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'PUSHED TO THE EDGE'

THE LAND RIGHTS OF INDIGENOUS
PEOPLES IN CANADA

A HEALTHY ENVIRONMENT
IS A HUMAN RIGHT

AMNESTY
INTERNATIONAL



INDIGENOUS PEOPLES IN CANADA EXPERIENCE MUCH GREATER LEVELS OF POVERTY THAN THE REST OF THE POPULATION. UNEMPLOYMENT IS WIDESPREAD, EXCEEDING 80 PER CENT IN SOME INDIGENOUS COMMUNITIES. ASSISTANCE PAYMENTS FROM THE GOVERNMENT ARE INSUFFICIENT TO MEET BASIC NEEDS. AN ESTIMATED ONE IN FOUR FIRST NATIONS CHILDREN LIVE IN POVERTY. IN ONE SURVEY, MORE THAN HALF THE RESPONDENTS FROM THE PREDOMINANTLY INUIT NORTHERN TERRITORY OF NUNAVUT SAID THEY OFTEN CANNOT AFFORD DECENT FOOD FOR THEIR FAMILIES. THE FAILURE OF GOVERNMENTS IN CANADA TO RESPECT AND PROTECT INDIGENOUS PEOPLES' RIGHTS TO THEIR LANDS AND TERRITORIES HAS BEEN A CRITICAL FACTOR IN THEIR IMPOVERISHMENT.

The hardship experienced by Indigenous Peoples contrasts sharply with the vast wealth generated by logging, mining, oil and gas development and other resource extraction on their lands. The failure to recognize and uphold Indigenous Peoples' land and resource rights has meant that Indigenous communities have had little meaningful say in development on their lands. Their share in the wealth created by industry has been small. While some Indigenous communities have chosen to participate in resource development given the few alternative sources of income, others have strongly rejected large-scale extraction as incompatible with their values and culture.

Traditional ways of living on the land, such as hunting, trapping and gathering of berries and plant medicines, continue to be both a vital source of subsistence and central to Indigenous Peoples' cultural identities. Environmentally destructive forms of development can undermine these activities, leading to further deprivation and cultural loss. Gender differences – in traditional land use activities, family responsibilities, and access to industry jobs – mean that Indigenous women often experience less benefit and

greater harm from resource development activities than do Indigenous men.

Canadian law and international human rights standards recognize that Indigenous Peoples have the right to use and benefit from their lands, to maintain their cultures and traditions, and to determine their own lives and futures. Consistent and effective protection of these rights is necessary to end the discrimination inherent in treating Indigenous Peoples' rights as secondary and expendable. Protection of Indigenous Peoples' land rights is also necessary to safeguard other human rights – including the rights to health, livelihood, culture and self-determination – which are inseparably linked to Indigenous Peoples' control and use of the land.

In 1996, a high-level public inquiry into the situation of Indigenous Peoples in Canada, the Royal Commission on Aboriginal Peoples (RCAP), estimated that the long history of violation of Indigenous Peoples' land rights had left them in possession of less than half of one per cent of the lands in southern Canada. RCAP stated, "Aboriginal peoples need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater

share of the lands and resources in this country, their institutions of self-government will fail... Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction."

Indigenous Peoples in Canada have long asserted rights to a greater share of lands and resources. This includes territory that the state has unilaterally claimed as "crown land" without any negotiated agreement with the Indigenous Peoples who have lived on and used the land for generations. It also includes rights to lands and resources where formal agreements to respect these rights have been violated by government actions.

Every government has an obligation to uphold and promote the rights of all people, without discrimination. Canadian administrations, however, have routinely sought to minimize or deny Indigenous Peoples' rights. Land rights negotiations often drag on for years or even decades without resolution. Even in light of positive court rulings affirming Indigenous Peoples' rights, federal, provincial and territorial governments in Canada have been slow to bring land rights policies into line with their legal duties. As a result, rights and title over large areas of the country remain contested.



