Session, Geneva, Aug. 8-12, 1983,” September 1, 1983, 1, 4, 9.

the subject. Several Canada-based indigenous groups attended, including the AFN, the Coalition of First Nations, the Indian Association of Alberta, the Treaty Six Alliance, the Métis National Council, the Union of New Brunswick Indians, the Bella Coola Indians of British Columbia and the Mic Mac Grand Council. Although these groups were “more restrained and rational” than their counterparts from other parts of the world, they pressed the issues of “full self-determination and sovereignty,” countering the Canadian government’s position, which was “self-government within the framework of the state.” Things became so heated that the working group was on the verge of crisis, the “seeds of disillusion and disaffection” on the part of both governments and indigenous groups having been sown.<sup>21</sup> Hoping to mitigate the highly charged nature of the meetings, the Canadian delegation used the occasion as an opportunity to propose improvements aimed at making the working group more functional and efficient. It called for the adoption of a work plan that would allow for more preparation between sessions, and recommended that the working group work more closely with the UN Centre for Human Rights when preparing documents for discussion.<sup>22</sup> But reforming the working group was the least of Canada’s concerns. For much of the session it found itself increasingly on the defensive about its record at the sub-commission thanks to a clash with the Soviets.

In 1983, Ottawa had successfully lobbied to have Justice Jules Deschênes of the Quebec Superior Court appointed to the sub-commission for the 1984 session, with Rita Cadieux, the deputy chief commissioner of the Canadian Human Rights Commission, as a substitute. It had done so on the grounds that no Canadian had sat on the sub-commission since John Humphrey, the first director of the Human Rights Division in the UN Secretariat and one of the authors of the Universal Declaration of Human Rights, and that having someone who was familiar with Canadian circumstances was in its interest. One of the first things Deschênes did in his new role was co-sponsor a resolution by the delegate from the UN condemning the Soviet Union for its treatment of Andrei Sakharov, the famous nuclear physicist, human rights advocate and Nobel laureate who in 1980 had been exiled to a remote area of the Soviet Union

21 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol.15908, file 45-13-1-1, pt. 20, “Telegram from GENEV to EXTOTT: Sub-Commission on Prevention of Discrimination and Protection of Minorities: WG on Indigenous Populations (3rd Session, GENEV 30 July – 3 August): Final Report,” August 8, 1984, 4, 9.

22 LAC, Department of External Affairs fonds, RG25-A-3, “Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,” vol.15908, file 45-13-1-1, pt. 20, “Intervention de l’Observateur du gouvernement du Canada,” August 9, 1984, 4.

for his public condemnation of his country's invasion of Afghanistan.<sup>23</sup>

Moscow was not impressed. Soviet officials let their displeasure be known to Ottawa. And then they made an offer, which Canadian officials interpreted as an attempt at "blackmail." In return for having the resolution on Sakharov withdrawn, the Soviets would withdraw the five counter-resolutions they had prepared on the discrimination of indigenous peoples, one of which accused Canada of being responsible for the "cultural and physical extinction" of indigenous peoples and called on the sub-commission to investigate whether it was guilty of "mass and flagrant violations of human rights."<sup>24</sup>

That the Soviets would attempt this was not surprising. Ever mindful of the Cold War context, officials had long feared that the Soviet Union would use the issue of indigenous peoples' rights to shame the West, especially if it was framed as a problem that only occurred in "white western societies."<sup>25</sup> To its credit, neither Ottawa nor its allies yielded. Nor could they have done so. Asking Deschênes to back down would have constituted a serious violation of the independence of the sub-commission. Instead, they tried, albeit unsuccessfully, to have the Soviet resolutions delayed to the next session on procedural grounds. On

23 See [www.nobelprize.org/nobel\\_prizes/peace/laureates/1975/sakharov-autobio.html](http://www.nobelprize.org/nobel_prizes/peace/laureates/1975/sakharov-autobio.html). The US delegate had also submitted resolutions concerning the disappearance of Raoul Wallenberg, the Swedish diplomat who had saved numerous Jews in Nazi-occupied Hungary during World War II. Wallenberg would later be arrested and executed by Soviet police on charges of espionage.

24 The Soviet resolution stated: "The Sub-Commission on Prevention of Discrimination and Protection of Minorities, Determined to promote and encourage universal respect of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion, Deeply concerned about the reports of the constant practice of discrimination against the indigenous population in Canada which leads to the cultural and physical extinction of that population, 1. Expresses its profound concern at the fate of the indigenous population in Canada suffering from the policy and practice of racial discrimination. 2. Urges the Canadian authorities to take without delay necessary legislative, administrative and other measures in order to put an end to all forms of racism and racial discrimination with regard to the indigenous population and to ensure the real respect for human rights and fundamental freedoms for all without any distinction. 3. Requests the Commission on Human Rights to consider at its 41st session the question of mass and flagrant violations of human rights in Canada with regard to indigenous population." The other Soviet resolutions dealt with the imprisonment of Leonard Peltier in the United States, comments about nuclear war made by US President Ronald Reagan, the situation in Northern Ireland, and racism and indigenous populations in the United States. LAC, Department of External Affairs fonds, RG25-A-3, "Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities," vol.15908, file 45-13-1-1, pt. 20, "Draft Soviet Resolution on Discrimination Against Indigenous Populations in Canada," August 28, 1984.

25 LAC, Department of External Affairs fonds, RG25-A-3, "Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities," vol.15908, file 45-13-1-1, pt. 15, "Telegram: FM GENEV to EXTOTT: WG on Indigenous Peoples," June 29, 1983.

September 4, the Soviet expert tabled the resolutions while simultaneously trying to block discussion of the Sakharov resolution and others aimed at the USSR. The result was deadlock at the sub-commission. In the end, no action was taken on any of the resolutions on the grounds that they were "too political."<sup>26</sup>

## CONCLUSION

The activities of the Working Group on Indigenous Populations had revealed a side of Canada that was at odds with the reputation that it had developed as a defender of both human rights and the UN human rights system. Indeed, P. Whitney Lackenbauer and Andrew Cooper (2007) suggest — and rightly so — that indigenous peoples' rights represent Canada's "Achilles heel." Although not entirely hostile to the activities of the working group, Ottawa nevertheless demonstrated that it was prepared to limit its vulnerability to both international scrutiny and the potential for international human rights law to influence sensitive political events at home. In this respect, it was no different than other states that understood all too well that with a robust human rights system came the possibility of encroachments into their sovereign affairs. In this sense, the period from 1982 to 1984 marked a low point in Canadian human rights diplomacy.

26 LAC, Department of External Affairs fonds, RG25-A-3, "Social Affairs – Human Rights – Minorities and Race Relations – United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities," vol.15908, file 45-13-1-1, pt. 20, "Telegram from GENEV to EXTOTT: Sub-Comm for Prevention of Discrimination and Protection of Minorities (GENEV 6 – 31 Aug): Soviet Draft Resolution on Situ of Indigenous Populations in CDA, etc.," September 4, 1984, 4. See also Iain Guest, "UN Human Rights Panel Spurns Sakharov Case," *International Herald Tribune*, September 3, 1984.

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# CONFLICTING ONTOLOGIES AND BALANCING PERSPECTIVES

Robert Maciel

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## INTRODUCTION

This paper provides a brief theoretical exposition on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in a Canadian and global perspective. UNDRIP acknowledges and affirms a wide range of indigenous rights that are to be realized at a global and local level. Canada, as a “settler society,” is in a unique position for the realization of UNDRIP — there exists a robust framework of multicultural rights that is buttressed by a culture that is, generally speaking, receptive of minority rights. Nonetheless, there are significant theoretical and institutional roadblocks that hamper the development and deployment of UNDRIP in Canada. This paper focuses exclusively on the theoretical impediments, arguing that despite the existence of multiculturalism as a background context for negotiating minority and indigenous rights in Canada, there is an ontological conflict between the state and the claims of indigenous peoples in Canada. The paper attempts to place this conflict within the framework of the liberal communitarian debate by demonstrating how the claims of indigenous peoples and requirements of UNDRIP are reflected in the language of recognition favoured by communitarian thinkers such as Charles Taylor. The Canadian state, on the other hand, tends to conceive of the ends of legitimate governance in liberal redistributive terms. This, therefore, delineates the realm of possible responses and approaches to governance. The paper concludes that to fully deploy UNDRIP in a Canadian context, the state may need to engage with policy development based on recognition and redistribution.

## BACKGROUND

The history of indigenous rights in Canada is fraught with hardship and controversy. Although there is a lengthy history of conflict and oppression, this paper aims to contextualize the author’s theoretical analysis with a focus on indigenous and state relations in the latter half of the twentieth century, leading up to the development of UNDRIP.

Pierre Trudeau’s infamous 1969 white paper encapsulated the state’s position on indigenous peoples and indigenous rights quite well. The paper attempted to outline a strategy for improving the living conditions of indigenous peoples across Canada; however, it was met with a very negative reception. Critics claimed that the government was simply attempting to strip indigenous people of their identities and make them “Canadian.” This position is generally backed up by the existence of the residential school system, which removed indigenous children from their homes and communities, placed them into schools and taught them to be “good Canadian citizens.” The residential school system is widely seen to have had a significantly negative impact on indigenous culture in Canada and indigenous-state relations. The white paper reflects the general position of the Canadian (and earlier British) government: assimilation (Grant 1996, 57). Indeed, the Canadian government had indigenous people legally categorized as children, which meant that they did not have the same rights as adult Canadian citizens. Additionally, although there was no official policy, property restrictions imposed on voting essentially ensured that indigenous peoples could not vote (Moss and Gardner-O’Toole, n.d.). This policy stance was utilized in an attempt to “change the Indians of Canada into ‘useful’ citizens” (Surtees 1971). In 2008,

the Canadian government made some headway toward reconciling indigenous peoples with the state with the establishment of the Truth and Reconciliation Commission Canada, but there is a long way to go until reconciliation is achievable (Rice and Snyder 2008). Importantly, the state's responses are still typified by traditional liberal responses to group claims. The state focuses on responding within the bounds of what it considers to be legitimate political action, hence the focus is on the distribution of rights and resources (Richards 2006). Although the distributive response is important, it does not do much to respond to the power imbalances and structural inequalities between indigenous peoples and the state. More importantly, the language of UNDRIP requires a more holistic approach to indigenous rights — an approach the state has yet to adopt.

## FRAMING RESPONSES IN TERMS OF REDISTRIBUTION AND RECOGNITION

UNDRIP affirms rights to self-government, determination and internal autonomy (UN General Assembly 2007, articles 3-4). It further affirms, "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State" (ibid., article 5). This requires, then, a significant reworking of indigenous-state relations in Canada. Indeed, fully realizing UNDRIP in Canada will require the granting of significant concessions to indigenous groups. One of the major impediments to realizing this is an ontological conflict that delineates the realm of possible responses from the state to traditional liberal ones, whereas the requirements of UNDRIP and indigenous claims on the state suggest the need for recognition-based approaches. This means, then, that to fulfill the requirements of UNDRIP, the state may be required to incorporate recognition-based approaches into a distributive framework to overcome the ontological conflict. When dealing with an ontological conflict of this sort, one that has irreconcilable ends, the only way to overcome it is through the incorporation of other perspectives within the framework. Importantly, the way that this issue is conceived of in this paper is not in terms of a "one-way street." Although the focus is largely on the concessions that the state will have to make, the state and indigenous peoples will have to work together to move forward. There are likely important views on both sides of the debate, which could greatly improve the lives of indigenous peoples and relations between indigenous peoples and the state. However, current relations are marred by conflicting approaches.

It could be suggested that the state's possible responses are restricted to those that consider the key principles of individual autonomy and liberty, best explicated by John Rawls (1971) in his *A Theory of Justice* (1971).

This understanding of the political adopts the more traditionally understood view of the legitimate purpose and actions of the state: arbiter of conflict, protector of individual rights. Hence, it should not come as a surprise to see statist responses framed in "distributivist" language. Distributivist language refers to the types of responses framed around distribution of rights and resources. From the other perspective we can see claims for recognition. Indigenous claims to the state tend to incorporate an aspect of recognition-based language. There is a desire to be recognized as a valuable group that is not met by distributive approaches. By focusing solely on distributivist outcomes, the state may be unable to adequately respond to indigenous claims. This paper argues that the language of UNDRIP incorporates a recognition-based approach into a distributivist framework. This means that in assessing claims with a distributivist outcome, the state may be required to recognize indigenous peoples as valuable and distinct peoples. By engaging in this type of recognition-based intercultural dialogue, the state may be able to develop more productive resolutions.

