

Of Bullies and Cowards:
Canada's Avoidance of Indigenous Human Rights
in the *United Nations Declaration on the Rights of Indigenous Peoples*

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Introduction

Bullies are cowards: they use power abusively on those who cannot stop them, and they generally avoid fights with serious opponents. In some respects Canada historically and contemporarily is the bully to Aboriginal peoples. It has played nice when necessary, broken its promises when it could, and used military, police, political and bureaucratic power to dominate, marginalize, delegitimize and assimilate Aboriginal peoples. Like most bullies, Canada doesn't like critique. It diminishes those who offer it, preferring its mythologies with respect to its goodness in the world. As a putatively democratic state with a now-universal franchise, Canada's political positions are the sum of the voting populations' dominant visions¹. The state does no more than it is allowed to do by those who control the economic and political apparatus. With my critique here I invite Canadians to insist that the state live up to domestic constitutional and international human rights guarantees in respect of indigenous peoples, and to animate these rights in public policy. This is a necessary first step in a process that may yet permit us all to come to terms with both the past and future, thus shifting the historic relations of dominance and subordination framed by racism and colonialism. Benefits of recognition and implementation of indigenous peoples' human rights become a benefit to all Canadians, as they are tied to the fundamental principles of the Canadian political order, democracy, the rule of law, and human rights (Joffe 2010:74; Dyck 2004:33).

The Declaration on the Rights of Indigenous Peoples (UNDRIP) was ratified by the UN General Assembly in September 13th, 2007². It constitutes “the minimum standards for the survival, dignity and well-being” of indigenous peoples (Article 43) and its provisions are to be “interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith” (Article 46(3)). The Declaration emerged as a response to profound state violation of inherent human rights of indigenous peoples (Fontaine 2010:8-11; Hartley, Joffe and Preston 2010:12) and the rights guaranteed in it are a species of human rights (Anaya 2004; Green 2005:230-31; Joffe 2010).

The Declaration is the gold standard for international and domestic law for state protection of Indigenous human rights and constitutes international human rights law (Charters and Stavenhagen 2009:10). Over forty years in the making, it is the result of an innovative and unique process beginning in the 1970s and is the first human rights instrument to include the participation of those affected – indigenous non-governmental organizations representing indigenous peoples from around the world (Willemsen-Diaz 2009; Eide 2009; Daes 2009; Henriksen 2009; Deer 2010; Joffe 2010).

Yet, Canada fomented dissension in the international community with regard to the United Nations adoption of the Declaration and voted against the resolution, for the first time

¹Within the limitations of the plurality electoral system. See, for example, Dennis Pilon, *The Politics of Voting*. Montgomery Emond Press, 2007.

²United Nations General Assembly A/61/L.67, September 7, 2007. See also <http://www.un.org/esa/socdev/unpfii/en/declaration.html> and <http://www.un.org/esa/socdev/unpfii/en/drip.html>.

opposing an international human rights instrument (Cosentino 2010; Deer 2010; Joffe 2010). Salil Shetty, Director General of Amnesty International, rebuked Canada for its stand, and expressed concern at the deteriorating climate for human rights and democratic expression in Canada (Sterling 2010) while Canadian Secretary-General Alex Neve castigated the decision, and warned that it “badly tarnishes” Canada’s human rights reputation (2008). Domestically, Aboriginal organizations opposed the government’s position³. Other voices of concern include the UN High Commissioner for Human Rights Louise Arbour (herself a Canadian) (John 2010:48); the UN Committee on the Elimination of Racial Discrimination, and Aboriginal organizations, scholars and human rights advocates in Canada. The Harper government’s opposition was based not on substantive legal and constitutional problems but on ideology (Joffe 2010:71). Moreover, the Harper minority government refused to accept the majority will of Parliament of April 8, 2008, endorsing the UNDRIP and committing Canada to implement it (Joffe 2010:76). And Joffe suggests that partisanship, not constitutional concerns, motivated the Harper government’s opposition to the UNDRIP (2010).

When Canada adopted the Declaration on November 12, 2010 it was the second to the last state in the world to do so, trailed only by the USA (which adopted the UNDRIP in December 2010) (Cosentino 2010). Contrary to the international consensus and to legal precedent with respect to international law (Charters and Stavenhagen 2009; Anaya 2004), and wrongly (Joffe 2010), the Harper government claimed that the Declaration was aspirational and not a legal obligation upon the state: “the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws” (INAC 2010).

