October 16, 2009

UN Declaration on the Rights of Indigenous Peoples

STATEMENTS BY THE GOVERNMENT OF CANADA AND SOME BRIEF RESPONSES

The following are examples of the erroneous, misleading, and unsubstantiated pronouncements made by the Canadian government in an effort to justify its ongoing opposition of the *UN Declaration on the Rights of Indigenous Peoples*. This document includes brief responses highlighting the basic defects in the Conservative government's positions. The government is well aware of these responses, yet continues to disseminate misleading information in Canada and internationally.

1. Canadian government's reversal of Canada's position on the *Declaration*

[The *UN Declaration*] It's very sweeping. It's very radical. We don't support it. ... It's not a text that has ever been agreed upon by a previous Canadian government ...

> Minister of Indian Affairs, Jim Prentice, in an interview with Mike Duffy, CTV, June 20, 2006

RESPONSE: During the last few years of the UN Working Group, the former government of Canada played a central role in the negotiation of the *UN Declaration* and actively encouraged States to endorse provisions that the current government now claims are unacceptable.

The alleged lack of support by any prior Canadian government was refuted by the UN Committee on the Elimination of Racial Discrimination. In its May 2007 report on Canada, the Committee expressed its regret for Canada's "change in the position ... in the Human

Rights Council and the General Assembly" and recommended "that the State party support the immediate adoption of the United Nations Declaration on the Rights of Indigenous Peoples".

The January 16, 2006 report of the Chair of the UN Working Group finalizing the *Declaration* highlighted that fully 37 provisions could be considered as a basis for provisional agreement or consensus. No State (including Canada) or Indigenous people had objected to these provisions and no further discussions were required.

By the time the Working Group concluded its work in February 2006, consensus on many of the remaining articles was blocked by the opposition of only one or two states. Canada was not among those states opposing consensus and had in fact championed many of the outstanding provisions.

The final text that went to the Human Rights Committee was issued by the Working Group Chair in late February 2006. By this time, the Conservative government had been elected so it would have been impossible for any "previous Canadian government" to have approved that text.

2. The *UN Declaration* and the Canadian Constitution and Charter of Rights and Freedoms

> **[The *Declaration*] is inconsistent with the Canadian Charter of Rights. It is inconsistent with our Constitution.**
>
> Minister of Indian Affairs, Jim Prentice, House of Commons, June 21, 2006

The government has failed to provide a legal rationale to substantiate that the *Declaration* is inconsistent with the Constitution and *Canadian Charter of Rights and Freedoms*. Rather, the *Declaration* is consistent with both.

The *UN Declaration* reinforces the recognition and affirmation of Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*. The *Declaration* also promotes reconciliation, which is a central objective of s. 35.

Furthermore, the *Declaration* explicitly states the "human rights and fundamental freedoms of all shall be respected" and every provision of 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" (Art. 46). These are core principles and values in international law and in the *Canadian Charter of Rights and Freedoms.*

The *Declaration* also states that the rights of Indigenous peoples may also be limited when strictly necessary "for the purpose of securing due recognition and respect for the rights and freedoms of others". This approach allows for both flexibility and balance.

The former UN High Commissioner for Human Rights and former Supreme Court of Canada justice, Louise Arbour, does not accept the government's reasons for opposing the *Declaration*. On October 22, 2007, as High Commissioner, she expressed publicly her "astonishment" and "profound disappointment" that Canada voted against the *Declaration* in the General Assembly.

3. The *Declaration* and Indigenous peoples' treaty rights

> **Five hundred treaties have been signed over the past 250 years. … The government does not support the declaration because that declaration *jeopardizes those treaties, the enforceability and the meaning of them*.**
>
> Minister of Indian Affairs, Jim Prentice, House of Commons, June 21, 2006

Under Canadian law, it is not possible for a declaration to upend the treaties that Canada or others have entered into with Indigenous peoples. The treaty rights of Indigenous peoples are protected by s. 35 of the *Constitution Act, 1982* and cannot be "jeopardized" by any international human rights instrument.