INDIGENOUS PEOPLES IN CANADA

The Canadian Constitution affirms the inherent rights of three distinct Indigenous Peoples: the diverse cultures known collectively as First Nations or “Indians”, the Inuit people of the Arctic, and the Métis, whose nation was formed by the merging of Indigenous and European culture prior to the creation of the Canadian state. Although each has their own distinct history and legal relationships with governments in Canada, the Inuit, Métis and First Nations all share a common struggle to maintain their traditions and ways of life in the face of deep-rooted discrimination in Canadian law and society.

Infrastructure and social services in Indigenous communities are typically underfunded compared to non-Indigenous communities. Basic services such as clean drinking water are often absent. The forced assimilation policies of the past, including the forced removal of Indigenous children to residential schools, have done lasting harm to the social fabric of Indigenous communities. This is manifested in high rates of suicide, drug and alcohol abuse and domestic violence.

In the report of his 2004 mission to Canada, the UN Special Rapporteur on indigenous people noted:

“Economic, social and human indicators of well-being, quality of life and development are consistently lower among Aboriginal people than other Canadians. Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children on welfare, women victims of abuse, child prostitution, are all much higher among Aboriginal people than in any other sector of Canadian society, whereas educational attainment, health standards, housing conditions, family income, access to economic opportunity and to social services are generally lower.”

Indigenous people currently account for just under five per cent of the Canadian population but their numbers are growing faster than the non-Indigenous population. Half of all Indigenous people are below the age of 25, creating additional pressure for jobs.

About half of Indigenous people live year-round in their home communities with ever-larger numbers seeking work or study opportunities in Canada’s urban centres. Those who do move away may return home frequently to maintain a connection to their community and traditional way of life. Despite the harms inflicted on Indigenous families and communities, ties to the land remain strong and are often seen as key to rebuilding Indigenous societies.

This digest draws mainly from Amnesty International’s ongoing work with specific First Nations communities across Canada, beginning with a 2003 report on the Lubicon Cree. We wish to thank these communities for their contributions.

above: Drumming marathon in support of the UN Declaration on the Rights of Indigenous Peoples, Ottawa, 2006.



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GRASSY NARROWS

In 1873, Anishnaabe communities in north-western Ontario entered into a treaty in which they agreed to share their land and resources with Canada and its settlers. While a relatively small area of land was “reserved” for the exclusive use of each of the communities, the treaty also guaranteed the right of the Anishnaabe “to pursue their avocations of hunting and fishing throughout the tract.” The failure by federal and provincial governments to protect these rights is the focus of an ongoing protest by the Grassy Narrows First Nation.

The people of Grassy Narrows have experienced decades of disruption to their economy and way of life, including the relocation of the community, flooding of their wild rice beds, and mercury contamination of the river system so severe that it continues to limit fishing some 40 years later. In 2003, community members set up a blockade to protest against large-scale clear-cut logging: “We were just fed up with watching our livelihood, our culture, our medicine, our children’s future – our forests – being carried off our land right

before our eyes,” says Grassy Narrows trapper J.B. Fobister.

After five years of protest, the Province agreed to enter talks that may lead to the people of Grassy Narrows having an unprecedented role in deciding how their traditional territory will be used and protected. Despite this, the province has ignored the community’s demand for a moratorium on clear-cut logging and other industrial development in the territory while talks proceed.



left: Waterfall, Wabigoon River, north-western Ontario, Canada, 16 April 2007. Fishing was central to the Grassy Narrows economy. But in the 1960s, the river system that runs through their territory was contaminated by mercury released by Dryden Chemical Company dumping its waste water into the Wabigoon River.

above: Piles of logs at a Weyerhaeuser lumber mill, north-western Ontario, Canada, 15 April 2007. Large-scale logging has cleared vast swathes of forest through the traditional territory of Grassy Narrows. North-western Ontario is under pressure to find sources of wood for mills like this that provide important of employment opportunities in the non-Indigenous community.

