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BY EMAIL

December 9, 2010

Maryse Choquette
Registry Office
Canadian Human Rights Tribunal
11th Floor, 160 Elgin Street
Ottawa, Ontario
K1A 1J4

Dear Ms. Choquette:

Re: FNCFCS et al v. Attorney General of Canada; Tribunal File No.: T1340/7008; Assembly of First Nation's Submissions on Canada's Endorsement of the *UN Declaration on the Rights of Indigenous Peoples*

As per the Chair's direction of December 1, 2010, herewith are the Assembly of First Nations' ('AFN') submissions regarding Canada's Endorsement of the *UN Declaration on the Rights of Indigenous Peoples.*

> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15. ["*UN Declaration*" or "*Declaration*"]

I. INTRODUCTION

1. The following request was made to the Canadian Human Rights Tribunal by the AFN, in relation to Canada's endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples*.

> The Assembly of First Nations regards this as an extremely significant and material development, not just for Aboriginal peoples, but for all of Canada, which undoubtedly has a bearing on this case and the motion currently before the Tribunal. As such, the Assembly of First Nations is seeking the opportunity to make submissions on this development, with a view to providing further guidance to the Tribunal on the impact of the endorsement of the UN Declaration by Canada.
>
> Letter, dated November 18, 2010, from David C. Nahwegahbow, legal counsel for AFN, to the Canadian Human Rights Tribunal (Maryse Choquette, Registry Officer).

2. In regard to this November 18 request, the Tribunal granted AFN "an opportunity to file written submissions on Canada's signature of the *United Nations Declaration on the Rights of Indigenous Peoples* by **December 9, 2010**."

> Letter, dated December 1, 2010, from Canadian Human Rights Tribunal (Michelle Costello, Director, Registry Operations) to Paul Champ, David C. Nahwegahbow *et al.* [bold in original]

II. CANADA'S ENDORSEMENT

3. On 13 September 2007, the overwhelming vote in favour of the General Assembly resolution on the adoption of the *Declaration* was 144 in favour, 4 against and 11 abstentions. UN records indicate a recorded vote of 143 States in favour of the resolution on the adoption of the *UN Declaration*. Just after the vote, Montenegro advised that it had intended to vote in favour of the resolution and this was also recorded in the official records.

> General Assembly, Official Records, UN GAOR, 61st Sess., 107th plen. mtg., UN Doc. A/61/PV.107 (2007) at 19.

4. Canada, Australia, New Zealand and the United States voted against the adoption of the *Declaration*. Since this historic vote, Australia and New Zealand have announced their support for the *Declaration*. Colombia and Samoa, who had originally abstained in the vote, have also declared their support.

> Australia (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs), "Statement on the United Nations Declaration on the Rights of Indigenous Peoples", Parliament House, Canberra (3 April 2009), online: http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm.
>
> Hon. Dr. Pita Sharples, Minister of Maori Affairs, New Zealand Permanent Mission to the United Nations, Te Mängai o Aotearoa, "New Zealand Statement", Ninth session of the United Nations Permanent Forum on Indigenous Issues, 19-30 April 2010 (19 April 2010).
>
> Colombia, "Gobierno anuncia respaldo unilateral a la Declaración de Naciones Unidas sobre los Derechos de los Pueblos Indígenas" (21 April 2009), online: http://web.presidencia.gov.co/sp/2009/abril/21/10212009.html.

5. With Canada's endorsement, there are 149 States in favour of the *Declaration*. The United States is the only State in the world that is still opposed, but it is in the process of reviewing its position.

6. Canada's endorsement of the *UN Declaration* occurred on November 12, 2010, by way of an official statement, accompanied by a news release and a Backgrounder.

Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", November 12, 2010, online: http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp. ["Canada's endorsement"]

Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429-eng.asp.

Backgrounder: Canada's Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples, November 12, 2010, online: http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429bk-eng.asp

7. Canada's endorsement of November 12, 2010, is a formal one, which has been conveyed both domestically and internationally. As confirmed by Indian and Northern Affairs Canada (INAC):

> Canada's Ambassador to the United Nations, Mr. John McNee, met with the President of the United Nations General Assembly, Mr. Joseph Deiss, to advise him of Canada's official endorsement of the United Nations Declaration.
>
> Indian and Northern Affairs Canada, "Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples", Ottawa, 12 November 2010, online: http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429-eng.asp.

