

## Indigenous peoples

The term “indigenous peoples” refers to ethnic groups who are native to a land or region and share a distinct cultural identity based on their spiritual traditions, histories, and philosophies.<sup>41</sup> Indigenous peoples often share common experiences, such as a history of colonization, displacement and resettlement, loss of culture, impoverishment, criminalization and discrimination.<sup>42</sup>

### United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a statement of principles aimed at eliminating human rights violations against the world’s 370 million indigenous peoples. Like the Universal Declaration of Human Rights, UNDRIP is not legally binding on the countries that have signed it. Rather, it reflects the aspirations of the countries that have signed it and provides guidance as to how to make the world a better place for indigenous peoples.<sup>43</sup>

UNDRIP was adopted by the UN General Assembly on September 13, 2007. It received 144 affirmative votes, with 11 Member States abstaining from voting, and four negative votes. The negative votes belonged to Canada, the United States, Australia, and New Zealand. Canada stated at the time that the UNDRIP was incompatible with the constitution and legal framework of Canada. However, Canada eventually adopted the UNDRIP on November 13, 2010, stating that it will interpret the principles in a manner consistent with the Canadian legal framework.<sup>44</sup>

Some of the key protections endorsed by UNDRIP include rights of indigenous peoples to:

- enjoy all human rights under international law and to be free from any kind of discrimination.
- practice and revitalize their cultural traditions and customs.
- not be subjected to forced assimilation or destruction of their culture.
- not be forcibly removed or relocated from their lands.

States must consult and co-operate with indigenous peoples and obtain their free, prior, and informed consent before adopting and implementing laws or administrative measures that may affect them.

Even though the UNDRIP is not legally binding on states, it is still very important for indigenous peoples and all global citizens. The United Nations is composed of different countries, but what happens if the government of your country does not speak for (or does not listen to) your people? Consider, for example, the First Nations of Canada who are trying to get the Canadian government to recognize and respect their rights. Canada is represented at the UN, but what about the First Nations communities who are not? The UNDRIP recognizes the rights of indigenous groups who are not represented at the UN in order to ensure that they are not discriminated against and to compel governments to remedy past injustices against indigenous peoples to greatest degree possible.



### Quick quiz 13

True or false:

1. The UNDRIP is legally binding on signatory states.
2. Canada voted in favour of the adoption of the UNDRIP.
3. The UNDRIP protects the rights of indigenous peoples to practise and revitalize their cultural traditions and customs

## Use of international law by indigenous peoples in Canada

A number of indigenous groups in Canada have used international law to claim protection of their rights under several treaties of the United Nations as well as the Organization of American States.<sup>45</sup>

## Human rights claims to the United Nations

Under the *International Covenant on Civil and Political Rights* (ICCPR), which is part of the *International Bill of Rights*, claims by Canadian indigenous groups have relied on Article 27, which states:

*In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*

In 1977, Sandra Lovelace filed a complaint with the UN human rights committee, which heard complaints based on the ICCPR, claiming that the *Indian Act*<sup>46</sup> was discriminatory on the ground of sex, contrary to the ICCPR. Ms. Lovelace was born and registered as a Maliseet Indian, but lost her rights and status as an Indian<sup>47</sup> under the *Indian Act* when she married a non-Indian man. Under the same laws, men who married a non-Indian woman did not lose their status. The committee determined that the *Indian Act* violated Ms. Lovelace's rights under the ICCPR because it denied her the right to freely enjoy her culture. As a result of the ruling by the human rights committee, Canada changed the *Indian Act* in 1985 to allow women to keep their status when marrying and to allow women to regain their status if it had been lost as a result of the provisions in the *Indian Act*.<sup>48</sup>

Unfortunately, the amendments made as a result of the Lovelace case did not completely remedy issues of gender discrimination under the *Indian Act*. In fact, the result of the changes to the *Indian Act* was merely to postpone the effect of the discrimination for a couple of generations, because now women who married non-Indians and their children were granted status, but the women's grandchildren were not. In contrast, the grandchildren of Indian men who married non-Indian women were entitled to have Indian status.

