



THE ASSEMBLY OF FIRST NATIONS
Submission to the United Nations Human Rights Council
Universal Periodic Review of
Canada's Human Rights Obligations

September 2008

I. Introduction

1. This submission is the contribution of the Assembly of First Nations (AFN) to the Universal Periodic Review led by the Human Rights Council, which will review Canada's human rights performance. The AFN is the national political organization representing over 800,000 Indigenous people in Canada. First Nations (Status Indians) are one of three Aboriginal peoples recognized under the *Constitution of Canada*, along with the Inuit and Métis.

2. The AFN recognizes Canada's human rights legislative, procedural and institutional framework as having the potential for promoting the human rights of Indigenous peoples. This potential has not been fully realized and, as such, compromises the human rights of First Nations citizens in Canada.

II. Canada's International Position on the Human Rights of Indigenous Peoples

3. In accordance with the Human Rights Council's "Agenda and Framework for the Programme of Work" (Res. 5/1, 18 June 2007), the "Rights of peoples" are permanently considered under Item 3 ("promotion and protection of all human rights"). This is consistent with UN practice for the past thirty years in which the rights of Indigenous peoples' rights are considered as human rights under the international human rights system.

4. Canada has made broad international commitments to protect and promote human rights. However, Canada's position against the *United Nations Declaration on the Rights of Indigenous Peoples (Declaration)*, as exhibited in efforts to undermine its support at the Human Rights Council and the General Assembly in 2006 and 2007 respectively, its negative vote in the General Assembly in September 2007, and its continued efforts to undermine its application domestically, undermines the rights of Indigenous peoples globally and First Nations citizens in Canada. It also undermines the international cooperative efforts aimed at achieving and implementing best practices to achieve the full realization of the human rights of Indigenous peoples. Canada's opposition to the *Declaration* violates the rule of law in Canada and undermines the work and mandate of the Human Rights Council.

5. Despite Canada's more than twenty year involvement and support for the development of the *UN Declaration* and the Parliament of Canada's majority support on 8 April 2008 for a motion calling on the Government of Canada to adopt and implement the *Declaration*¹, the Government of Canada has refused to do so. As such, Canada continues to flout its own democratic representative institutions. Recently, Canada stated "The Government of Canada has made it clear that it does not accept this set of political commitments. Canada reiterates its understanding that this Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law."² This position blatantly rejects and undermines international and domestic human rights processes as well as the emerging international customary law with respect to the principles and standards contained in the *Declaration*. States must not be allowed to pick and choose which international human rights instruments and standards they will accept and respect. Moreover, States with a seat on the Human Rights Council (HRC) are expected to set and follow the highest standards in human rights principles and practices. Canada's stance on the *Declaration* seriously undermines the work and mandate of the HRC.

6. There are no national independent bodies with a legislative mandate to monitor the implementation of international instruments in Canada. However, independent examination would yield findings similar to those of the UN Special Rapporteur on Housing, who visited Canada in 2007 and noted "the devastating impact of the paternalism that marks federal and provincial government, legislations, policies and budgetary allocation for



Aboriginal people on and off reserve”. He found that, “These policies have seriously compromised the right to self determination that Aboriginal people enjoy under the original treaties and the International human rights instruments.”³ As such, Canada’s refusal to implement and endorse the *Declaration* is a serious impediment to realizing the human rights of Indigenous peoples in Canada.

III. The Suppression of Indigenous Rights in the Application of Domestic Legal Instruments and Political Processes

7. From the treaties between the Crown and First Nations, the Royal Proclamation of 1763,⁴ recent amendments to Canada’s *Constitution*⁵, and other legal instruments such as domestic jurisprudence, it would be reasonable to conclude that the human rights of Indigenous peoples, the inherent rights of First Nations in Canada, were protected and promoted in law.

