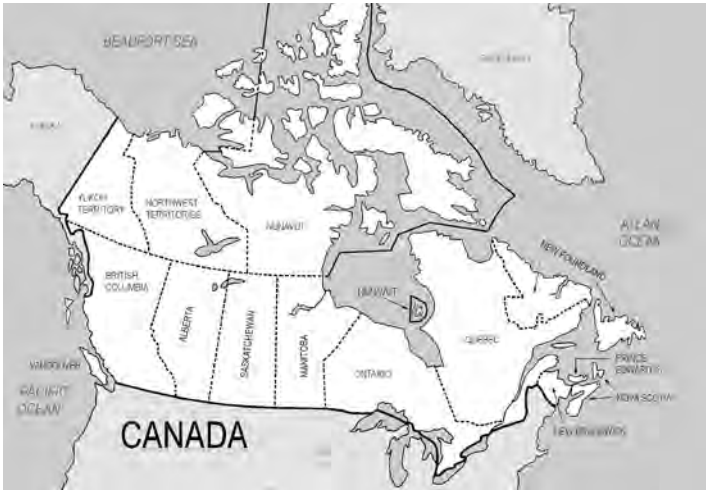
CANADA

The Indigenous peoples of Canada are collectively referred to as "Aboriginal peoples". The Constitution Act, 1982 of Canada recognizes three groups of Aboriginal peoples: Indians, Inuit and Métis. According to the 2011 National Household Survey, 1,400,685 people in Canada had an Aboriginal identity, representing 4.3% of the total Canadian population. 851,560 people identified as a First Nations person, representing 60.8% of the total Aboriginal population and 2.6% of the total Canadian population.

First Nations (referred to as "Indians" in the Constitution and generally registered under Canada's Indian Act) are a diverse group, representing more than 600 First Nations and more than 60 languages. Around 55% live on-reserve and 45% reside off-reserve in urban, rural, special access and remote areas. The Métis constitute a distinct Aboriginal nation, numbering 451,795 in 2011, many of whom live in urban centres, mostly in western Canada.

Canada's Constitution Act, 1982 recognizes and affirms the existing Aboriginal and Treaty rights of Aboriginal peoples. The Supreme Court has called the protection of these rights "an important underlying constitutional value" and "a national commitment". Canada's highest Court has called for reconciliation of "pre-existing aboriginal sovereignty with assumed Crown sovereignty".[1] Canada has never proved it has legal or *de jure* sovereignty over Indigenous peoples' territories, which suggests that Canada is relying on the racist doctrine of discovery.[2]

In 2010, the Canadian government announced its endorsement of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which was adopted by the UN General Assembly in September 2007. This decision comes as a reversal of Canada's earlier opposition to the Declaration, which it had pursued together with Australia, the USA and New Zealand, and who have all since revised their attitude towards the UNDRIP. Canada has not ratified ILO Convention No. 169.



2014 is most noted for the historic Supreme Court decision, *Tsilhqot'in Nation v British Columbia*,[3] affirming Aboriginal title to traditional lands – including rights to own, benefit from and determine future use of these lands. This decision marked the first time a Canadian court has provided legal recognition to Indigenous land title based on the Indigenous Nation's traditional use and control of the lands. In opposition to the Supreme Court decision and the efforts of Indigenous peoples and their allies, the federal government of Canada has intensified its efforts to undermine Indigenous peoples' human rights both domestically and internationally. The government remains hostile to the UN Declaration on the Rights of Indigenous Peoples, despite its 2010 endorsement (see also *The Indigenous World 2011*).

Tsilhqot'in Nation victory

On 26 June, the Supreme Court of Canada unanimously recognized the right of the Tsilhqot'in people to own, control and enjoy the benefits of approximately 2,000 km^2 of land at the heart of their traditional territory in central British Columbia (see *The Indigenous World 2014* for an introduction to the SCC hearing). This

decision marks the first time that a Canadian court has affirmed the land ownership of a particular Indigenous Nation, rather than relying on negotiations to address land rights.

