



ASSEMBLY OF FIRST NATIONS

Introduction to the United Nations Declaration on the Rights of Indigenous Peoples

Summary of Key Points

- Declaration negotiated over a 24-year period with Indigenous Peoples, States and UN experts.
- Adopted by UN General Assembly in 2007. Canada endorsed in 2010. In 2016, Canada committed to adopt and implement Declaration without qualification.
- Declaration has been reaffirmed eight times by consensus by UN General Assembly.
- Declaration is a principled legal framework for achieving reconciliation, redress, and respect.
- Declaration does not create new rights. It elaborates on the inherent or pre-existing rights of Indigenous peoples.
- Declaration affirms the human rights of Indigenous peoples, as well as individuals. Collective rights indispensable for existence, well-being and development as peoples.
- Rights in Declaration constitute minimum standards for the survival, dignity, security, and well-being of Indigenous peoples.
- UN declarations are not signed or ratified by States. They are universally applicable upon adoption by UN. Consensus strengthens its legal effect.
- International human rights declarations are intended to guide governments, courts, and other institutions in ensuring that human rights are respected, protected, and fulfilled.
- UN Declaration has diverse legal effects. Domestic courts can and do harmonize Canadian law with the UN Declaration.
- Supreme Court of Canada ruled that international declarations are “relevant and persuasive sources” for interpretation of domestic human rights.
- Truth and Reconciliation Commission calls for UN Declaration to be the framework for reconciliation.
- UN Declaration affirms right of Indigenous peoples to self-determination. Self-determining peoples have a right to choose and to determine their own future.
- Prime Minister Trudeau indicated his government is “absolutely committed” to implementation of UN Declaration and TRC Calls to Action. Declaration is also a “top priority”.



The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated.

United Nations Secretary General Ban Ki-moon

The UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, (UN Declaration or Declaration) an international human rights instrument, on 13 September 2007 after more than twenty years of negotiations. It is the most comprehensive universal instrument specifically addressing the human rights of the world's Indigenous peoples. The adoption was celebrated globally in recognition of this extraordinary achievement and the need it fills. The Assembly of First Nations is proud to have been active and committed throughout the entire history of the development and adoption of the UN Declaration.

Developed in response to deep injustices and extreme human rights violations, the UN Declaration is a symbol of triumph and hope. The UN Declaration can guide the development of new relationships between Indigenous peoples and States, including Canada. It provides a principled legal framework for achieving reconciliation, redress, and respect.

There are over 370 million Indigenous people in over 70 countries around the world. Globally Indigenous peoples have suffered for centuries from loss of identity, forced assimilation, destruction of culture, and genocide. We have been dispossessed, discriminated against, and denied self-determination and self-government.

These violations are rooted in colonial laws and policies, many of which continue today. Our human rights continue to be routinely trampled, even when protection is established in national laws. The *International Convention on the Elimination of All Forms of Racial Discrimination* underlines that “the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist”. Although Canada ratified this Convention over 45 years ago, it has not adopted legislation to repudiate colonialism.

“Indigenous” is the term used internationally to describe the original or first peoples in different countries around the world. Canada’s *Constitution* refers to Indigenous peoples as “Aboriginal” peoples, which include First Nations, Inuit and Métis peoples. The Supreme Court of Canada uses both terms interchangeably.

Significance of the UN Declaration

The development of the UN Declaration was a unique and democratic process. A critical element was that, for the first time, a UN human rights instrument was created with the rights holders as active participants. Indigenous peoples’ representatives participated in both working groups that developed the text, first with the Working Group on Indigenous Populations (WGIP) and then in the Working Group on the Draft Declaration (WGDD).

In 1977 Indigenous people went to Geneva for the International NGO Conference on Discrimination against Indigenous Populations in the Americas. One of the outcomes was the development of the WGIP, first meeting in 1982. In 1985, the WGIP began drafting what was to become the Declaration and worked on the text for nine years.



