

**Treaty 4 First Nations Response to Canada's Nineteenth and Twentieth Reports
(covering the period of June 2005 to May 2009) to
the Committee on the Elimination of Racial Discrimination**

January 2012

I. Introduction

On behalf of Treaty 4 First Nations, the Treaty 4 International Affairs Secretariat welcomes the opportunity to comment on Canada's Nineteenth and Twentieth Reports (Canada's Report) to the Committee on the Elimination of Racial Discrimination (the CERD Committee) on its compliance with the UN *International Convention on the Elimination of Racial Discrimination* (CERD or the *Convention*).

Treaty 4 was entered into between the Crown and the Nahkawe (Saulteaux), Nakota and Plains Cree Indigenous Nations in 1874 whereby it was agreed to share 75,000 square miles of traditional territory to "the depth of a plow", extending from the southeast corner of Alberta, to most of southern Saskatchewan to west central Manitoba in exchange for promises by the Queen of reserve lands, agricultural provisions, protections for hunting, trapping and fishing, schools, annuities and well-being of the children and generations to come, "as long as the sun shines and the water flows." The governing authority of the Treaty 4 First Nations Chiefs Council has a membership of 34 chiefs, representing the 34 communities of Treaty 4.

Racial discrimination, prohibited by article 1(1) of CERD has negatively influenced the relationship between Indigenous Nations in the Treaty 4 Territory and the governments of Canada and Saskatchewan. This discrimination has led to an inadequate recognition of rights related to self-determination, lands, territories and resources and other economic, social, cultural, spiritual, civil and political rights of Treaty 4 First Nations. A more detailed explanation of the historical background of Treaty 4 is provided in Annex I.

Below, the perspectives of the Treaty 4 International Affairs Secretariat are provided on the following key issues related to racial discrimination facing Indigenous peoples in Treaty 4 Territory (located in parts of the provinces of Alberta, Saskatchewan and Manitoba): 1. Self-determination and the implementation of the United Nations *Declaration on the Rights of Indigenous Peoples* and, 2. Discriminatory practices and the outstanding rights related to lands, territories and resources in Treaty 4 territory (including the right to free, prior and informed consent), 3. Discriminatory practices and socio-economic conditions, and 4. The Establishment of a National Treaty Commissioner.

II. Key Concerns related to Canada's Obligations under the UN *Convention on the Elimination of all Forms of Racial Discrimination*

1. Self-Determination and the Implementation of the UN *Declaration on the Rights of Indigenous Peoples* (article 2.1 of CERD)

The UN *Declaration on the Rights of Indigenous Peoples* (the UN *Declaration*) represents the minimum standard required for the survival, dignity and well-being of Indigenous peoples and includes the centrally important right to self-determination. The Treaty 4 First Nations exercised the right to self-determination since time immemorial through their historical practices as passed down throughout the generations by the Elders. Self-determination was necessarily exercised in order to enter into Treaty 4 and forms the basis for the recognition of our nationhood by the Crown in right of Great Britain through the Royal Proclamation of 1763 and by the Crown in right of Canada through section 35 of the *Constitution Act of 1982* and is confirmed by the agreement to enter into Treaty 4. However, only two years following the conclusion of Treaty 4 in 1874, the Treaty 4 First Nations' right to self-determination was effectively eviscerated through the imposition of the *Indian Act* in 1876. To this day, the right to self-determination remains unfulfilled in our territories.

Treaty 4 welcomes Canada's endorsement of the UN *Declaration* in 2010, reversing its former position of opposition to the UN *Declaration* (Canada's Statement of Support, 12 November 2010). This is consistent with the CERD Committee's recommendation that called upon Canada to support the UN *Declaration* (Concluding Observations, 2007, para. 27).

In order to make the minimum standards contained in the UN *Declaration* a reality, the Treaty 4 International Affairs Secretariat calls upon Canada, including provincial and territorial governments, to work in partnership with Indigenous peoples in Canada to fully implement the UN *Declaration* (pre-ambular paragraph 24).