8. States do not sign or ratify declarations adopted by the UN General Assembly. Canada's official statement of support on November 12, 2010 is a valid method of endorsing the *UN Declaration*.

9. Canada's endorsement follows on a Motion adopted in April 2008 in the House of Commons calling for its full implementation:

> 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.
>
> *House of Commons Debates*, No. 074 (8 April 2008) at 4656 (vote was 148-113 in favour of the Motion, with government members objecting). The text of the Motion is reproduced in the *House of Commons Debates* (7 April 2008).

III. SUBMISSIONS

10. These submissions will address the following three topics:

    a. the significance of the Declaration,
    b. the legal status and effect of the Declaration, and
    c. the significance of Canada's Endorsement for Indigenous peoples and all of Canada, and its relevance to this Complaint and Respondent's Motion.

a. Significance of the Declaration

11. These submissions will focus on the positive aspects of Canada's endorsement of the Declaration. Any other aspects, including any qualifications to the endorsement, will be addressed in reply if raised by Canada.

12. As aforesaid, there are 149 States in favour of the *Declaration*. The current situation of almost global consensus serves to significantly increase the normative weight of this human rights instrument. As has been noted:

> Soft law instruments may be as intensely negotiated as treaties and great weight subsequently may be given to the voting patterns and the number and character of dissenting voices.
>
> Christine Chinkin, "Normative Development in the International Legal System" in Dinah Shelton, ed., "Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System" (Oxford/New York: Oxford University Press, 2003) 21 at 38-39.

13. The *Declaration* is "the most comprehensive and universal international human rights instrument explicitly addressing the rights of Indigenous peoples." It affirms the economic, social, cultural, political, environmental and spiritual rights of Indigenous peoples.

> Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121 at 123.

14. As indicated in its preamble (PP 7), the *Declaration* responds to the "urgent need to respect and promote the inherent rights of indigenous peoples" and the "urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States".

15. The *Declaration* does not create new rights. It elaborates "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" (art. 43). The *Declaration* applies to the estimated 370 million Indigenous people in over 70 countries.

> The Declaration does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. These include the basic norms of equality and non-discrimination, as well as other generally applicable human rights in areas such as culture, health or property, which are recognized in other international instruments and are universally applicable.
>
> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya,* UN Doc. A/HRC/9/9 (11 August 2008), para. 40.

16. Both collective and individual human rights are affirmed and protected in the *UN Declaration*. Since international human rights instruments largely focus on individual rights, the *Declaration* fills an important gap in the international system and thereby strengthens it.

> ... the Declaration is expected to fill a crucial gap, providing universal and comprehensive protection to the rights of the world's indigenous peoples.
>
> Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples", (2009) 58 ICLQ 957, at 959. ["Mauro Barelli, The Role of Soft Law, 2009"]

17. The *Declaration* contains some of the most comprehensive balancing provisions that exist in any international human rights instrument. When exercising the rights in the *Declaration*, the "human rights and fundamental freedoms of all shall be respected" (art. 46(2)). Its provisions 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(3)). These core principles and values are the same ones as in international and domestic legal systems, including Canada.

> ... human rights have a dual nature. Both collective and individual human rights must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of rights without diminishing either.
>
> Canadian Human Rights Commission, "Still A Matter of Rights", A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the Canadian Human Rights Act, January 2008, at 8.

b. Legal Status and Effect of the Declaration

18. The *Declaration* was adopted as an Annex to a General Assembly resolution. General Assembly resolutions, including declarations, *per se* are generally considered to be non-binding. However, they may have diverse legal effects, both now and in the future:

> ... in the *Namibia Advisory Opinion* ... The Court ... found that the General Assembly resolutions, while manifestly not binding, were not without legal effect ...
>
> Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 24-25.
>
> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971] I.C.J. Rep. 16.