Responding to the landmark decision, the Tsilhqot'in Nation said, "The Supreme Court of Canada's ruling ends a long history of denial and sets the stage for recognition of Aboriginal title in its full form."

The legal principles articulated in the Court's decision are widely applicable and should be adopted as part of a principled framework for the recognition of Indigenous land rights in Canada. Indeed, this jurisprudence could be used by Indigenous peoples in other countries. Highlights of the decision include:

- Aboriginal title confers ownership rights including "the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land," [4] as well as the "right to control" the land.[5]
- The doctrine of *terra nullius* "never applied in Canada." [6] The Court affirmed that Indigenous peoples exercised rights to control, use and benefit from their lands prior to the arrival of Europeans and that the assertion of European sovereignty in British Columbia did not extinguish this "independent legal interest".[7]
- The Court repeatedly emphasized the constitutional requirement of obtaining Indigenous peoples' "consent".[8] The right to "control" title land "means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders".[9] If the Aboriginal group does not consent to the use, "the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the *Constitution Act, 1982*".[10]
- In regard to federal and provincial governments, "incursions on Aboriginal title cannot be justified if they would substantially deprive future generations of the benefit of the land".[11]
- The Court rejected assertions by the province that Indigenous title lands are necessarily limited to small tracts of continuous intensive use. Instead, the Court found that Indigenous societies that historically exercised control over large territories could establish ongoing title to these lands.[12]

- The "Crown had... a legal duty to negotiate in good faith to resolve land claims".[13] "The governing ethos," the Court said, "is not one of competing interests but of reconciliation."[14] Further, "What is at stake is nothing less than justice for the Aboriginal group and its descendants, and the reconciliation between the group and broader society."[15]
- Finally, the Court cautioned, "if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title." [16]

Indigenous Peoples and their allies have celebrated this ruling as a "game-changer".[17] Government and industry have been slower to respond. The federal government had not yet engaged with the Tsilhqot'in Nation in any constructive manner by the end of the year. The province of BC was urged to meaningfully work with Indigenous peoples on the eve of a significant gathering of provincial government and First Nations leaders.[18]

Report of the Special Rapporteur on the rights of indigenous peoples

Former UN Special Rapporteur James Anaya visited Canada in the fall of 2013 (s*ee The Indigenous World 2014*) and his report was presented to the Human Rights Council in 2014.[19] Key conclusions of Anaya's report echo concerns raised repeatedly by Indigenous peoples. In his conclusions, Anaya states:

> *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.*[20]

Anaya's report details ongoing challenges with regard to rights violations and lack of implementation of the court decisions that support Indigenous peoples. He touches on many topics that have been covered in previous issues of *The Indigenous World:* child welfare, murdered and missing Indigenous women, the Truth and Reconciliation Commission, resource development and the right of free, prior and informed consent and the need for implementation of the *UN Declaration on the Rights of Indigenous Peoples*.

There has been no substantive response from the Government of Canada. Canada is increasingly a state participating in "rights ritualism",[21] agreeing to and participating in the visit of the Special Rapporteur in the appearance of good faith while having no plan to seriously engage in implementing the recommendations of the report. As described by Hilary Charlesworth: "Rights ritualism can be understood as a way of embracing the language of human rights precisely to deflect real human rights scrutiny and to avoid accountability for human rights abuses." [22]

Indigenous peoples and their allies have welcomed the report and are using the Special Rapporteur's work in their own.

World Conference on Indigenous Peoples

Indigenous peoples' and human rights organizations were outraged that the federal government used the World Conference on Indigenous Peoples as an opportunity to continue its unprincipled attack on the UN Declaration on the Rights of Indigenous Peoples.[23] After the consensus adoption of the Outcome Document, Canada was the lone state that insisted on an Explanation of Vote. Canada then filed a two-page statement of objections, including that it could not commit to upholding provisions in the UN Declaration that deal with free, prior and informed consent (FPIC) since these provisions "could be interpreted as providing a veto to Aboriginal groups".

