



An Indigenous Right to Food

This booklet provides an overview of some of the legal and policy approaches for advancing Indigenous rights to food and control over traditional **food lands** (i.e. natural resources where food is derived) in Canada.

The **legal and policy tools** for the Indigenous right to food include:

- Canada's international obligations
- Constitutional dimensions
- Modern treaties, and
- Policies

Canada has made strong commitments to improving food rights for Indigenous Peoples through their adoption of the **United Declaration of the Rights of Indigenous Peoples** (UNDRIP) and plans to co-develop the new national food policy: **A Food Policy for Canada: Everyone at the Table.**

In light of these commitments, it is important for Indigenous Peoples and settlers to understand the benefits and challenges of different approaches to realizing a right to food.

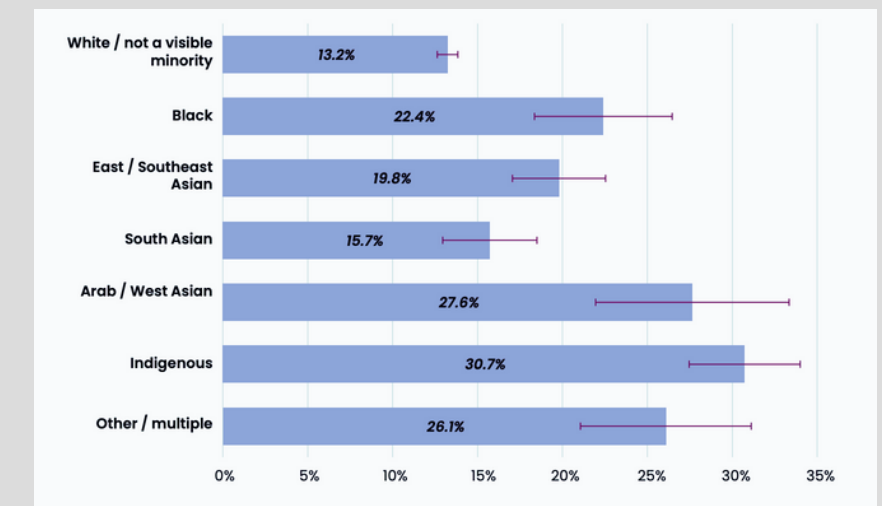


Indigenous Food Insecurity

Indigenous people experience disproportionately high rates of food insecurity (lack of access and availability of healthy, fresh, and safe foods).

Roughly 31% off-reserve Indigenous people are food insecure, and up to 70% in remote Northern communities compared to the average 16% of the Canadian population.

Percentage of individuals living in food-insecure households by racial/cultural identity & Indigenous status (PROOF, 2021)



Indigenous identity, culture, and spirituality are closely tied to food. However, colonial control, residential school assimilation, environmental pollution, and forced migration have caused Indigenous people to lose their connection, control, and access to traditional lands and foods. This has led to physical, psychological, and spiritual distress within Indigenous communities. It also points to a need to secure not just access to food, but to **food lands**.

Legal Tools for Realizing Indigenous Food Sovereignty: A Rights-Based Approach

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A Right to Food And Food Sovereignty

The **right to food** is a legal concept and a fundamental human right recognized in International law.

Food sovereignty is a political concept and can be used to progress a right to food. Food sovereignty emphasizes control over one's food system and inherently implies a right to self-governance.



Indigenous food sovereignty is deeply connected to control and access to traditional land and waters. Food sovereignty can help advance arguments for a right to food that are grounded in self-governance. This recognizes that access and control of land and natural resources are crucial to ensuring a robust and culturally sensitive Indigenous food system, above and beyond just food security.

International Obligations

The **International Covenant on Economic, Social and Cultural Rights** provides that food is a fundamental human right. As a signatory to this convention, Canada has committed to realizing a right to food for everyone, including Indigenous people. This means Canada has a legal obligation to respect, protect, and fulfill the right to food under international law.

In 2016, Canada adopted **UNDRIP** article 24 acknowledges that "Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals, and minerals".

UNDRIP also has provisions on rights to access and control traditional lands and natural resources, which is directly connected to realizing a right to food.

UNDRIP provides another strong government commitment to fulfilling an obligation to protect a right to food for Indigenous Peoples.



Canada's Failure to Realize a Right to Food



In 2012, the United Nations released a report finding that Canada was **failing to meet its international obligations** to secure adequate healthy food for society.

The report highlighted the special relationship between Indigenous identity and food systems. It found that the Canadian government perpetuated Indigenous food insecurity by attempting to extinguish land title through lengthy land-claim negotiations, and narrowly interpreting historic treaties to deprive access to traditional food lands.

Pros

- International obligations provide a means of holding the Canadian government accountable for the recognition and protection of Indigenous rights.
- UNDRIP may provide stronger protection against government actions that interfere with a right to food.