³For example, on September 17, 2010, the Union of BC Indian Chiefs adopted Resolution 2010-33, “United Nations Declaration on the Rights of Indigenous Peoples and Canada's Intention to Endorse,” and on October 20, 2010, the UBCIC wrote to the Prime Minister asking for Canada’s unqualified support of issued a call for the federal government to adopt the DRIP without reservation. In the letter, the UBCIC notes: “In March 2010, your government announced in the Speech from the Throne that it would take immediate steps to endorse the UNDRIP “in a manner that is fully consistent with Canada's Constitution and laws.” We strongly urge you to endorse the UNDRIP immediately and without qualification” (UBCIC 2010).

The Harper government's anaemic endorsement was accompanied by claims that the Canadian adoption was limited to the extent of any conflict with the Canadian Constitution (legal scholars say there are none) and by claims that the UNDRIP is not "law" (which again contradicts the most authoritative legal scholarship on the status of declarations: see for example Falk 2000; Anaya 2004; and Joffe 2010). At least some public commentary expressed consternation at the Canadian government's position⁴. On November 16, 2010, twenty-nine indigenous, faith groups and other NGOs⁵ issued a public joint statement urging the government proceed with DRIP implementation "in a principled manner that fully respects their spirit and intent".

The principle of international law is that it applies to all states: it cannot be conditional and is not merely aspirational. As Cosentino (2010) observes, "International human rights standards are essential in the promotion and protection of rights that states have failed to uphold. They are meant to assist the reform of laws, policies and guide state behaviour". By definition, then, international human rights law requires change from states rather than deferring to the status quo. The *Declaration* "imposes obligations on states" (Charters and Stavenhagen 2009:13; Joffe 2010).

The UNDRIP is part of the corpus of international law and legal norms that animates the human rights guarantees in the Canadian Constitution. The UNDRIP recognizes the deleterious legacy of colonialism and affirms that states should guarantee the human rights and the collective indigenous rights of indigenous peoples. It condemns all doctrines, policies and practices that are racist, false, unlawful, immoral and unjust. It affirms the right at international law of self-determination of all peoples, and the right of internal self-government. In Article 44 it guarantees all rights equally to male and female persons. Sa'ke'j Henderson calls the *Declaration* a "just document" that "expresses minimum standards of human rights" (2010:75).

Article 43: The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

⁴Salil Shetty said that "the Harper government's unwillingness to sign the International Covenant on Economic, Social and Cultural Rights and the Declaration on the Rights of Indigenous Peoples was a major disappointment". Harry Sterling, "Opinion", *Edmonton Journal* 2010-09-05, page A14.

⁵ The statement was signed by Amnesty International Canada, Amnistie internationale Canada francophone, Atlantic Policy Congress of First Nations Chiefs Secretariat, Canadian Arab Federation, Canadian Council on Social Development, Canadian Friends Service Committee (Quakers), Chiefs of Ontario, First Nations Child and Family Caring Society of Canada, First Nations Confederacy of Cultural Education Centers, First Nations Summit, First Peoples Human Rights Coalition, Front d'action populaire en réaménagement urbain (FRAPRU), Québec Grand Council of the Crees (Eeyou Istchee), Indigenous World Association, Innu Council of Nitassinan, Innu Takuaikan Uashat Mak Mani-Utenam, Institut Culturel Tshakapesh, International Organization of Indigenous Resource Development (IOIRD), Kanien'kehá:ka Onkwawén:na Raotitiohkwa Language and Cultural Center, KAIROS: Canadian Ecumenical Justice Initiatives, Louis Bull Cree Nation, National Association of Friendship Centres, Public Service Alliance of Canada, Quebec Native Women / Femmes autochtones du Québec, RightOnCanada.ca, Samson Cree Nation, Treaty 4 Chiefs, Treaty 6 Medicine Chest Task Force, and the Union of British Columbia Indian Chiefs.

In this paper I consider the Canadian context for Aboriginal human rights, and the implications of the UNDRIP for Canadian compliance with international law and for domestic policies. I take up the Harper government's resistance to the UNDRIP; its refusal to take the advice of its own expert bureaucrats; and its final equivocal and conditional adoption of the UNDRIP. I conclude by considering Canada's contemporary political record with respect to Aboriginal rights, and the implications of state non-compliance with the UNDRIP for Canada's own constitutional integrity regarding respect for the rule of law, for respect of human rights, and for its relationship with the indigenous peoples of Canada.

