**Indigenous Rights Centre Submission on List of Issues related to Canada’s Sixth Report to the ICESCR**

January 30, 2015

**Proposed Issues:**

Issue #1 – Please provide information on the number of practitioners of traditional occupations and the scope of the traditional economy in Canada.

Issue #2 – Please articulate how federal and provincial agencies are coordinating issues of land rights, treaty rights, nutritional issues, promotion of traditional knowledge and cultural heritage and the promotion of traditional occupations and traditional economies

Issue #3 – Please provide information on federal, provincial, territorial and aboriginal government programs and initiatives which support traditional occupations and economies

Issue #4 – Please provide information on how environmental and natural resources legislation, regulation and policy supports Canada’s obligations under articles 1, 2, 6, 11 and 15 of the Covenant with respect to traditional occupations and economies

Issue #5 – Please provide the amount of funding the government provides for job training to support aboriginal engagement in:

1. the market economy, generally
2. the resource sector
3. in traditional occupations

Issue #6 – Please provide information on efforts by the State to implement Supreme Court of Canada decisions related to traditional occupations, particularly fishing, hunting and trapping

Issue #7 – Please provide information on how the State supports traditional occupations and traditional economies through implementation of modern treaties, historic treaties and other constructive arrangements

**Introduction**

1. Since time immemorial, the aboriginal peoples of Canada have engaged in traditional economies based on wildlife harvesting,[[1]](#footnote-1) fishing,[[2]](#footnote-2) traditional agricultural practices[[3]](#footnote-3) and mineral development.[[4]](#footnote-4) These economies were founded in practices rooted in very particular and very balanced relationships which aboriginal peoples have with the environmental resources contained in their lands, territories and resources.
2. The process of colonization has displaced many traditional economies in favor of a market economy. Conflicts between traditional economies and market economies can be framed in terms of conflicts over the lands, territories and resources of indigenous peoples, the rights of indigenous peoples, and the development of natural resources.[[5]](#footnote-5)While human rights mechanisms and courts have focused on the effects of colonization and specific situations involving the territorial rights of indigenous peoples, the broad effects of commercial enterprises in the form of the effect of the market economy on traditional economies requires special attention.
3. In some cases, discrimination against traditional economies is direct and blatant, often exercised by the state’s application of its criminal law-making authority.[[6]](#footnote-6) For example, potlaches, a spiritual, cultural and economic activity of many First Nations, were once deemed illegal by Canada.[[7]](#footnote-7) In other cases, discrimination against traditional occupations may be quite subtle, for example by removing environmental protections and encouraging irresponsible development of natural resources, which contaminate key environmental resources and undermine the ability of indigenous peoples to continue to pursue traditional occupations.[[8]](#footnote-8)
4. The traditional occupations and the traditional economies of indigenous peoples are relevant to Articles 1, 2, 6, 11 (health status and community well-being)[[9]](#footnote-9) and 15 (for protection and promotion of traditional knowledge)[[10]](#footnote-10). The extent to which First Nations may continue to practice traditional occupations is relevant to Canada’s existing obligations under the Discrimination (Employment and Occupation) Convention[[11]](#footnote-11), the Convention on Biological Diversity [[12]](#footnote-12) and the Convention on the Elimination of All Forms of Racial Discrimination.
5. General Recommendation 23 of the CERD calls on state Parties, including Canada, to “[p]rovide indigenous peoples with conditions allowing for a **sustainable** economic and social development **compatible with their cultural characteristics**.”[[13]](#footnote-13) This, combined with Article 2 of the Covenant and the broad definition of ‘occupation’ applied by the International Labour Organization means pursuit of traditional occupations and traditional occupations is precisely the form of development called for in General Recommendation 23.[[14]](#footnote-14)
6. While states are permitted and encouraged to undertake special measures to reduce discrimination against indigenous peoples as individual participants in the market economy, states often do not consider discrimination against collectives: traditional economies and traditional occupations. As a result, Canada has offered a report focusing solely on the extent to which aboriginal individuals have been assimilated into the broader economy, rather than one which focuses on Canada’s obligation to support traditional economies, as well as social and cultural development of aboriginal peoples.