In 1985, Sharon McIvor launched a court challenge after she was denied Indian status for herself and her children under the new provisions in the act. Both of McIvor's grandmothers were status Indians, but her grandfathers were not. After 17 years, McIvor's case finally reached the British Columbia Supreme Court (BCSC) in 2006.<sup>49</sup>

The BCSC agreed with McIvor that the *Indian Act* contravened the *Canadian Charter of Rights and Freedoms* as well as international conventions on human rights, women's rights and children's rights. The court ordered that the offending section (section 6) of the *Indian Act* to be of no force and effect, meaning that it was essentially void and not legally enforceable.

However, the federal government appealed the decision to the British Columbia Court of Appeal (BCCA), which ruled that although section 6 of the *Indian Act* was discriminatory, the majority of this discrimination was justified.<sup>50</sup> In response to the ruling of the BCCA, Parliament has proposed changes to the *Indian Act* in Bill C-3; however, the proposed changes fail to fully address the sex discrimination embedded in the *Indian Act*.

In 2009, McIvor appealed the BCCA decision to the Supreme Court of Canada, but her appeal was denied. In 2010, McIvor applied to take her case to the United Nations Human Rights Committee. She has stated: "Many people in Canada, Aboriginal and non-Aboriginal, recognize that this long-standing discrimination against Aboriginal women and their descendants is wrong and should end. Before me, Mary Two-Axe Early, Jeanette Corbière Lavell, Yvonne Bedard, and Sandra Lovelace all fought to end sex discrimination against Aboriginal women in the status registration provisions in the *Indian Act*. I will continue, with the same determination they had, until Aboriginal women enjoy equality." She presented her case to the Committee in 2011.<sup>51</sup>

## Organization of American States

Currently, the Hul'qumi'num Treaty Group (HTG), a coalition of six First Nations whose traditional territories are on Vancouver Island, have appealed to the Inter American Commission on Human Rights<sup>52</sup> for recognition of the ongoing violations by Canada to Aboriginal rights to property, culture, religion, and equality under the law. In particular, the HTG are seeking assistance in protecting forestlands that have been the subject of ongoing and unresolved treaty negotiations. In 2007, the Inter American Commission ruled that Canada's land claims process did not meet international standards for justice, but has not yet ruled on the specific case of the HTG. In May 2011, the HTG asked the Inter American Commission to call for the provincial and federal governments to suspend logging activities, property sales, and development leases on the disputed lands until the case is resolved.

## Extractive industries and indigenous peoples

The term "extractive industries" is used to describe companies engaged in oil, gas, mining, forestry, and other projects that have significant environmental impacts. Because many indigenous cultures have very strong ties to the land and environment, the effect of extractive industries on the way of life of indigenous peoples can be devastating. So the question is, how can international law be used as a tool to ensure that extractive industries do not destroy the traditional way of life for indigenous peoples or the natural environment that we all depend on?



Although the UNDRIP is not binding, it is expected to be influential when it comes to the relationships between corporations and indigenous peoples. It provides another tool for indigenous peoples to use to push for their rights. UNDRIP sets out the responsibility of governments to gain free, prior and informed consent from indigenous peoples for development projects. Even though the UNDRIP is aimed at governments, it will have a direct impact on corporations as well, especially if governments incorporate the principles of UNDRIP into their domestic laws.

## The Lubicon Cree

On April 29, 2011, the Rainbow pipeline that runs through Northern Alberta ruptured, releasing 4.5 million litres of oil into the environment. It was the largest oil spill in Alberta since 1975. The traditional territory of the Lubicon Cree was part of the area affected by the spill. The Province of Alberta has said that the spill was contained, and that there would be no threat to public health, but the school had to be closed following the spill because the teachers, students, and community members became sick.<sup>53</sup>



The Lubicon Cree have never signed a treaty to give their land to the Canadian government, nor have they ever given permission to the Canadian government to use their land for oil exploration. Despite this, since the 1970s, the Canadian government has leased approximately 70% of the Lubicon Cree's traditional territory to oil companies for oil and gas development. As a result, the Lubicon people can no longer maintain their traditional economy and way of life and have been thrust into poverty.<sup>54</sup>

For decades, the Lubicon Cree have been involved in disputes with the Canadian government over land claims. Their main complaints are that oil and gas development on or near their traditional territory threatens their way of life, their culture, and the health of their community. In 1990, the United Nations Human Rights Committee ruled that Canada was in violation of Article 27 of the ICCPR for failing to protect the Lubicon land rights from the impact of oil and gas extraction.<sup>55</sup> Since then, the Canadian government has been censured by various UN human rights agencies on multiple occasions.<sup>56</sup> In 2010, the UN Special Rapporteur on the rights of indigenous peoples submitted a report to the UN Human Rights Council stating that there should be no further development on Lubicon land unless the Lubicon people give their consent.<sup>57</sup>