19. Such legal effects may cover a wide range:

> ... General Assembly resolutions ... may either influence or reflect international law in several ways. First, as the [International Court of Justice] concluded in the *Nicaragua*

> *Case*, they may be *evidence of opinio juris* which confirms the existence of a rule of customary international law. Second, they may be invoked as an authoritative interpretation of a binding treaty obligation, such as those set out in the UN Charter. Third, they may be regarded as assessments of general principles of law accepted by States, a third source of international law anticipated in Article 38 of the Statute of the International Court of Justice ... And in all of these various ways, they may influence the practice and *opinio juris* of states and, thus, the future content of customary international law.
>
> John H. Currie, Craig Forcese & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin Law, 2007) at 130.
>
> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, [1986] I.C.J. Rep. 14.

20. In the *UN Declaration*, there are numerous examples of existing customary international law. These would include, *inter alia*, the prohibitions against racial discrimination (preambular paras. 5, 9, 18 and 22 and arts. 1, 2, 8(2)(e), 9, 14, 15(2), 16(1), 17(3), 21(1), 24(1), 29(1), 46(2) and 46(3).); slavery (PP 1,2 and arts. 1, 2); genocide (arts. 1, 7), torture (PP 1, 2 and arts. 1, 2, 7, 22) and the right of self-determination (PP 1, 2, 16, 17 and arts. 1, 2, 3, 4), as well as the right to Indigenous peoples' own means of subsistence (PP 1, 2 and arts 1, 2, 3, 20). At the same time, these provisions also reflect existing obligations or rights in international conventions.

> Consistent practice and *opinio juris* or *opinio necessatatis* show that other rules now belong to the corpus of customary law: those banning slavery, genocide, and racial discrimination; the norm prohibiting forcible denial of the right of peoples to self-determination; as well as the rule banning torture.
>
> Antonio Cassese, *International Law*, 2nd ed. (Oxford/N.Y.: Oxford University Press, 2005), at 394.
>
> This right [of self-determination] has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*.
>
> Robert McCorquodale, *Self-Determination: A Human Rights Approach*, (1994) 43 Int'l & Comp. L.Q. 857 at 858.

21. Canadian courts are free to rely on the *Declaration* when interpreting Indigenous peoples' human rights. As confirmed by the Supreme Court of Canada, declarations and other international instruments and norms are "relevant and persuasive" sources for interpreting human rights in Canada.

> The various sources of 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 [*Canadian*] *Charter*'s provisions.

Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313, at 348, per Dickson C.J. (dissenting on other grounds).

See also *R.* v. *Sharpe*, [2001] 1 S.C.R. 45, at paras. 175, 178 (citing United Nations Declaration of the Rights of the Child, G.A. Res. 1386 (XIV) (1959).

The famous "relevant and persuasive" passage [in *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313] has been cited in subsequent Canadian cases. ... Canadian judges rarely, if ever, consider international law sources by taking into account whether they have a legally binding effect on Canada. Instead, they tend to consider all sources of international law as "relevant and persuasive".

William .A. Schabas & Stéphane Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3rd ed. (Toronto: Carswell, 2007) at 87.

22. In Belize, the Supreme Court relied on the *UN Declaration* and other aspects of international and domestic law in upholding the land and resource rights of the Maya people.

Cal v. Attorney General of Belize and Minister of Natural Resources and Environment; Coy v. Attorney General of Belize and Minister of Natural Resources and Environment (18 October 2007) Claims No. 171 & 172 (Consolidated), (Supreme Court of Belize), paras. 118-135.

23. International treaty monitoring bodies are encouraging States to use the *Declaration* and are relying on it to interpret the rights of Indigenous peoples and individuals and related State obligations.

... the Committee [on the Rights of the Child] urges States parties to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No.169 and the United Nations Declaration on the Rights of Indigenous Peoples.

Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), para. 82.

Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Peru*, UN Doc. CERD/C/PER/CO/14-17 (3 September 2009), para. 11.

Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua*, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 35.