Issue #1 – Please provide information on the number of practitioners of traditional occupations and the scope of the traditional economy in Canada.

**CANADA IS FOCUSED ONLY ON SUPPORT FOR MARKET OCCUPATIONS**

1. Canada’s fifth report contains several examples of programs and services, targeting increased participation by First Nations in the market economy. This includes skills training, enhanced employment opportunities and other measures designed to foster participation of aboriginal citizens in the broader Canadian economy, specifically the resource sector.
2. These initiatives are not themselves problematic – they receive strong support from some within aboriginal communities themselves because they are designed to address longstanding barriers to participation in the market economy by First Nations, Inuit and Metis.
3. While such initiatives present a legitimate attempt by the state to address labour market participation by aboriginal citizens, they reveal a subtle form of discrimination commonly encountered in Canada. Canada does not view traditional economies as legitimate economies, nor does Canada view traditional occupations, as ‘occupations’ or ‘jobs’, for the purposes of domestic or international labour or human rights law.
4. The traditional economies and the traditional occupations of indigenous peoples are invisible to Canadian or provincial policy and legislation. This invisibility makes the protection of traditional occupations and traditional economies particularly vulnerable to marginalization as the state expends considerable resources to expand natural resource development.
5. Paragraph 22 of the report refers to the number of jobs lost, then gained reveals that for Canada, the only occupations worth reporting on are those found in the market economy. Canada does not have information on the state or trends of traditional occupations and economies, and as a consequence does not use any such information in the development of social, cultural or economic policy in Canada.
6. Canada should report on the state of traditional occupations, per Article 2(2) of the ICESCR, including on state measures to support traditional occupations. In addition, many of the measures Canada has taken in support of the ICESCR may be discriminatory of traditional occupations.[[15]](#footnote-15)

Issue #2 – Please articulate how federal and provincial agencies are coordinating issues of land rights, treaty rights, nutritional issues, promotion of traditional knowledge and cultural heritage and the promotion of traditional occupations and traditional economies

Issue #3 – Please provide information on federal, provincial, territorial and aboriginal government programs and initiatives which support traditional occupations and economies

**SUPPORT FOR MARKET ECONOMY PARTICIPATION IS FOCUSED ON RESOURCE EXTRACTION**

1. Article 6(1) of the Covenant recognizes the “right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.” Traditional occupations and their associated economies, for example hunting, trapping or fishing, are examples of work which indigenous peoples undertake in order to practice cultures, achieve food security and achieve a sustainable and prosperous standard of living.
2. Article 2(2) of the Covenant guarantees “that the rights enunciated in the present Covenant will be exercised without discrimination”. As a consequence, actions which support market occupations, while prejudicing traditional occupations may be violations of state obligations under the Covenant. This is more likely with traditional occupations exercised by indigenous peoples, especially where the practice of such occupations is itself related to other indigenous rights.
3. Canada provides strong support to the extractives sector through tax breaks,[[16]](#footnote-16) financing incentives,[[17]](#footnote-17) favourable regulatory changes in the form of relaxed environmental regulation,[[18]](#footnote-18) and jobs training programs.[[19]](#footnote-19) To the extent that aboriginal peoples are concerned, most of Canada’s support for job training is focused on placing aboriginal peoples in paid employment positions within the extractive sector.
4. Other Articles of the Covenant are potentially impacted by the invisibility of traditional occupations and traditional economies. For example, while Canada has extended Employment Insurance to the self-employed, practitioners of traditional occupations cannot benefit from EI, because they are not involved in the market economy.[[20]](#footnote-20)

Issue #4 – Please provide information on how environmental and natural resources legislation, regulation and policy supports Canada’s obligations under article 2, 6, 11 and 15 of the Covenant with respect to traditional occupations and economies