The WGDD was then established by the UN to further work on the text with a 10-year mandate – due to end in 2004. Extensions to the WGDD carried it through 2006. Over the course of more than two decades, Indigenous peoples’ representatives traveled to the UN and shared details of the human rights violations they suffered. From these words the articles of the Declaration were crafted, revised, and ultimately adopted.

At the time of the 2007 vote, 144 states supported the UN Declaration. Only four – Australia, Canada, New Zealand, and the United States – voted against it. Eleven abstained. States that did not vote in favour at the time of adoption can later endorse or express their support for it. All four dissenting states have since reversed their position and have expressed support for the Declaration. Colombia, Samoa and Ukraine, who had abstained, have now also endorsed the Declaration.

The UN Declaration affirms the human rights of Indigenous peoples, as well as individuals. The Declaration does not create new rights. It elaborates on the inherent or pre-existing rights of Indigenous peoples. It applies existing international human rights standards to the specific historical, cultural and social circumstances of Indigenous peoples worldwide.

The emphasis on collective human rights makes much-needed contribution to the on-going development of the international human rights system. Collective rights are indispensable to the survival, dignity, security, and well-being of Indigenous peoples. These rights are also critical for their ongoing existence and development as distinct peoples.

There are 46 operative articles in the UN Declaration, as well as 24 preambular paragraphs. Taken together, they affirm the economic, social, cultural, political, environmental, and spiritual rights of Indigenous peoples. This includes rights relating to governance, lands and resources, health, education, culture, language, environment, development, spirituality, sacred sites, and treaties.

At times the UN Declaration has been the target of extreme interpretations by some commentators. However, aside from the prohibition of genocide, the human rights in the Declaration are relative and not absolute. As affirmed in article 46(3), every provision in the Declaration must be interpreted “in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith”. These are the principles of the Canadian and international legal systems. They are also the principles that have been denied to Indigenous peoples throughout Canada’s history.

There is a need for increased understanding generally as to how international human rights law can serve to reinforce and otherwise positively influence Canadian law. Extreme or narrow interpretations of the UN Declaration are not helpful – especially if individual provisions are interpreted in isolation rather than considered in the context of the whole instrument and other international law.

In Canada, the *Constitution Act, 1982* includes the *Canadian Charter of Rights and Freedoms* in Part I and Aboriginal and treaty rights in Part II. Both Parts include human rights. Indigenous peoples’ rights have been addressed within the international human rights system for over 35 years. It is time for governments and courts to address Indigenous peoples’ rights through the human rights framework of the UN Declaration.

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International human rights declarations

International human rights declarations are intended to guide governments, courts, and other institutions in ensuring that human rights are respected, protected, and fulfilled.

The UN General Assembly uses the term “declaration” for resolutions that express political or legal principles of particular importance. Such principles often reflect existing international law. They can also provide a basis for the progressive development of new law.

In United Nations practice, a declaration is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance. Maximum compliance is expected. The UN Declaration is such a declaration deserving of utmost respect.

Declarations are not signed or ratified by states. The UN Declaration was adopted as an annex to a General Assembly resolution. Human rights declarations are different from legally binding treaties or conventions, to which states are bound after they ratify them. This does not mean declarations have no legal effects.

Former UN Special Rapporteur on the rights of Indigenous peoples James Anaya has emphasized: “Although technically a resolution, the Declaration has legal significance ... the Declaration is an extension of standards found in various human rights treaties that have been widely ratified and that are legally binding on States.”² Anaya concluded, “implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification.”³

Adoption of the UN Declaration sends a clear message to the international community that the rights of Indigenous peoples are not separate from or less than the rights of others, but are an integral and indispensable part of a human rights system dedicated to the rights of all.

While the UN Declaration is not binding in the same manner as international treaties, it does have diverse legal effects. The Declaration can be used to interpret Indigenous peoples’ rights and related Crown obligations. It can be used to fill in the gaps in treaties between Indigenous peoples and States. This is especially important for numbered or pre-Confederation treaties, which are less detailed than post-1975 treaties in Canada.