24. In terms of compliance, article 42 provides:

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies ... and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

25. In May 2008, the UN Permanent Forum on Indigenous Issues affirmed that the *Declaration* "will be its legal framework" and will therefore ensure that the *Declaration* is integrated in all aspects of its work. The seven substantive mandated areas of the Permanent Forum are "economic and social development, environment, health, education, culture, human rights and the implementation of Declaration".

> Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April - 2 May 2008)*, UN ESCOR, 2008, Supp. No. 23, UN Doc. E/2008/43, E/C.19/2008/13 at para.132.

26. With regard to the special procedures of the Human Rights Council, a November 2008 report states: "Mandate-holders agreed that the effective implementation of the Declaration constituted a major challenge ahead, and decided to strengthen their efforts in that regard". In this context, it was also agreed that

> the rights of indigenous peoples are a cross-cutting issue that concerns all thematic and geographic mandates and that the work of all special procedures mandates-holders is important for the promotion and protection of the rights of indigenous peoples.
>
> Human Rights Council, *Note by the United Nations High Commissioner for Human Rights* (report on the fifteenth meeting of special rapporteurs/ representatives, independent experts and chairpersons of working groups of the special procedures of the Council, held in Geneva from 23 to 27 June 2008), UN Doc. A/HRC/10/24 (17 November 2008), para. 67.

27. UN specialized agencies are also taking seriously their responsibilities under the *Declaration*. For example, the Food and Agriculture Organization (FAO) has defined its role with Indigenous peoples as follows: "FAO's responsibility to observe and implement [the *Declaration*] is clearly stated in Article 41:

> *The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.*
>
> Food and Agriculture Organization, "FAO Policy on Indigenous and Tribal Peoples" (Rome: FAO, 2010), at 2-3. [italics in original]

28. Within the Organization of American States (OAS), the UN Declaration is being used as "the baseline for negotiations and … a minimum standard" for the draft American Declaration on the Rights of Indigenous Peoples.

> The majority of States and all of the indigenous representatives supported the use of the UN Declaration as the baseline for negotiations and indicated that this represented a minimum standard for the OAS Declaration. Accordingly, the provisions of the OAS Declaration ha[ve] to be consistent with those set forth in the United Nations Declaration.
>
> Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), *Report of the Chair on the Meetings*

for Reflection on the Meetings of Negotiations in the Quest for Points of Consensus (Washington, D.C., United States – November 26-28, 2007),OEA/Ser.K/XVI, GT/DADIN/doc.321/08 (14 January 2008), at 3.

29. As a "soft" law instrument, the *Declaration* can have a number of advantages over "hard" law instruments such as international conventions.

> Soft law may ... 'provide more immediate evidence of international support and consensus than a treaty.' This is so because, even once agreed upon, a treaty will have to wait the necessary number of ratifications before entering into force. For indigenous peoples, instead, it was crucial that, after more than twenty years of negotiations, the final instrument could be instantly effective. This is so because urgent action is key to the protection of their rights. In addition, the possibility of entering reservations on fundamental provisions of a treaty may weaken importantly the idea of international support, which, instead, represented a crucial factor in the context of indigenous rights.
>
> Mauro Barelli, The Role of Soft Law, 2009, *supra*, at 966.
>
> Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007) 212. [quoted by Barelli]

30. The *Declaration* is more than just an aspirational document. Such a description unjustly diminishes the status and impact of this human rights instrument and fails to account for the diverse ways that bodies, courts and States are implementing it. The *Declaration* is a prime example where the distinctions between "soft" and "hard" law are increasingly "blurred".

> The line between law and not-law may appear blurred. Treaty mechanisms are including more 'soft' law obligations, such as undertakings to endeavour to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of procedures may have compliance procedures that range from soft to hard. ... In fact, it is rare to find soft law standing in isolation; instead, it is used most frequently as a precursor to hard law or as a supplement to a hard law instrument. Soft law instruments often serve to allow treaty parties to authoritatively resolve ambiguities in the text or fill in gaps.
>
> D. Shelton, "Introduction: Law, Non-Law and the Problem of 'Soft Law'" in Dinah Shelton, ed., "Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System" (Oxford/New York: Oxford University Press, 2003) 1 at 10. [underline added]

31. As illustrated in these submissions, the *UN Declaration* constitutes a universal, principled and normative framework for the promotion, protection and fulfillment of Indigenous peoples' human rights. Its provisions require compliance by the United Nations and its bodies and specialized agencies.