The distributive element of addressing claims is important, and necessary to redress in most forms. Many aspects of indigenous claims could be met with distributive responses — by strengthening land claims, shifting capital to tribal groups or offering protections over resources, for example. Indeed, many policy makers are hoping to improve the lives of indigenous peoples, but this type of exclusively distributive response ignores the salient cultural elements of the picture. Although this paper is critical of a solely redistributivist focus, this type of response is important and necessary as part of redress. Indeed, many issues affecting indigenous peoples today could be addressed through the proper distribution and allocation of rights and resources. However, focusing solely on distributive ends means a key element of the claim is missed. One of the reasons that the state has been unsuccessful in bridging the gap between the state and indigenous peoples in Canada is that it has ignored the important recognition-based approaches embedded within Aboriginal claims.

Canadian thinker Charles Taylor (1995) best articulates the recognition-based approach, contending that recognition is a key aspect of engagement with the "other" and "otherness." In the case of the Canadian state and indigenous peoples, there are two groups that may have fundamentally different ontological positions, aims and goals. This does not mean that *all* indigenous peoples are necessarily opposed to liberal/redistributive politics, nor does it assume uniformity within indigenous groups, rather, for a variety of historical reasons, indigenous groups are conceptualized as the other in Canadian politics. In dealing with otherness, then, one cannot simply assign or apply his or her own political ideals on the other. Hence, the recognition-based approach emphasizes the role of intercultural dialogue. The goal in overcoming

an ontological conflict should not be oppression or the submission of one view to the other: it should be based on communication and dialogue aimed at understanding and engaging with the other on a meaningful level.

There are several reasons why we ought to engage with the other through recognition. First, Taylor argues that at an individual level, we require positive recognition by others as meaningful members of a community. His analysis here is derived from G. W. F. Hegel's (1979) "master-slave dialectic" (*Herrschaft und Knechtschaft*) in his *Phenomenology*. Hegel (and subsequently Taylor) argues that the dialectic is the relationship between the master and slave, who both desire recognition as self-conscious beings. Meaningful recognition is impossible, as the slave cannot offer the master recognition without either giving up position as master or slave. This can be understood in relation to individual identities and our desire to be perceived as equals, or at least as meaningful contributors to a community. On another level, the desire is for recognition of difference — not only are individuals and groups claiming recognition of value ("I am a valuable member of this community and have important contributions to make"), but there is also an important claim of difference ("I am different than you in an important way"). This paper argues that recognition of difference can help inform state-indigenous relations, especially in cases where there are clear fundamental ontological differences at stake. Additionally, recognition of difference informs the ways in which we interact with other groups.

Importantly, recognition of difference does not lead to a fractured society. It does not lead us to the conclusion that since you are different than us we cannot work together. Rather, it can help lead to a more meaningful engagement and create a new direction forward. By recognizing the distinctions and differences between groups we can better understand their positions, aims and goals in political engagement. This should not be taken to mean that we need to accept every position or even value the ideals and beliefs of a group in themselves. Simply because I recognize the value of a group's practices or beliefs does not mean that I value or recognize the practices in or of themselves. I am not pigeonholed to defending values, beliefs or practices that are fundamentally opposed to those that I hold. All that is required is that I recognize the importance of the other's beliefs and practices to them and attempt to understand why they hold meaning and value within that group or to that individual (Modood 2007, 67). Nonetheless, by engaging with the other through recognition, we may be able to better understand where they are coming from, which can help inform policy going forward. More importantly, the position defended in this paper calls for a holistic approach that incorporates both the distribution and recognition sides.



A Squamish Nation canoe approaches Bella Bella. UN Photo/John Isaac.

By forgoing recognition, we may be susceptible to misrecognition — the ascriptions of features we assume are important markers of difference or the assumption of similarity. Indeed, the potential of misrecognition has led some to conclude that we ought to avoid engaging in this type of political interaction (Coulthard 2007). When we misrecognize, we are apt to drive policy on the basis of features that we assume are important to groups, or, perhaps worse, we assume that the aims and goals of a group are the same as ours. On the other side, by forgoing distribution we ignore the important material ends and goals that are (in many cases) required to help fulfill the cognitive ends. Martha Minow (1998, 112) helpfully demonstrates this with the case of apology (a recognition-based approach): "perhaps most troubling are apologies that are purely symbolic and carry no concrete shifts in resources or practices to alter the current and future lives of survivors of atrocities." Recognition can be used to inform policy prescriptions that have redistributive implications, and there is evidence in favour of adopting this type of approach (Kymlicka 2010).

The realization of UNDRIP in Canada will depend on the state's ability to incorporate recognition-based approaches into its policy prescriptions. By incorporating both distributive and cognitive ends, the state may be able to give meaningful voice to indigenous peoples at a national level. This is not an easy task, and will require significant concessions from the state and a change in approach.

## PROSPECTS GOING FORWARD: UNDRIP IN CANADA

This final section of the paper assesses the prospects for implementation of UNDRIP in Canada in light of conflicting ontologies. There is great potential to move in a positive direction and UNDRIP offers a positive framework for state-indigenous relations, but much theoretical and political work remains. There is, therefore,

reason to be cautiously optimistic about the prospects of UNDRIP and state-indigenous relations going forward. Importantly, UNDRIP offers an international forum for voicing and protecting indigenous concerns that may be ignored or poorly governed at a subnational level.

One of the main reasons to be hopeful about state-indigenous relations going forward is the existence of an international framework of indigenous rights that will, it is hoped, impact national policies. UNDRIP can offer a forum for indigenous groups to make claims and a framework to appeal to when their voices are marginalized or otherwise ignored. The existence of this framework will work to affirm an international place for indigenous groups to engage with other subnational groups and states regarding issues of overlapping concern. Moreover, it offers a venue for voicing concern, gaining empathy and obtaining solidarity with international groups to help further their causes at a subnational level. These are voices that are now being taken seriously at an international level. Appeals to protection over national resources are one example. Of particular relevance in Canada is the debate over the Keystone XL Pipeline that would connect northern Alberta to refineries in Texas. Several prominent indigenous leaders have voiced their concerns beyond a provincial or national level and appealed to international authorities. UNDRIP provides, at least in theory, a relevant space for Aboriginal peoples to voice their concerns at this level and to appeal to international authorities when they are being ignored at a national level.

On the other side of the coin, however, there is the crucial aspect of power imbalances, both economic and symbolic, that inform state-Aboriginal relations. The overview of the relationship between distributive and recognition approaches in the previous section is something that could be implemented to overcome these structural imbalances and level the field, but it would take a serious amount of political will from the state. The state is in a uniquely powerful position to impose policy over Aboriginal peoples as they see fit. By governing Aboriginal peoples in a uniform way and engaging with them as prescribed by the 1969 white paper (i.e., the same as they would govern over other Canadians), the state is likely to further the divide between groups. Additionally, this will only work to further reinforce the power imbalances between the groups. However, engaging in recognition-based intercultural dialogue and framing policy prescriptions in this manner may help bridge the gap between groups and lead to progress.

Although the paper is focused primarily on how the state impacts Aboriginal peoples through policy, incorporating the recognition-based approach may provide a new avenue for engagement with Aboriginal groups to help inform national policy going forward. By providing a meaningful voice for Aboriginal peoples at a national level (one that is protected and enshrined in an international framework),

the state may obtain the tools and conceptual framework for devising new policy paths that incorporate different perspectives. Again returning to the example of natural resource policy, by incorporating a recognition-based perspective the state may be able to devise sustainable yet economically positive policy.

UNDRIP provides good reason for the state to incorporate recognition-based approaches into policy development. With an international voice and a forum for engagement outside of the state, Aboriginal groups are not necessarily beholden to the decisions of the state. This changes the relationship from a unilateral one to one that is more bilateral. Incorporation of recognition-based approaches can help overcome the ontological divide that currently haunts state-Aboriginal relations. If anything, UNDRIP can help to bring this issue to the forefront so that it will be dealt with directly.

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# INTERNATIONAL GAZE BRINGS CRITICAL FOCUS TO QUESTIONS ABOUT ABORIGINAL GOVERNANCE IN CANADA

Terry Mitchell

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## INTRODUCTION

Persistent and unacceptable gaps exist between the individual and collective well-being of settler populations and indigenous communities worldwide, regardless of whether they are members of minority populations, majority populations or living within third or first world countries (Cohen 1999, 7; Economic and Social Council [ECOSOC] 2014). Canada is no exception (Adelson 2005; Anaya 2013; Loppie Reading and Wien 2009). These gross inequalities are confirmed by empirically based socio-indicators of health, education, employment, income, and social and political participation, and have been reported by international bodies such as the United Nations.

Indigenous peoples, challenged by these political realities, have been developing transnational mechanisms to address enduring and growing inequalities through the acknowledgement and advancement of indigenous rights (Anaya 2009; Henderson 2008). This paper discusses the emergence of an international indigenous rights regime, the development of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (see UN General Assembly 2007b), and considers UNDRIP's influence and utility in relation to resource extraction and Canada's reputation as a world leader on human rights and indigenous issues.

## EMERGENCE OF AN INTERNATIONAL INDIGENOUS RIGHTS REGIME

Despite diversity of culture and context, indigenous peoples globally share the dire consequences of having their lives and territories governed by colonial and neo-colonial states, as detailed in the report on the discrimination of the world's indigenous peoples by the UN Special Rapporteur of the Sub-commission on the Prevention of Discrimination and Protection of Minorities, José R. Martínez Cobo (ECOSOC 1982). ECOSOC responded to the Cobo report by creating the Working Group on Indigenous Populations to focus on indigenous issues worldwide and to make recommendations to the UN Commission on Human Rights. The internationalization of indigenous rights has, however, been a slow, hard-won battle for rights recognition, beginning in 1923 when Deskaheh (Levi General) of the Six Nations of the Grand, Canada, made a trip to Geneva, Switzerland to present the "red man's appeal" to the League of Nations (Deskaheh 1924). This marked the first attempt to take indigenous claims for sovereignty to an international forum. In 1974, Chief George Manuel of the Shuswap Nation Neskonalith Indian Band in British Columbia became the first president of the World Council of Indigenous Peoples. Manuel was instrumental in developing early drafts of UNDRIP. He also advanced the concept of the internationalization

of indigenous rights with Michael Posluns in *The Fourth World: An Indian Reality* (Manuel and Posluns 1974).

Eighty-four years of vision and patience, followed by decades of international planning, dialogue and debate (with unprecedented levels of indigenous participation) have resulted in an international indigenous rights regime that includes the International Labour Organization's (ILO's) convention 169 (ILO 1989) on indigenous rights and UNDRIP. Despite Canadian indigenous leaders' significant role in advancing the internationalization of indigenous rights, the Government of Canada is not a signatory to ILO Convention 169 and refused to sign UNDRIP at its adoption in 2007.

The Canadian government eventually became a signatory to UNDRIP in 2010. The declaration is an important development in the recognition and internationalization of indigenous rights, providing a standard for 148 signatory nations. UNDRIP is not a legally binding convention; however, it does represent an international consensus on "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (UN General Assembly 2007b, article 43). Although UNDRIP has been criticized as lacking legal weight and being state-centric (Kulchyski 2013; Venne 1998), it is the only UN document developed with consistent and primary participation of the affected population and has strong, but largely unfulfilled, potential as a global governance mechanism. Full implementation will require the harmonization of UNDRIP within various domestic legal and political environments.

## CANADA'S INTERNATIONAL REPUTATION ON INDIGENOUS RIGHTS

Canada has long been regarded as a progressive advocate for the advancement of human rights globally. Canada, instrumental in the development of the United Nations in 1945, has been recognized for its progressive legal framework for land settlements and was the first country to make indigenous constitutional provisions through section 35 of the 1982 Constitution Act (Anaya 2013).

Although many Canadian indigenous leaders are still working on the internationalization of indigenous rights, Canada's leadership status on indigenous affairs has become tarnished. As opposed to a stalwart advocate of human rights, Canada has increasingly become known as a world leader in suicide rates among indigenous peoples and as a wealthy nation that has failed to adequately address the community well-being, education and life-span gaps between Aboriginal and non-Aboriginal peoples. Upon concluding his visit to Canada in October 2013, James Anaya, the UN special rapporteur on indigenous rights from 2009 to 2014, indicated that Canada offers no exception to the grave situation of indigenous

peoples' rights and well-being globally (ibid.). Canada has traditionally looked outward to address human rights violations internationally. It must now begin to look inward at domestic Aboriginal affairs from a critical international indigenous rights perspective that includes the application of UNDRIP.