In 1987, Chief Justice Dickson of the Supreme Court of Canada ruled that “declarations” and other international human rights instruments are “relevant and persuasive sources” for the interpretation of domestic human rights.⁴

In 2012, the Federal Court of Canada indicated: “International instruments such as the [UN Declaration] and the *Convention on the Rights of the Child* may also inform the contextual approach to statutory interpretation”.⁵ Thus, domestic courts can and do harmonize Canadian law with the UN Declaration.

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In 2016, in *Catholic Children’s Aid Society of Hamilton v. G.H.*, an Ontario court relied on statements and commitments of the Crown – including those relating to the Truth and Reconciliation Commission and the UN Declaration – in determining whether a Métis child had been discriminated against contrary to s. 15 of the Canadian *Charter*.⁶ The Court added that all such developments “form an important contextual backdrop for the analysis”.⁷

In 2017, an Ontario court elaborated:

*...in dealing with aboriginal people and aboriginal land claims and rights, the Crown has a special responsibility and relationship with its indigenous peoples. The Crown must deal with such peoples and related issues fairly and appropriately, especially in light of the recent recommendations as released by the Truth and Reconciliation Commission and Canada’s recent adoption of the United Nations Declaration of the Rights of Indigenous Peoples.*⁸

Widespread support for the UN Declaration

The UN Declaration has been reaffirmed eight times by consensus by the United Nations General Assembly⁹ and, of course, Canada is part of that consensus.

In June 2016 the Organization of American States adopted by consensus the *American Declaration on the Rights of Indigenous Peoples*¹⁰, which further affirms the UN Declaration.

The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in Geneva has concluded that the UN Declaration constitutes “a principled framework for justice, reconciliation, healing and peace”.¹¹ The UN Permanent Forum on Indigenous Issues in New York also has a similar perspective.

Following the World Conference on Indigenous Peoples, a “system-wide action plan”¹² has also been devised within the UN with international and national dimensions. The action plan has the ultimate goal of implementing, with the effective participation of Indigenous peoples, the Declaration at all levels.¹³

In September 2016, the UN Human Rights Council amended the mandate of the EMRIP, so that it “shall provide the ... Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration”.¹⁴

Within Canada, the Truth and Reconciliation Commission (TRC) reinforced the significance of the UN Declaration. Sixteen of the 94 Calls to Action are tied to the Declaration. A crucial aspect of the TRC’s Calls to Action is for “federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations Declaration ... as the framework for reconciliation.”

The report of the TRC and the Calls to Action were welcomed UN Secretary General Ban Ki-Moon, who reminds us: “Truth-telling is important but not sufficient for reconciliation. I encourage all involved in this effort to follow up on the report’s recommendations, using the UN Declaration on the Rights of Indigenous Peoples as a roadmap.”¹⁵

In their report, the Commissioners concluded “that a refusal to respect the rights and remedies in the Declaration will serve to further aggravate the legacy of residential schools, and will constitute a barrier to progress towards reconciliation”.





UN Declaration – Advancing Indigenous self-determination and self-government

One of the most important articles of the Declaration is article 3:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Indigenous peoples' representatives throughout the negotiations insisted that the right of self-determination in international law must be affirmed in the final document. Both the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* have the right of self-determination as identical article 1.¹⁶ These two Covenants are core instruments in international law and Canada has ratified both of them.

At the United Nations, human rights bodies have repeatedly applied the right of self-determination in the two international human rights Covenants to Indigenous peoples.

As elaborated in the two Covenants, self-determination is the right of all peoples to “freely determine their political status and freely pursue their economic, social and cultural development.” This includes rights relating to natural resources. Also: “In no case, may a people be deprived of its own means of subsistence.” States, such as Canada, have a duty to “promote the realization of the right of self-determination, and ... respect that right, in conformity with ... the Charter of the United Nations.”

Canada and other States have been reluctant to fulfill their obligations relating to Indigenous peoples' self-determination and self-government. Therefore, it was important to affirm such rights in the UN Declaration.