The notion that the Declaration could be interpreted as conferring an absolute and unilateral veto power has been repeatedly raised by Canada as justification for its continued opposition. This claim, however, has no basis either in the UN Declaration or in the wider body of international law.

Much as there has been no visible engagement with the report of the Special Rapporteur, Canada has not engaged domestically with Indigenous peoples with any dialogue with regards to an action plan for implementation of the Outcome

Document of the WCIP. The Coalition on the UN Declaration on the Rights of Indigenous Peoples, which is made up of Indigenous peoples' and human rights organizations, is engaging with the Outcome Document and exploring strategies for advancing the recommendations, with or without the engagement of the State.

Murdered and missing Indigenous women

Indigenous peoples' and human rights organizations have been raising awareness on the issue of murdered and missing Indigenous women and girls for many years, with calls for a national inquiry and national plan of action.[24] In May 2014, Canada's national police, the RCMP, published the first national statistics on the numbers of missing and murdered Indigenous women known to police. The RCMP reported that 1,017 Indigenous women and girls were murdered between 1980 and 2012 (a rate 4.5 times higher than homicides of non-Indigenous women). As of November 2013, at least 105 Indigenous women and girls remained missing under suspicious circumstances or for undetermined reasons.[25]

In August, the body of 15-year-old Tina Fontaine was pulled from Winnipeg, Manitoba's Red River – having been murdered and dumped into the river in a plastic bag. The horror of the story hit the national consciousness. Media coverage, rallies and vigils took place across the country. In November, another Indigenous teen, Rinelle Harper, was found almost dead after crawling out of the Assiniboine River (also in Winnipeg, Manitoba). Shockingly, the federal government refused to engage – the Prime Minister repeatedly denying the issue was a "sociological phenomenon".[26] In an end-of-year interview, the Prime Minister replied to a question about whether the federal government would respond to the call for an inquiry by saying: "It isn't really high on our radar, to be honest." [27]

Education Act

The long-standing need to ensure equity in funding for Indigenous education was intended to be addressed in federal legislation introduced in 2014.[28] On 7 February, the federal government announced legislation, and 1.9 billion dollars of funding, with the support of the National Chief of the Assembly of First Nations. Quickly, the draft legislation, ironically titled "First Nations Control of First Nations Edu-

cation", was heavily criticized for, among other things, placing too much control in the hands of the Minister of Aboriginal Affairs. On 2 May, the National Chief resigned.[29] The following week, the Minister of Aboriginal Affairs put the legislation "on hold". The budgeted funds did not flow and Indigenous education remains starkly underfunded. The Prime Minister insists that funds will not be released until the Indigenous leadership agrees to the terms set by the government. As of year-end, no progress had been made.

Review of the Comprehensive Land Claim Policy

One of Canada's processes for addressing land rights violations is the comprehensive land claim policy (CCP). For Indigenous peoples who do not have a Treaty or other arrangement, this is intended to be a method of redress for land dispossession. In August 2014, the federal government unilaterally appointed a ministerial special representative, Mr. Douglas Eyford, to develop recommendations for the reform of the CCP. The government also released an interim policy on resolution of comprehensive claims.[30] The interim policy is described by government "as a starting point for discussions with partners and outlines the Government of Canada's current approach to the negotiation of treaties, including the developments that have occurred since the publication of the last policy in 1986". However, the interim policy does not depart in any significant way from existing policies and fails to incorporate either the standards established in the *Tsilhqot'in* decision or international human rights law, including the UN Declaration on the Rights of Indigenous Peoples. Many substantive submissions were made to Eyford by Indigenous organizations and others.[31]

Specific Claims Tribunal

Another form of intended redress for past violations is the specific claims process. This process differs from the CCP as it deals with compensation not exceeding 150 million dollars for specific violations of agreements, including treaties, or the mismanagement by the government of an Indigenous Nation's assets.