The government's statements are contradicted by the *Declaration* itself. The preamble recognizes "the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties" (PP8). It also affirms that "treaties … and the relationship they represent … are the basis for a strengthened partnership between indigenous peoples and States" (PP15).

Further, Art. 37 affirms that "Indigenous peoples have the right to the recognition, observance and enforcement of treaties … concluded with States … and to have States honour and respect such treaties". All of these provisions serve to honour, protect and enforce treaties with Indigenous peoples as sacred and living agreements.

4. The *Declaration* and national laws and policies on Indigenous rights

> **[The *Declaration*] is inconsistent with all of the policies under which we have negotiated land claims for 100 years.**
>
> Minister of Indian Affairs, Jim Prentice, House of Commons, June 21, 2006

It is not necessary that an international human rights instrument reflect national laws and policies. If that were true, the *Declaration* would also have to reflect the laws, treaties and policies of approximately 70 other countries that include Indigenous peoples. This would serve to perpetuate the status quo and the regressive laws and policies of countless governments. Rather, a key purpose of the *Declaration* is to provide uplifting international human rights norms, which "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (Art. 43).

It is misleading to state that the *Declaration* is "inconsistent with all of the policies under which we have negotiated land claims for 100 years". For 24 of the last 100 years (1927-1951), it was an offence in the Indian Act for "Indians" to raise funds or retain a lawyer for the advancement and prosecution of land claims. At the AFN General Assembly on July 16, 2006, former Indian Affairs Minister Jim Prentice decried the specific claims process: "I have been one of the most outspoken critics in this country over the last 20 years of how the claims process isn't working." Yet, he was prepared to support and cite this process as a reason for not endorsing the *Declaration*.

The above statement by the government reflects its objection that Indigenous peoples' land and resource rights are affirmed in the *Declaration* as being based on traditional occupation and use that is rooted well into the past. However, these criteria are consistent with rulings of the Supreme Court of Canada, as well as federal land claims policy. The Final Report of the Royal Commission on Aboriginal Peoples explicitly cited a similar earlier version of Art. 26 of the *Declaration* and urged the Canadian government to safeguard Aboriginal lands and resources in accordance with such norms.

5. The *Declaration* and military activities on Indigenous peoples' lands

[The *Declaration*] is inconsistent with the National Defence Act.

Minister of Indian Affairs, Jim Prentice, House of Commons, June 21, 2006

Canada's above objection was not supported by the Department of National Defence. A freedom of information request revealed that the Department recommended that the government support the *Declaration* with a statement of understanding.

In regard to military activities on Indigenous lands, the government incorrectly claimed that the military would not be able to provide assistance in the event of natural disasters and other emergencies. On August 13, 2007, when Canada disclosed its proposed amendments relating to such military activities, the government's changes suggested a very different objective.

Canada's proposed amendments to article 30(2) of the *UN Declaration* would have limited the duty of States to consult to situations "where military activities take place by agreement or upon request" of Indigenous peoples. In other words, no consultation would be required on unilateral military activities on Indigenous lands. This would be a lesser standard than is required currently under Canada's Constitution.

6. Balancing of rights in the *Declaration*

> **In Canada, you are balancing individual rights vs. collective rights, and (this) document ... has none of that ... By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that's inconsistent with our constitution.**
>
> Minister of Indian Affairs, Chuck Strahl, quoted in S. Edwards, "Tories defend 'no' in native rights vote", *The [Montreal] Gazette*, September 14, 2007

The above statements by the Minister are contradicted by the *UN Declaration* itself. Seventeen provisions in the *Declaration* address individual rights. These are: PP4, PP22 and Arts. 1, 2, 6, 7, 8, 9, 14, 17, 21, 22, 24, 33, 40, 44 and 46.

The Minister's statements serve to generate confusion and opposition to the *Declaration*. The *Declaration* contains some of the most comprehensive balancing provisions that exist in any international human rights instrument. In contrast, in relation to Aboriginal and treaty rights in Part II of Canada's Constitution Act, 1982, there are no explicit balancing provisions (except for gender equality). That function is left to Canadian courts.