8. However, the Government of Canada denies the rights contained in these instruments by narrow and regressive interpretation of First Nation rights. As a principal example, the right to self-government is denied through the exercise of jurisdiction by the Government of Canada in application of the *Constitution Act, 1867*, S. 91(24)⁶ and the *Indian Act*,⁷ under which the Government of Canada presumes to hold all legal authority over First Nations and grant or delegate specific administrative authorities to First Nations governments as it sees fit. To date, First Nations have not been consulted on Government proposals for structural and legal reform. Structural reform is necessary to fulfill the inherent right of self-government and the right of self-determination as affirmed in the *Declaration*.⁸

9. This and other rights of First Nations, which have domestic legal enforceability through S. 35 of the *Constitution* and international recognition through the *UN Declaration*, are denied in practice by the Government of Canada which presumes to make or have the authority to delegate when and as it wishes, all decisions over land, schooling, housing, economic development and all other social, cultural, political, legal and human rights of First Nations citizens.⁹ Furthermore, Canada’s “Inherent Right Policy” and “Comprehensive Claims Policy” remain in conflict with S. 35 rights despite criticisms from the Government of Canada’s own Auditor General¹⁰.

10. It is anticipated that Canada’s report will misrepresent the factual and legal context of this reality. For example, the AFN is confident that Canada’s report will attempt to present two legislative initiatives from 2008: amendments to the *Canadian Human Rights Act* removing an exemption on matters covered by the *Indian Act* and the tabling of a Bill in Parliament dealing with the matrimonial real property of First Nations people as supporting human rights. These steps were and are themselves violations of the rights of First Nations people. As a matter of inherent Aboriginal and treaty right, as a matter of domestic constitutional law (S. 35 of the *Constitution Act, 1982*) and as a matter of international law (Article 19 of the *United Nations Declaration on the Rights of Indigenous Peoples*), Canada has a duty to consult and accommodate the interests of First Nations prior to enacting any legislation that affects the rights of First Nations. This was not done in the two cases cited above, constituting a violation of First Nations’ fundamental political rights. Furthermore, Bill C-47 on matrimonial real property rights attempts to create an additional authority over the decisions of First Nations governments in this regard, constituting yet an additional violation of the political and legal rights First Nations rights.

11. The denial of the right to free, prior and informed consent or to consultation and accommodation is practiced in various ways by Canada. In 2008, two acts of peaceful protest against resource extraction projects that had been initiated without meeting the duty to consult resulted in the jailing of seven Aboriginal leaders in Ontario.¹¹



Similarly, current work by the Government of Canada to develop legislation concerning clean drinking water, a serious problem among First Nations communities where over 100 boil water advisories are in effect, is being undertaken in a unilateral fashion without appropriate consultation or consideration of First Nations governments' jurisdiction¹².

IV. Conditions of Poverty and Discrimination

12. First Nations citizens numbered 805,600 in 2007, approximately 2.5% of the population of Canada.¹³ While under-represented in personal income, employment, education and health, First Nations are drastically over-represented in incarceration rates, disabilities, poor health indices, suicide and poverty.¹⁴

13. In 2000, the average individual income among Registered Indians was \$16,935 as compared to \$29,769 for the Canadian population as a whole and in 2001, the unemployment rate among Aboriginal peoples 15 years and older was nearly three times higher than for non-Aboriginal peoples. Further, in 2001, the high school completion rate for Registered Indians was 48.6% as compared to 68.7% for the total Canadian population and life expectancy for Registered Indian men was 70.4 years in 2001 as compared to 77.0 years for the total Canadian male population, while Registered Indian women had a life expectancy of 75.5 years in 2001 as compared to 82.1 years for Canadian women in general.¹⁵

14. Two specific examples of discriminatory funding are particularly informative. The Government of Canada provides 22% less in funding for child and family services for First Nations children than the responsible provincial authorities provide for non-Aboriginal children in their care.¹⁶ Similarly, the Government of Canada provides an average of \$2,000 less per child for education of First Nations children than is spent by provincial governments on the education of non-Aboriginal children.¹⁷ Much of the explanation for lower income and employment rates and higher incarceration and suicide rates can be found in these expenditure statistics.