Cons

- Canada has not always upheld its international obligations.
- International obligations may not have the force of law in Canada, which can limit their enforceability.



A Constitutional Right to Food?

The **Charter of Rights and Freedoms** protects the right to life, liberty and security of the person, and guarantees those rights are provided equally.

However, the right to food is not explicitly mentioned in the Charter or in case law. Further, courts have been reluctant to find a positive obligation for the Canadian government to provide access to the basic necessities of life, including food.



Section 35 (s35) of the *Constitution Act 1982*, recognizes and affirms Aboriginal (i.e., First Nations, Métis and Inuit) and treaty rights.

Courts have consistently interpreted these rights to include the right to hunt, fish and gather food for social, ceremonial, and spiritual purposes on traditional territories.

S35 Case Law

Some Important **s35 cases** that impact a right to food include:

R v Badger, SCC 1996: Affirms a constitutional right to hunt for food in areas subject to numbered treaties. This right is **not** extinguished or replaced by the *National Resources Transfer Agreement Act*.

R v Van der Peet, SCC 1996: This case established the **narrow legal test** for determining s35 rights. The SCC found the Aboriginal right to fish did not include the right to sell the fish commercially.

R v Marshall, SCC 1999: Affirms a Mi'kmaq Aboriginal right to fish for food under a **historic treaty**. The decision angered non-Indigenous fisheries. In response, the Supreme Court of Canada issues an "elaboration"

R v Marshall (No. 2) which seemed to **narrow** the right and give more room for justifiable Crown infringement.



S35 and A Right to Food



If governments infringe s35 rights, First Nations, Métis, and Inuit people can pursue legal action as a remedy.

Pros:

- S35 provides a legal basis for Aboriginal Peoples to assert their rights and hold governments accountable for infringements.
- S35 can provide a framework for negotiations between Aboriginal Peoples and governments to resolve disputes and reach agreements.
- Courts have found s35 to include collective rights over hunting, fishing, and gathering for social purposes on traditional territory.

Cons:

- Litigating s35 rights can be costly, time-consuming and onerous.
- S35 rights are generally interpreted narrowly, such as fishing and gathering for social purposes in a specified area. Courts are reluctant to find broad rights that could accommodate a general right to food.
- The government can infringe s35 rights if justified for certain public purposes like conservation.



Modern Treaties



Modern Treaty Negotiations involve Indigenous Peoples, and provincial and federal governments. Agreements can include terms to manage and control food systems. Three West Coast examples have provisions that touch on the right to food.

The Nisga'a, Tsawwassen First Nation, and Maa-nulth First Nations Agreements include rights to hunt, fish, and harvest for domestic and social purposes. Commercial fishing and fisheries management are covered by Harvest Agreements that balance Indigenous rights to sell fish with other public, health, and conservation considerations

Pros:

- Can help advance Aboriginal rights, including those related to land, resources, and self-government.
- Clear rights, responsibilities, and processes for decision-making and dispute resolution increase certainty and predictability.

Cons:

- Negotiations can be expensive and time-consuming.
- Historic treaty regions with land cession agreements cannot negotiate modern treaties.
- Canadian governments may still have more bargaining power.



Impact of Policies

Government policies can signify government intention and be used to hold them accountable. They can also be problematic.

For example, **Nutrition North Canada**, a federal policy designed to improve healthy food access in remote Northern communities, has been ineffective due to insufficient oversight and inadequate inclusion of Indigenous Peoples in policy development. Further, **Health and safety regulations**, based on colonial views, are restrictive and create compliance challenges for Indigenous Peoples.

Pros:

- Policies can provide resources to support the realization of Indigenous rights.
- Policies can provide a means of holding governments accountable.

Cons:

- Policies can be influential but are not "hard law" so they are not legally binding
- Policies can be slow to implement.
- If meaningful collaboration is not undertaken, policies can limit Indigenous autonomy.

Everyone at the Table: A National Food Policy



In 2019, Canada's federal government committed to establishing the first-ever national food policy called **A Food Policy for Canada: Everyone at the Table**.

One of the six priority areas of the policy is to build **strong Indigenous food systems**. The government recognizes that co-development with Indigenous communities is necessary for working towards broader goals of reconciliation. Now that Canada has adopted UNDRIP, policy commitments like this may have more strength.

Many of the problems with past policies centred on failures to meaningfully collaborate with Indigenous communities. Recognizing the strengths and weaknesses of different legal approaches can resist repeating the same mistakes as in the past.

A robust national food policy that is co-created on the basis of **mutual respect** and **meaningful collaboration** can signify a move towards nation-to-nation partnership which can help ensure an Indigenous right to food and progress goals of reconciliation

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