> ... there exists a solid relationship between the normative content of the Declaration and the norms, standards, and principles related to indigenous peoples that have recently emerged at the international level. This circumstance has important consequences with regard both to the legal significance and compliance pull of the Declaration. ...

> [I]nstitutional mechanisms for the promotion and monitoring of the Declaration are in place, thus moving the relevant international setting closer to that of a hard law instrument. All this suggests that the Declaration has important legal effects and can generate reasonable expectations of conforming behaviour. [underline added]
>
> Mauro Barelli, The Role of Soft Law, 2009, *supra*, at 983.

c. Significance of Canada's Endorsement for Indigenous peoples and all of Canada, and its Relevance to this Complaint and Respondent's Motion

32. The AFN has always and continues to maintain that domestic use of the *Declaration* is not dependent on Canada's endorsement. Regardless of whether any particular State chooses to endorse the *Declaration*, it is still applicable to all States as an international human rights standard. As UN Special Rapporteur Anaya indicated to Canada prior to its endorsement:

> The Special Rapporteur does not dispute that the Declaration is not *in itself* a legally binding instrument. … This does not mean, however, that the Declaration has no legal significance or normative weight, including in regard to Canada.
>
> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, UN Doc. A/HRC/15/37/Add.1 (15 September 2010) (Advance Version), para. 110. ["Human Rights Council, Report of the Special Rapporteur Anaya, July 2010"]

33. In interpreting international human rights instruments, international bodies can invoke the *UN Declaration* even if a given State opposes it.

> While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples …, the Committee ... recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention [on the Elimination of All Forms of Racial Discrimination] relating to indigenous peoples.
>
> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc. CERD/C/USA/CO/6 (8 May 2008), para. 29.

34. Canadian courts may use the *Declaration* in interpreting the Indigenous peoples' rights and related State obligations. Within their respective mandates, federal, provincial and territorial **human rights commissions and tribunals may also rely on the *Declaration* for interpretive purposes.** As noted by the Honourable Mary Ellen Turpel-Lafond:

> While it is disappointing that Canada has not endorsed the *Declaration*, human rights commissions, social services and other agencies, Indigenous peoples, and the courts are free to find guidance in the *Declaration* in interpreting and promoting the rights of Indigenous children. The *Declaration* can also provide a framework for policy development and reconciliation. This will be strengthened when Canada endorses the *Declaration*.

> Mary Ellen Turpel-Lafond, "More than Words: Promoting and Protecting the Rights of Indigenous Children with International Human Rights Instruments" in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 169 at 171. ["Mary Ellen Turpel-Lafond, More than Words, 2010"]
>
> As indicated at 287, the Honourable Mary Ellen Turpel-Lafond is British Colombia's first Representative for Children and Youth. She is on leave from the Saskatchewan Provincial Court.

35. Nevertheless, the fact that Canada has moved to positively endorse the *Declaration* is significant, especially given its previous opposition. The opening paragraph in the endorsement is an important one. For the first time in 4½ years, Canada will not be opposing the *Declaration*. The government commits to "supporting" the *Declaration* and "promoting and protecting" Indigenous peoples' rights in Canada and internationally:

> Canada joins other countries in supporting the United Nations Declaration on the Rights of Indigenous Peoples. In doing so, Canada reaffirms its commitment to promoting and protecting the rights of Indigenous peoples at home and abroad.

36. This commitment is reinforced by another one: "our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada". Such "partnership", which was hardly possible during the government's years of opposition, is a central element in the *Declaration*. The last preambular paragraph (PP24) describes the *Declaration* "as a standard of achievement to be pursued in a spirit of partnership and mutual respect".