The UN Declaration affirms the right of Indigenous peoples to self-determination, including the right to self-government (arts. 3 and 4). The preamble adds “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law”.

Self-determining peoples have a right to choose and to determine their own future.¹⁷ In *Tsilhqot'in Nation*, in relation to Aboriginal title lands, the Supreme Court referred to Indigenous peoples' “right to choose”¹⁸.

In 1996, the Royal Commission on Aboriginal Peoples (RCAP) concluded that s. 35 of the *Constitution Act, 1982* “provides the basis for recognizing Aboriginal governments as constituting one of three orders of government in Canada”.¹⁹

Systems of governance and laws of Indigenous peoples are inseparably linked to their lands, territories, resources and environment. It is urgent that Indigenous peoples continue to devise strategies and assert their rights and responsibilities in regard to present and future generations, as well as stewardship of the natural environment. The UN Declaration affirms such rights and related State obligations in regard to all these crucial aspects.

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Current positions of Canada

Prime Minister Trudeau has indicated that implementation of the UN Declaration is a “top priority” for his government. Repeatedly the government has committed and re-committed to four principles in their relationship with Indigenous Peoples: **respect, recognition of rights, co-operation and partnership**. These four principles have complete synergy with the UN Declaration, as well as with the government’s commitment to adopt and implement the UN Declaration.

The Prime Minister and key relevant cabinet ministers have committed Canada to the adoption and implementation of the UN Declaration, starting with the mandate letters Prime Minister Trudeau wrote to all cabinet ministers in November 2015. The Prime Minister summarized these commitments in his comments on National Aboriginal Day 2016:

We understand the importance of reconciliation and the process of truth-telling and healing in this renewal. With this in mind, we will continue the vital work of reconciliation as outlined in the Truth and Reconciliation Commission Calls to Action, in partnership with First Nations, the Métis Nation, the Inuit, the provinces, and the territories. This work will build on our commitment last month to fully adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples.²⁰

Attorney General of Canada and Minister of Justice, Jody Wilson-Raybould confirms:

For all of us at the highest level, the United Nations Declaration provides the framework for reconciliation, setting minimum standards and is instructive on how we develop our own made-in-Canada framework for reconciliation, reflecting our history and our unique legal and constitutional framework.²¹

On February 22, 2017, Prime Minister Trudeau announced a major initiative to “examine all relevant federal laws, policies and operational practices to ensure that the Crown is meeting its constitutional obligations as well as adhering to the UN Declaration on the Rights of Indigenous Peoples and other international human rights standards.”²² If carefully devised in collaboration with Indigenous peoples, such an initiative can make a significant contribution.

Unfortunately, we have heard very little about this Working Group and their progress to date. Such a mandate is also called for in Bill C-262, currently before the Senate. (See companion paper on UN Declaration Implementation for more on C-262.)

The Assembly of First Nations acknowledges that full implementation of the Declaration will require long-term commitment and collaboration. We need the Declaration precisely because so many of the laws and policies affecting the lives of First Nations in Canada are profoundly unjust and rest on foundations of racism and colonialism. As the Truth and Reconciliation Commission reminded us over and over again, “reconciliation is going to take hard work.”

After decades of widespread discrimination, domination, exploitation and unilateral actions, Indigenous peoples must be full partners in the reform of domestic laws and policies. The UN Declaration provides a framework for the law and policy reform needed to ensure justice and achieve reconciliation, harmonious relations and lasting peace. We know it won’t be easy, but the AFN is fully committed to this crucial challenge.





ENDNOTES

¹ This text draws upon, with permission, other published materials by Jennifer Preston and Paul Joffe.

² General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (14 August 2013) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), paras. 63 and 65.

³ *Ibid.*, para. 67.

⁴ *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348 (Dickson C.J. dissenting); cited with approval in *United States of America v. Burns*, [2001] 1 S.C.R. 283, para. 80.

⁵ *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, para. 353. Affirmed in 2013 FCA 75.