Recommendations:

It is recommended that the CERD Committee direct Canada to work, in partnership with Indigenous peoples, to develop a plan of action for implementation of the UN *Declaration on the Rights of Indigenous Peoples* in all jurisdictions. This must include the participation of provincial and territorial governments.

It is further recommended that the CERD Committee direct Canada to report regularly to a Parliamentary Committee established specifically to address implementation of the international human rights of Indigenous peoples. If this is not possible, a recommended alternative is to direct Canada to report regularly to the existing Parliamentary Committee on International Affairs.

2. Discriminatory Practices and the Outstanding Rights related to Lands, Territories and Resources in Treaty 4 Territory (including the right to free, prior and informed consent) (articles 2 1. (c), 2.2., 5 (d) (v), 5(e) (i), (iii), (iv) and (v) of CERD)

Treaty 4 envisions the development of a positive relationship with Canada based on the original spirit and intent of Treaty 4 and mutual respect and recognition of the Treaty rights contained in Treaty 4. Specifically, in relation to self-determination, and rights related to lands, territories and resources, we seek recognition of the right to free, prior and informed consent of First Nations prior to any development on Treaty 4 Territory, in accordance with, *inter alia*, article 32(2) of the UN *Declaration*.

First Nations in Treaty 4 territory have seen the exploitation of their lands and resources often resulting in devastating effects on the environment and the livelihood of their people. Under Treaty 4, we agreed to share in the lands, territories and resources of Treaty 4 Territory which we had occupied since time immemorial with the Crown and non-Indigenous settlers. We never relinquished these rights and, as such, maintain an interest in these lands, territories and resources. The UN *Declaration* recognizes rights related to lands, territories and resources of Indigenous peoples, as set out, *inter alia*, under articles 26 to 30. In particular, article 26 provides that Indigenous peoples have the “right to own, use, develop and control the lands, territories and resources that they possess” and “[s]tates shall give legal recognition and protection to these lands, territories and resources.”

Treaties must be interpreted in accordance with the true spirit and intent understood by the Parties, which involves a sharing of natural resources. Access to lands, territories and resources and a degree of control over potential economic proceeds derived therefrom will foster the economic development and self-determination of First Nations in Treaty 4 territory. Related to the right to self-determination, is the requirement of States and third parties to seek to obtain the free, prior and informed consent of Indigenous peoples regarding any decision that could impact their lands, territories and resources. For example, article 29(2) of the UN *Declaration* requires states to “take effective measure to ensure no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.” Article 29(2) recognizes Indigenous peoples’ “...right to conservation and protection of the environment and the productive capacity of their lands or territories or resources.”

Treaty 4 is protected under section 35 of the *Constitution of Canada*, which provides for recognition and respect of Aboriginal and Treaty rights. Treaty rights are recognized under article 37 of the UN *Declaration*. The UN *Declaration* also recognizes that Treaties “...and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States” (preambular paragraph 15).

Furthermore, article 8(2)(b) of the UN *Declaration* requires states to provide effective mechanisms for the prevention and redress of “any action which has the aim or effect of dispossessing [Indigenous peoples] of their lands, territories or resources.”

At paragraph 115, Canada references the constitutional protection of Aboriginal rights in Canada, but states that:

“Many First Nations have successfully challenged governmental decisions in Canadian courts on the basis of asserted but unproven Aboriginal rights and successfully enjoined developmental activity until proper consultation and, where required, reasonable accommodation of asserted Aboriginal rights occurs.”

This represents the approach taken by Canada whereby rights asserted are typically only accepted following lengthy, expensive litigation of claims to Aboriginal rights. This approach is contrary to the spirit and intent of Treaty 4, to the honour of the Crown, and to the UN *Declaration*. Currently, provincial governments often issue licences and permits to authorize development, including mining, by industries, prior to seeking to obtain the free, prior and informed consent of Indigenous peoples. The federal and provincial governments must ensure that this practice does not continue.