## Canadian domestic law

In Canada, the principle that governments and corporations must consult with indigenous peoples has already been adopted into our domestic laws. In the court case known as *Haida Nation v. British Columbia (Minister of Forests)*<sup>58</sup> the court determined



### Quick quiz 14

True or false:

1. The changes made following the *Lovelace* case removed all gender discrimination from the *Indian Act*.
2. The Lubicon Cree have signed a treaty with the Canadian government that establishes their legal rights.
3. As a result of the *Haida* case, Canadian domestic law requires the federal and provincial governments to consult with First Nations and accommodate their interests.

### Activity: Indigenous communities and extractive industries

This activity is intended to encourage students to think about the impact that extractive industries (such as mining, forestry and oil and gas exploration) have on indigenous communities who rely on the land for their traditional way of life. It should take place prior to discussing materials on extractive industries and indigenous peoples.

Divide the class into three groups:

- One group represents the government of the country.
- One group represents a mining corporation.
- One group represents an indigenous community.

The mining company runs a mining operation on the traditional lands of the indigenous community that has been authorized and subsidized by the government. The mining activities are contaminating the river upstream from the town where the indigenous community is and destroying the forest where the people of the indigenous community would traditionally hunt for food. Ask each group to consider the following:

#### **The government:**

The government has the responsibility to maintain jobs at the mining site and to protect the economy, but it also has a responsibility to protect the environment, as well as to ensure that the human rights of the indigenous community are not violated. The government has to choose where its priorities lie.

Are they going to give tax credits and subsidies to the mining corporation so that it can expand and contribute to the country's economy? Or are they going to protect the traditional lands of the indigenous community?

What do you think the government's priorities should be? Why should they prioritize in this way? How does this affect the government's responsibility to the economy, the environment and the protection of human rights?

**The mining corporation:**

The goal of the mining corporation is to continue and expand their mining activities at this particular mining site. They have obligations to their shareholders to run a successful business and make a profit. The indigenous community is appealing to the mining corporation to stop expansion on their land. There are no laws that require the corporation to consult with or get permission from the indigenous community.

Do you think the mining corporation should have any responsibility to the indigenous community? Why?

**The indigenous community:**

The indigenous community has not signed a treaty with the government giving over rights to their land. The land of the indigenous community has been taken from them without compensation, and the community feels their human rights are being violated as a result of the mining activities on their land. The community is concerned that their traditional way of life is being destroyed and that the health of their people is being threatened by the contamination of the river.

What can the indigenous community do to appeal for help? What rights documents can they use to defend their rights? What rights are protected in these documents?

Have each group present their question and the answers they have come up with.

Discuss corporate social responsibility using the following questions:

- Do you think corporations should have a responsibility to indigenous communities when they buy or use land that is or once was the traditional territory of an indigenous community?
- Many governments provide subsidies to extractive industries (such as mining, forestry, and oil and gas). Governments have legal obligations to indigenous peoples, such as the duty to consult and obtain consent. Do you think that corporations receiving subsidies should share these legal obligations? How do you think international law could enforce this?
- What happens if a country decides not to include the rights contained in UNDRIP into their domestic laws? Should corporations have a responsibility to consult with and receive consent from indigenous peoples regardless of whether they are required to by law? How do you think the international community could enforce this?

**Discussion questions:**

1. What concerns might the indigenous peoples of Canada have about Canada's statement that it will interpret the UNDRIP in accordance with the Canadian legal framework?
2. Why has Article 27 of the *International Covenant on Civil and Political Rights* been important for Canada's indigenous peoples?
3. Do you think it is right for the Canadian government to have allowed oil and gas development on the Lubicon Cree's traditional territory? Do you think the oil and gas companies, as well as the government, should be held responsible for the harm to the Lubicon Cree?

4. Why do you think Canada is so slow to recognize the harm to the Lubicon people, despite repeated judgments from UN human rights agencies?
5. How does the treatment of the Lubicon Cree fit with the judgment in the *Haida* case?