⁶ *Catholic Children's Aid Society of Hamilton v. G.H.*, 2016 ONSC 6287, para. 66: "The Crown ... highlighted that a cornerstone of its commitment to achieving reconciliation between Aboriginal and non-Aboriginal Canadians was the establishment of the Indian Residential Schools Truth and Reconciliation Commission. In 2010, the federal government took another important step in implementing the promise to pursue reconciliation by signing the United Nations Declaration on the Rights of Indigenous Peoples. In May 2016, the government announced that Canada is now a full supporter, without qualification, of this international Declaration."

⁷ *Ibid.*, para. 73.

⁸ *R. v. Sayers*, 2017 ONCJ 77, para. 53(2). See also para. 51, where the Ontario Court of Justice cited TRC Calls to Action 42, 45, 46, 52 and 92(i) and (ii). At para. 50, the Court cited the UN Declaration, arts. 3, 8(2)(b), 26, 28, 32 and 40. In view of the unacceptable delay by the Crown in dropping criminal charges, the Court awarded costs of \$390,000 to the Indigenous defendants.

⁹ General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (adopted without a vote), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2, para. 3: "We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples". Following the adoption by consensus of the Outcome document, Canada indicated that it would issue a written statement on this instrument. Such statement has no legal effect on the consensus adoption. If Canada had wished to formally object, it would have had to call for a vote and then voted against the Outcome document.

See also General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble: "Reaffirming the United Nations Declaration on the Rights of Indigenous Peoples, which addresses their individual and collective rights". Most recently, see General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/71/178 (19 December 2016) (adopted without vote), preamble.

¹⁰ *American Declaration on the Rights of Indigenous Peoples*, Res. AG/doc.5537, adopted without vote by Organization of American States, General Assembly, 46th sess., Santo Domingo, Dominican Republic, 15 June 2016. This regional instrument applies in the Americas, which includes North, South and Central America and the Caribbean.

¹¹ Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/27/65 (7 August 2014), Annex - Expert Mechanism Advice No. 6 (2014), para. 1.

¹² General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, supra, para. 31.

¹³ Permanent Forum on Indigenous Issues, "System-wide action plan for ensuring a coherent approach to achieving the ends of the United Nations Declaration on the Rights of Indigenous Peoples", UN Doc. E/C.19/2016/5 (19 February 2016), para. 4.

¹⁴ Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/RES/33/25 (30 September 2016) (adopted without a vote), para. 1.

¹⁵ UN Secretary-General (Ban Ki-moon), "Secretary-General Praises Canada's Truth, Reconciliation Commission for Setting Example by Addressing Systemic Rights Violations against Indigenous Peoples", SG/SM/16812, 1 June 2015, <http://www.un.org/press/en/2015/sgsm16812.doc.htm>

¹⁶ *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (1966), adopted by the UN General Assembly on December 16, 1966 and entered into force March 23, 1976, accession by Canada 1976 and *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, adopted by the UN General Assembly on December 16, 1966 and entered into force 3 January 1976, accession by Canada 1976, identical article 1(3).

¹⁷ Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7, Add. 4 (J. Cobo, Special Rapporteur), at paras. 579 & 580: "Self-determination, in its many forms, must be recognized as the basic pre-condition for the enjoyment by indigenous peoples of their fundamental rights and the determination of their own future. It ... constitutes the exercise of free choice by indigenous peoples".

¹⁸ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, paras. 67 and 75.

¹⁹ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, (Ottawa: Canada Communication Group, 1996), vol. 2(1), para. 168.

²⁰ Prime Minister Justin Trudeau, "Statement by the Prime Minister of Canada on National Aboriginal Day", Ottawa, Ontario, 21 June 2016, <http://pm.gc.ca/eng/news/2016/06/21/statement-prime-minister-canada-national-aboriginal-day>

²¹ Minister of Justice and Attorney General of Canada (Jody Wilson-Raybould), "Notes for an address: 2016 Aboriginal Law Conference - Continuing Legal Education Society of British Columbia", Vancouver, BC, November 25, 2016

²² "Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples", February 22, 2017, <http://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>



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