1. Traditional occupations are also relevant to the state’s obligations under Article 11 of the Covenant. Article 11 guarantees a “right of everyone to an adequate standard of living for himself and his family”. Canadian jurisprudence recognizes that practitioners of traditional occupations are capable of harvesting for both subsistence and to support economic activity.[[21]](#footnote-21)
2. Harvesting, whether hunting, trapping, fishing or harvesting plants, remains an important source of food and economic activities for many indigenous peoples in Canada. Traditional foods are more nutritious and less fatty than market foods typically consumed by First Nations.[[22]](#footnote-22) Indigenous peoples in Canada currently suffer from elevated rates of both obesity and hunger.[[23]](#footnote-23)
3. Recent studies in Canada have demonstrated that traditional foods are rich in nutrients and might contribute to dietary choices, which could alleviate both hunger and obesity in indigenous communities across Canada.[[24]](#footnote-24) As traditional occupations and economies, particularly harvesting occupations, are the primary means used to acquire and share traditional foods, the ability to practice traditional occupations is very closely related to the state’s obligation under Article 11(2) of the Covenant.
4. Support for traditional occupations mutually reinforces other international human rights and environmental obligations assumed by Canada. For example, under Article 15, the government of Nunavut reported on construction of the Piqqusilirivvik Cultural Facility in Clyde River. This initiative not only supports transmission of traditional knowledge, but also traditional occupations.[[25]](#footnote-25)

Issue #5 – Please provide the amount of funding the government provides for job training to support aboriginal engagement in:

1. the market economy, generally
2. the resource sector
3. in traditional occupations

**FAILURE TO IMPLEMENT LAWS IMPACTS ON TRADITIONAL OCCUPATIONS AND ECONOMIES**

1. Canadian jurisprudence is strongly supportive of traditional occupations.[[26]](#footnote-26) Several Canadian Supreme Court of Canada cases support traditional occupations of aboriginal claimants.[[27]](#footnote-27) Despite these positive developments, First Nations have expressed concern regarding the alleged state of non-implementation of Supreme Court of Canada decisions on aboriginal rights.[[28]](#footnote-28)
2. In addition, Canada and aboriginal peoples have developed a number of constructive arrangements which protect and support the ability of indigenous peoples to continue to practice traditional occupations.[[29]](#footnote-29) Whether treaties are implemented on issues of traditional occupations remains an open question,[[30]](#footnote-30) as Canada has not yet articulated a coherent treaty implementation policy. The absence of such a policy impacts the rights of First Nations citizens under Articles 2, 11 and 15 of the Covenant.
3. In response to some of these Supreme Court of Canada decisions, the government of Canada has articulated policy changes. For example, the Sparrow decision resulted in the development of the Aboriginal Fisheries Strategy (AFS).[[31]](#footnote-31) This initiative and others represent positive actions by the state to support traditional occupations, and Canada’s obligation under the Covenant. For this reason, the policy framework and the current state of implementation of the policies themselves deserves scrutiny from First Nations and from the Committee.

Issue #6 – Please provide information on efforts by the State to implement Supreme Court of Canada decisions related to traditional occupations, particularly fishing, hunting and trapping

Issue #7 – Please provide information on how the State supports traditional occupations and traditional economies through implementation of modern treaties, historic treaties and other constructive arrangements

1. *R. v. Badger*, [1996] 1 SCR 771, 1996 CanLII 236 (SCC), <<http://canlii.ca/t/1frbp>>. [↑](#footnote-ref-1)
2. *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2013 BCCA 300 (CanLII), *R v. Marshall,* [1999] 3 SCR 456, 1999 CanLII 665 (SCC) [↑](#footnote-ref-2)
3. *Beattie v. Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCA 105 (CanLII). in absence of a case, cite a book about wild rice and another about maize. [↑](#footnote-ref-3)
4. See *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2008 BCSC 447 (CanLII) at para 435. This case focused on commercial fisheries. The trial judge noted an extensive pre-contact economy involving trade in, among other things, copper. [↑](#footnote-ref-4)
5. S James Anaya, *Extractive Industries and Indigenous Peoples Report of the Special Rapporteur on the rights of Indigenous Peoples*, A/HRC/24/41 (2013). Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources* OEA/Ser.L/V/II (30 December 2009), online: <http://cidh.org/countryrep/Indigenous-Lands09/TOC.htm>