LUBICON CREE

For more than 30 years, the Lubicon Cree of northern Alberta have been seeking formal recognition and protection of their rights to their traditional lands and resources. Despite their efforts – including negotiation, litigation, and successful appeals to UN human rights mechanisms – they have been unable to reach an agreement with the Canadian government.

During this period, the Province of Alberta has licensed more than 2,000 oil and gas wells on Lubicon land, with an estimated C\$14 billion in oil and gas extraction. The Lubicon have never consented to this development and have not shared in the wealth. In fact, their traditional economy has been devastated by the impacts of such large-scale development. With few other sources of livelihood to replace hunting and trapping, the Lubicon have been plunged into poverty and ill-health.

“These are people that had survived, that had lived off the land,” says Lubicon community member Cynthia Tomlinson. “This was their livelihood. It was what they knew. Then in the late 70’s [when oil development began] suddenly there wasn’t enough game. People couldn’t live off the land. In came the welfare system. I don’t know how to explain it – it just takes the spirit away.”

right: A Lubicon Cree trapper’s cabin, Alberta, Canada, 29 June 2008. The cabin is no longer used since the construction of an oil well next to it.

inset: Oil and gas installations in the Lubicon Cree territory, Canada, 29 June 2008. The Lubicon estimate that there are more than 2000 oil and gas wells in their territory, along with pipelines, storage facilities and processing plants. A community member told Amnesty International that in most of the traditional territory you can’t walk more than 400 metres without encountering signs of oil and gas development.





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RESOURCE BOOM

Before the 2008 economic downturn, Canada was experiencing unprecedented expansion in mining and oil and gas production. Profits in this sector doubled during the previous five years. In Ontario, mining increased by 500 per cent between 2002 and 2008.

Inevitably, a substantial part of this development is taking place on lands that Indigenous Peoples use for traditional practices like hunting and fishing, and over which there are ongoing disputes about Indigenous rights. The federal government has estimated that 1,200 Aboriginal communities are located within 200 kilometres of current mining activities.

Under the Canadian Constitution, the federal government has specific responsibility for First Nations and their lands. Most resource development activities, however, are licensed by provincial governments. Until challenged by recent court decisions, the provinces have largely ignored the rights of Indigenous Peoples. Most provincial government bodies responsible for licensing oil and gas development, mining or logging still have no formal mandate or process to consider possible impacts on Indigenous rights and interests. The federal government has rarely intervened in provincial resource decisions, even when these decisions have the potential to cause irreparable harm to Indigenous Peoples' rights.

LAND RIGHTS AND BROKEN PROMISES

In 1763 the British Crown issued a proclamation stating that its North American colonies would only acquire further territory through negotiation and treaty-making with the "Nations or Tribes of Indians". The Royal Proclamation provides early legal recognition of Indigenous Peoples' rights to their

THE SACRED HEADWATERS

For several years, north-western British Columbia has been poised on the verge of a mining and resource extraction boom. Approved projects include an open pit gold and copper mine that would be the largest of its kind in northern America, as well as plans to drill some 1,000 wells to extract coal bed methane. The open pit mine is currently being challenged in court while the coal bed methane project has been suspended for two years following community opposition. At least six other major projects are in development.

The region targeted for development includes an area known as the Sacred Headwaters. Three major salmon-bearing rivers and hundreds of smaller rivers and streams begin there. This watershed is vital to the subsistence economy and culture of the Indigenous Tahltan peoples and other First Nations who live downstream. Tahltan leaders say the Province has never properly considered the potential long-term combined impacts of these projects on the environment and the people. Downstream communities have not even been consulted.

"It's a danger to all the life that's in that water and to our life as Tahltan people," says Tahltan elder Millie Pauls. "They bring their maps and say this is where we're going to mine, this is what we're going to do. Is that consultation? I don't believe that's consultation. I don't believe they've done the right thing."

territories and that lawful transfer of rights to live on or use these lands requires a process of negotiated consent. In 1982, the Canadian Constitution Act affirmed the pre-existing rights of Indigenous Peoples, and the treaties negotiated with them, as part of the highest framework of law.