## THE UN SPECIAL RAPPORTEUR ON INDIGENOUS RIGHTS REPORTS ON CANADA

Anaya's report following his visit acknowledged Canada's strong legal framework and treaty process, stating that Canada remains an example to the world in terms of "reconciliation and accommodation of indigenous and national interests" (UN General Assembly 2014, 17). The report also affirmed that

Canada's relationship with the indigenous peoples within its borders is governed by a well-developed legal framework that in many respects is protective of indigenous peoples' rights. Building upon the protections in the British Crown's Royal Proclamation of 1763, Canada's 1982 Constitution was one of the first in the world to enshrine indigenous peoples' rights, recognizing and affirming the aboriginal and treaty rights of the Indian, Inuit, and Métis people of Canada...Perhaps most significantly, it has legislation, policy and processes in place to address historic grievances of indigenous peoples with respect to treaty and aboriginal rights. In this regard, Canada is an example to the world." (ibid., 5, 17)

However, Anaya also articulated that, despite a strong legal framework, there is a crisis in the area of indigenous rights within Canada. Anaya noted that, in contrast to the high standard of living experienced by most Canadians, many Aboriginal people live in conditions that approximate those of people living in the most economically disadvantaged and underdeveloped countries in the world. He highlighted the multiple social problems facing indigenous peoples across Canada, including unacceptable disadvantages in living standards, education, health and employment, stating "it simply cannot be acceptable that these conditions persist in the midst of a country with such great wealth" (ibid.). Anaya also identified the distrust between indigenous peoples and governments, the growing challenges of resource governance on indigenous territories and the lack of appropriate consultation with indigenous communities in advance of development despite existing legal provisions,



People gather to hold a rally on Parliament Hill in Ottawa on October 25, 2012, demanding that the Canadian government develop a national action plan to end violence against women. iStock.

constitutional requirements and the responsibilities as a signatory to UNDRIP.

Canada is increasingly under international scrutiny by the United Nations, Amnesty International and international advocacy groups (Amnesty International 2013; Anaya 2013; Harper 2014). International attention is being brought to the startling statistics on missing and murdered women, youth suicides, water quality, housing standards and incarceration, as well as the rising tensions between Aboriginal communities, industry and federal, provincial and territorial governments in relation to the extraction of non-renewable resources and the contentious pipeline routes (for example, Northern Gateway and Keystone XL) over indigenous territories.

## CRITICAL QUESTIONS ON ABORIGINAL GOVERNANCE IN CANADA

The international gaze brings a number of critical questions into focus:

- Why, in a wealthy democratic nation, do gross social inequalities persist between Canada's first peoples and the settler communities?
- Why do First Nations and Inuit communities continue to struggle to preserve their territories and to participate favourably in the development of economic opportunities related to the natural resources on their land despite Canada's constitutional provision of the duty to consult and accommodate?
- Why does the Canadian government assert that the duty to consult and accommodate, as provided within section 35 of the Constitution, does not include veto power despite international and industrial standards of free, prior and informed consent (FPIC)?

This paper addresses these questions with the intention of elaborating on the issues of concern rather than attempting to answer them. It does not deign to offer solutions to the complex issues that lawyers, indigenous scholars and policy makers individually and collectively seek to address, but rather to reframe and highlight them as questions of national and international importance.

Firstly, Canadian leaders and policy makers need to ask why Aboriginal populations are so disadvantaged in terms of health, education and overall well-being in a democratic country with a universal health care plan, public education system and relatively large Aboriginal fiscal commitments arising from treaty agreements. There is a stark and troubling irony that indigenous communities are scoring lower on the Community Wellbeing Index (CWI) than the general population and the most recent newcomer communities (McHardy and O'Sullivan 2004). As highlighted in Anaya's report, 96 of the bottom 100 Canadian communities on the CWI are First Nations, and only one First Nation community is in the top 100 (UN General Assembly 2014). Rodolfo Stavenhagen, UN special rapporteur on the rights of indigenous peoples (2001–2008), has attributed the widespread failure of indigenous development programs globally to structural barriers and infringements of individual and collective rights. He recommended that development initiatives for indigenous peoples be based on "self-determination as an essential basis for promoting and managing their own development" (UN General Assembly 2007a). In this regard, UNDRIP is an international tool that provides a rights-based framework for sustainable development on indigenous territories and for the advancement of cultural, economic and social well-being of current and future generations.

Secondly, why do protracted conflicts repeatedly arise between Aboriginal communities, industry and different levels of government? On paper, Canada recognizes the inherent right of self-government as an existing Aboriginal right under the Constitution, which includes the right of indigenous peoples to govern themselves in matters that are internal to their communities or integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources. However, as articulated in Anaya's report, "it is difficult to reconcile Canada's well-developed legal framework and general prosperity with the human rights problems faced by indigenous peoples in Canada that have reached crisis proportions in many respects. Moreover, the relationship between the federal Government and indigenous peoples is strained, perhaps even more so than when the previous Special Rapporteur visited Canada in 2003" (UN General Assembly 2014, 7).

UNDRIP articles 26–29 and 32 are focused on the recognition of indigenous peoples, the conservation and protection of their land and the right to determine

priorities and strategies for the development of their territories. In keeping with section 35 of the Constitution and the Supreme Court of Canada's (SCC's) related rulings (SCC 2014), and in accordance with articles 18 and 19 of UNDRIP, consultation, participation and consent in decisions affecting indigenous populations are a necessary part of good governance, which Canada is failing to uphold.

Thirdly, an ironic and contentious issue exists on the question of consultation, consent and veto power. The federal government entered into a process of reconciliation with Aboriginal peoples in Canada following the Royal Commission on Aboriginal Peoples (see Royal Commission on Aboriginal Peoples 1996) and the government's 2008 apology for the residential school system. The government has advanced the objective of building a new relationship with Aboriginal peoples, which, from an indigenous perspective, would be based on an honouring of basic principles of sovereignty. However, the increasing focus on extractive industries generates ever-greater tensions between the development objectives of government and industry on the one side, and indigenous peoples' efforts to protect their cultures and advance territorial and political autonomy and survival, on the other side. Government has opined that neither section 35 of the constitution nor UNDRIP provide veto power to Aboriginal peoples. A stark irony exists regarding consultation, participation and FPIC. That is, if Aboriginal leaders and their representatives cannot say no in decision making on matters that affect their territories, how can Aboriginal peoples actually provide consent? Further, how can Aboriginal peoples ensure the security and productivity of their territories for future generations as outlined by the SCC if they do not have the power to determine whether or how their lands are developed? Paragraph 86 of *Tsilhqot'in v. British Columbia* states "the Crown's fiduciary duty means that the government must act in a way that respects the fact that Aboriginal title is a group interest that inheres in present and future generations. The beneficial interest in the land held by the Aboriginal group vests communally in the title-holding group. This means that incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land" (SCC 2014).

Article 18 of UNDRIP discusses the right to participate in decision making "in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions" (UN General Assembly 2007b). Article 19 of UNDRIP further explicates that "states shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" (ibid.). The necessities of

authentic, legitimate consultation are reiterated by Anaya: "Resource development projects, where they occur, should be fully consistent with aboriginal and treaty rights, and should in no case be prejudicial to unsettled claims. The federal and provincial governments should strive to maximize the control of indigenous peoples themselves over extractive operations within their lands and the development of benefits derived therefrom" (UN General Assembly 2014, 26).

The recent SCC ruling of Chief Justice Beverly McLachlin on *Tsilhqot'in v. British Columbia*, which determined the province had breached its duty to consult by providing contracts to logging companies without appropriate consultation, is consistent with international standards of FPIC: "The honour of the Crown required that the Province consult the Tsilhqot'in on uses of the lands and accommodate their interests. The Province did neither and therefore breached its duty owed to the Tsilhqot'in" (SCC 2014). The ruling established that consultation and accommodation are required for negotiations with Aboriginal groups that are asserting title and that consent is required when Aboriginal title has been established.

The challenge, then, is to define consent. If no means no, indigenous peoples worldwide would hold veto power over decisions that affect their lands. The SCC very clearly asserted the necessity of consent and the protection of the enjoyment of Aboriginal lands for future generations:

In summary, Aboriginal title confers on the group that holds it the exclusive right to decide how the land is used and the right to benefit from those uses, subject to one carve-out — that the uses must be consistent with the group nature of the interest and the enjoyment of the land by future generations. Government incursions not consented to by the title-holding group must be undertaken in accordance with the Crown's procedural duty to consult and must also be justified on the basis of a compelling and substantial public interest, and must be consistent with the Crown's fiduciary duty to the Aboriginal group. (ibid.)

Therefore, the right of FPIC, including the power to say no, is established in UNDRIP and by the Canadian Constitution — with governments perhaps holding veto power pending a demonstrated proof of conflict with the public good.

## CONCLUSION

With the emergence of an international indigenous rights regime, increased international scrutiny is being applied to Canada's performance on Aboriginal rights. Canada

is challenged to apply international rights standards to address and resolve the significant disparities between the well-being of the general Canadian population and Aboriginal peoples, despite the existence of a strong social and legal environment. The questions discussed in this paper point to several troubling ironies and unrealized opportunities, as highlighted by the UN report on the crisis of indigenous issues in Canada. Although Canada has many positive accomplishments in the area of indigenous law, it has not currently positioned itself as a progressive leader on the issue of resource extraction and indigenous rights. Canada's view on FPIC is falling behind that of the international community. Canada has repeatedly asserted that UNDRIP is an aspirational and non-binding document while other countries, such as Bolivia and Ecuador, have taken leadership to adopt the declaration within their constitutions.

Innovators in business and industry are also taking leadership in developing a working relationship with the emerging international indigenous rights regime. As reported by First Peoples Worldwide (2013), considerable yet insufficient progress is being made in the area of FPIC. The World Bank has required borrowers to engage in FPIC with indigenous peoples since 2005. In 2011, Newmont and Talisman became two of the first extractive companies to explicitly commit to obtaining FPIC from indigenous peoples. Indigenous policies that are consistent with UNDRIP and ILO Convention 169 have also been adopted by ConocoPhillips, BP and ExxonMobil (ibid.). Significantly, in 2013, the International Council on Mining & Metals released *Indigenous Peoples and Mining: Position Statement*, which defined FPIC as “a process based on good faith negotiation, through which Indigenous Peoples can give or withhold their consent to a project” (International Council on Mining & Metals 2013, 2).

In this period of intense national and global resource extraction, Canada has an opportunity to work in concert with indigenous leaders, various levels of government and industry to advance the implementation of UNDRIP and the principle and practice of FPIC. In doing so, Canada may once again earn a legitimate voice at the international table on issues of human rights and indigenous issues through the promotion of indigenous leadership and intercultural dialogue on the internationalization and realization of indigenous rights.

Reconciliation of the past, based on a new relationship for the present and for the future, will certainly require a new understanding of land and resources and the meaning, application and enforcement of FPIC. This will require intercultural dialogue and an understanding of indigenous world views informed and guided by the international indigenous rights regime that has arisen out of over 80 years of indigenous visioning, advocacy and political negotiation.

Working toward the harmonization of UNDRIP and domestic law would serve to recognize Aboriginal self-determination and advance productive, mutually beneficial business partnerships. Sustainable development practices grounded in an international indigenous rights framework, such as UNDRIP, will promote the co-generation and redistribution of wealth, addressing, in part, the unacceptable gaps between Aboriginal peoples and settler populations. The most recent SCC ruling provides not only the incentive to develop and exercise the appropriate international protocols and tools, but the necessity to apply section 35, up to and perhaps including veto power, within the resource extractive industries, with an understanding of the state's responsibility to address the public good while preserving a traditional land base for future generations of indigenous peoples.

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# INDIGENOUS HEALTH GOVERNANCE AND UNDRIP

Bonita Beatty

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The preferred model for indigenous health governance in Canada is community based. This approach builds capacity and efficiency, and maximizes accessibility and responsiveness (Webster 2009; Beatty 2006). It is validated by recent changes in international indigenous law. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has emerged as an influential global political and policy instrument in support of indigenous health governance in Canada. UNDRIP makes nation-state governments more accountable for their actions toward honouring indigenous rights and treaties. The declaration establishes an international standard for supporting the human rights of indigenous peoples, as well as their right to self-determination in all areas, including health (United Nations 2009). Under the agreement, which it signed in 2010, Canada is obligated to uphold both individual and collective health rights of indigenous peoples, empowering them to build and maintain their own health institutions and systems toward improving their well-being (United Nations 2009, 156).

UN instruments, such as UNDRIP, may help further health governance rights for indigenous communities in Canada, even if the agreement does not have enforcing powers. While UNDRIP's support for indigenous autonomy is evident, it is not clear how it translates into implementation and appropriate changes to official government policies and actions. The Canadian government's poor track record in implementing treaties with First Nations has made some skeptical toward the practical utility of UNDRIP. It could, potentially, set unrealistic expectations, including the idea that the United Nations can somehow "gift" indigenous peoples with rights, when in fact Aboriginal rights are collective and inherently flow from customary rights (Champagne 2013; Kulchyski 2013). In other words, the

declaration is not a magic instrument that can somehow correct all the wrongs against indigenous peoples.