In 2008, a Specific Claims Tribunal was established to make the process more efficient and improve access to justice.[32] In November 2014, the Tribunal

issued its report, including grave concerns about its ability to function. Tribunal Chair Justice Harry Slade warned:

> *The Tribunal has neither a sufficient number of members to address its present and future case load in a timely manner, if at all. Nor is it…assured of its ability to continue to function with adequate protection of its independence… Without the appointment of at least one additional full time member and several part time members…The Tribunal will fail.*[33]

This pronouncement is another example whereby Canada appears to be engaging in rights ritualism, as described above. Canada has created a body to address past violations yet does not give the body the resources or the independence to function properly.

In *Aundeck Omni Kaning* v. *Canada*, the Tribunal ruled that the federal government's negotiating position was

> *paternalistic, self-serving, arbitrary and disrespectful of First Nations. It falls short of upholding the honour of the Crown, and its implied principle of 'good faith' required in all negotiations Canada undertakes with First Nations. Such a position affords no room for the principles of reconciliation, accommodation and consultation that the Supreme Court … has described as being the foundation of Canada's relationship with First Nations.*[34] ❍

Notes and references

1 Canada is part of the British Commonwealth. The British Crown is the symbolic head of state and the term refers to government. The federal government is the Crown in right of Canada and each of the provincial governments is the Crown in right of the province.

2 See Permanent Forum on Indigenous Issues, *Study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress.* UN Doc. E/C.19/2014/3 (20 February 2014) Study by Forum member Edward John, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N14/241/84/PDF/N1424184.pdf?OpenElement.

3 *Tsilhqot'in Nation* v. *British Columbia*, 2014 SCC 44.

4 *Tsilhqot'in Nation, supra* note 1, para. 73. See also paras. 94 and 121.

5 *Ibid*., paras. 2, 18, 75 and 76.

6 *Tsilhqot'in Nation, supra* note 1, para. 69.

7 *Ibid*., para 69.