15. The Government of Canada has maintained a 2% cap on annual funding growth for core programs and services to First Nations while increasing health and social transfers to the provinces grows at a 6.6% rate.¹⁸ Conversely, the First Nations population is growing at over twice the rate of the non-Aboriginal population. If inflation were constant for the two groups (it is higher for First Nations due to the rural and remote location of most communities), this discriminatory practice would still favour the non-Aboriginal population by greater than 600%.

16. Opportunities to correct this situation have not been pursued by the Government of Canada. An unprecedented agreement between federal, provincial and Indigenous leaders in November of 2005 known as the Kelowna Accord was intended to address immediate poverty issues, but Canada reneged on its commitment. Instead, Canada falsely suggests that sufficient funding is being provided, despite strong evidence to the contrary.¹⁹

17. The Government of Canada practices discriminatory and punitive funding with regard to First Nations citizens which results in predictably negative social determinants and a lower quality of life for First Nations. As these practices have been pointed out to the Government of Canada on many occasions by a variety of interlocutors, it can only be concluded that these practices are deliberate. As the Human Rights Council is well aware, economic and social rights are also human rights and on this score, Canada continues to actively discriminate against First Nations through its funding practices.



V. Conclusion

18. The ongoing practice by Canada with regard to First Nations is to deny existing legal rights and to exercise discriminatory practices with regard to fundamental economic and social rights. These breaches of the human rights of First Nations are both deliberate and, in effect, punitive.

19. It has long been the policy of the Government of Canada to seek to assimilate First Nations citizens within the mainstream of Canada. The Prime Minister offered an apology on June 11, 2008 for the assimilative policy of Residential Indian Schools. However, it is now time to act on reconciliation. The deliberate denial of rights and efforts to starve First Nations off reserve through underfunding are construed as a continuation of the policy of assimilation, the result of which, if it were successful, would eradicate First Nation culture and identity. Canada's unwillingness to respect the *UN Declaration* makes this reality even more plausible given the rights, principles and commitment to best practices contained therein. At a minimum, Canada must endorse and implement the *Declaration* and work with First Nations to create and implement a comprehensive, long-term spending and programmatic plan aimed at eradicating First Nations poverty.

VI. Recommendations

The AFN respectfully submits that the HRC:

- a. **Recommend that Canada endorse and fully implement the *Declaration*;**
- b. **Use the *Declaration* as the yardstick to measure and assess Canada's obligations and human rights commitments to Indigenous peoples;**
- c. **Review Canada's performance in the HRC against its mandate, particularly in light of Canada's continued opposition and undermining of the *Declaration*;**
- d. **Reprimand Canada on its failure to uphold the rule of law and the honour of the Crown in its duty to consult and accommodate, and its violations of the provisions in the *Declaration* regarding territory and natural resources and the right of free, prior and informed consent;²⁰ and,**
- e. **Recommend that Canada work with First Nations to implement a just and fair spending and programmatic plan aimed at eradicating First Nations poverty.**



(Endnotes)

¹ Government of Canada, *Motion Concurring in the third report of the Standing Committee on Status of Women, April 8, 2008*, “That the government endorse the United Nations Declaration on the Rights of Indigenous Peoples as adopted by the United Nations General Assembly on 13 September 2007 and that Parliament and Government of Canada fully implement the standards contained therein”, carried 148 to 113.

² Government of Canada, *Explanation of Position to the Report of the UN Permanent Forum on Indigenous Peoples* to the United Nations Economic and Social Council, July 25, 2008.

³ United Nations, *Press Release*, November 1, 2007.

⁴ *Royal Proclamation of 1763*, R.S.C., 1985, App. II, No. 1

⁵ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Sections 25 and 35.