Although the implementation of UNDRIP cannot be guaranteed, it does create a "moral high ground" (Champagne 2013), a "starting point for a relationship" (Assembly of First Nations 2013a) and a "framework for action" (Joffe 2013). It is a tool, not a panacea. The declaration can help by facilitating international network collaboration and information sharing to influence governments, policy makers and health providers. Three methods of facilitation are profiled here. UNDRIP can:

- inform broader public policy and engage indigenous peoples by helping to give a public profile to priority health areas from an international political level;
- generate ideas and innovation through knowledge collaboration and comparative dialogue on indigenous health governance; and
- facilitate forums to help advocate for strategic measures and resources to support community-based health systems.

UNDRIP can facilitate indigenous aspirations, but can never take the place of Canada's Constitutional and pre-Confederation treaty obligations toward indigenous peoples.

Indigenous engagement at international policy forums and special conventions can be informative and educational for federal, provincial and indigenous policy makers. The United Nations Permanent Forum on Indigenous Issues (UNPFII) that meets annually is an example. The UNPFII advises the UN Social and Economic Council on many



Chief Wilton Littlechild, Advisor to the Secretariat of the UNPFII, addresses the press conference on the World Conference on Indigenous Peoples on September 22, 2014. UN Photo/Amanda Voisard.

social and economic indigenous issues, including health (Department of Economic and Social Affairs 2013). The Federation of Saskatchewan Indian Nations and certainly the Assembly of First Nations and other indigenous groups have been active in UNPFII meetings for some time. Their participation clearly supports UNPFII's intent, even though they may have some reservations on any timely implementation (Assembly of First Nations 2013b).

Clearly, effective profiling of health priorities at the various decision-making levels requires good working communication and knowledge-transference capacities among key players in the health networks. They must be able to work together and have sufficient authority to make their decisions stick. The lack of intergovernmental coordination and absence of harmonizing policies across federal and provincial governments have made First Nations particularly vulnerable with respect to poor health and communicable diseases, including pandemics (Webster 2009; Beatty 2006). Good working linkages are required between governments and their health systems at all levels so they can activate quickly when needed, particularly against high-risk health threats. A good example of this link in action was the global response to the H1N1 flu pandemic in 2009 (Public Health Agency of Canada 2013). The World Health Organization and UN member countries rapidly responded to the global health threat through strategic planning, public education, announcements and national vaccination campaigns. Similarly, the organized and collaborative efforts across health jurisdictions in Canada reached the individual level through community-based health agency efforts. Information blitzes and planning meetings occurred across Canada, in large cities and small northern indigenous communities. While rapid responses of this nature are generally triggered by potential global health threats and not daily health challenges, they illustrate that there is

sufficient infrastructure across governments and health systems that, if called upon, can be effective and timely. Political will, engagement and organized efforts are crucial elements for working toward workable collective action. It is also important to note that access to information through global communications, such as the Internet, is also becoming better utilized — even by those living in remote northern communities, making them better informed about health trends and other issues (Beatty et al. 2013).

Generating and supporting innovation in indigenous health governance and delivery is an emerging area of research interest. Solutions to address multijurisdictional challenges and complex health needs are being actively pursued. It is crucial to develop timely research on indigenous health developments and innovative local practices, both from a practical and scholarly basis. There is ample evidence suggesting that the more innovative models come from the community level, where health programs and services meet human need in a more direct responsive fashion (Beatty 2006; Lavoie, Forget and O'Neil 2007). The more direct the investment of resources into front-line health care, the better the accessibility and responsiveness of the health system to the people who need it. Often missing at the local levels, however, are capacity resources and the time required to explore innovative ideas from outside the region and country. The potential exchange relationship between local and global health knowledge can be very valuable because, if managed properly, it can better inform health policy and program developments at all levels. A frequent policy error is assuming that the “latest and greatest” health governance model is going to fit everywhere. This is especially trying when it has not stood the test of time and experience. There is no one “perfect model.” Single tier, self-governing health authorities involving provincial governments, such as the British Columbia First Nations Authority model (a province-wide entity), are not favoured by First Nations in most prairie provinces because of perceived threats to their treaty relationship with the federal government. And while centralized regimes can create positive economies of scale, “forcing a fit” can also cause logistical policy and administrative problems that could result in service gaps, inhibit community innovation and capacity building, and marginalize the smaller and more isolated communities (Graham 2003; Beatty 2006). Without local capacity building, programs and services cannot mature effectively, resulting in crisis management and inefficient administration.

The practice of advocating at provincial, national and international levels for improved community-based health systems is not new to indigenous peoples in Canada. The treaties are an example. Federal responsibility over First Nations health is broadly identified in the medicine chest clause of Treaty Six (1876), even though the federal

government rarely acknowledges Aboriginal and treaty rights in health funding agreements, preferring to address them as policy positions (Boyer 2003). While the scope of federal responsibility has been a matter of ongoing debate between federal and provincial governments, First Nations interpret the provision to mean comprehensive medical services, the full “basket” or, in Cree, “mewut” (Cardinal and Hildebrandt 2000). Further, First Nations hold that the section 35 Aboriginal and treaty rights in the Canadian Constitution include health rights (Boyer 2003). At the time of treaty negotiations, the elders and leaders were worried about the future of their descendants following European colonization, which devastated Aboriginal communities and traditional ways of life.

Epidemics (such as tuberculosis), poverty and poor health were a problem then and remain a concern today. Issues of inequitable funding, lack of access, inadequate healthcare, problems with national health insurance coverage, insufficient Aboriginal engagement in planning, varying capacity issues across communities and inadequate front-line and community public health education are some of the health issues that plague indigenous communities in Canada (Lavoie, Forget and O’Neil 2007; Beatty 2006; King, Smith and Gracey 2009). Self-determination in health is viewed as the way forward in improving the health of indigenous peoples. Enabling policy instruments, however, such as Federal-First Nation and Inuit Health Transfer Agreements are limited in that they largely provide for self-administration of certain health programs and services rather than self-government arrangements. Nonetheless, these have provided valuable experiential governance experience for First Nations health authorities at the community level. While First Nations health agencies struggle with funding inequities compared to their provincial counterparts, there has been ample evidence, since the inception of health transfer arrangements in 1989, that indigenous community-based health systems are a superior way of improving healthcare in indigenous communities (Beatty 2006; Lavoie, Forget and O’Neil 2007).

## INDIGENOUS POLITICAL ACTIVISM AND INTERNATIONAL COLLABORATION

The League of Indians of Canada, formed in 1919, provides an early example of national indigenous political organizing in Canada around issues that remain relevant today, such as treaty and land rights; hunting, fishing and trapping rights; and education and language rights, as well as the need to better the generally poor economic and health conditions on Indian reserves. Other political organizations, including the current Assembly of First Nations, benefit from the many local innovators, including veterans of both world wars and other indigenous community activists, who tenaciously lobbied governments to not only address their outstanding treaty

obligations with First Nations, but also the basic human rights of all indigenous peoples in Canada (Beatty 2006). Veterans returning home became influential advocates for their people after seeing the continuing poverty and after they themselves were denied benefits given to other soldiers. Most indigenous activism has been culturally rooted in addressing the needs of one’s family, community and future generations. Well-being is broadly perceived as being more than physical health or the absence of disease; it involves a more comprehensive view of life, with the idea that all is interconnected. Wellness has to do with balancing the physical, emotional, mental and spiritual elements of life (King, Smith and Gracey 2009; Beatty 2006). From the start, treaties were concerned with providing a lasting legacy of land and resources for the use and benefit of “the future generations” (Cardinal and Hildebrandt 2000). In retrospect, this was both prophetic and practical economic foresight. The development of natural resources, which sustained Canadian development for many years, also sadly marginalized indigenous communities to the point of poverty, a situation indigenous peoples continuously strive to change.

Things are slowly improving. Through the leadership and organizing efforts of the early indigenous activists and community leaders, indigenous peoples are not the passive citizens often depicted in political analyses that measure participation through the lens of federal and provincial voting trends (Beatty et al. 2013). In the northern communities, indigenous peoples are highly politically engaged in local elections, but appear more strategic in provincial and federal politics. They have good civic participation in community events and still engage in traditional livelihood pursuits (ibid.). Nonetheless, past legislative and economic injustices through government policies and regulations, such as residential schools, have taken a negative toll in their communities. It is likely that it will take a few more generations for indigenous health and well-being to noticeably improve. The demographic profile of the majority of indigenous peoples in Canada has often been likened to conditions facing third world countries. The struggle to improve local health conditions is truly an uphill battle for indigenous governments and health agencies. In 2013, former UN Special Rapporteur on the Rights of Indigenous Peoples James Anaya visited Canada to assess the quality of life of Aboriginal Canadians. His visit made dramatic headlines, highlighting the crisis conditions in Canada. In a *Maclean’s* article, Anaya is quoted as stating: “The well-being gap between aboriginal and non-aboriginal people in Canada has not narrowed over the last several years, treaty and aboriginals claims remain persistently unresolved, and overall there appear to be high levels of distrust among aboriginal peoples toward government at both the federal and provincial levels” (Taylor-Vaisey 2013).

Anaya highlighted the need for meaningful participation by indigenous peoples on all matters pertaining to their rights and interests. This message is not new and has been a consistent theme in indigenous politics in Canada. It helps to have influential people such as the UN Special Rapporteur, and political organizations such as the Assembly of First Nations, profile indigenous issues at the national and international levels. Unfortunately, “meaningful participation” is also an anomalous phrase that can be interpreted in ways that fall far short of the expectations and understandings of indigenous peoples. Nonetheless, the policy influence of the UN declaration provides important guiding principles and frameworks that make indigenous issues harder to ignore. At the provincial level, political organizations such as the Federation of Saskatchewan Indian Nations formally endorsed UNDRIP in 2008, focusing on those elements relating to the implementation of inherent and treaty Rights (Federation of Saskatchewan Indian Nations 2013).

As indigenous peoples, in particular First Nations in Canada, continue to administer more of their own health services under various funding arrangements, emerging models of health care delivery and administration are being developed. Most First Nations set up health departments within their local governments. Some choose partial program integration in regional First Nation entities. Increasingly, many are incorporating health institutions, governed by health boards, under federal or provincial legislation (Graham and Bruhn 2009; Beatty 2006). While health institutional developments fall short of what indigenous peoples may call self-government, taking over health governance and service delivery systems has provided valuable experiential learning, training and capacity building in the communities, where providers are better positioned to work in meaningful partnerships with the larger health systems (Beatty 2006). Unfortunately, most decision makers are located far away from community health systems and have limited contact with the realities faced by health providers, both indigenous and non-indigenous. In a recent study on Aboriginal political engagement, there was widespread sentiment among survey responders in isolated communities in northern Saskatchewan that too many decisions affecting communities were being made in the south (Beatty et al. 2013). Physical proximity may be one factor for limited influence in centralized government policy making, but there are obviously others, including procedural and jurisdictional access issues. Inability to influence government policies made without their consultation or knowledge by government officials has always been problematic for indigenous peoples. Engagement at the health policy level, especially at the national and provincial government levels, remains largely advisory if it exists at all, with little opportunity for indigenous peoples to engage in decision making. As in most instances where governments are concerned, health policy making is political, usually

stemming from a political problem needing resolution and consultation (Graham and Bruhn 2009, 7). Unfortunately, few processes are in place to allow for meaningful joint consultation and resolution with indigenous peoples.

## CONCLUSION

In conclusion, the greatest potential impact of UNDRIP at the community level has to do with providing access to the world stage through annual forums and other means. The right to health is both a fundamental human and indigenous right. UNDRIP suggests indigenous health governance is key for facilitating improved health status among indigenous peoples in Canada, in particular for First Nations in rural and northern reserve areas where issues relating to access to health services are most evident (Beatty 2006). The organizations and networking that formed during the 2009 H1N1 flu pandemic planning offer good ideas for focused engagement in targeted areas such as indigenous health. Working dialogues at the national and provincial levels are necessary. The Assembly of First Nations has been advocating for the Canadian government to engage in national dialogues with indigenous peoples toward implementing UNDRIP (Assembly of First Nations 2012), and further studies toward the development of an international mechanism by which to implement UNDRIP have also been recommended (Assembly of First Nations 2013a). It is increasingly clear that meaningful participation or engagement by indigenous peoples is crucial in working toward the implementation of the declaration.

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# BENEFIT SHARING AND THE MOBILIZATION OF ILO CONVENTION 169

Gonzalo Bustamante and Thibault Martin

## INTRODUCTION

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and International Labour Organization (ILO) Convention 169 establish the right of free, prior and informed consent (FPIC) for Aboriginal people and assert that they must participate in the benefits of the exploitation of their lands by extractive industries. In Latin America in recent years, Aboriginal peoples and other actors have focused on consultation and FPIC rights, while in Canada, experiences and legislation in the last 20 years have been focused on “benefit-sharing” approaches.