37. These two ongoing commitments, if honoured and fulfilled, would be highly beneficial to Indigenous peoples and to all of Canada. Taken together, these solemn promises enable the Canadian government to meet its central obligation in article 38 of the *Declaration* in a spirit of harmony and cooperation:

> States in consultation and cooperation with indigenous peoples shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

38. Another important dimension in Canada's endorsement is the affirmation that the *Declaration* "speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances." This appears to reflect a vital purpose of this *Declaration*. As Special Rapporteur Anaya describes:

> ... the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character...

> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, Addendum: Summary of cases transmitted to Governments and replies received*, A/HRC/9/9/Add.1 (15 August 2008), para. 86 (Conclusions).

39. The distinctive context of Indigenous peoples cannot be invoked so as to lead to further disparities, inequalities or disadvantages for the peoples concerned. Different people are often treated differently so as to achieve substantive equality. Canada's endorsement refers to the specific situation of Indigenous peoples in an overall context of respect, protection and well-being. Yet the Attorney General of Canada's Motion, if successful, would lead to greater inequality and disadvantage.

> *Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such …
>
> *UN Declaration*, preambular para. 2.

40. Canada's endorsement also states: "The Government's vision is a future in which Aboriginal families and communities are healthy, safe, self-sufficient and prosperous within a Canada where people make their own decisions, manage their own affairs and make strong contributions to the country as a whole." This vision contributes to the well-being of Indigenous peoples and serves to strengthen Canada as a whole. The reference to healthy, safe and self-sufficient Aboriginal families and communities is consistent with the purposes and provisions of the *Declaration*. It is also relevant to the present Complaint.

41. In particular, the preamble of the *Declaration* affirms: "*Recognizing* in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child". This aspect goes to the heart of the present Complaint. Rather than continue to separate children from their families and communities, INAC should be improving services to First Nations children on reserve and investing much more in preventive measures – with a priority toward supporting and maintaining healthy, secure and self-sufficient children, family and communities.

> In taking effective — and, where appropriate — special measures to ensure the continuing improvement of the economic and social conditions of Indigenous peoples, states are to pay special attention to the rights and special needs of Indigenous elders, women, youth, children, and persons with disabilities. Indeed, the whole of the *Declaration* is to be interpreted and applied giving special consideration to the rights of Indigenous children and youth and their need for safety, security and well-being.
>
> The Declaration therefore affirms standards or guidelines that encourage new policy directions at a national level to create a better future for Indigenous children.
>
> Mary Ellen Turpel-Lafond, More than Words, 2010, *supra*, at 178. [See also *Declaration*, arts. 21-22 and art. 7 (right to security)]

42. Further to the issue of preventing the separation of children from their families and communities, in its November 2009 Reports to the Committee on the Rights of the Child, Canada has acknowledged its ongoing role in initiating a "prevention-focused approach" on First Nations reserves.

> The disproportionately high number of Aboriginal children in state care is part of broader social challenges on reserves, such as poverty, poor housing conditions, substance abuse and exposure to family violence. The Government of Canada is incrementally shifting its child welfare programs for Aboriginal children to a prevention-focused approach. It is expected that all agencies will be using the prevention-focused approach by 2013.
>
> Canada, "Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the period January 1998 – December 2007", *supra*, para. 98. [underline added]

43. In the same Reports, Canada included in an Annex its Response to the Standing Senate Committee on Human Rights, where it highlighted again its role and jurisdiction in initiating a prevention-focused approach.

> Indian and Northern Affairs Canada is working in partnership with provinces and First Nations to improve First Nations Child and Family Services on reserve using a successful provincially-enhanced prevention model. Beginning in 2007-2008, a prevention-focused approach to child and family services on reserve will help to prevent First Nations children from coming into care unnecessarily. On April 27th, 2007, the Government of Canada announced additional investments for a prevention-focused approach for Alberta First Nations on reserve.
>
> Canada, "Government Response to the Standing Senate Committee on Human Rights Report: "Children: The Silenced Citizens Effective Implementation of Canada's International Obligations with Respect to the Rights of Children"" in Canada, "Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the period January 1998 – December 2007", *supra*, Appendix 5, at 202. [underline added]

44. The government's "vision" of Canada in the endorsement is that "people make their own decisions, manage their own affairs and make strong contributions to the country as a whole". This suggests a greater exercise of self-determination by Aboriginal peoples, which in turn suggests that Canada ought to be promoting self determination not by under-servicing or under-funding First Nation on reserve child welfare services. Moreover, Canada's responsibilities under the *Canadian Human Rights Act* ought to be evaluated contextually in light of this purpose. Self-determination is especially lacking or absent in regard to child welfare services on First Nations reserves.

