

Canada: Climate Change and the Cultural Rights of Indigenous Peoples

Submission to:

Ms. Karima Bennouna, *Special Rapporteur in the field of cultural rights*

Via email: srculturalrights@ohchr.org

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"Indigenous Climate Action is a diverse network of active and engaged Indigenous knowledge keepers, water protectors and land defenders. We inspire action through Indigenous-led solutions for climate justice."



"The Union of B.C. Indian Chiefs strengthens Indigenous Nations to assert and implement their Aboriginal Title, Rights, Treaty Rights and Right of Self-Determination as Peoples. The UBCIC works collectively amongst Indigenous Nations in B.C., providing a cohesive voice in support of Indigenous Nations and communities."

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INTRODUCTION:

Indigenous peoples living on Turtle Island in the area of Kanáta - Canada are diverse. With approximately 56 different languages, peoples and protocols, they anxiously and precariously defend their tangible and intangible cultural rights. The common struggle to all Indigenous peoples living in Canada remains the racist colonial Doctrines'¹ persistent oppressive and assimilative laws and policies designed to dispossess Indigenous peoples from their Homelands and resources.

The enjoyment of Indigenous peoples' cultural heritage remains a challenge in Canada despite advancements in the protection and promotion of Indigenous peoples' human rights. These include the *UN Declaration on the Rights of Indigenous Peoples (UN Declaration)* which is comprised of various human rights norms². However, international human rights obligations in states such as Canada have yet to be implemented and indeed respected, particularly during this global pandemic of COVID-19. The suspension of public health safety standards for Coastal GasLink workers who continue to work on Wet'suwet'en lands and receive protection from the RCMP while the issue remains unresolved is evident of this fragility.

As various types of resource development proceed unabated within Indigenous territories, long standing Indigenous land rights issues persist, forcing more land dispossession and threatening Indigenous cultural heritage. These threats to Indigenous peoples' land-based languages and culture must be addressed through Canada's compliance with international human rights obligations.

Furthermore, climate change now compounds these threats, disproportionately impacting the cultures of Indigenous peoples in Canada. Many aspects of Indigenous cultures are intimately tied to ecosystems and the biodiversity of the natural environment. In this context "Indigenous culture" is a broad concept that includes knowledge and traditions that intersect with aspects of spirituality, survival skills, language, and law and governance.³

QUESTIONS:

1. What negative impacts of climate change on culture, heritage and the enjoyment of cultural rights by all have been documented in your context? Are particular groups, such as women, persons with

¹ Doctrine of Discovery "the enduring impact of the Discovery Doctrine on indigenous peoples and the right to redress for past conquests covered under articles 28 and 37 of the Declaration on the Rights of Indigenous Peoples", UNPFII, 11th Session, 3 & 4th meeting, New York, USA
<https://www.un.org/press/en/2012/hr5088.doc.htm>

² These include: "the Universal Declaration on Human Rights of 1948, the International Covenant on Economic, Social and Cultural Rights of 1966, and the International Covenant on Civil and Political Rights of 1966.

³ Indigenous nations within Canada vary greatly and have distinct systems of law and governance. However, each Indigenous nation has laws relating to what are now considered "land-based" activities like hunting and gathering. Some Indigenous nations also recorded other aspects of their laws in place names and the related stories, or in traditions and practices that are land-related. See *Thinking About Indigenous Legal Orders*, Val Napoleon, June 2007, available online at <http://www.fngovernance.org/ncfng_research/val_napoleon.pdf>.

disabilities, indigenous peoples, rural persons or peasants, and youth or future generations, as well as cultural practitioners being impacted in specific and disproportionate ways? What efforts are being undertaken to inventory and monitor such impacts?