The aim of this paper is to analyze and discuss — from a human rights approach — the existing literature on benefit-sharing experiences, mainly in Canada but also in other countries. It is hoped this discussion will contribute to the debate on the governance of resource extraction in Aboriginal territories.

## BENEFIT SHARING IN UNDRIP AND ILO CONVENTION 169

Following UNDRIP and ILO Convention 169 recognition of the Aboriginal right to FPIC in Latin America, the ILO convention has received a lot of the attention due to the fact that it is a legally binding instrument that most of the countries in Latin America have signed. Even though Canada did not sign ILO Convention 169 and hesitated in endorsing UNDRIP, its Supreme Court has established that the Crown has a duty to provide consultation and

accommodation whenever a governmental initiative might affect Aboriginal rights (Newman 2014).

However, both UNDRIP and ILO Convention 169 also recognize that in the case of resources extraction, Aboriginal peoples also have the right to what the World Bank calls “benefit sharing” (Égré 2007). UNDRIP establishes that Aboriginal peoples have the right to obtain “just, fair and equitable compensation” (art. 10, 28, 32) and to mitigation in the case of adverse environmental, economic, social, cultural or spiritual impact (art. 32). In the same spirit, ILO Convention 169 recognizes the right of Aboriginal peoples to “wherever possible participate in the benefits of such (sub-surface or mineral resource extraction) activities, and [to]...receive fair compensation for any damages” (art. 15). However, the recognition of these benefit-sharing rights received less attention from the different actors involved in resources extraction than the right to FPIC.

## THE IMPLEMENTATION OF BENEFIT SHARING: A REVIEW OF THE LITERATURE

Benefit sharing refers to any case where Aboriginal or local communities receive any form of direct compensation for the damages caused by the extraction of natural resources carried out on or near their territories, and where they participate directly in any form of the benefits gained from these activities. The existing literature identifies several forms of benefit sharing: the most common are “impact and benefit agreements” but it also includes

“community development agreements,” “agreements protocols,” “participation agreements,” “memorandum of understanding,” “surface lease agreements” and others.

In Canada, the first experience of benefit sharing can be found in the James Bay and Northern Quebec Agreement (JBNQA) in the mid-1970s, but it began to be used more systematically in the 1990s in the mining operations sector,<sup>1</sup> and in recent years has expanded to hydro development and tar sand projects.

Most of the existing literature focuses on the issue of whether or not a legal framework is needed, as well as on the contents of a benefit-sharing agreement, how the process is conducted, the role of the state and the nature of the outcomes for Aboriginal communities.

In Canada, the most common type of benefit-sharing agreement is negotiated outside of any legal framework. It is thus a voluntary agreement between two private actors. The content of this agreement can be anything the extractive industries and Aboriginal communities agree to include.<sup>2</sup> The benefit-sharing agreement is reached by the way of a long-term relationship that is supposed to be based on trust, although in many cases Aboriginal communities don't have the legal means to prevent the project from going ahead, which may somehow incline them to negotiate an agreement. They take part in the negotiations since they can obtain some short-term positive outcomes that will help support community development. The negotiating process also allows them to voice their concerns in terms of environmental impacts. Long-term outcomes are not always clear; however, the JBNQA, which opened the way for this type of agreement in Canada, is generally considered positive.<sup>3</sup>

The main incentive for extractive industries to negotiate benefit-sharing agreements is to gain a “social licence.” Reducing uncertainty is another incentive, since investors do not have to fear major protests from Aboriginal communities affected by the project once they are participating in it. As the traditional mining and hydro development regimes are no longer socially accepted, benefit-sharing experiences represent a

broader participation of Aboriginal communities in the governance of the extraction of natural resources in their territories. Allowing the affected Aboriginal communities to participate in the benefits and in the decision making regarding compensation for any form of damage is a way to make this type of project politically acceptable (Fidler and Hitch 2007). Nevertheless, in Canada — even though the Supreme Court stated that consultation is needed and even if communities participate directly within negotiations — benefit-sharing experiences do not include the crucial issue of whether the project should be carried out or not, and more often there are no discussions about consent and in several cases consultation occurs outside any processes defined by the provincial government that have the jurisdiction on resource extraction. Thus, in some ways, this approach is premised on the assumption of the legitimacy of resource extraction on Aboriginal land. What is discussed, therefore, is what the communities are going to receive in exchange for access to their lands, rather than whether or not they consent to the extraction of resources from their lands.

In sum, in the Canadian context, the benefit-sharing approach appears to be a means to compensate for the lack of participation of Aboriginal peoples in the decisions regarding the extraction of natural resources in their territories, while for industries it is a way to gain a “social licence” and reduce uncertainty. The current right to FPIC of the international legislation and the current right to consultation and accommodation of the Canadian legislation are intended to increase the participation of Aboriginal peoples within the governance of extractive projects.



Drilling rig working in a northern Canadian forest. iStock.

1 Up until 2012, some 182 different forms of benefit-sharing agreements have been signed in Canada (Natural Resources Canada 2013).

2 Égré (2007) classifies two main benefit-sharing contents: monetary and non-monetary agreements. Although the agreements can include social, cultural, environmental and economic issues, Knotsch, Siebenmorge and Bradshaw (2010) criticize that they focus only on economical issues.

3 Interestingly, there are two different opinions from an indigenous perspective: Weitzner (2006) shows a critical opinion from community representatives of Dene First Nation, for whom the agreements are less than expected, and the other from Cree people of northern Quebec for whom the agreement represents a step forward toward a “nation-to-nation” relationship where they succeed in obtaining more political autonomy (Saganash, 2008).

## CONCLUSION

In the Canadian context, these benefit-sharing experiences represent a “pragmatic” approach in order to include the concerns of Aboriginal communities, with the potential to contribute to community development. However, they also have limitations: the lack of a clear legal framework, the absence of governmental implication in the process and the unequal power between Aboriginal communities and extractive industries during negotiations. In addition, the benefit-sharing approach assumes some “inevitability” that implies that Aboriginal communities cannot oppose the project.

It is proposed that, using the norms included in UNDRIP and ILO 169 Convention, a more comprehensive governance framework should include an interrelation of consultation and consent, and that negotiations about benefit sharing should only take place after consent is given. This implies a governance of resources extraction that redefines the relationships between current actors. This renewed governance might reduce conflicts and uncertainty, and give more legitimacy to these projects and more power to Aboriginal communities.

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# UNDRIP AND THE 2009 BOLIVIAN CONSTITUTION: LESSONS FOR CANADA

Roberta Rice

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## INTRODUCTION

Bolivia was the first country in the world to incorporate the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into domestic law and later its constitution (Albó 2010; Schilling-Vacaflor and Kuppe 2012). The new constitution goes further than any previous legislation in Bolivia, if not globally, in securing rights and freedoms for the nation's indigenous peoples. To what extent has UNDRIP become entrenched in the country's governing structures? Are indigenous rights activists engaging with the declaration in their struggles? What lessons can be drawn from the Bolivian experience? In light of these questions, the paper examines the Bolivian constitutional process, with particular attention to the impact of international forces on the outcome, and assesses the merits and limits of the new constitution in advancing indigenous self-determination in the country. The right to self-determination is at the heart of UNDRIP (Anaya 2009). The challenge for indigenous peoples in Bolivia and beyond is to operationalize this right. This paper argues that while the UNDRIP-inspired Bolivian Constitution has been an effective tool used in indigenous rights campaigns, it has only just begun to transform indigenous-state relations in the country. The conflict over the government's proposed highway project through the Isiboro-Sécure Indigenous Territory and National Park (TIPNIS) is an important test of the state's internalization of indigenous rights norms. The paper finds that by framing their claims in the declaration's terms, indigenous groups in TIPNIS may have succeeded in narrowing the gap between legislation

and practice. The Bolivian case highlights the importance of international agreements and activism to encourage dialogue between the state and indigenous groups on such matters as free, prior and informed consent.

## PLURINATIONAL CONSTITUTIONALISM

Bolivia's first indigenous president, Evo Morales (2006–) of the Movement Toward Socialism (MAS) party, has made indigenous rights the cornerstone of his administration. His government set out to redefine state-society relations to promote a more inclusive polity. In one of his first official acts, President Morales disbanded the Ministry of Indigenous and First Peoples Affairs under the logic that indigenous peoples' demands are to be incorporated into all facets of government, rather than addressed separately (Gómez 2006). The move that has incited the most heated debates and confrontations in the country so far was the Constituent Assembly to redraft the country's constitution. In addition to ensuring a stronger role for the state in the economy, the new constitution provides for a whole host of rights for the nation's indigenous peoples.<sup>1</sup> It combines elements of representative democracy with the recognition

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1 Indigenous peoples constitute a slight majority of Bolivia's total population. The Aymara and Quechua are the principal indigenous peoples in the highlands. The Bolivian lowlands are home to over 30 ethnic groups, including the Guaraní, Chiquitano and Moxeño peoples. Out of consideration for the country's diverse regional identities, the 2009 constitution employs the hybrid term "first peoples indigenous peasants." The term is inclusive of the first peoples of the highland plateau, the indigenous peasants of the highland valley region and the indigenous peoples of the lowlands.

of traditional authority structures (Domingo 2009). In what proved to be a major milestone for the indigenous movement, the new constitution officially renamed the country the Plurinational State of Bolivia. Plurinationality challenges previous governmental attempts to divide indigenous peoples, classify them in ways that obscure their ethnicity, discount them from national policy debates and denigrate them as obstacles to development. It entails doing government differently. A plurinational state recognizes the plurality of cultural, legal and political systems that exist within a territory and places them on an equal footing (Becker 2011; Walsh 2009). It replaces the unilateral system of domination with bilateral relations of mutual respect and consideration. In short, plurinationality posits a new set of indigenous-state relations.

The incorporation of indigenous peoples' rights in Bolivia was strongly influenced by the organizational and mobilizational efforts of indigenous groups in the country over the past two decades, as well as positive developments in international human rights law. The adoption of UNDRIP by the United Nations General Assembly in September 2007, the exact moment when Bolivia's Constituent Assembly was completing a draft of the constitution, greatly facilitated President Morales' proposed reforms (Clavero 2009, 350). Bolivian Law 3760 of November 7, 2007 transposed the declaration into domestic law.<sup>2</sup> On December 9, 2007, Bolivia's Constituent Assembly approved the new constitution. In the national referendum of January 2009, the constitution passed with just over 60 percent of the vote. The constitutional text echoes UNDRIP in a number of key areas. For instance, article 4 of UNDRIP states: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs" (United Nations 2008). Article 2 of the 2009 Bolivian constitution guarantees indigenous peoples right to self-determination, "which consists in the right to autonomy, self-government, to their culture, the recognition of their institutions and the consolidation of their territorial entities" (Republic of Bolivia 2009). The new constitution also recognizes all 36 indigenous languages as official languages of the state (article 5) and guarantees the proportional representation of indigenous peoples in the national legislature (article 147). The rights enshrined in the 2009 Bolivian Constitution provide a framework for the realization of self-determination, within certain limits.



Secretary-General Ban Ki-moon (right) meets with Evo Morales, president of Bolivia, in September 2008. UN Photo/Evan Schneider.

## THE LIMITS TO SELF-DETERMINATION

Indigenous autonomies are an important means for indigenous peoples to exercise the right to self-determination. The Bolivian Constitution provides for multiple ways to establish indigenous autonomies. Under current provisions, existing indigenous territories as well as municipalities with a substantial indigenous presence may convert themselves into self-governing entities. These autonomous areas would see the restoration of traditional forms of governance that would assume the basic rights and responsibilities of municipalities, in essence subverting indigenous governance to the logic of the state. While the indigenous autonomies would coordinate with departmental governments, they would not be directly subordinate to them (Centro de Investigación y Promoción del Campesinado 2009). The creation of indigenous autonomies has been fraught with controversy in Bolivia. The governing MAS party draws much of its support from the highland valley indigenous peasant unions, which back a strong interventionist and redistributive state. During the Constituent Assembly, indigenous lowland organizations as well as indigenous groups from the highland plateau had to convince their peasant allies of the importance of establishing indigenous autonomies (Schilling-Vacaflor and Kuppe 2012, 354). Meanwhile, opposition groups in the country were concerned that the construction of a plurinational state with multiple indigenous autonomies would threaten national unity and governability. Indigenous autonomies do not pose a threat to national sovereignty or territorial integrity. A central limitation of the current configuration is that the legal constitution of indigenous autonomies would only apply to indigenous groups with a rural land base, which is less than half of Bolivia's indigenous population (Albó 2010, 356).

<sup>2</sup> International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples was also accorded the status of a national law in Bolivia (Law 1257 of July 11, 1991).