> ... research in British Columbia has supported a finding that "communities with some level of self government and/or multiple community control factors present had the lowest rates of suicide." Cultural safety and self-determination, therefore, seem to be significant factors in protecting and promoting the health and well-being of Indigenous people, especially children.
>
> Mary Ellen Turpel-Lafond, More than Words, 2010, *supra*, at 184.

Chief Public Health Officer, *The Chief Public Health Officer's Report on the State of Public Health in Canada 2008* (Ottawa: Minister of Health, 2008) at 53: www.phac-aspc.gc.ca/publicat/2008/cpho-aspc/pdf/cpho-report-eng.pdf. (quoted above).

45. If the Canadian government were to honour its commitments and vision in its endorsement, Canada would likely improve its international reputation on Indigenous peoples' human rights and the *Declaration*. By unequivocally supporting such basic rights and the *Declaration*, Canada would be strengthening the international system as a whole. This would be beneficial to everyone in Canada, as well as the global community.

R. Bajer, "Canada loses face internationally in voting against indigenous rights", *Lawyers Weekly* (19 September 2008) at 12.

46. As emphasized by the Complainants, complaints of discriminatory exercise of federal powers in relation to First Nation child welfare services on reserve are appropriately considered under section 5 of the *Canadian Human Rights Act*. This position is reinforced by a contextual interpretation of the *Act* that entails both Canadian and international human rights law, including the *UN Declaration*.

47. In regard to domestic implementation of the *Convention on the Rights of the Child*, the government of Canada has acknowledged to both the Standing Senate Committee on Human Rights and the UN Committee on the Rights of the Child, the manner in which it exercises its responsibilities in this field:

> Canada implements and complies with its international human rights obligations through a multifaceted approach, including constitutional protections that are already in place under the *Canadian Charter of Rights and Freedoms*, as well as legislation, policies, programs, and public education.
>
> Canada, "Government Response to the Standing Senate Committee on Human Rights Report: 'Children: The Silenced Citizens Effective Implementation of Canada's International Obligations with Respect to the Rights of Children'" in Canada, 'Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the period January 1998 – December 2007", received by Committee on the Rights of the Child on 20 November 2009, Appendix 5, at 184. [underline added]

48. In its November 2009 report to the Committee on the Rights of the Child, Canada explained: "The present report outlines key measures adopted in Canada from January 1998 to December 2007, to enhance implementation of the *Convention on the Rights of the Child* (CRC) ..." (para. 1) Among the many examples of implementation, Canada's report cites child welfare services involving First Nations:

> A number of tripartite agreements have been signed between the Government of Canada, several provincial and territorial governments, and First Nations organizations that facilitate the delivery of enhanced and culturally appropriate services in areas such as health, child welfare, housing and education.

> Canada, "Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the period January 1998 – December 2007", received by Committee on the Rights of the Child on 20 November 2009, para. 19.

49. In elaborating on implementation and its own role, the government of Canada affirmed that it is INAC that offers a wide range of adoption "services" on reserves comparable to those provided by the provinces and territories.

> The delivery of adoption services on reserve has recently been enhanced through new authorities, which enable Indian and Northern Affairs Canada to offer services comparable to those provided by the provinces and territories. Positive, permanent placements should result from a better range of options for adoptive families living on reserve including kinship care (care provided by extended family members), post-adoption subsidies (monthly payments to the adoptive parents), and supports (including counselling services and special needs support for children with disabilities). [underline added]

> Canada, "Government Response to the Standing Senate Committee on Human Rights Report: 'Children: The Silenced Citizens Effective Implementation of Canada's International Obligations with Respect to the Rights of Children'" in Canada, 'Convention on the Rights of the Child: Third and Fourth Reports of Canada Covering the period January 1998 – December 2007", *supra*, Appendix 5, at 195.