As reflected in the *Declaration*, human rights are generally relative and must be balanced with the rights of others. Article 46 explicitly states that every provision 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 core principles and values of not only Canada's Constitution, but also the international system.

7. Essential scope of the *Declaration*

> **The current text of the declaration is flawed. It lacks clear, practical guidance for implementation ...**
>
> Chuck Strahl (Minister of Indian Affairs), "A document Canada couldn't sign", *National Post*, September 14, 2007

International instruments cannot be crafted to suit the particularities of one state. The *Declaration* is a living instrument that has universal application for countless contexts in over 70 countries. It is broadly crafted, so as to be capable of addressing a wide range of circumstances both now and in the future.

The diverse human rights standards elaborated throughout the *Declaration* include "practical guidance for implementation". The *Declaration* is "a standard of achievement to be pursued in a spirit of partnership and mutual respect" (last preambular para.). The *Declaration* itself

includes implementation provisions relating to UN bodies, States and Indigenous peoples. It also includes numerous provisions that refer to "harmonious and cooperative relations", "consultation", and "cooperation" between Indigenous peoples and States. In this context, various collaborative processes are specified in relation to particular rights, including lands and resources.

8. Implementing the *Declaration* in Canada

> **As explained in our statement to the [General] Assembly, delivered prior to the vote, this Declaration has no legal effect in Canada, and its provisions do not represent customary international law. It is therefore inappropriate for the Special Rapporteur to promote the implementation of this Declaration with respect to Canada.**
>
> > Canada, "Statement to the Human Rights Council on the Mandate of the UN Special Rapporteur on the situation of the human rights and fundamental freedom of indigenous people", Geneva, 26 September 2007

The government is incorrect in declaring that the *UN Declaration* "has no legal effect in Canada". Such statements cannot prevail over the rulings of Canadian courts. For example, in the 1987 *Reference re Public Service Employee Relations Act (Alta.)*, Chief Justice Dickson stated:

> The various sources of international human rights law -- *declarations*, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms -- must, in my opinion, be *relevant and persuasive sources for interpretation* of the Charter's provisions. [emphasis added]

Within their respective mandates, UN bodies and regional bodies (e.g. within the Inter-American human rights system) are free to take into account the *UN Declaration* in interpreting the rights of Indigenous peoples residing in Canada. At the domestic level, Canadian courts have the legal capacity to take into account the *Declaration* in interpreting Indigenous peoples' rights.

As the High Commissioner for Human Rights indicated to the Canadian Human Rights Commission on October 22, 2007: "Human rights protection can only be achieved by national actors operating under the international normative framework, and in cooperation with the international human rights protection machinery." Human rights bodies in Australia and New Zealand declared that they will use the *Declaration* as a standard in their work, despite the opposition of their national governments. On April 3, 2009, Australia endorsed the *Declaration*.

It is inaccurate for the Canadian government to declare that the provisions of the *Declaration* "do not represent customary international law". Examples in the *Declaration* include, *inter alia*:; the right to self-determination; right not to be subjected to genocide; prohibition against racial discrimination; the general principle of international law of pacta sunt

servanda ("treaties must be kept"); good faith in the fulfilment of the obligations assumed by States in accordance with the *Charter*; and the *UN Charter* obligation of States to promote "universal respect for, and observance of, human rights and fundamental freedoms for all". Some prominent jurists, including the High Commissioner for Human Rights, state that the rule banning gender discrimination is now customary international law.

9. Collaboration with Indigenous peoples on suitable objectives

> **We have not yet arrived at a text that provides appropriate recognition of the Canadian charter, the many treaties that have been signed, and other statutes and policies of the Government of Canada, and we continue to work with our aboriginal partners to try to achieve such a text.**
>
> Minister of Indian Affairs, Jim Prentice, House of Commons, June 12, 2007

It is incorrect to suggest that a purpose of the *UN Declaration* is to provide "appropriate recognition of the Canadian charter, the many treaties that have been signed, and other statutes and policies of the Government of Canada". If that were true, the *Declaration* would also have to reflect the laws, treaties and policies in all countries that include Indigenous peoples. This would serve to perpetuate the status quo and the regressive laws and policies of countless governments. Rather, a key purpose of the *Declaration* is to provide uplifting international human rights norms, which "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (Art. 43).