The constitutional provision that all non-renewable resources remain under the control of the state also places firm limits on the right to self-determination. According to UNDRIP, article 32.2, states must consult and cooperate in good faith with indigenous peoples in order to obtain their free and informed consent prior to the approval of any projects that may affect their lands or territories. Bolivia's constitution (article 30.15) does not establish the right of indigenous peoples to free, prior and informed *consent*, but merely to prior *consultation* concerning planned measures affecting them, such as mining and oil or gas exploration (Schilling-Vacaflor and Kuppe 2012, 360; Wolff 2012, 193). In keeping with UNDRIP, the constitution does stipulate that the prior consultation process by the state must be conducted in good faith and in a concerted fashion, and should respect local indigenous norms and procedures (article 352). Under the new rules, the Bolivian state has the obligation to consult indigenous groups but indigenous groups cannot reject proposed developments on their territories. As it stands, the constitution does not fully change power relations between the state and indigenous peoples. On the ground, however, indigenous groups are challenging the terms of the constitution through their protest campaigns.

## MAKING THE DECLARATION WORK IN TIPNIS

There is evidence that indigenous rights activists in Bolivia have begun to wield the declaration in their struggles with the state. A high level of distrust and hostility between the MAS and lowland indigenous groups has developed over the government's proposed plan to build a highway through the TIPNIS in the department of Beni that would connect the central Andean highlands with the lowlands to the north. The residents cite the government's lack of prior consultation as stipulated in the new constitution and UNDRIP as their main concern (Andean Information Network 2011). The MAS maintains that the road is essential for national development. In August 2011, close to 1,000 indigenous demonstrators began a march from the city of Trinidad, Beni to the capital city of La Paz to protest the construction of the Villa Tunari-San Ignacio de Moxos highway. Morales blamed opposition leaders for instigating the protest. On September 25, 2011, the protesters were subdued by violent police action in the Yacumo region of Beni that left multiple people wounded. The police crackdown was ordered to prevent clashes between the protestors and highland indigenous and migrant communities that support the road project (Read 2011). The Bolivian defense and interior ministers resigned their posts over the incident. President Morales denied authorizing excessive police force against the protesters and promised a national dialogue on the issue.

In January 2012, a pro-road march led by migrant communities from the TIPNIS area breathed new life into

the highway project. On February 10, 2012, the government passed the Law of Prior Consultation (Law 222) to begin an arduous process of community consultations in TIPNIS to decide if the highway project should proceed. Between July 29 and December 7, 2012, the government reached out to all 69 resident communities. According to official data, 55 communities agreed to support the road, three opposed it, and 11 boycotted the process (*Los Tiempos* 2013). The Bolivian government considers the country's first experience with the prior consultation process to have been a success. For many activists, the consultation process lacked legitimacy. They balked at the government's effort to link support for the road with promises to deliver basic services and other community benefits and suggested that the outcome of the consultation was predetermined. Although the government achieved 80 percent support for the project, it did not achieve consensus within indigenous communities or gain the backing of the TIPNIS Subcentral, the main indigenous authority in the zone (Achtenberg 2012). To some observers, the government failed to conduct the consultation in good faith by including the votes of non-native indigenous groups, meaning recent migrants from the highlands, as a strategy to swamp the opposition vote (Picq 2012). On April 25, 2013, amid vows to impede the highway's construction by opposition groups, Morales suspended the project until further notice.

## CANADA: BUSINESS AS USUAL?

Canada's relationship with UNDRIP differs markedly from that of Bolivia. Although Canada was an active participant in the drafting of the declaration, it ultimately voted against its adoption, as did Australia, New Zealand and the United States. Canada's stated objections included the portions of the text pertaining to lands, territories and resources; free, prior and informed consent when used as a veto; self-government in the absence of negotiations; intellectual property; the military; and the balance between the rights and obligations of indigenous peoples and the state.<sup>3</sup> According to the Government of Canada, the declaration could be interpreted as being inconsistent with the Canadian Constitution Act of 1982, the Canadian Charter of Rights and Freedoms and previous decisions of the Supreme Court of Canada that inform Aboriginal-state relations in the country.<sup>4</sup> For example, the federal government has historically signed treaties with Aboriginal peoples to secure land for settlement. The treaties contained an extinguishment clause under which Aboriginal peoples were required to relinquish all existing and possibly existing land rights to vast territories in exchange for reserve lands, goods and services (Maaka and Fleras 2005). A central concern of the federal

3 See Government of Canada (2008).

4 See "Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples" at [www.aadnc-aandc.gc.ca/eng/1100100014078/1100100014079](http://www.aadnc-aandc.gc.ca/eng/1100100014078/1100100014079).

government was that the provisions on lands, territories and resources contained in UNDRIP could broadly be interpreted to support indigenous land claims, even where such rights were legally ceded through treaty. Throughout the negotiation process, Canada consistently sought a declaration that would fit within its existing constitutional and legal framework.

On November 12, 2010, the Government of Canada reversed its decision and formally endorsed UNDRIP. In its statement of support, the government indicated that its endorsement offered an opportunity to improve relations with Aboriginal peoples in Canada, as well as support indigenous rights abroad. It also emphasized the non-binding nature of the document and its confidence that “Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.”<sup>5</sup> The Minister of Aboriginal Affairs, Bernard Valcourt, in an interview with the media, reiterated the government’s message that UNDRIP does not change Canadian laws or affect its current policies and programs regarding Aboriginal matters. Specifically, he defended the government’s constitutional obligation to consult and, where appropriate, accommodate Aboriginal interests against the concept of free, prior and informed consent as outlined in the declaration (Woods 2013). Nevertheless, if recent developments in Bolivia surrounding the debate over prior consultation are any indication, UNDRIP may be used domestically and internationally by indigenous rights activists in Canada to urge the government to take transformative action.

## CONCLUSION

The passage of the 2009 Bolivian Constitution marked a critical turn in indigenous-state relations in the country. Being the first country to implement UNDRIP transformed Bolivia into a global leader of indigenous rights. This historic accomplishment has created an unprecedented opportunity to address the long-standing demands of the nation’s indigenous peoples. The new constitution provides indigenous rights activists with an important instrument with which to force the Bolivian government into compliance with UNDRIP. The TIPNIS conflict revealed the serious gaps between legislation and practice that still exist in Bolivia.

The experiences of Bolivia indicate that while the latest wave of constitutional and legal recognition of indigenous rights represents a rupture with previous models of indigenous-state relations, it is not fully entrenched in governing structures. The case also demonstrated that framing issues in the legal language of the declaration

encouraged the government to begin to engage with it. As Claire Charters (2009) suggests, this is the first step in bringing about positive change in the everyday lives of indigenous peoples. It is also a reminder of the importance of the internationalization of indigenous rights in building a framework for indigenous-state relations based on equality, partnership, trust and mutual respect.

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# OUR WAYS WILL CONTINUE ON: INDIGENOUS APPROACHES TO SUSTAINABILITY

Jeff Corntassel

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## INTRODUCTION

As the 2015 deadline for achieving the Millennium Development Goals (MDGs) nears and with the Second International Decade of the World's Indigenous People coming to a close, indigenous peoples are reasserting their voices and visions for what a sustainable future entails. The MDGs are eight overarching goals designed to eradicate poverty and inequality worldwide, including ensuring sustainable development (Goal 7). However, MDG monitoring and implementation processes have largely excluded indigenous nations and peoples,<sup>1</sup> leading to profound misunderstandings regarding indigenous sustainable practices and place-based relationships. For example, in the area of inequality and sustainability, researchers noted the compartmentalization of the MDGs' sustainable development goals, which fail to "capture the causes and consequences of inequality for Indigenous peoples" (International Work Group on Indigenous Affairs [IWGIA] and Tebtebba 2014, 3).

Given the major shortcomings of the MDGs in promoting indigenous health, well-being and sustainability, it is clear that state-centric forums and a narrow rights-based approach have serious limitations in terms of recognizing and bolstering the self-determining authority of indigenous

nations. And the fact that over 80 percent of the world's biodiversity thrives on indigenous homelands is not a coincidence (United Nations Development Programme 2011, 54). When indigenous peoples exercise autonomy on their homelands, biodiversity tends to thrive; however, in states where a settler presence dominates indigenous homelands, resource extraction via deforestation, desertification, pollution and freshwater depletion are prevalent.

Increasingly, researchers recognize that the same forces that threaten biodiversity also threaten indigenous peoples' long-standing relationships with their homelands and the health and well-being of Native nations. However, amidst calls for a "green economy" and carbon trading schemes such as Reducing Emissions from Deforestation and Forest Degradation (REDD), it is evident that there are competing conceptions of what sustainability entails. For example, in 2013, the Vancouver-based mining company Goldcorp donated CDN\$500,000 to the University of Victoria's School of Business in order to fund the Centre for Social and Sustainable Innovation (Wilson 2013). Despite Goldcorp's claims of "sustainable prosperity," its mining operations in the Americas are well known for their extensive human rights abuses and environmental destruction. For example, operations at the Marlin Mine in Guatemala, have led to water contamination and there have been assassination attempts against Mayans who have protested the mine (Basu and Hu 2010; Paley and Saunders 2009). In 2011, Goldcorp was removed from the Dow Jones Sustainability Index because its "operations in Guatemala and Honduras are not sustainable for communities, the environment, nor

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<sup>1</sup> See, for example, UN Permanent Forum on Indigenous Issues (UNPFII) (2006) as well as subsequent desk reviews of *MDG Reports and Indigenous Peoples* available at <http://undesadspd.org/IndigenousPeoples/CrossThematicIssues/MDGs.aspx>. See also Vinding (2006).

ultimately for responsible investors” (Moore and Kistler 2011).

What, then, accounts for such divergent perspectives and practices when invoking the term sustainability? English scholar Leerom Medovoi (2010, 130) found that in addition to the often used 1987 Brundtland Report definition of sustainability as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (World Commission on Environment and Development 1987), there is a darker side to the term. Sustaining something may also mean “to endure or withstand it,” such as sustaining an injury (Medovoi 2010, 131). From this perspective, another meaning for sustainability is “tolerance,” which can serve to “gauge the kind and amount of life that must not be killed now so that the process of surplus value extraction can continue indefinitely into the future” (ibid., 142).

As Medovoi points out, the term sustainability is rife with contradictions and, ultimately, indigenous languages are better suited to describing these complex community relationships. According to a conversation with Cherokee Elder Benny Smith, a Cherokee word that relates to sustainability is *nigayaiso’i*: “Even though we lose someone, the way that we live will continue on; these ways will continue on; the nation will persist.” Without respectful relationships to the land, water and natural world; resilience; systems of reciprocity; and humility, Indigenous lifeways cannot flourish.

Given the multiple meanings of sustainability, how has this term been operationalized within international legal instruments and indigenous forums? This paper will examine how sustainability has been portrayed by international legal instruments, such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and compare that with how sustainability has been conceptualized and practiced by indigenous nations, leaders and scholars.

## INDIGENOUS SUSTAINABILITY IN INTERNATIONAL LAW

The most comprehensive indigenous rights instrument in effect today is UNDRIP, which was drafted by indigenous activists, scholars and state representatives over three decades. In 2007, the declaration was adopted by the United Nations General Assembly with the support of a majority of member states (143 in favour and four against). Although Canada initially voted against the declaration (along with Australia, New Zealand and the United States), it has since reversed its position and formally endorsed

the declaration on November 12, 2010.<sup>2</sup> When endorsing the declaration, Canada stated unequivocally that it was “a non-legally binding document that does not reflect customary international law nor change Canadian laws” (Cultural Survival 2010). Several would disagree with the accuracy of Canada’s lukewarm endorsement of the declaration, including legal scholar S. James Anaya, who contends that the principles outlined in the declaration still have political and legal force as they “are simply derived from human rights principles of equality and self-determination that are deemed of universal application” (Anaya 2009, 184). In his role as UN Special Rapporteur on the Rights of Indigenous Peoples, Anaya (2014, 20) observed the following about Canada’s relationship to indigenous nations and peoples:

Canada faces a continuing crisis when it comes to the situation of indigenous peoples of the country. The well-being gap between aboriginal and non-aboriginal people in Canada has not narrowed over the last several years, treaty and aboriginal claims remain persistently unresolved, indigenous women and girls remain vulnerable to abuse, and overall there appear to be high levels of distrust among indigenous peoples towards government at both the federal and provincial levels.