I use the term "indigenous", the accepted international term, as expressed in the Declaration. The term "Aboriginal" is the accepted term in Canadian constitutional law and in the *Constitution Act 1982*, s.35, which refers to "Indians, Inuit and Metis" and which recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. Thus the international discourse and legal regime in respect of indigenous peoples applies to Aboriginal peoples in Canada, and the Canadian state is bound both by international law and by the Canadian Constitution to recognize and affirm these rights.

The primary right protected at international human rights law and reiterated in the UNDRIP is the right to exist; it is closely followed by the right to self-determination. The Declaration acknowledges that a range of international legal instruments provide the foundation for self-determination, and also recognizes the right of self-determination.

Article 3: Indigenous peoples have the right to self-determination.

Aboriginal and treaty rights are inseparable in the conditions of the colonial state, which has usurped Aboriginal lands, resources, and sovereignty. They are a partial and particular application of the guarantees in the *Declaration*, which is "comprehensive ... (and) covers the full range of civil, political, economic, social, cultural and environmental rights" and recognizes these as inherent rights (Charters and Stavenhagen 2009:13). James Anaya, now Special Rapporteur to the United Nations on the rights of indigenous peoples, notes that these are not special rights, but a "contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples" (UN 2009).

The Declaration emerges from the foundation of international human rights law, beginning with the UN *Charter* in 1945 and including the UN *Declaration of Human Rights* (1948), the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948), the *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), the *Covenants on Civil and Political Rights*, and *Economic, Social and Cultural Rights* (1966) (Diaz

2009:17; Joffe 2010). It includes the optional protocol attached to the *Convention on Civil and Political Rights*, which permits individuals to take their states before the UN *Human Rights Committee* for alleged violations in the *Covention*. On this legal and philosophical base the international community has build additional rights guarantees relevant to indigenous peoples, including the 1979 *Convention on the Elimination of All Forms of Discrimination against Women*, the 1990 *Convention on the Rights of the Child*, and in 2007, the *Declaration on the Rights of Indigenous Peoples*.

The Declaration was presented in draft form to the United Nations by the Working Group on Indigenous Peoples in 1993, the International Year of Indigenous Peoples. However, it still had to make its way up the food chain to the UN General Assembly for ratification. Along the way, states' politics necessitated negotiations, amendments and subsequent ratifications. Not till 2007 was there sufficient consensus to ensure passage of the UNDRIP by a vote of 143 for; 4 (Canada, Australia, New Zealand and the USA) against; and 11 abstentions (Diaz 2009:29).

The UNDRIP makes clear the distinctions between the objective of equality as inclusion in the social, political and economic order of states, and the objective of self-determination as indigenous peoples existing in conditions of colonization, political non-dominance, and loss of territory and thus of economies. The proposition of equality as inclusion had long been read to legitimate the colonial predations of settler states, and their subsequent objectives of elimination of indigenous peoples via assimilation. In conditions of colonization, equality was an unlikely benefit, measured against a standard determined by a regime hostile to the nations which were stigmatized, racialized and oppressed in the colonial process. Its assumptions are disrespectful, taking for granted the superior state of the dominant to that of the oppressed⁶. For Aboriginal peoples in Canada, equality has been both a stalking horse for assimilation and an unrealized state relative to the measures of quality of life of settler society. The form of equality is not chosen as per self-determination, and is not realized in any calculus by positive outcomes.

During drafting and negotiations of the UNDRIP, some states were concerned with the use of the term "peoples" in relation to indigenous nations, preferring the more anaemic term "populations" (Deer 2010). At international law, "peoples" have a claim to territory, to self-determination, and ultimately to sovereignty. As "populations" they can be conceptually and legally subsumed into existing states without regard for historical claims against the state. At the core of this quarrel are histories of oppression, dispossession, and genocide.

Self-determination is the foundational right from which all others flow (Deer 2010:27). In Canada, despite the protections of international law identifying self-determination's primacy and despite the protection of Aboriginal and treaty rights in the Constitution 1982, the dominant

⁶For an example of this perspective see Tom Flanagan, *First Nations? Second Thoughts*. Kingston and Montreal: Queen's University Press*.

political discourse has been stalled in the framework of “self-government”, a limited exercise more akin to self-administration of state policies. The framing of self-government seems designed to avoid discussions or implementation of self-determination. Moreover, Canada has historically blackmailed Aboriginal nations by holding treaty and land claims negotiations hostage to the agreement of the Aboriginal participants to extinguish their general rights in return for limited codified rights (Green 1995). Despite the change of language from extinguishment to certainty, the effect continues to be the extinguishment of Aboriginal rights. These rights are both individual and collective.