On the issue of outstanding Indigenous land rights, the CERD Committee’s Concluding Observations from its review of Canada’s 17th and 18th Reports in 2007 (UN Doc. No. CERD/C/CAN/CO/18 25 May 2007) are highly relevant:

“22. While acknowledging the information that the “cede, release and surrender” approach to Aboriginal land titles has been abandoned by the State party in favour of “modification” and “non-assertion” approaches, the Committee remains concerned about the lack of perceptible difference in results of these new approaches in comparison to the previous approach. The Committee is also concerned that claims of Aboriginal land rights are being settled primarily through litigation, at a disproportionate cost for the Aboriginal communities concerned due to the strongly adversarial positions taken by the federal and provincial governments (art. 5 (d)(v)).

In line with the recognition by the State party of the inherent right of self-government of Aboriginal peoples under section 35 of the Constitution Act, 1982, the Committee recommends that the State party ensure that the new approaches taken to settle aboriginal land claims do not unduly restrict the progressive development of aboriginal rights. Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts. Treaties concluded with First Nations should provide for periodic review, including by third parties, where possible.

Recommendations:

It is recommended that the CERD Committee call upon Canada to act in accordance with Treaty 4 and the UN *Declaration* and to uphold the honour of the Crown by engaging in good faith negotiations with Treaty 4 on outstanding Treaty obligations without resort to legal action.

It is further recommended that the CERD Committee call upon the provincial governments to engage in formalized processes leading to resource revenue sharing agreements with Indigenous peoples consistent with their right to free, prior and informed consent.

It is further recommended that the CERD Committee call upon the Crown in right of Canada and the provinces to ensure that Indigenous peoples' right to free, prior and informed consent is recognized and respected in the context of proposed development of the lands, territories or resources of Indigenous peoples. In particular, the Crown in right of Canada should ensure that provincial governments cease to issue licences and permits to authorize development, including mining, by industries, prior to seeking to obtain the free, prior and informed consent of Indigenous peoples.

It is further recommended that the CERD Committee call upon Canada to ensure that the international norms, standards and laws are followed in the implementation of Aboriginal and Treaty rights.

3. Discriminatory Practices and Socio-economic Conditions (article 5(e) of CERD)

According to article 5(e) of CERD, states must ensure there is no discrimination in relation to economic, social and cultural rights. The lack of Treaty recognition is what underlies the low socio-economic conditions that currently exist in Treaty 4 territory. Article 5 of the UN *Declaration* further confirms the right of Indigenous peoples to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions.”

Without the right to an adequate standard of living, the right to health and the right to adequate housing, Indigenous peoples will remain behind poverty lines. In fact, according to the Community Well-Being Index, which assesses socio-economic status based on census data on education, labour force, income and housing, 96 of 100 communities with the lowest well-being score were First Nation communities.¹

¹ Indian and Northern Affairs Canada, “First Nation and Inuit Community Well-Being: Describing Historical Trends (1981-2006). (Hull: Strategic Research and Analysis Directorate, 2010), available online: http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/cwbdck_1100100016601_eng.pdf at 27.

i) Employment and Income (article 5(e)(i) of CERD)

Although Indigenous peoples represent 3.75% of Canada's population (2006 Census Canada), 21.7% of Indigenous people had incomes below Statistic's Canada's low-income cut-off after tax compared to 11.1% for non-Aboriginal people.² This is partly attributable to the low employment rates of Aboriginal peoples and the discrepancies between salaries of Aboriginal peoples and non-Aboriginal people. It is clear that Canada is falling short of its obligations under article 5(e)(i) of CERD.

The majority of Treaty 4 rights holders reside in Saskatchewan; the discrepancies in relation to employment rates in this province as between Aboriginal and non-Aboriginal peoples are shocking. The unemployment rate of Aboriginal peoples is 18.2% compared to 5.6% of non-Aboriginal people, while the employment rates are 46.1% compared to 64.6% respectively. In Manitoba, the situation is similar, with an unemployment rate of 15.4% for Aboriginal peoples compared to 5.5% for non-Aboriginal people (2006 Census Canada).