Based on Anaya’s report, it is clear that questions of indigenous self-determination cannot be meaningfully discussed without also addressing the health, well-being and sustainability of community relationships. The above-mentioned “high levels of distrust” became more pronounced in September 2014 when the government of Canada was the only member state to object to the wording of the World Conference on Indigenous Peoples’ Outcome Document, stating that “Free, prior and informed consent, as it is considered in paragraphs 3 and 20 of the WCIP Outcome Document, could be interpreted as providing a veto to Aboriginal groups and in that regard, cannot be reconciled with Canadian law, as it exists.” (Permanent Mission of Canada to the United Nations, 2014). Given Canada’s unwillingness to support the declaration and the WCIP Outcome Document, indigenous leaders have questioned Canada’s commitment to deeper questions of indigenous self-determination and sustainability. Given the urgent need to address the health and well-being of indigenous nations, how has the declaration offered protections and enhancements of indigenous sustainable practices?

<sup>2</sup> For a full transcript of Canada’s formal endorsement, see Cultural Survival (2010). Australia, New Zealand and the United States have also since reversed their 2007 votes against UNDRIP and formally endorsed the document.



A wide view of the General Assembly Hall, as Secretary-General Ban Ki-moon addresses the opening of the high-level plenary meeting of the assembly known as the WCIP on September 22, 2014. UN Photo/Cia Pak.

While the declaration briefly mentions sustainability in the preamble — “Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment” (paragraph 11) — article 20 outlines some clearer guidelines relating to an indigenous right to subsistence:

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress. (ibid.)

When analyzing the language of the declaration and comparing it with previous drafts, Oglala Sioux Nation scholar Charmaine White Face (2013, 68) finds that part 2 of article 20 has been rewritten to seemingly deny “all the past actions that have deprived Indigenous Peoples ‘of their means of subsistence and development.’” The implications of these word changes are significant, as she points out: “In most cases, Indigenous Peoples have a bond with our means of subsistence in far more than the physical sense. When Indigenous Peoples are denied that bond, we cease to be who we were created to be” (ibid.) Subsistence, which entails spiritual, social and economic forms of everyday living on the land, is a fundamental aspect of sustainability. According to the late Seneca scholar John Mohawk (2006, 26), subsistence living is a “cultural, spiritual, social exchange that’s intended to go on for generations.” The language of article 20 overlooks

the spiritual aspects of indigenous relationships to the land and natural world, while also imposing narrow conceptions of history and place. Sustainability entails having an expanded world view and timeline premised on resilience and reciprocity.

Article 19 of the declaration, which focuses on the promotion of free, prior and informed consent when setting policies that may affect indigenous peoples, is also an important element of indigenous sustainability as indigenous peoples seek to represent themselves on their own terms in order to promote subsistence economies that strengthen communities first and foremost. However, as White Face (2013, 66) observes, the original language of this article allowed indigenous peoples to “participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.” The current language in article 19 takes away the right of indigenous peoples to devise their own legislation and cedes that authority to the state. This is reminiscent of Medovoi’s examination of sustainability as “tolerance” rather than promoting reciprocal relationships.

Article 25 further expounds on the right of indigenous peoples to “maintain and strengthen their distinctive spiritual (and material) relationship with the lands, territories, waters and coastal seas and other resources” (ibid.). Unfortunately, the words “and material” were deleted from the final version of the declaration, which not only “shows the total lack of understanding of indigenous spirituality” but also greatly diminishes the right “with the removal of this word” (ibid., 75).

Finally, article 29 deals with the right to the conservation (restoration) and protection of the environment. White Face finds that the deletion of the word “restoration” from the original text actually takes away accountability by states and other actors for their responsibilities to indigenous nations (ibid., 82). Additionally, the European language of conservation doesn’t necessarily line up with indigenous community notions of sustainability and ongoing relationships with the natural world (Altamirano-Jiménez 2013, 27, 215-16; Nadasdy 2005). While the declaration offers some important protections, there needs to be accountability and meaningful restoration for the ongoing environmental destruction that jeopardizes the sustainable relationships indigenous nations have practised for thousands of years, including land-based and water-based cultural practices such as gathering medicines, hunting, fishing and farming. This is one reason why an optional protocol for the declaration has been researched in order to address the need for a mechanism to implement the provisions of the declaration (UNPFII 2014).

Treaties in force have also begun to address the issue of indigenous sustainability. For example, International Labour Organization (ILO) Convention 169 describes dimensions of indigenous subsistence in article 23:

1. Handicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.

2. Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development. (ILO 1989)

However, the mandated powers in the above article are centred on the state (i.e., “tolerance”) rather than providing more community-centred tools for promoting indigenous sustainability. Furthermore, indigenous sustainability entails more than “traditional activities” — these are ever-changing and evolving spiritual relationships and reciprocal practices that are continuously renewed. Also, the process of free, prior and informed consent (article 19) is outlined much more clearly and forcefully in the declaration compared to ILO Convention 169. Finally, there are only 22 countries that have ratified the convention,<sup>3</sup> which limits its applicability and further justifies a need for putting an optional protocol in place (Canada, for example, has not ratified it).

One of the clearest and most forceful treaties on indigenous sustainability is likely the 1992 UN Convention on Biological Diversity (CBD), which addresses the protection of indigenous peoples’ cultural heritage (and was ratified by Canada). According to article 8(j) of the CBD:

Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity

and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices. (United Nations 1992)

Despite problematic wording, such as “traditional lifestyles,” which can relegate indigenous peoples’ sustainability practices to the past, the CBD obliges some 194 ratifying countries to respect indigenous land-based and water-based cultural practices, such as hunting, fishing and medicine gathering. Article 10 of the CBD addresses the protection and restoration of indigenous communities and sustainable use:

(c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements;

(d) Support local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced. (ibid.)

The CBD is significant in that it acknowledges the central role indigenous peoples play in the discourse on subsistence and sustainability. Other declarations, such as the 1992 Rio Declaration on Environment and Development, have further reaffirmed the critical role indigenous peoples play in the sustainability discourse:

Principle 22: Indigenous people...have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. (UN Conference on Environment and Development 1992)

In 2012, more than 500 indigenous peoples issued a follow-up to the 1992 Kari-Oca Declaration and the Indigenous

<sup>3</sup> The 22 countries that have ratified ILO Convention 169 are: Argentina (2000), Bolivia (1991), Brazil (2002), Central African Republic (2010), Chile (2008), Colombia (1991), Costa Rica (1993), Denmark (1996), Dominica (2002), Ecuador (1998), Fiji (1998), Guatemala (1996), Honduras (1995), Mexico (1990), Nepal (2007), the Netherlands (1998), Nicaragua (2010), Norway (1990), Paraguay (1993), Peru (1994), Spain (2007) and Venezuela (2002).

Peoples Earth Charter at the Rio+20 conference.<sup>4</sup> In the Kari-Oca II Declaration, indigenous peoples critiqued the destructive impacts of market-driven approaches to sustainability embodied by the so-called “green economies”:

We reject the false promises of sustainable development and solutions to climate change that only serve the dominant economic order. We reject REDD, REDD+ and other market-based solutions that focus on our forests, to continue the violation of our inherent rights to self-determination and right to our lands, territories, waters, and natural resources, and the Earth’s right to create and sustain life. (Indigenous Peoples Global Conference on Rio+20 and Mother Earth 2012)

Indigenous delegates at Kari-Oca also outlined a broader vision for sustainability:

We continue to inhabit and maintain the last remaining sustainable ecosystems and biodiversity hotspots in the world. We can contribute substantially to sustainable development but we believe that a holistic ecosystem framework for sustainable development should be promoted. This includes the integration of the human-rights based approach, ecosystem approach and culturally sensitive and knowledge-based approaches. (ibid.)

From the perspective of the indigenous participants of the Rio+20 conference, little progress has been made within the state system to promote indigenous sustainability practices. Instead, the language of sustainability as “tolerance” and “green-washing” have prevailed among state and corporate actors. Given the serious shortcomings of the MDGs, intergovernmental treaties and UNDRIP, it is important to consider some indigenous conceptualizations on sustainability that can be used to build a more “holistic ecosystem framework.”

4 Other indigenous declarations of note are the 2002 Kimberley Declaration ([www.iwgia.org/environment-and-development/sustainable-development/the-kimberley-declaration/424](http://www.iwgia.org/environment-and-development/sustainable-development/the-kimberley-declaration/424)), the 2003 Indigenous Peoples Kyoto Water Declaration ([www.waterculture.org/uploads/IPKyotoWaterDeclarationFINAL.pdf](http://www.waterculture.org/uploads/IPKyotoWaterDeclarationFINAL.pdf)), the 2011 *Manaus Declaration* ([www.iwgia.org/images/stories/sections/envir-and-devel/sust-development/docs/finalmanausdeclaration\\_eng%202.pdf](http://www.iwgia.org/images/stories/sections/envir-and-devel/sust-development/docs/finalmanausdeclaration_eng%202.pdf)) and the 2012 Declaration of Indigenous Peoples on Self-determination and Sustainability ([www.iwgia.org/images/stories/sections/envir-and-devel/sust-development/docs/final\\_declaration\\_on\\_selfdetermination\\_and\\_sustainability.pdf](http://www.iwgia.org/images/stories/sections/envir-and-devel/sust-development/docs/final_declaration_on_selfdetermination_and_sustainability.pdf)). Given the brevity of this paper, it was not possible to discuss these important documents.

## INDIGENOUS SUSTAINABILITY

Economist Ron Trosper, who is a citizen of the Confederated Salish and Kootenai Tribes, conducted research on the sustainable practices of the Nisga’a Nation along with other First Nations of the northwest coastal region. He found that several values, principles and practices undergird sustainable indigenous systems that have been thriving for over 2,000 years, such as proprietorship and governance systems that establish roles and responsibilities to the land/water, complex systems of reciprocity that were enforced publicly and resilience that can “withstand large shocks” (Trosper 2009, 14–23, 154–155).

Evaluations of sustainable practices should have a longer time frame in mind, such as a seven-generations model of planning and assessment (Wildcat 2009, 124). According to Euchee scholar Dan Wildcat (ibid., 124–125), we should base our understandings of sustainability on direct, experiential knowledge, and what he calls relationships in complex harmony.

There is also a spiritual aspect to sustainability that is overlooked in most policy-making discussions. Mohawk describes it as the “renewable quality — the sacredness of every living thing that connects human beings to the place they inhabit — is the single most liberating aspect of our environment” (Barreiro 2010, 58). These everyday acts of renewal are both an individual and community-driven process where “evolving indigenous livelihoods, food security, community governance, relationships to homelands and the natural world, and ceremonial life can be practiced today locally and regionally, thus enabling the transmission of these traditions and practices to future generations” (Corntassel 2008, 119; 2012). It ultimately is a process of giving back more than you take, which embodies an ethic of generosity and humility.

Finally, David Hall, a psychology scholar conducted interviews with 13 indigenous leaders from the “salmon nation” bioregions to assess their concepts and practices around sustainability. The results were published online, and revealed several dimensions to indigenous models of sustainability, including notions of home, humility, spirituality, cultural sustainability, reciprocity and respect. As Okanagan educator and activist Jeannette Armstrong, described it, “sustainability on one level means to be able to maintain and sustain the fullness of health that needs to be there for us to thrive, and for everything else to thrive” (quoted in Hall 2008).

How can indigenous conceptions of sustainability be translated into policy? Some possible future directions are offered in the next section.

## CONCLUSIONS

If we are to take sustainability seriously, more holistic models of restoration and environmental governance need to be adopted under the direction of indigenous nations and peoples. Related to this, the compartmentalization of sustainability in most international legal documents strips it of its full complexity and power. After all, culture is a key dimension of sustainability and needs to be recognized as such. This is why concepts such as “sustainable self-determination” can be useful ways to expand the discourse. Ultimately, indigenous sustainability is about nurturing and honoring the relationships that promote the health and well-being of communities and individuals.

Also, understanding more localized and regional indigenous approaches to sustainable practices, such as Trosper’s study of Nisga’a or Hall’s study on Salmon Nations, can yield more nuanced, gendered understandings of how reciprocity and resilience operate at ground level for indigenous women, men and youth. Indigenous-led gatherings, such as the Indigenous Peoples Global Conference on Rio+20 and Mother Earth (2012), can hold states and other global actors accountable while representing indigenous peoples on their own terms. There is also promise around accountability mechanisms within international legal instruments, such as the CBD, which is now being charged to further the 17 Sustainable Development Goals developed by the Open Working Group on Sustainable Development Goals within the UN General Assembly (Secretariat of the Convention on Biological Diversity 2014). Creative solutions, such as the Optional Protocol for the Declaration, can enhance the implementation mechanism of this comprehensive document.

The question becomes whose visions of sustainability will set the agenda post 2015 — those emphasizing “tolerance” or those advocating meaningful environmental sustainability grounded in reciprocity, respect and resilience? One thing is certain: our ways as indigenous peoples and nations will continue on.