During the UNDRIP negotiations between 1993 and 2007, some states were unwilling to account for the consequences of their origins in relation to indigenous oppression. They feared economic, political and territorial consequences, despite the explicit wording in the Declaration that it did not envision secession; and the opinions of several noted legal scholars that self-determination was not synonymous with statehood.

Are or were Aboriginal peoples *peoples* within the meaning of international law? There is no coherent defensible argument to the contrary. Importantly, indigenous peoples did and do not accept that they are minorities, insisting rather on the more muscular definition as “peoples”. Henderson writes that the Declaration “clearly affirms that Indigenous peoples are peoples whom nation-states cannot arbitrarily deny the right of self-determination” (2010:75). Are Aboriginal peoples a challenge to the economic, social and political relationships within settler states? Almost certainly recognition as peoples infers countervailing claims to land, resources, political capacity and sovereignty – self-determination, as Henderson put it -- and that has been the position of Aboriginal nations since the moments of first colonial contact. In Canada, those countervailing claims were manifest in negotiated relationships and agreements such as treaties, honoured more in the breach by the nascent and contemporary settler state. The Preamble to the UNDRIP stated that treaties are both a means of improving state-indigenous relationships, and can be matters of international concern (UNDRIP Preamble 2007).

After all, states had emerged into and then reinforced an international order that validated their existence and their sovereignty. This self-reinforcing order constitutes most of the corpus of international law and international relations currently framing the United Nations and its members’ self-understanding. This positivist legal approach amounted to valorization of the rules of the rulers. As Eide (2009:32-33) writes:

National sovereignty was the basic organizing principle. International law was considered to derive solely from state consent and state practice and to deal exclusively with relations between sovereign states. Conditions inside states were the exclusive concern of the colonizing power. Consequently, the treatment of indigenous peoples was generally a matter of internal affairs ... Even treaties between colonial empires and

indigenous peoples were subsequently considered to fall under domestic, rather than international, jurisdictions.

Explained thusly, indigenous peoples became by definition internal populations of sovereign states, who were then insulated from international scrutiny and accountability for the nature of their relationships with indigenous peoples. Even now some states insist that their oppression of populations within their borders is beyond the purview of international agencies or other states. They condemn any attempt by “outsiders” to raise issues of human rights abuses as interference. To the extent that the international community accepts these claims it is complicit in those abuses.

It was not until the adoption and normalization of the 1945 UN Charter that human rights became a subject of international concern. Notably, Article 27 of the International Covenant on Civil and Political Rights guaranteed to “minorities” the right to culture, religion, and language in community (Eide 2009:33-35). “Minorities” are not viewed as “peoples” with the concomitant entitlements to human rights protection and to recognition in international tribunals. While human rights were guaranteed equally to all human beings, states were charged with ensuring their realization. Thus, when the state was the violator of human rights, victims were at a disadvantage unless the international community was willing to raise concerns in an authoritative way; and for the most part, individual persons had no standing to raise issues in United Nations forums. (The Optional Protocol attached to the Convention on Civil and Political Rights permits nationals to bring their states before the UN Human Rights Committee; Canada is signatory to the Optional Protocol, has been taken before the UNHRC successfully previously by indigenous citizens⁷ and will likely be taken there in the near future by Sharon McIvor, as I discuss later in this paper.) Indigenous peoples, whose claims were primarily against states occupying their territories and stealing their resources, and subjecting indigenous communities and nations to state sovereignty and to genocidal practices, had few allies in the states represented at the United Nations, some of which did not even recognize indigenous existence.

In the drafting of the Declaration, the focus of states’ representatives was on indigenous minorities; the focus of indigenous peoples’ representatives was on self-determination. The latter, according to Eide, shifted the focus onto “who should govern whom, and who should exercise authority and control over territory and natural resources” (Eide 2009:36-37).