For those First Nations who are able to obtain employment, the income gap between persists. The median income for Aboriginal peoples in 2006 was \$18,962, or 30% lower than the \$27,097 median income for the rest of Canadians.³ Further, in Saskatchewan, it was found that the non-Aboriginal employees with the same certificate or degree below a bachelor earned an average of \$11,662 more annually than an employed Aboriginal person.⁴

ii) The Right to Education (article 5(e)(v) of CERD)

Although education is improving among younger generations of Aboriginal peoples, only about 8% of the Aboriginal population aged 25-64 in Canada has a university degree, significantly lagging behind the non-Aboriginal rate of 23%.⁵

iii) Poverty and Indigenous Children

Indigenous children are more likely to come from low income economic families than non-Indigenous children. Throughout the Canadian provinces in 2006, 41% of Aboriginal children under the age of six were from low income families versus 18% of non-

² Alain Noel and Florence Larocque, "Can provincial Governments Make a Difference?" (20 August 2009), online: University of Montreal <http://www.cccg.umontreal.ca/rc19/PDF/Noel-A_Rc192009.pdf>.

³ Daniel Wilson and David Macdonald, "The Income Gap between Aboriginal Peoples and the rest of Canada" (April 2010), online: Canadian Centre for Policy Alternative <<http://www.policyalternatives.ca/sites/default/files/uploads/publications/reports/docs/Aboriginal%20Income%20Gap.pdf>>.

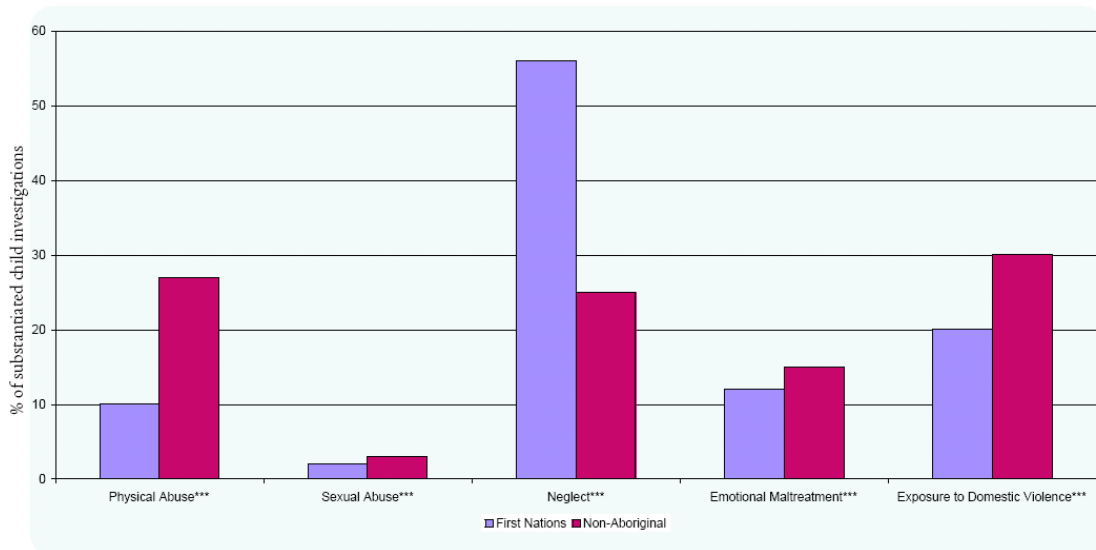
⁴ 2009 Saskatchewan Education Indicators Report, online: Saskatchewan Ministry of Education <<http://www.education.gov.sk.ca/Default.aspx?DN=dfaff52e-a0f2-485e-9213-daaa59424ffe>>.

⁵ 2011-2012 Report on Plans and Priorities: Demographic Description, online: Aboriginal Affairs and Northern Development <<http://www.aadnc-aandc.gc.ca/eng/1315424049095>>.