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## CONTRIBUTORS

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**Bonita Beatty** is Graduate Chair at the International Centre for Governance and Development and assistant professor in the Department of Native Studies at the University of Saskatchewan. She is from Deschambault Lake, Saskatchewan and a member of the Peter Ballantyne Cree Nation. Her non-academic work reflects her academic interest in the areas of First Nation health management and administration, policy making, strategic planning, community development and training. She was a senior policy analyst for the provincial government in the Saskatchewan Indian and Metis Affairs Secretariat, director of community development and executive director of the Peter Ballantyne Cree Nation Health Services Inc., and executive director of the Health and Social Development Secretariat, Federation of Saskatchewan Indian Nations. In 2013, Bonita received the Provost's Outstanding Graduate Teaching Award in recognition of her leadership in developing the Master of Northern Governance and Development program as well as her strong and sustained commitment to ensuring the success of northern students.

**Yvonne Boyer** currently holds the Canada Research Chair in Aboriginal Health and Wellness and is associate professor of Native studies at Brandon University. She is a member of the Métis Nation of Saskatchewan and owns Boyer Law Office, where she specializes in providing holistic services that blend mainstream law with indigenous laws. With a background in nursing, she has more than 15 years of experience practising law and publishing extensively on the topics of Aboriginal health and how Aboriginal and treaty law intersects on the health of First Nations, Metis and Inuit. She is a member of the Law Society of Upper Canada and Law Society of Saskatchewan. Yvonne received her bachelor of laws from the University of Saskatchewan and master of laws and doctorate of laws from the University of Ottawa. In 2012, she completed a post-doctoral fellowship at the Indigenous People's Health Research Centre.

**Gonzalo Bustamante** is associate professor at the University of La Frontera, Chile, and lecturer and Ph.D. candidate in applied social sciences at Université du Québec en Outaouais, Canada. He is also research assistant to the Canada Research Chair on the Indigenous Governance of Territories, Thibault Martin, at Université du Québec en Outaouais. For the last 15 years, he has worked on indigenous issues in the south of Chile, as a volunteer adviser with indigenous organizations and a researcher on indigenous issues including education, health and rights, as well as local development. His current research topics are the governance of the extraction of natural resources on indigenous lands, indigenous rights on development issues, public policies on indigenous issues and indigenous local development issues. Gonzalo has published book chapters on indigenous and non-indigenous local development, indigenous childhood issues and community psychology, and scientific articles on community development and on the relationship between indigenous communities and environmental organizations on development issues.

**Ken Coates** is Canada Research Chair in Regional Innovation at the Johnson-Shoyama Graduate School of Public Policy. Raised in the Yukon, with a B.A. (history) from the University of British Columbia (UBC), M.A. (history) from Manitoba and Ph.D. (history) from UBC, Ken has worked at universities across Canada and in New Zealand. He was the founding vice-president (academic) of the University of Northern British Columbia and held administrative posts at the University of Waikato (New Zealand), the University of New Brunswick at Saint John, the University of Saskatchewan and the University of Waterloo. His co-authored work, *Arctic Front: Defending Canada in the Far North*, won the Donner Prize in 2009. He was recognized by the Canadian Society for Civil Engineering for his work on the history of the Alaska Highway and has received awards from the Manitoba

Historical Society, the BC Historical Society and the Yukon Historical and Museums Association. Ken is the president of the Japan Studies Association of Canada. His research focuses on Aboriginal rights, science and technology policy, and northern development.

**Jeff Corntassel** (Cherokee Nation) is associate professor and graduate adviser in indigenous governance at the University of Victoria. His research and teaching interests include sustainable self-determination and indigenous political mobilization/indigenous nationhood movements. Jeff's research has been published in *Alternatives*, *American Indian Quarterly*, *Canadian Journal of Human Rights*, *Decolonization* and *Human Rights Quarterly*. He is currently completing a co-edited volume (with Tom Holm) entitled *The Power of Peoplehood: Regenerating Indigenous Nations*, which brings together native scholars from Canada and United States to discuss contemporary strategies for revitalizing indigenous communities.

**Carin Holroyd** is associate professor, Department of Political Studies, University of Saskatchewan. After completing a degree in Asian studies at the University of British Columbia, she studied at Chaminade University of Honolulu/Sophia University of Japan and then received her Ph.D. in political science from the University of Waikato in New Zealand. She has worked for the Asia Pacific Foundation, Kansai Gaidai University, CIGI, the University of Waterloo and the University of Saskatchewan. She has published widely on political economy in Asia, including *Government, International Trade and Laissez Faire Capitalism* (a study of trade with Japan) and the co-authored books *Japan and the Internet Revolution*, *Innovation Nation: Science and Technology in 21st Century Japan*, *Digital Media in East Asia: National Innovation and the Creation of a Region* and the forthcoming book *Digital Planet: Government Policy and Digital Media*. Carin was involved with the establishment of the University of Northern British Columbia, where she negotiated agreements with several Arctic partners, and has travelled extensively in the Canadian and circumpolar North.

**Rhoda E. Howard-Hassmann** is Canada Research Chair in International Human Rights at Wilfrid Laurier University, jointly appointed to the School of International Policy and Governance and the Department of Political Science. Since 1993 she has been a Fellow of the Royal Society of Canada. In 2006 she was named the first distinguished scholar of human rights by the Human Rights Section of the American Political Science Association, and in November 2013 she was awarded the John William Dawson Medal for interdisciplinary research by the Royal Society of Canada. Her most recent books include *Reparations to Africa* (2008) and *Can Globalization Promote Human Rights?* (2010), as well as her co-edited *The Age of Apology* (2008) and *The Human Right to Citizenship: A Slippery Concept* (forthcoming). She maintains a website on political apologies and reparations as well as a blog, *Rights & Rightlessness*. Her current

research is on state food crimes, including case studies of North Korea, Zimbabwe, Venezuela, the Occupied Palestinian Territories and Canada.

**Robert Maciel** holds a Ph.D. from the University of Western Ontario in political science. He has expertise in multiculturalism, political philosophy, global ethics and indigenous policy. Robert has published articles in the *International Indigenous Policy Journal* and *Political Studies Review*. His current research focuses on the relationship between communitarian and liberal perspectives on global ethics and cosmopolitanism.

**Thibault Martin** holds a Ph.D. in sociology from Université Laval (2001) for which he won the Excellence Award from the Faculty of Social Sciences (best doctoral thesis). He is the author of many articles and several books on indigenous issues. His book *De la banquise au congélateur : mondialisation et culture au Nunavik* (2003) received an award from the Association internationale des sociologues de langue française. After teaching indigenous studies at the University of Winnipeg, he is now professor of sociology in the Département des sciences sociales de l'Université du Québec en Outaouais and is Canada Research Chair in Aboriginal Governance of Territory.

**Terry Mitchell** is associate professor of community psychology at Wilfrid Laurier University and the Balsillie School of International Affairs. She completed her doctoral degree at the Ontario Institute for Studies in Education at the University of Toronto, based on her field work with two Yukon First Nation communities. She is also a registered psychologist and founding board member of the Aboriginal Psychology section of the Canadian Psychological Association. She is the director of the Laurier Indigenous Rights and Social Justice Research Group and was a visiting scholar at the Institute of Indigenous Studies at the Universidad de La Frontera, in Chile. Her research focuses on colonial trauma, indigenous rights and governance issues. With the support of a CIGI collaborative research grant, and SSHRC development funds, she has mobilized an interdisciplinary and intercultural group of scholars who are developing a pan-american research network, PAIR-GN, now with links also to New Zealand and Norway, on the internationalization of indigenous rights. Her current research attends to the meaning and processes of achieving free, prior and informed consent and signatory countries' alignment with the United Nations Declaration on the Rights of Indigenous Peoples.

**Roberta Rice** is adjunct professor in the School of Languages and Literatures at the University of Guelph. Her research focus is indigenous politics in Latin America. Her book, *The New Politics of Protest: Indigenous Mobilization in Latin America's Neoliberal Era*, was nominated for the 2014 Canadian Political Science Association prize in Comparative Politics. She currently holds a standard research grant with the Social Sciences and Humanities

Research Council of Canada for a comparative project on indigenous rights and representation in Canada and Latin America. Her research cases include the Yukon and Nunavut in Canada and Ecuador and Bolivia in Latin America.

**Thierry Rodon** is an associate professor at the political science department at Université Laval. He holds the Research Chair on Northern Sustainable Development and is the director of the Centre interuniversitaire d'études et de recherches autochtones. He specializes in northern policies and community development and has extensive experience working with Inuit, Cree and Innu communities and northern institutions on education, resource management, policy development and evaluation and community consultations. His current research projects cover the social impact of mining in northern communities, access to post-secondary education for Inuit and the development of northern governance.

**Andrew S. Thompson** is a senior fellow at CIGI, adjunct assistant professor of political science at the University of Waterloo and the program officer for the global governance programs at the Balsillie School of International Affairs. He is a specialist in the fields of international human rights, civil society movements and fragile states. He is the author and co-editor of four books, *Fixing Haiti: MINUSTAH and Beyond* (2011), *In Defence of Principles: NGOs and Human Rights in Canada* (2010), *Critical Mass: The Emergence of Global Civil Society* (2008) and *Haiti: Hope for a Fragile State* (2006), and his work has been published in *The Journal of Human Rights*, *The Journal of Canadian Studies* and the *American Review of Canadian Studies*. He has also appeared as an expert witness before the *Canadian House of Commons Standing Committee on Foreign Affairs and International Development* and the *Canadian Senate Standing Committee on Human Rights*. In 2004, he was a member of an Amnesty International human rights lobbying and fact-finding mission to Haiti, and in 2011 he was elected to Amnesty International Canada's Executive Board. Also in 2011, he was named to the advisory editorial board of the *Global Civil Society Report*, the annual report of the World Alliance for Citizen Participation, and in 2013 was named to the boards of the International Migration Research Centre and the Waterloo Lutheran Seminary. He holds a Ph.D. in history from the University of Waterloo. His latest book *On the Side of Angels: Canada and International Human Rights Law, 1946 to 2006* is currently under review.



# ACRONYMS

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AEPS	Arctic Environmental Protection Strategy	MAS	Movement Toward Socialism
AFN	Assembly of First Nations	MDGs	Millennium Development Goals
AIM	American Indian Movement	NGO	non-governmental organization
CBD	Convention on Biological Diversity	NIB	National Indian Brotherhood
CHRA	Canadian Human Rights Act	OHCHR	Office of the High Commissioner for Human Rights
CITES	Convention on International Trade in Endangered Species	SCC	Supreme Court of Canada
CWI	Community Wellbeing Index	TIPNIS	Isiboro-Sécure Indigenous Territory and National Park
ECOSOC	Economic and Social Council	UBC	University of British Columbia
FPIC	free, prior and informed consent	UDHR	Universal Declaration of Human Rights
HBC	Hudson's Bay Company	UN	United Nations
IACHR	Inter-American Court of Human Rights	UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
ICC	Inuit Circumpolar Conference	UNPFII	United Nations Permanent Forum on Indigenous Issues
ICCPR	International Covenant on Civil and Political Rights	UNEP	United Nations Environment Programme
ILO	International Labour Organization	USSR	Union of Soviet Socialist Republics
ISESCR	International Covenant on Economic, Social and Cultural Rights	WCIP	World Council of Indigenous Peoples
ITK	Inuit Tapiriit Kanatami		
IWGIA	International Work Group for Indigenous Affairs		
JBNQA	James Bay and Northern Quebec Agreement		
LAC	Library and Archives Canada		

## ABOUT CIGI

The Centre for International Governance Innovation is an independent, non-partisan think tank on international governance. Led by experienced practitioners and distinguished academics, CIGI supports research, forms networks, advances policy debate and generates ideas for multilateral governance improvements. Conducting an active agenda of research, events and publications, CIGI's interdisciplinary work includes collaboration with policy, business and academic communities around the world.

CIGI's current research programs focus on three themes: the global economy; global security & politics; and international law.

CIGI was founded in 2001 by Jim Balsillie, then co-CEO of Research In Motion (BlackBerry), and collaborates with and gratefully acknowledges support from a number of strategic partners, in particular the Government of Canada and the Government of Ontario.

Le CIGI a été fondé en 2001 par Jim Balsillie, qui était alors co-chef de la direction de Research In Motion (BlackBerry). Il collabore avec de nombreux partenaires stratégiques et exprime sa reconnaissance du soutien reçu de ceux-ci, notamment de l'appui reçu du gouvernement du Canada et de celui du gouvernement de l'Ontario.

For more information, please visit [www.cigionline.org](http://www.cigionline.org).

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<b>Communications Manager</b>	Tammy Bender	<a href="mailto:tbender@cigionline.org">tbender@cigionline.org</a> (1 519 885 2444 x 7356)
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67 Erb Street West  
Waterloo, Ontario N2L 6C2, Canada  
tel +1 519 885 2444 fax +1 519 885 5450  
[www.cigionline.org](http://www.cigionline.org)