Despite this, the promise to respect Indigenous rights remains largely unfulfilled. While Canada has a long history of treaty-making with Indigenous Peoples, there are vast areas of the country where lands and resources were simply taken without negotiation or consent. There are no treaties with the Métis and, until 1975, there were no treaties with the Inuit. Throughout most of British Columbia, Eastern Ontario, southern Quebec and Atlantic Canada, there are still no treaties defining Indigenous land rights.

The treaties and other commitments to Indigenous Peoples have also been widely breached. RCAP estimated that since 1867, expropriation and unlawful sales had

resulted in the loss of roughly two thirds of the reserve lands that the federal government had committed to preserve for exclusive First Nations' use. In 1973, the federal government established an adjudication process for treaty violations and other breaches of government obligations. Since then, more than 1,300 specific claims have been made. Of these, 765 remain unresolved. Acknowledged failings in the system lead to the overhaul of the specific claims process in 2008.

In 1973, the federal government established a process to negotiate "comprehensive claims" over territory previously excluded from treaty-making. To date, 20 modern treaties have been negotiated, principally in northern Canada, including the agreement establishing the northern territory of Nunavut. Around 60 other comprehensive claims remain unresolved. Most of these negotiations have

right: Tahltan fishing camps on the Stikine River, British Columbia, Canada, 20 July 2008.



gone on for 10 years or longer, creating a heavy debt burden for the Indigenous communities involved. The post-1973 treaties, which are excluded from the specific claims process, are the subject of dozens of court cases alleging violations of government obligations.

High-level public inquiries and UN human rights bodies have consistently criticized the adversarial approach taken by governments in Canada to resolve Indigenous land disputes. As RCAP noted, the authorities have failed to work collaboratively with Indigenous Peoples to promote the recognition and enjoyment of their rights. Instead, federal and provincial governments try to minimize their legal obligations by restricting the Indigenous rights they are willing to recognize and protect. RCAP has stated that the government "considers itself the 'loser' when a claim is settled in favour of Aboriginal people."

A recent report by Canada's Auditor General on the failure to reach timely and satisfactory resolution of land claims found that government negotiators often lack a clear mandate to reach agreement with Indigenous Peoples. Resolution of negotiations is repeatedly delayed by internal disagreements among government departments over how much they are willing to "concede" to Indigenous Peoples.

A report by the Aboriginal Affairs Committee of the Canadian Senate on conflicts over modern treaties described the federal government department responsible for Indigenous rights as "a department which is steeped in a legacy of colonialism and paternalism". The report concluded: "It is not surprising to find that [this department] cannot be a successful defender and promoter of the Crown's interests and simultaneously honourably defend and promote the interests of the Aboriginal peoples of Canada."

Of particular concern is the policy of demanding that Indigenous Peoples give up or agree not to assert any rights not set out in the agreement. Given that Indigenous Peoples' rights are affirmed in the Constitution and the interpretation of these rights continues to evolve, many Indigenous Peoples have refused to negotiate on the basis of such a wholesale surrender of their rights.

Canadian courts have affirmed that all levels of government have a responsibility to uphold Indigenous Peoples' Constitutional rights. Although reluctant to make a final determination on Indigenous rights and title, the courts have set out principles and duties for the effective protection of these rights. These include the principle that constitutionally protected rights must take precedence over other interests that are not similarly protected. The courts have called for treaties and other agreements to be interpreted generously, taking Indigenous perspectives into account.

The Canadian Supreme Court has repeatedly called on the provincial and federal governments to carry out consultations in good faith with Indigenous Peoples so that any concerns can be identified and accommodated before decisions are made. In some instances, the Court has said that decisions should proceed only with the affected peoples' consent.

Repeated Supreme Court rulings affirming and elaborating on the duty of consultation and accommodation have forced governments in Canada to examine how to enable Indigenous participation in decision-making over resource development. However, few concrete reforms have been implemented and governments continue to define their duties towards Indigenous Peoples much more narrowly than the courts have done.



above: Protesters march in support of jailed Ardoch Algonquin spokesperson, Bob Lovelace, in the nearby town of Napanee, Ontario, 2009. The jailing of Indigenous leaders over anti-mining protests led to widespread demand for reform of the Ontario Mining Act.