⁶ *Ibid*, Section 91(24)

⁷ *Indian Act*, R.S.C., c. I-6.

⁸ GA Res 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, UN Doc. A/61/49, Vol. III (2008), arts 3, 4 and 5.

⁹ See for example, art. 38 “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”, *Supra* note 8.

¹⁰ Auditor General of Canada, *Report to Parliament*, November 2006, ch. 7.

¹¹ Robert Lovelace, former Chief of the Ardoch Algonquin First Nation, was jailed February 15, 2008 for protests against uranium exploration by Frontenac Ventures Inc. on traditional territories. Canada and the Algonquin do not have a treaty over these lands. Kitchenuhmaykoosib Inninuwug Chief Donny Morris, Deputy Chief Jack McKay, Head Councillor Cecilia Begg, Councillors Sam McKay and Darryl Sainnawap and band member Bruce Sakakeep were jailed March 17, 2008 for preventing mining exploration company Platinox Inc. from accessing drilling sites in the community’s traditional territory.

¹² Polaris Institute, “*Boiling Point! Six Community Profiles of the Water Crisis Facing First Nations Within Canada*”, May 2008.

¹³ Government of Canada, *Indian and Northern Affairs Canada Report on Plans and Priorities, 2007-08*, Summary Information tables.

¹⁴ “Indigenous peoples in North America experience greater social stresses than the majority population. This includes higher incarceration rates and for longer periods (Correctional Service Canada, 2007; American Indian Policy Centre, 2007), in Canada higher suicide rates (Health Canada, 2007; National Centre for Injury Prevention and Control, 2007), higher rates of death from violence including domestic violence (First Nations Chiefs Health Committee and British Columbia Ministry of Health Planning, undated; National Centre for Injury Prevention and Control, 2007), and higher rates of drug addiction and alcoholism (First Nations Chiefs Health Committee and British Columbia Ministry of Health Planning, undated; Office of National Drug Control Policy; 2001).” United Nations Environment Programme, Secretariat for the Convention On Biological Diversity, *Composite Report On The Status And Trends Regarding The Knowledge, Innovations And Practices Of Indigenous And Local Communities, Revision of the Second Phase of the Composite Report: North America*, for the Ad Hoc Open-Ended Inter-Sessional Working Group On Article 8(J) And Related Provisions of the Convention On Biological Diversity, fifth session, UNEP/CBD/WG8J/5/INF/7 (Montreal: Secretariat for the Convention On Biological Diversity, 2007) para. 149, online: Secretariat for the Convention On Biological Diversity <<http://www.cbd.int/doc/meetings/tk/wg8j-05/information/wg8j-05-inf-07-en.doc>>.

¹⁵ Source for the statistics in this paragraph: Indian Affairs and Northern Development, *Comparison of Socio-economic Conditions, 1996 and 2001 - Registered Indians, Registered Indians living on reserve and the total population of Canada, 2005*, http://www.ainc-inac.gc.ca/pr/sts/csc/index_e.html

¹⁶ Auditor General of Canada, *Report to Parliament*, May 2008, Ch. 4

¹⁷ Assembly of First Nations, “National Chief Calls Federal Budget a ‘Bitter Disappointment’”, February 28, 2008, available at <http://www.afn.ca/article.asp?id=4029>

¹⁸ By 2009-10, the Canada Health and Social Transfers will have increased by 33% over 5 years (from \$43.2 billion in 2004-05 to \$57.3 billion in 2009-10).

¹⁹ AFN, “*Federal Funding to First Nations: the Facts, the Myths and the Way Forward*”, November 2004, available at <http://www.afn.ca/cmslib/general/Federal-Government-Funding-to-First-Nations.pdf> and “The \$9 Billion Myth Exposed: Why First Nations Poverty Endures”, 2006, available at <http://www.afn.ca/cmslib/general/M-Ex.pdf>

²⁰ See *Supra* note 8, arts 26, 27, 28, 29.