50. Canada's endorsement emphasizes "promoting and protecting the rights of Indigenous peoples at home and abroad" and "good faith". Consistent with these commitments, the government of Canada should not be seeking to exclude the *Declaration* and other relevant international human rights law from interpretations relating to the Complaint and Respondent's Motion.

51. Canada also states: "In endorsing the Declaration, Canada reaffirms its commitment to build on a positive and productive relationship with First Nations, Inuit, and Métis peoples to improve the well-being of Aboriginal Canadians, based on our shared history, respect, and a desire to move forward together." This commitment to improve the "well-being" of Indigenous people, based on a shared history, respect and collaboration are all key elements entrenched in the *Declaration*. They are also relevant to the Complaint. The rights in the *Declaration* constitute minimum standards for the "well-being" of Indigenous peoples worldwide (art. 43).

> *Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests ...

> *UN Declaration*, preambular para. 6.

> States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

Convention on the Rights of the Child, 20 November 1989, 1577 U.N.T.S. 3, *entered into force* 2 September 1990, art. 27(1).

52. In reference to the repeal of section 67 of the *Canadian Human Rights Act*, INAC has concluded as follows in its "Backgrounder", issued contemporaneously with its official statement endorsing the *Declaration*: "... a legislative amendment passed in 2008 ensures that First Nations people living on reserves have full access to, and protection under, the *Canadian Human Rights Act*."

> Indian and Northern Affairs Canada, "Backgrounder: Canada's Endorsement of the United Nations Declaration on the Rights of Indigenous Peoples", 12 November 2010, online: http://www.ainc-inac.gc.ca/ai/mr/nr/s-d2010/23429bk-eng.asp. [underline added]

IV. CONCLUSION

53. Canada's current motion relies on legal technicalities and the division of powers to avoid its human rights obligations to First Nations children on reserves in Canada. It is AFN's submission that the endorsement of the *Declaration* calls for a more purposive approach to an analysis of Canada's human rights obligations, consistent with intentions stated in the *Declaration* itself and in Canada's statements regarding the *Declaration* and elsewhere.

54. In Canada's endorsement, the government declared that it is "confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework." The government's view is now consistent with that expressed on the *Declaration* in an open letter in May 2008 by over 100 legal scholars and experts in Canada:

> The Declaration provides a principled framework that promotes a vision of justice and reconciliation. In our considered opinion, it is consistent with the Canadian Constitution and Charter and is profoundly important for fulfilling their promise. Government claims to the contrary do a grave disservice to the cause of human rights and to the promotion of harmonious and cooperative relations.
>
> "*UN Declaration on the Rights of Indigenous Peoples*: Canada Needs to Implement This New Human Rights Instrument" (1 May 2008), online: http://www.cfsc.quaker.ca/pages/documents/UNDecl-Expertsign-onstatementMay1.pdf.

55. It is important to emphasize that a central purpose of international human rights standards is to urge or require States to uplift their own domestic standards. AFN does not interpret Canada's endorsement as derogating from this objective.

56. Canada's endorsement states: "Aboriginal and treaty rights are protected in Canada through a unique framework. These rights are enshrined in our Constitution, including our *Charter of Rights and Freedoms*, and are complemented by practical policies that adapt to our evolving reality." The reference to an "evolving reality" is highly appropriate to Indigenous peoples and would fully accommodate the *UN Declaration*. In the *Québec Secession Reference*, the Supreme Court of Canada applied the "living tree" doctrine to the underlying principles in Canada's Constitution, which include the protection of Aboriginal and treaty rights.

> ...observance of and respect for these [underlying constitutional] principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a 'living tree', to invoke the famous description in *Edwards* v. *Attorney-General for Canada* ...
>
> *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, at para. 52.
>
> The [*Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits."
>
> *Edwards* v. *A.-G. Canada*, [1930] A.C. 124 (P.C.) at 136.

57. In view of all its submissions, Complainant AFN respectfully requests the Tribunal to dismiss the current Motion without further delay.

All of which is respectfully submitted,

NAHWEGAHBOW, CORBIERE

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