The long-standing failure to protect Indigenous land rights has already impoverished Indigenous communities across Canada and jeopardized ways of life essential to their subsistence and cultural identity. This is in addition to the harm still being felt from the forced



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ONTARIO MINING ACT

In early 2008, seven elected leaders, elders and spokespersons for two Indigenous communities in Ontario – Kitchenuhmaykoosib Inninuwug in the north and the Ardoch Algonquin in the east – were each sentenced to six months in jail for contempt of court. The prosecution stemmed from their peaceful efforts to stop mineral exploration on lands subject to ongoing claims. The provincial government had licensed these exploration activities without the consent or knowledge of the affected communities.

A higher court later reduced their sentences to time served. The court characterized the disputes as a clash between the Indigenous communities' "respectable interpretation" of their rights and the fact that "remarkably sweeping" provincial laws for granting mineral exploration permits include no protection of these rights.

Public outcry over the jailing of the seven led the Province to propose significant reforms to the Mining Act in April 2009, including requirements that mining companies submit plans for consultation with Indigenous Peoples as part of their proposals. Whether such reforms will prevent future confrontations may largely depend on how the Province interprets the duty of consultation and accommodation. Current draft guidelines on consultation provide little substantiation of the duty to accommodate and make only one mention of obtaining consent.

assimilation policies of the past. In this context, decisions about use of lands and resources are of crucial importance to the survival of Indigenous communities. It is both reasonable and necessary, therefore, to apply the highest standard of protection when making decisions about resource development activities that could affect Indigenous Peoples' rights.

International human rights standards call on states to seek the consent of Indigenous Peoples in decisions affecting their interests, particularly concerning lands and resources. UN human rights bodies have recognized

that such consent must be given freely, before any decision is made, and with access to adequate information about the possible consequences and benefits. The right of free, prior and informed consent is also affirmed in the 2007 UN Declaration on the Rights of Indigenous Peoples.

The federal government has cited the right of free, prior and informed consent as one of the reasons it voted against the UN Declaration at the UN General Assembly, despite the important role played by Canada in the negotiation of the text. The federal government has since claimed that the

Declaration is not applicable in Canada. In fact, the human rights norms affirmed in UN declarations are considered applicable to all states from the time of their adoption. Canadian courts have accepted international human rights norms as a source of authoritative interpretation of rights protected under Canadian law.

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TAKE ACTION NOW

Write to the Prime Minister of Canada:

- Note that failure to adequately protect the land and resource rights of Indigenous Peoples has contributed to the drastic impoverishment of Indigenous communities in Canada.
- Urge the government to follow the lead of Australia, which in April 2009 reversed its opposition to the UN Declaration on the Rights of Indigenous Peoples.
- Call on the government to work with Indigenous Peoples to implement the Declaration, including provisions on free, prior and informed consent, as part of the framework for achieving a just and timely resolution of outstanding land disputes and preventing further erosion of Indigenous Peoples' land and resource rights.

Please send your letter to:

The Right Honourable Stephen Harper
Office of the Prime Minister
80 Wellington Street
Ottawa, ON
Canada
K1A 0A2

SEE AMNESTY INTERNATIONAL'S OTHER BRIEFINGS:

'Fighting for the future of our children': Indigenous rights in the sacred headwaters region, British Columbia, Canada
Index: AMR 20/003/2009

'A place to regain who we are': Grassy Narrows First Nation, Canada
Index: AMR 20/001/2009

Land and way of life under threat: The Lubicon Cree of Canada
Index: AMR 20/006/2008

front cover: Fish Lake, Lubicon Cree territory, Canada, 29 June 2008. Fish Lake is part of the proposed Lubicon reserve, an area the Lubicon have successfully protected for fishing, ceremonies and other cultural use.

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