- The impacts of climate change on the water- and land-based aspects of Indigenous cultures include, but are not limited to, restricted access to the land and water, limited ability to harvest culturally relevant foods, and loss of specific culturally-relevant sites on the land and water. In addition, language transmission, aspects of which are taught in water- and land-based contexts, are threatened.
- Climate change has also caused extreme weather patterns resulting in delayed seasonal changes that directly impact Indigenous people's abilities to practice their cultures. This has necessitated later planting seasons, earlier harvests, and different approaches to seeding.
- Increased climate variability also contributes to greater frequency and severity of environmental disasters (including wildfires, drought, and flooding, etc.), to the detriment of Indigenous peoples' livelihoods. Those who rely on resources from the land for their subsistence and livelihoods by way of hunting, fishing, and harvesting traditional medicine are disproportionately affected by the climate effects that threaten the continued accessibility and production of cultural foods.
- Shorter, milder winters have enhanced the survival of invasive species, such as the emerald ash borer and the Mountain pine beetle, threatening the survival of plants or trees utilized in ceremonies and daily life. These include trees like the Black Ash, customarily used for making ceremonial baskets and for daily use, and the Great White Pine, a medicine and symbol of Haudenosaunee sovereignty, amongst many others. These invasive species damage the health of the environment and the distinctive qualities of the land. Consequently, Indigenous peoples' land-based languages, already in a state of urgency, are experiencing complex threats under the effects of climate change despite revitalization efforts.
- In particular, Indigenous peoples living in remote and Northern communities are disproportionately affected by the impacts of climate change. Thawing permafrost undermines the structural integrity of housing in communities. Declines in the operational lifespan and safety of winter roads compromise the flow of essential goods and critical supplies into northern communities and limit the ability of community members to safely travel within their territories. Changes in wildlife and plant species' distribution exacerbate existing issues of habitat loss, infectious disease, and overharvesting, further deteriorating the accessibility of these resources to Indigenous peoples.
- The impacts of climate change also pose a severe risk to the physical, spiritual and cultural welfare of Indigenous women and girls. Research and documentation on the issue of Murdered and Missing Indigenous Women and Girls (MMIWG) in Canada links fossil fuel production and

extraction with colonial rooted gender discrimination and racism. According to Seeding Sovereignty, “there is a direct correlation between increased rates of sexual abuse, trafficking and domestic violence against women and children in regions where fossil fuel extraction companies set up ‘man camps’ to house workers.”⁴

- In terms of efforts related to monitoring and addressing climate change impacts, land use and occupancy mapping can be conducted using GIS to support Indigenous peoples’ efforts in safeguarding their cultural heritage. A minority of communities have been at the forefront of using GIS to safeguard their sacred cultural sites. Indigenous language speakers and traditional knowledge holders are essential to mapping sites that contain a diverse range of traditional cultural activities and resources and for the restoration of traditional names⁵.
- There is great opportunity and potential ahead to implement Indigenous laws and protocols for land mapping in the traditional territories of Indigenous peoples.

3. Please provide examples of specific natural resources, local sites used for cultural practices or seasonal patterns that influence the ability to participate in diverse aspects of cultural life that may be subject to volatility due to climate change. Consider also diffuse geographical features or resources that may be at risk and are definitive or influential in the practice and development of culture on either a collective or individual basis.

- Given the cultural diversity amongst Indigenous peoples within Canada, it is important to not generalize or conflate the unique cultural practices and cultural heritage of Indigenous peoples tied to lands and water that are threatened by the impacts of climate change
- Regardless, the effects of climate change on specific resources that are culturally significant to Indigenous peoples, such as fish, game, and access to waterways and land, have already been immense and will worsen even with drastic mitigation measures.
- Climate change diminishes the food security of Indigenous communities in numerous ways. Extreme variation in temperature and precipitation affects the predictability of seasons and weather, reducing the efficacy of traditional knowledge for forecasting culturally significant animal migrations or planting/harvesting times; invasive species devastate ecosystems that

⁴<https://seedingsovereignty.org/mmiw>

⁵ The Kitchenuhmaykoosib Inninuwug Cultural Atlas (<http://www.ki-culturalatlas.ca/atlas/>) utilized the use-and-occupancy methods outlined in *Living Proof: the essential data-collection guide for Indigenous use-and-occupancy mapping*

support traditional ways of life.⁶ Northern communities are particularly vulnerable due to higher percentages of subsistence food and land practices.⁷

- Increased climate variability has contributed to greater risks of flooding and wildfire emergencies in Indigenous communities, necessitating temporary and permanent relocations to another community. Relocation significantly affects ability to participate in many aspects of cultural life.

5. What are the diverse legal frameworks, trends and practices at the national and international levels that promote intervention from across the cultural ecosystem, including by cultural rights defenders and cultural practitioners, as well as women, persons with disabilities, indigenous peoples, rural people and peasants, and youth, in addressing disparate impacts and influencing decisions around climate change mitigation and adaptation? What are the challenges to such inclusivity and how are they being addressed?