8 In regard to "consent", see *Tsilhqot'in Nation*, paras. 2, 5, 76, 88, 90-92, 97 and 124; and *UN Declaration*, article 32(2).
9 *Ibid*., para. 76. In regard to "control", see also paras. 2, 15, 18, 31, 36, 38, 47, 48, 50, 75 and 119; and *UN Declaration*, article 26(2).
10 *Ibid*., para. 76.
11 *Tsilhqot'in Nation*, *supra* note 1, para. 86.
12 *Tsilhqot'in Nation*, *supra* note 1, para. 50.
13 *Tsilhqot'in Nation*, *supra* note 1, para. 17.
14 *Tsilhqot'in Nation*, *supra* note 1, para. 17.
15 *Tsilhqot'in Nation*, *supra* note 1, para. 23
16 *Tsilhqot'in Nation*, *supra* note 1, para. 92.
17 For example, Tears and cheers greet historic Supreme Court ruling handing Tsilhqot'in major victory, *APTN National News,* 26 June 2014. Online at: http://aptn.ca/news/2014/06/26/supreme-court-hands-tsilhqotin-major-victory-historic-ruling/.
18 Amnesty International and Canadian Friends Service Committee, *Open Letter to the Premier of British Columbia,* 10 September 2014. Online at: http://quakerservice.ca/wp-content/uploads/2014/09/Open-Letter-to-the-Government-of-British-Columbia-10-Sept-14.pdf
19 UN Human Rights Council, 2014: *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex.
20 *Ibid*., para. 80.
21 For more on this concept, see Fleur Adcock, 2012: The UN Special Rapporteur on the Rights of Indigenous Peoples and New Zealand: A study in compliance ritualism. *New Zealand Yearbook of International Law*, Vol. 10 at 97 (2012).
22 Hilary Charlesworth 2010: Kirby Lecture in International Law: Swimming to Cambodia. Justice and Ritual in Human Rights After Conflict. *29 Australian Yearbook of International Law* 1 at 12-13, quoted in *The Limitations of the Current International Human Rights Law System in Regard to Monitoring of Rights? Does it Encourage 'Rights Ritualism'*?, Presentation by Ms Fleur Adcock, The Australian National University, at the International Expert Group Meeting, Dialogue on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples, hosted by the Secretariat of the Permanent Forum on Indigenous Issues in New York, January 2015. UN Doc. PFII/2014/EGM, New York, 27 - 29 January 2015, para. 10.
23 Ad hoc coalition on the UN Declaration on the Rights of Indigenous Peoples, 24 September 2014**:** *Canada uses World Conference to continue indefensible attack on UN Declaration on the Rights of Indigenous Peoples*. Available online: http://quakerservice.ca/wp-content/uploads/2014/09/Joint-Public-statement-following-WCIP-24-Sept-2014.pdf
24 See generally Native Women's Association of Canada and Amnesty International Canada
25 Canada, RCMP 2014: *Murdered or Missing Aboriginal Women: National Operational Overview*. Available online : http://www.rcmp-grc.gc.ca/pubs/mmaw-faapd-eng.pdf
26 Alex Boutilier, 2014: Native teen's slaying a 'crime', not a 'sociological phenomenon', Stephen Harper says. *Toronto Star*, 21 August 2014. http://www.thestar.com/news/canada/2014/08/21/native_teens_slaying_a_crime_not_a_sociological_phenomenon_stephen_harper_says.html.
27 The full text of the interview is available online: http://www.cbc.ca/news/politics/full-text-of-peter-mansbridge-s-interview-with-stephen-harper-1.2876934
28 Minister of Aboriginal Affairs and Northern Development. Bill C-33, An Act to establish a framework to enable First Nations control of elementary and secondary education and to provide for-

related funding and to make related amendments to the Indian Act and consequential amendments to other Acts (*First Nations Control of First Nations Education Act*) , 2nd Session, Forty-first Parliament. http://www.parl.gc.ca/content/hoc/Bills/412/Government/C-33/C-33_1/C-33_1.PDF

29 See: How the First Nations education act fell apart in matter of months, *Canadian Press*. 11 May 2014. Online at http://www.cbc.ca/news/politics/how-the-first-nations-education-act-fell-apart-in-matter-of-months-1.2639378

30 Aboriginal Affairs and Northern Development Canada, 2014: *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights*, September 2014 ["Interim Policy"], Online at http://www.aadnc-aandc.gc.ca/eng/1408631807053/1408631881247

31 Coalition on the UN Declaration on the Rights of Indigenous Peoples: Amnesty International Canada; Assembly of First Nations; Canadian Friends Service Committee (Quakers); Chiefs of Ontario; First Nations Summit; Grand Council of the Crees (Eeyou Istchee); Indigenous World Association; Inuit Tapiriit Kanatami; KAIROS: Canadian Ecumenical Justice Initiatives; Native Women's Association of Canada; Québec Native Women/Femmes Autochtones du Québec; Union of British Columbia Indian Chiefs. 27 November 2014: *Renewing the Federal Comprehensive Claims Policy: Submission to Douglas Eyford, Ministerial Special Representative*. Available online at http://quakerservice.ca/wp-content/uploads/2014/11/Joint-submission-Renewing-the-Comprehensive-Claims-Policy.pdf

32 *Specific Claims Tribunal Act*, Statutes of Canada 2008, c. 22.

33 Specific Claims Tribunal, ANNUAL REPORT, For Presentation to the Honourable Bernard Valcourt, Minister of Aboriginal Affairs and Northern Development Canada, 30 September 2014, http://www.sct-trp.ca/pdf/Annual%20Report%202014.pdf, at 2.

34 *Aundeck Omni Kaning* v. *Canada*, 2014 SCTC 1, para. 89.

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