In Canada, imperialism was initiated in the predatory economic and political activity of primarily European states, leading to the imposition of political and economic relationships on those they dominated. The benefits accrued to the imperialist community, at the expense of the colonized. Imperialism morphed into colonialism – the practice of creating permanent

⁷For example, Sandra Lovelace, 1977, on membership discrimination in the *Indian Act*; and Bernard Ominiyak, for the Lubicon Lake Cree in their struggle to obtain recognition for their ownership of and interest in their traditional territories.

settlements, with people from the imperial state. That produced permanent political frameworks, contested by Aboriginal claims of sovereignty; and to state practices causing the marginalization and dispossession of the original inhabitants. The political economy of the Canadian state is underwritten by Aboriginal dispossession. As Elijah Harper said in 2010, “With your democratic state, you oppressed us, democratically” (quoted in Green 2010).

Article 10: Indigenous peoples shall not be forcibly removed from their lands or territories.

Colonialism was and is justified by racism, an ideology that assumes that those who are dominated represent vices or incapacities best remedied by the enforcement of colonial practices; by enforced civilization, Christianization, education and wardship, or if irremediable, by passive or active elimination. Those practices are essentially genocidal: they are intended to eliminate the cultural particularity and its political implications in favour of a homogeneous settler state culture, where rights are without distinction and history has no contemporary consequences. In Canada, that racism is now framed in the language of intractable cultural differences, or the need for specific forms of capitalist development to remedy the intergenerational social pathologies that plague colonized Aboriginal communities. There is virtually no consideration of the processes and consequences of colonialism in creating indigenous immiseration, or in alleviating it. Joffe proposes that “colonialism, dispossession and discrimination” are the basis of Aboriginal peoples’ poverty and intergenerational trauma, and constitute the denial of Aboriginal human rights (2010:74). Moreover colonial relationships are fraught with “pervasive structural and psychological” dimensions between colonizers and colonized (LaRocque 2010:121).

Article 8: Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of culture.

Aboriginal or indigenous rights are a species of human rights. They are vital for the survival of Aboriginal peoples *as* Aboriginal peoples; they are not assimilationist in their conception or implementation. All human rights are entitlements of Aboriginal people, but additionally, Aboriginal peoples are entitled to those rights that guarantee the possibility of existence as Aboriginal peoples.

Article 1: Indigenous peoples have the right to the full enjoyment as a collective or as individuals, of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and in international human rights law.

Colonialism has damaged all indigenous peoples, and it has been experienced by women differently than men (Green 2007; McKay and Benjamin 2010). Indigenous women suffer from the magnified impacts of the deterioration of community and culture because of gendered roles, and because of women’s vulnerability to male violence in the home and in public spaces. Aboriginal women in Canada are more likely to experience male violence than non-Aboriginal

women and are more likely to be killed or imprisoned. Amnesty International has suggested that a toxic combination of racism and the vulnerabilities created by colonialism radically impair Aboriginal women's security (McKay and Benjamin 2010:157-159). For example, there are several hundreds of missing and murdered Aboriginal women in Canada, belatedly the subject of public consternation because of the advocacy of Aboriginal women and other activists (Anderson et al. 2010). McKay and Benjamin argue that "the economic, social, and cultural rights of Indigenous women are indivisible from their right to be free from violence and discrimination" (2010:157).

In different ways, at different times and with some regional variation, the Canadian state has practised genocidal policies towards indigenous peoples whose territory the state appropriated. These practices were framed by the goal of assimilation, which assumes cultural annihilation; and prosecuted through military, police and bureaucratic force, and through education. This superficially liberatory exercise was implemented through the residential and day schools, sub-contracted to various Christian churches, which pursued assimilation, civilization and education objectives in ways so violent that the Canadian state, through then-Prime Minister Harper, apologized for them on June 11, 2008⁸ saying "this policy of assimilation was wrong, has caused great harm, and has no place in our country" (cited in John 2010:53). This grotesque historical approach to "education" deprived generations of Aboriginal peoples of education and inflicted inter-generational suffering as a result of the social and psychological destruction consequent to the education policies⁹.

Despite this, Aboriginal peoples continue to insist on a right to education. That right is first named in the Universal Declaration of Human Rights, and in the International Conventions on Civil and Political Rights, and Economic, Social and Cultural Rights; and in the Convention on the Rights of the Child; and enunciated specifically in relation to indigenous peoples in the UNDRIP. Further support for indigenous education at international law is found in the International Labour Organization (ILO) Convention 169, which requires indigenous involvement and participation in education, including in its formulation and pedagogical methods (Graham 2010). Yet, federal policy and funding provides only modest support for some status Indian students – a fraction of the Aboriginal student constituency – and does so not as implementation of a right, but as a limited program. Additionally, the federal government is generally understood to spend less on on-reserve K-12 education, for which it recognizes a constitutional obligation, than provincial governments spend per student in provincial schools. And the federal and Saskatchewan provincial governments joined in whip-sawing the First Nations University of Canada in 2010, bringing the only Aboriginal university in the country to its knees and triggering a student occupation of the university in Regina¹⁰.