There are many examples where Canadian laws and policies fall below international human rights standards. For example, as former Indian Affairs Minister Jim Prentice confirmed at the AFN General Assembly on July 16, 2006, the present *Indian Act* is an "archaic, tangled, and patronizing legislative framework that defines the vast majority of relations between government and Aboriginal peoples".

It is also inaccurate for the government to state: "we continue to work with our aboriginal partners". In opposing the *Declaration* for over 17 months, the government failed to consult Indigenous peoples and accommodate Indigenous concerns. Representatives of both Indigenous peoples and human rights organizations have repeatedly highlighted the government's failure to fulfill its constitutional and international obligations to engage in genuine consultations and uphold the honour of the Crown.

10. Minimal opposition to *Declaration*

> **We are not the only ones with concerns. The United States, Australia and New Zealand have also voiced major concerns with the current text.**
>
> Chuck Strahl (Minister of Indian Affairs), "A document Canada couldn't sign", *National Post*, September 14, 2007

Only four countries voted against the *Declaration*. Aside from Canada, these were New Zealand, Australia and the United States – three of the most obstructionist States during the previous UN standard-setting process. The *Declaration* was adopted with 144 countries voting in favour and 11 countries abstaining. There are more than 370 million Indigenous people worldwide; less than two percent live in these four countries. Australia has now endorsed this human rights instrument.

11. Government actions on education, drinking water, etc. are not a defence to opposing the *UN Declaration*

> **[T]his government has acted on many fronts to "improve quality of life … for all Aboriginal peoples … This agenda … is leading to tangible progress in a range of areas including land claims, education, housing, child and family services, and safe drinking water.**
>
> Letter from Minister of Indian Affairs, Chuck Strahl, to AFN National Chief, Phil Fontaine, December 10, 2007

Such actions are expected of any national government that assumes constitutional responsibility for Indigenous peoples. These measures are not a defence or response to attempting to undermine the rights of Indigenous peoples in an international human rights instrument, such as the *UN Declaration*, and opposing its implementation. Yet the above comments are made in the context of defending the opposition to the *Declaration*.

The government's characterization of its domestic agenda is incomplete and self-serving. No mention is made here of the Conservative government's unilateral rejection of the *Kelowna Accord*, which had been agreed to in November 2005 by national Indigenous leaders and all First Ministers. This agreement would have enhanced the enjoyment of human rights, by helping to reduce the severe socio-economic disparities affecting Indigenous peoples in all regions of Canada. While funding was made available as part of the economic stimulus package in January 2009, huge disparities still exist in Canada between Indigenous and non-Indigenous peoples.

12. *UN Declaration* is highly relevant to climate change

[The *UN Declaration*] has nothing whatsoever to do with climate change.

> Minister of the Environment, Jim Prentice, world climate talks, Poland - quoted in B. Curry and M. Mittelstaedt, "Ottawa's stand at talks hurting native rights, chiefs say", *Globe and Mail*, December 12, 2008.

The above statement is contradicted by the provisions of the *Declaration*. Human rights in the *Declaration* that are relevant to climate change include those relating to: conservation and protection of the environment; self-determination; treaties; lands, territories and resources; life and security; health; cultural integrity; subsistence; effective remedies; and forcible relocations.

The Environment Minister's statement undermines global attempts to respond effectively to climate change. It also unfairly politicizes Indigenous peoples' human rights. It is inconsistent with Canada's response in November 2008 to the Office of the High Commissioner (OHCHR), acknowledging that "there can be an impact on the effective enjoyment of human rights as a result of situations arising from environmental degradation amplified by climate change".

The Minister's statement on the irrelevance of the *UN Declaration* to climate change runs directly counter to the positions and approaches taken by numerous institutions and mechanisms, including the OHCHR; UN Permanent Forum on Indigenous Issues; Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people; Australian Human Rights Commission (Social Justice Commissioner); and International Union for the Conservation of Nature (IUCN).

Endorsed by:

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Amnesty International Canada
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