Aboriginal children. In Saskatchewan, there is an even greater discrepancy, with 51% of Aboriginal children under the age of 6 coming from low income families compared to 15% of non-Aboriginal children.⁶ The foster care caseload in Saskatchewan for Aboriginal families is sadly 70% compared to 30% for non-Aboriginal children. There are more Aboriginal children in state care today than there were at the height of the Residential Schools era. And while foster care is not associated with the high rates of sexual and physical abuse as was the case in residential school, the effects of cultural dislocation are comparable, with most Indigenous children in care placed with non-Indigenous families.

As can be seen in the table below, the overwhelming cause of state apprehension of First Nation children is not abuse (the rates of sexual and physical abuse being lower than for non-First Nation child apprehension cases), but neglect, and therefore are closely related to issues of poverty, health and inadequate housing.

Figure 2: Primary Categories of Substantiated First Nations and Non-Aboriginal Child Maltreatment Investigations in Canada, Excluding Quebec, in 2003



See: *Mesnmimk Wasatek – catching a drop of light: Understanding the Overrepresentation of First Nations Children in Canada’s Child Welfare System: An Analysis of Canadian Incidence Study of Reported Child Abuse and Neglect*. First Nations Child and Family Caring Society of Canada, 2006.
<http://www.fsin.com/healthandsocial/childportal/detail.php?firstLevel=&secondLevel=¤tItemId=264>

⁶ *Supra* note, 3.

iv) The Right to Adequate Housing (article 5(e)(ii) of CERD)

Aboriginal households are still four times more likely to be crowded than non-Aboriginal households.⁷ Further, the 1996 and 2006 Censuses indicated little improvement in the conditions of Aboriginal dwellings. Aboriginal dwellings were still almost three times more likely to require repairs than non-Aboriginal dwellings as of 2006. On reserves, the situation is dire. Almost 5 in 10 registered First Nations dwellings, or 46.7%, were in need of major repairs as of 2006.⁸

The Committee's Concluding Observations from its review of Canada's 17th and 18th Reports in 2007 (UN Doc. No. CERD/C/CAN/CO/18 25 May 2007) in instructive in relation to economic, social and cultural well-being of Indigenous peoples. It states:

“21. While welcoming the commitments made in 2005 by the Federal Government and provincial/territorial governments under the Kelowna Accord, aimed at closing socio-economic gaps between Aboriginal and non-Aboriginal Canadians, the Committee remains concerned at the extent of the dramatic inequality in living standards still experienced by Aboriginal peoples. In this regard, the Committee, recognising the importance of the right of indigenous peoples to own, develop, control and use their lands, territories and resources in relation to their enjoyment of economic, social and cultural rights, regrets that in its report, the State party did not address the question of limitations imposed on the use by Aboriginal people of their land, as previously requested by the Committee. The Committee also notes that the State party has yet to fully implement the 1996 recommendations of the Royal Commission on Aboriginal Peoples (art. 5 (e)).

In light of article 5 (e) and of general recommendation no. 23 (1997) on the rights of indigenous peoples, the Committee urges the State party to allocate sufficient resources to remove the obstacles that prevent the enjoyment of economic, social and cultural rights by Aboriginal peoples. The Committee also once again requests the State party to provide information on limitations imposed on the use by Aboriginal people of their land, in its next periodic report, and that it fully implement the 1996 recommendations of the Royal Commission on Aboriginal Peoples without further delay.”

⁷ 2006 Census: Aboriginal peoples in Canada in 2006: Inuit, Metis and First Nations, 2006 Census, online: Statistics Canada < <http://www12.statcan.gc.ca/census-recensement/2006/as-sa/97-558/p5-eng.cfm>>. Crowding refers to those households with more than one person per room (not the bathrooms, halls, vestibules, and rooms used for business purposes only).