- The *UN Declaration* sets out a framework for recognizing the inherent right to self-determination by Indigenous peoples in Canada, but it has not become law in Canada in spite of political promises to do so.
- Indigenous peoples in Canada have a long and ongoing history of being targeted and discriminated against by Canadian law and excluded from decisions that affect Indigenous inherent and constitutionally guaranteed rights. In 1982, the Constitution Act entrenched inherent Aboriginal rights into the Canadian constitution (section 35), and since then Aboriginal rights have slowly gained prominence in Canadian decision making, but only after First Nations brought forward numerous cases to Canadian courts, forcing the Canadian and Provincial governments to respect Indigenous rights.
- Unfortunately, Canadian jurisprudence has proven that there are limits to protecting Indigenous rights using the Canadian constitution. Case law grounded in section 35 has developed in a manner that now requires meaningful consultation and accommodation, where appropriate. However, a recent case involving the Trans Mountain Pipeline Expansion project⁸ diminishes the duty to consult to a procedural requirement to provide reasons, with Canadian ‘Public Interest’ justifying the infringement of Indigenous rights.

⁶ Settee, Priscilla (2020). ‘The Impact of Climate Change on Indigenous Food Sovereignty’ in Priscilla Settee and Shailesh Shukla *INDIGENOUS FOOD SYSTEMS Concepts, Cases, and Conversations*, Canadian Scholars, an imprint of CSP Books Inc, pp. 211-228.

⁷ [Written articulation submitted by Daniel T’selie](#), a member of the K’asho Got’ine Dene from Radili Ko, activist and practicing Indigenous Rights lawyer.

⁸ Coldwater First Nation v. Canada (Attorney General) [2020 FCA 34](#). See also: [On adequate consultation, reconciliation and skyrocketing project costs: The TMX saga enters a new chapter](#)

- Canadian courts have also been clear that the application of Indigenous rights, and the right to Free Prior Informed Consent, does not equal a ‘veto’ over projects – a direct violation of the United Nations Declaration on the Rights of Indigenous Peoples.
- Most Indigenous peoples are excluded from meaningfully participating in the decision-making processes on industrial projects that impact Indigenous Rights and Title. Where participation does occur, Indigenous interests are typically viewed as a “stakeholder”, to be balanced against the commercial interests of project proponents.
- The Charter of Rights and Freedoms and Canadian Human Rights codes theoretically provide the legal tools for equity seeking groups to address inequities. However, as one recent example regarding the [‘willful, reckless’ and discriminatory funding of First Nations’s children’s welfare](#) compared to non-Indigenous children shows, the Canadian government will defend their discriminatory practices in court, and thus far, has not changed their practices nor compensated the families who were discriminated against.
- One important solution is the [recognition and enforcement of Indigenous laws](#) (the laws of Indigenous peoples themselves) by the Canadian state and international bodies. Currently, Canadian courts recognize that Canadian law did not extinguish Indigenous laws, but stops short of giving those laws legal effect in Canadian law. Various UN bodies have documented Canada’s violation of the Human Rights of Indigenous peoples, and recognition of Indigenous laws at the international level could change the way that domestic courts and governments interact with Indigenous peoples.
- Applying Indigenous laws and worldviews to the issue of climate change would impact specific project reviews and approvals, and could improve measures to combat climate change by recognizing the value of Indigenous knowledge, cultures and practices and including them in climate and energy policies.

8. Are affected persons and groups being consulted and enabled to participate in discussions related to climate policy and climate action?

- Canada’s domestic climate action plan includes commitments to collaborate with Indigenous peoples on climate mitigation and adaptation. However, Indigenous perspectives are not accommodated, and their participation in these processes is marginalized to prioritize the interests of non-state actors and resource development. Canada relies on top-heavy colonial processes; it conducts engagement sessions separate from international human rights norms⁹

⁹ Successful practices include those where indigenous decision-making processes and traditional knowledge are respected by the community and by other authorities. A/HRC//18/42 Human Rights Council Eighteenth session Agenda item 5 Human rights bodies and mechanisms. Final report of the study on indigenous peoples and the right to participate in decision-making Report of the Expert Mechanism on the Rights of Indigenous Peoples Distr.: General 17 August 2011 Original: English article 19

and employs an arbitrary interpretation of the principle of Free, Prior, and Informed Consent. Consequently, Indigenous laws¹⁰ and concerns rarely lead to substantive outcomes in developing state climate policy despite the disproportionate impacts that climate change has on the rights and lives of Indigenous peoples.

- As the UN Charter states: “all human rights are inter-related, universal, indivisible and inter-dependent.” The importance of including Indigenous languages and cultural knowledge holders is vital to finding solutions for protecting cultural rights in the face of climate change. However, these knowledge holders are rarely included in engagement sessions on climate policy.
- The financial and human resources necessary to participate in Canada’s Indigenous engagement processes are often distributed to representative National Aboriginal Organizations which are not themselves holders of Indigenous Title or Rights. These organizations advocate on behalf of Indigenous peoples in Canada, but this process marginalizes Indigenous traditional governments, grassroots Indigenous organizations, and the holders of Indigenous Title and Rights.
- A gendered analysis of the role Indigenous women play in addressing climate change in Canada revealed that “Indigenous women’s expertise remains marginal to climate change policy and strategy throughout Canada.¹¹” Indigenous women continue to be excluded from key decision making processes and their ecological knowledge and insight under utilized.