⁸The text of the apology is available at <http://www.cbc.ca/news/canada/story/2008/06/11/pm-statement.html>

⁹Interested readers should consult the transcripts of the Truth and Reconciliation Commission for accounts of the consequences.

¹⁰Accounts of this are available in the CAUT Bulletin, the *Prairie Dog*, the *Regina Leader-Post*, and in the *Saskatoon Star-Phoenix* under Doug Cuthand's byline.

Article 14(1): Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Article 14(2): Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

Article 14(3): States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

The Declaration is part of international law. It may well be upgraded to the status of Convention at some point. The issue is not whether it is law, but how it will be implemented. Canada has an obligation to revise existing and develop future legislation and policy in light of its obligations under the UNDRIP. Anaya (UN 2009) notes the need for states to interpret other legal instruments in light of the provisions of the Declaration. “The Declaration, interpreted in conjunction with other international instruments, provided an authoritative normative framework for the full and effective protection and implementation of the rights of indigenous peoples” (UN 2009). Moreover, Canadian judicial decisions have held that the state has a “duty to consult” Aboriginal peoples on matters affecting their lands, livelihoods and rights¹¹. In light of the congruence of domestic constitutional and international law on this score, it is surprising that on many files, the federal and provincial governments are proceeding as though Aboriginal rights and participation were ephemera and without any consideration of the human rights protection of the UNDRIP. Here, I list only a few of the many examples of this evident failure to implement the protections of Aboriginal peoples’ human rights.

Article 33 UNDRIP:

- 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.*
- 2. Indigenous peoples have their right to determine the structure and to select the membership of their institutions in accordance with their own procedures.*

The vexed matter of Indian status under the Indian Act provides a good example of how the UNDRIP should shape Canada’s legislative approach. The status issue has been contested by especially Aboriginal women since at least 1868. Post-1982, the Canadian Charter of Rights and Freedoms was understood to eliminate legislative sex discrimination. However, the federal government’s ham-handed amendment of the Indian Act, C-31, actually continues sex

¹¹*Haida, Taku; Mikisew Cree*

discrimination¹². The failure of Canada's political and legal processes to eliminate this discrimination is now about to land Canada before the UN Human Rights Committee (not for the first time¹³), charged with persistent legislative violations of protected human rights of indigenous peoples.

Article 9: Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

In 1994, Sharon McIvor and her son Jacob Grismer brought a constitutional challenge to the sex discrimination in the registration provisions of the *Indian Act*. The B.C. Supreme Court ruled that section 6 of the Indian Act violated s. 15 of the Charter. However, upon appeal by Canada, the B.C. Court of Appeal ruled that although the *Indian Act* was discriminatory, the bulk of the discrimination was justified because the Government's purpose was to preserve the existing rights of the Aboriginal men and their descendants who had been given preferred status¹⁴. McIvor is currently proceeding to take her case before the United Nations Human Rights Committee.

In response to the Court of Appeal decision, Parliament subsequently amended the *Indian Act* with Bill C-3, with the bill passing the Senate in 2011. This latest amendment provides only a partial and inadequate solution to the sex discrimination. It makes some female line descendants newly eligible for status, but with a lesser ability to transmit status than their male line counterparts. In addition, Bill C-3 continues to exclude many descendants of Indian women who were unmarried. As long as these Aboriginal women and their descendants continue to be ineligible for registration as Indians, sex discrimination will remain an entrenched characteristic of the *Indian Act*. (Day and Green 2010; Day 2010)

Article 44: All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

¹²See *McIvor v. The Registrar, Indian and Northern Affairs Canada* (2007), 2007 BCSC 827 and 2007 BCSC 1732, reversed in part by *McIvor v. Canada (Registrar of Indian and Northern Affairs)* 2009 BCCA 153, leave to appeal denied 11.05.2009 (SCC); Supplementary Reasons (Extension of Suspension of Declaration of Invalidity) to *McIvor v. Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153 (April 1, 2010); and Eberts 2010.