Note that some of these sources suggest that greater control by indigenous peoples might facilitate development of natural resources (Anaya paper). If indigenous peoples exerted greater control over development of their lands, then there is also a much greater likelihood that discrimination against traditional economies and traditional occupations would be ameliorated. [↑](#footnote-ref-5)
6. *R. v. Horseman*, [1990] 1 SCR 901, 1990 CanLII 96 (SCC), where the Court recognized a right to hunt, including a right to hunt for commercial purposes, but also recognized that Canada and the province of Alberta can and did limit those commercial rights through unilateral legislative enactments. [↑](#footnote-ref-6)
7. The U'mista Cultural Society, “The Story of the Masks”, online: <http://www.umista.org/masks_story/en/ht/potlatch02.html> (retrieved Jan. 1, 2015). [↑](#footnote-ref-7)
8. While outside the temporal scope of Canada’s report, substantial portions of Canada’s Economic Action Plan relate to serious and severe weakening of environmental legislation, regulation and policy. [↑](#footnote-ref-8)
9. See, for example, Laurie Chan, Olivier Receveur, Donald Sharp, Harold Schwartz, Amy Ing and Constantine Tikhonov. *First Nations Food, Nutrition and Environment*

*Study (FNFNES): Results from British Columbia (2008/2009)*. Prince

George: University of Northern British Columbia, 2011. See also, Council of Canadian Academies, 2014. *Aboriginal Food Security in Northern Canada: An Assessment of the State of Knowledge*, Ottawa, ON. The Expert Panel on the State of Knowledge of Food Security in Northern Canada, Council of Canadian Academies. [↑](#footnote-ref-9)
10. *Convention on Biological Diversity*, 1760 UNTS 79 (1992) at Article 8(j). [↑](#footnote-ref-10)
11. International Labour Organization Convention 111, *Discrimination (Employment and Occupation)*, ratified by Canada 26 November 1964. Note the Secretariat of the International Labour Organization and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) have defined traditional occupations as ‘occupations’ for the purposes of this Convention. See: International Labour Office, *Eliminating Discrimination Against Indigenous and Tribal Peoples in Employment and Occupation A Guide to ILO Convention 111*, (Geneva: International Labour Organization, 2007). [↑](#footnote-ref-11)
12. Supra note 10. Traditional Occupations are particularly relevant to Article 10(c) of the Convention, which states that each contracting party shall, “Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” [↑](#footnote-ref-12)
13. Committee on the Elimination of All Forms of Racial Discrimination, General Recommendation 23, Rights of indigenous peoples (Fifty-first session, 1997), U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 212 (2003) at para 4(c). [↑](#footnote-ref-13)
14. Note Convention 111 is noted in the preambular language of the CERD, and that the CERD expressly prohibits discrimination in employment – Article 5(e)(i). See General Recommendation 23. The IRC asserts that indigenous peoples engaged in traditional economic activities, including harvesting and trade are engaged in ‘occupations’ and that the economic activities of indigenous peoples engage protection under Convention 111, the CERD and the Covenant. [↑](#footnote-ref-14)
15. For example, resource extraction which is incompatible with traditional occupations, particularly hunting, trapping and fishing, may displace practitioners of traditional occupations in favor of workers in the extractive sector. [↑](#footnote-ref-15)
16. Amy Taylor, Matthew Bramley and Mark Winfield, Government Spending on Canada's Oil and Gas Industry Undermining Canada's Kyoto Commitment, Pembina Institute (2005), online: <http://www.pembina.org/reports/GovtSpendingOnOilAndGasFullReport.pdf> [↑](#footnote-ref-16)
17. Ibid. [↑](#footnote-ref-17)
18. See, for example Bill C-38 and Bill C-45. These omnibus budget bills resulted in substantial amendment or complete replacement of several environmental laws, with the stated objective of supporting extractive industries in Canada. We note that these Bills were promulgated outside the reporting period, so note them only for a reference point – to be explored in more detail in a future report to the Committee. Canada reports on events outside the reporting period, Committee should be aware that Canada’s position on right to water and responsible resource development undermines accessibility to water and discriminates against practitioners of traditional occupations. [↑](#footnote-ref-18)
19. See paras 79-82 of Canada’s report. Government labour and employment policy is focused on the market economy and wage earning jobs, particularly wage earning jobs which support the extractive sector. ASETS does not involve or consider support for traditional occupations. [↑](#footnote-ref-19)
20. Canada’s report at paragraph 97. [↑](#footnote-ref-20)
21. See *Marshall* and *Ahousaht*, supra note 2. [↑](#footnote-ref-21)
22. See Laurie Chan, Olivier Receveur, Donald Sharp, Harold Schwartz, Amy Ing