9. Are cultural rights defenders who are working on climate-related harms to culture and cultural rights facing specific challenges in their work, and are they at particular risk of threats, harassment and human rights violations? If so, how should these human rights defenders be better protected and supported?

- Indigenous land defenders in Canada work in part to resist the development of emissions-intensive projects to protect the environment within their territories from direct environmental effects and climate impacts. Preventing fossil fuels development by protest is a climate mitigation strategy that has been delegitimized by industry and state interests.
- The ongoing criminalization of Indigenous land and cultural rights defenders in Canada is vested in the legal fictions of state sovereignty. This criminalization violates Indigenous cultural rights defenders who undergo state surveillance and scrutiny in their travels. This is exacerbated by institutionalized racism and violations of their fundamental human rights and democracy. “Aboriginal” Inherent rights under Canada’s Constitution Act, 1982 are not clearly defined,

¹⁰ Articles 5, 27, 34 and 40 of the Declaration on the Rights of Indigenous Peoples “affirms the right of indigenous peoples to maintain and strengthen their own legal systems.”

¹¹ Morgan, C. (2008). The Arctic: Gender issues. Parliamentary Information and Research Service Publication PRB 08-09E, October 24

forcing Indigenous peoples to endure hardships of local harassment, racist attacks¹², and lack of access to justice while land dispossession continues.

- Excessive use of force by policing authorities at Indigenous-led land protests must be halted. These are often accompanied by coercive methods by state and non-state actors to create division amongst Indigenous communities. This not only causes further hardship for legitimate protests but sanctions dispossession of Indigenous land by non-state actors

Protection for Human Rights Defenders

- Increasing community education and participation on the direct and indirect impacts of climate change, climate change policies, and proposed strategies on the rights of Indigenous peoples.
- The implementation of international human rights standards by all state actors in every level of government.
- Policing authorities must refrain from excessive use of force and be guided by the state's international human rights obligations, especially regarding the promotion and protection of Indigenous peoples' rights to self-determination.
- Provide access to an effective remedy regarding human rights violations by authorities, non-state actors and political entities, along with access to financial and human resources support
- Decolonize legal processes that force Indigenous land and cultural protectors to conform to domestic laws, which do not respect Indigenous rights to self-determination
- Canada must repudiate the Doctrine of Discovery and other racist policies.

14. What recommendations should be made to States and other stakeholders concerning these topics?

- Pass legislation for the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* at all levels of decision making and government.
- Use the principles of Free, Prior and Informed Consent to implement a human rights-based framework for creating climate policies and legislation in partnership with States.

¹² Most recently on April 19, 2020, Kanahus Manuel, an Indigenous land defender and member of the Secwepemc First Nation, and a male Indigenous land defender were in The Tiny House Warriors camp when they were physically assaulted and subjected to racist and misogynistic comments from intruders. The Tiny House Warrior Camp is located in unceded Secwepemc territory in the interior of B.C. and was established in opposition to the ongoing expansion of the Trans Mountain pipeline and construction of work camps.

- Improve access to resources (funding and capacity) for Indigenous communities to undertake the necessary research and studies to develop sovereign and independent climate change adaptation and mitigation strategies.¹³
- Increase the technical and technological capacity in Indigenous communities for land use mapping, safeguarding tangible and intangible Indigenous cultural heritage.
- Increase opportunities to implement renewable energy projects in Indigenous communities.
- States must provide financial resources to support Indigenous peoples' capacity enhancing their effective and full participation on climate change strategies, policies, and laws.
- Resource extraction projects causing irreparable damage to the lands, waters, and territories of Indigenous Peoples, must be inclusive of Indigenous laws and protocols with the full and effective participation of Indigenous peoples.
- Gender-based equality in decision making processes to restore the authority and role of Indigenous women.
- Recognize and respect Indigenous laws and decisions as equal and not subservient to domestic state laws.

¹³ Indigenous Climate Action, [Final Report on the INDIGENOUS PEOPLES MEETING ON CLIMATE CHANGE](#) - JANUARY 24-26, 2016 Amiskwaciwâskahikan, Treaty No. 6 Territory. Edmonton, Alberta, pp 34-37