⁸ Housing Conditions, online: Statistics Canada <http://www.statcan.gc.ca/pub/89-645-x/2010001/housing-logement-eng.htm>>.

Recommendation:

It is recommended that the CERD Committee address these discriminatory obstacles that continue to exist, in partnership with Treaty 4, to ensure that unequal socio-economic conditions do not continue. This should be accomplished through a comprehensive national plan, jointly formulated between Canada and Indigenous peoples, to close the socio-economic gap through measures aimed at achieving equality related to education, labour force and economic participation and adequate housing between Indigenous and non-Indigenous peoples in Canada. Such measures should respect the Treaty rights to education and to health.

4. The Establishment of a National Treaty Commissioner

Treaty 4 advocates the establishment of a National Treaty Commissioner appointed by and reporting to Parliament and to Indigenous peoples in Canada. The outstanding Treaty obligations that continue to be violated by Canada are founded on a racist regime. To address this, negotiations must be undertaken in good faith and in accordance with a principled human rights framework, including article 46(3) of the UN *Declaration* which states that “The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.” The mandate of the National Treaty Commissioner should include addressing the racist approach taken towards the resolution of land claims. Further, a visit by the Special Rapporteur on Racism to Canada could assist in addressing the racism that currently exists in this area.

Recommendations:

It is recommended that the CERD Committee call upon Canada to ensure that Canada include in the mandate of the National Treaty Commissioner the authority to address racism and to take measures to ensure its mandate is consistent with section 35 of Canada’s Constitution. Further, the National Treaty Commissioner should be jointly accountable to First Nations and the Crown.

It is recommended that the CERD Committee call upon Canada to undertake Treaty negotiations in good faith and in a manner that respects international law, norms and standards, including article 46(3) of the UN *Declaration*.

It is recommended that the CERD Committee instruct the Special Rapporteur on Racism to investigate Treaty violations for which Treaty 4 is currently seeking redress.

Annex I: Historical Background of Treaty 4

The Royal Proclamation of 1763 establishes the Treaty-making process in Canada, setting out that the Crown required an agreement to obtain lands from Indigenous peoples.

In 1874, Treaty 4 was entered into between the Crown and the Nahkawe (Saulteaux), Nakota and Plains Cree Indigenous Nations whereby it was agreed to share 75,000 square miles of traditional territory to “the depth of a plow”, extending from the southeast corner of Alberta, to most of southern Saskatchewan to west central Manitoba in exchange for promises by the Queen of reserve lands, agricultural provisions, protections for hunting, trapping and fishing, schools, annuities and well-being of the children and generations to come, “as long as the sun shines and the water flows.”

When Canada established Saskatchewan and Alberta in 1905 and Manitoba in 1870, the government of Canada retained the ownership of the public lands and resources. The retention of natural resources by the federal government allowed the government of Canada to control immigration, land settlement and railways.

In 1930, the prairie provinces wanted the same consideration as given to the original provinces of confederation by section 109 of the *British North America Act, 1867* (now known as the *Constitution Act, 1867*). As a result, the Prairie Provinces were given ownership of the public lands and resources on the same footing as other provinces. Sections 109 and 117 of the *Constitution Act, 1867* provide as follows:

109. All Lands, Mines, Mineral and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick of the Union, and all Sums their due or payable for such Lands, Mines, Minerals and Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia and New Brunswick in which the same are situate or arise, **subject to any Trusts existing in respect therefore, and to any Interest other than that of the Province in the same.** (emphasis added)

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Rights of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

In 1930, the federal Crown purported to transfer, through the *Natural Resources Transfer Agreements* (NRTA), the federal Crown’s land rights to the prairie provinces (including Saskatchewan and Manitoba). This transfer was explicitly made subject to “existing trusts” which included Treaty 4 First Nations interests in the lands, territories and resources that the Indigenous peoples of Treaty 4 agreed to share.

In 1982, under section 35 of the Canada's *Constitution Act, 1982* Aboriginal and Treaty rights are recognized and protected. Section 35 states:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit, and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.