¹³Sandra Lovelace, a Maliseet Indian exiled by the membership section 12(1)(b), won a ruling by the UNHRC in 1977 that Canada was in violation of s.27 of the Convention on Civil and Political Rights, as the Indian Act deprived her and similarly situated persons of the right to reside and participate in her community and culture.

¹⁴For a critique of these decisions see Mary Eberts' case comment, 2010 *Indigenous Law Journal*.

Having made a multi-century mess of status Indian membership, the federal government recently turned its sights onto the Metis, floating suggestions through the civil service that it would assist with standardization of Metis membership. Currently Metis identity is defined by several Metis organizations, by some communities, and by individuals who self-identify. Organizations have formula, require “proofs” including multi-generational evidence, and issue “cards” to those who satisfy their criteria. Noted Metis scholar Emma LaRocque carries no card, speaks Cree and English, and makes “a distinction between metis (or halfbreed) and Metis Nation peoples, the former meaning those individuals who are first-generation part Indian and part White; the latter referring to those peoples whose ancestors were originally White and Indian but who went on to develop as distinct peoples ... becoming a new race or ethnicity” (2010:7) characterized by the experience of dispossession, colonization, and racism (2010:81; 100-104; 9). Many Metis have not felt the need to obtain that verification of their status, and identify without having the card in their pockets (or without participating in the political life of the organizations). The regulation of Metis identity worries some, and comforts others (Green 2011; Andersen 2011). Federal regulation of this diverse Metis diaspora would erase many, valorize some, and complicate identities, families, and politics as thoroughly as it has done for the status Indian constituency.

Other legislative initiatives that should have been framed with regard to the UNDRIP include Bill S-1, the *Safe Drinking Water for First Nations Act*; and Conservative MP Kelly Block's private member Bill C-575, *First Nations Accountability Act*. Cosentino is of the view that both initiatives suffered from a lack of consultation with Aboriginal constituencies, and in particular the Block bill “fails to meet even the most rudimentary tests of both international and domestic standards related to consultation and participation in decision-making” (Cosentino 2010). Both bills died when the 2011 election was called, but following the Conservative majority win May 2nd some observers expect them to be re-introduced, and the Block bill to receive government support.

The protection of the last remnants of indigenous collective lands recognized by the state, Indian reserves, is under attack by those who would see it privately held and mortgageable, and thus alienable on the market. The federal Department of Indian Affairs is alleged by some researchers to be advocating “private ownership of reserve lands as the solution to First Nations economic and social development” in the form of the proposed *First Nations Property Ownership Act*, and is supported in this “by the First Nations Tax Commission, a federal agency whose chair and members are appointed by the Minister of Indian Affairs” (fourarrows@rogers.com 2010; for an approving analysis of privatization see Tom Flanagan and Andre Dressey* 2010). The Assembly of First Nations and many regional Aboriginal organizations oppose any effort to transform the property regime on reserves. Arguing against the proposal to privatize reserve lands, noted Secwepemc leader Arthur Manuel notes:

Transforming Indian Reserve lands to Fee Simple would break up the Indian Reserve land base and take away the protection that the collective ownership of Indian Reserves by Indian Bands provides, making them inalienable and not subject to expropriation. (First Nations Strategic Bulletin 2010)

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.

Manuel notes that an overwhelming majority of Chiefs, members of the Assembly of First Nations, Canada's national status Indian organization, passed a resolution rejecting the fee simple proposal, with only three opposing votes¹⁵.

The Canadian state is squatted on indigenous lands, and enjoys enviable first-world status from its resources. Most aboriginal peoples do not significantly share in this bounty. Manuel notes that "The big question facing us today is not how can we fit into the mainstream economy, but how the mainstream economy can fairly, honestly and justly manage the fundamental change that recognition of Aboriginal Rights creates (First Nations Strategic Bulletin 2010). He writes elsewhere¹⁶:

We are poor because we are systemically made poor because we are dispossessed of our land by federal and provincial laws that do not recognize our Aboriginal and Treaty Rights. Federal and provincial law irresponsibly ignores our Aboriginal and Treaty Rights despite the fact they have been recognized by the Supreme Court of Canada (SCC) and protected by the Canada Constitution 1982.