and Constantine Tikhonov. First Nations Food, Nutrition and Environment

Study (FNFNES): Results from British Columbia (2008/2009). Prince

George: University of Northern British Columbia, 2011, online: <http://www.fnfnes.ca/download>. [↑](#footnote-ref-22)
23. Ibid. See also, Council of Canadian Academies, 2014, *Aboriginal Food Security in Northern Canada: An Assessment of the State of Knowledge* (Ottawa) at page 30. [↑](#footnote-ref-23)
24. Laurie Chan, Olivier Receveur, Donald Sharp, Harold Schwartz, Amy Ing

and Constantine Tikhonov. First Nations Food, Nutrition and Environment

Study (FNFNES): Results from Ontario (2012/2013). Ottawa: University of Ottawa, 2014, online: <http://www.fnfnes.ca/download>. [↑](#footnote-ref-24)
25. See para. 660 of Canada’s report. This is relevant to Canada’s obligations under Article 15 of the Covenant and to Canada’s obligations under Articles 8(j) and 10(c) of the *Convention on Biological Diversity*. [↑](#footnote-ref-25)
26. Under the law of aboriginal rights, any practice which pre-existed contact with European society and is integral to a distinct aboriginal society, receives constitutional protection. [↑](#footnote-ref-26)
27. *R. v. Gladstone*, [1996] 2 SCR 723, 1996 CanLII 160 (SCC), <http://canlii.ca/t/1fr8w>. *R. v Sparrow*, [1990] 1 SCR 1075, 1990 CanLII 104 (SCC), <http://canlii.ca/t/1fsvj>. [↑](#footnote-ref-27)
28. Assembly of First Nations, AFN Resolution 67/2010 *Implementation of Supreme Court of Canada decisions*. [↑](#footnote-ref-28)
29. Canada, *Treaty 3 between Her Majesty the Queen and the Saulteaux Tribe of the Ojibbeway Indians at the Northwest Angle on the Lake of the Woods with Adhesions*, online: <http://www.aadnc-aandc.gc.ca/eng/1100100028675/1100100028679>. The harvesting clause of Treaty 3 states, “Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government.” See also, for example, Canada, Land Claims and Self-Government Agreement among the Tåîcho and the Government of the Northwest Territories and the Government Of Canada, online: <https://www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544>. Chapters 10-12 focus directly on harvesting rights. [↑](#footnote-ref-29)
30. *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (CanLII), <http://canlii.ca/t/g80bn>.  Note that this case involved implementation of the harvesting clause of Treaty 3, cited above. [↑](#footnote-ref-30)
31. Canada, Department of Fisheries and Oceans, *Aboriginal Fisheries Strategy*, online: <http://www.dfo-mpo.gc.ca/fm-gp/aboriginal-autochtones/afs-srapa-eng.htm>. [↑](#footnote-ref-31)