Article 26 (1): Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

Article 26(2): Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Conclusion

The United Nations General Assembly's 2007 adoption of the *Declaration* demonstrated at least two important facts. First, indigenous peoples' rights are a concern of international law and attention for the entire international state community. Second, and despite the distinction between declaratory and covenant status, the UNDRIP assumes primacy as the gold standard protecting what are the fundamental human rights of indigenous peoples: in effect, it becomes the norm for state practice. The passage of the Declaration is a "tipping point in international law and history" (Henderson 2010:80) as it renders indigenous peoples visible, self-determining, and entitled to individual and collective human rights to be guaranteed by the very states that have subsumed indigenous peoples.

I have argued that Canada has obligations at international and constitutional law requiring the state to guarantee the human and indigenous rights of the Aboriginal peoples now encapsulated in the Canadian state. I have suggested that the state has been recalcitrant in acceding to international law on this point, and has made haphazard, half-hearted and sometimes no efforts to bring its own practices, including its legislation, in line with international law. Yet

¹⁵ August 23, 2010 letter from Arthur Manuel.

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Canada is regularly criticized in the international arena for the shocking disparity of quality of life indicators (documented in *Statistics Canada's* 2006 dataset¹⁷) for Aboriginal and settler Canadians. Canada has been and will again be censured by the UN Human Rights Commission for egregious violation of Aboriginal human rights. Canada's Constitutional law, too, has pointed the state in the direction of more consensual and beneficial relationships with Aboriginal peoples. Foundationally, the obligation of the state, now squatted on Aboriginal territories and claiming the entire portion of sovereignty, remains in the form of the duty to consult, and the duty to respect and animate domestic and international human rights law.

Despite the reservations posed by the Harper government, the obligations in the *Declaration* are neither optional nor detrimental to the body politic. Indeed, there are many positive implications for the settler state and for Aboriginal nations, including the potential for the reconciliation of settler and Aboriginal peoples in a common, mutually beneficial and mutually determined post-colonial future.

Despite the language of inclusion and the liberal assumptions of Canada's political culture, for many indigenous peoples the state remains oppressive, both in its institutions and in the political culture which informs discussions about indigenous peoples and their rights. Yet, the *Declaration's* Article 9 guarantees the right to belong to an indigenous community or nation. Article 33(1) says that this does not preclude citizenship in the state. Moreover, Article 15(2) requires states to take measures to "combat prejudice and eliminate discrimination". Article 34 guarantees the right to indigenous structures, customs, traditions, and juridical systems, in accordance with international human rights standards.

The history of Canadian citizenship demonstrates the evolution of an exclusive and exclusionary franchise to the present inclusive formula. However, the politico-economic and legislative history of the state indicate that indigenous people are welcome only when they effectively assimilate – when they adopt the assumptions and practices of the state, and turn away from any critical reading of the state's legitimacy. Yet the core of indigenous rights is located in implicit recognition of the historical realities of colonialism. This is the truth on which the *Declaration on the Rights of Indigenous Peoples* is based. But for that, there would be no need to separately conceptualize indigenous human rights.

The occupation of indigenous territories and peoples is sanitized by states through law and culture, and indigenous peoples are then invited to participate in the putatively egalitarian processes of the democratic settler state. Democratic settler states rely on profoundly contradictory assumptions: on the proposition that state sovereignty is unimpeachable, and on the proposition that all citizens, despite the colonial history and contemporary reality, are equal and equally empowered. Without a process for confronting the legacy of colonialism, settler states will never be able to offer meaningful citizenship to those whose ancestral communities and nations were subordinated by these same states. That process begins by acts of recognition of our relational past and of the human rights of indigenous peoples. It begins with state recognition and animation of the guarantees of the UNDRIP. It continues with state deference to indigenous

¹⁷For example, see Catalogue no. 97-558-XIE, "Aboriginal Peoples in Canada in 2006: Inuit, Métis and First Nations, 2006 Census".

rights, including in its own legislative and policy agenda. Without such concrete implementation by the state it can be assumed that Canada continues to pay lip service to the notion of Aboriginal peoples' human rights when it must, and to use its judicial, political and economic power to continue the colonial practices of dispossession and domination. When Canada is prepared to move from denial and repression to implementation of indigenous human rights, it will also move from bullying and cowardice to courage and commitment.

Article 46(2) UNDRIP: In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this declaration shall be subject only to such limitations as are determined by law, in accordance with international human rights obligations. Any such limitations shall be nondiscriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedom of others and for meeting the just and most compelling requirements of a democratic society.

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