

**Joint Submission to the United Nations Human Rights Council
in regard to the
Universal Periodic Review Concerning Canada**

Submitted By:¹

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¹ The following additional organizations and nations associate themselves with the concerns and recommendations outlined in this Submission, but are not listed as joint submitters since they are contributing their own briefs to this Review: Assembly of First Nations; First Nations Summit; International Organization of Indigenous Resource Development (IOIRD); Samson Cree Nation; Ermineskin Cree Nation; Montana Cree Nation; Louis Bull Cree Nation; Native Women's Association of Canada (NWAC); International Indian Treaty Council; Amnesty International Canada; Arc International; and Action Canada for Population and Development (ACPD)/Action Canada pour la population et le développement.

Universal Periodic Review Concerning Canada

1. This Joint Submission is made in regard to the Human Rights Council's Universal Periodic Review (UPR) of Canada, which is scheduled to take place in February 2009.
2. The primary focus of this Submission is Canada's actions¹ relating to the *United Nations Declaration on the Rights of Indigenous Peoples*² (hereinafter "*UN Declaration*" or "*Declaration*"), adopted by the UN General Assembly on 13 September 2007.
3. It is provided in Human Rights Council resolution 5/1 of 18 June 2007 that the basis of the UPR is: (a) The Charter of the United Nations; (b) The Universal Declaration of Human Rights; (c) Human rights instruments to which a State is a party; (d) Voluntary pledges and commitments made by States;³ and applicable international humanitarian law. As described below, the *UN Declaration* relates to all of these elements.
4. All members elected to the Human Rights Council "shall uphold the highest standards in the promotion and protection of human rights" and "shall fully cooperate with the Council".⁴ Canada's performance must be consistent with these standards and obligations – especially for purposes of the present UPR. The Canadian government continues to demonstrate that it is not willing to uphold these solemn duties in relation to over 370 million Indigenous people worldwide.
5. The *UN Declaration* does not create new rights, but elaborates on the inherent rights of Indigenous peoples worldwide. It provides a principled framework and Indigenous context for interpreting existing international human rights instruments, such as the *Universal Declaration on Human Rights*,⁵ the two human rights *Covenants* and the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁶ The *Declaration* is therefore highly relevant to Canada's existing international obligations.
6. Canada has a legal duty to uphold the purposes and principles of the *UN Charter*, which include: "To achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction ..."⁷ Canada also has a duty to "take joint and separate action in co-operation with the [United Nations] for the achievement of the purposes set forth in Article 55",⁸ i.e. to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction".⁹
7. Canada has impeded international and regional cooperation¹⁰ and failed to promote universal respect for human rights *for all*.¹¹ It is required that the work of the Human Rights Council "be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights".¹²
8. In regard to the *UN Declaration*, the current government of Canada has significantly altered the positions of its predecessor. The government claims that no previous government ever supported this *Declaration*. This argument is misleading, since the former government was no longer in power at the time the final text was issued by the Chair of the Working Group in February 2006. The argument lacked credibility with the Committee on the Elimination of

Racial Discrimination, which explicitly referred to the supportive positions of the previous Canadian government.¹³ Canada also claims that it has persistently objected to the *Declaration*. This argument has no merit.¹⁴

9. At the time of the vote in the General Assembly on the *UN Declaration*, the Canadian government indicated publicly that there were only collective rights in this new instrument and that there was no balancing of individual and collective rights.¹⁵ The government added that the rights of non-native Canadians would have been threatened had the government not opposed the *Declaration*¹⁶ and that “the document is unworkable in a Western democracy under a constitutional government”.¹⁷ Such extreme statements are simply false.¹⁸ They constitute propaganda¹⁹ under international law. They serve to generate fear among the Canadian public, as well as opposition to the *Declaration* and discrimination against Indigenous peoples’ human rights.
10. Canada argues that the *Declaration* is inconsistent with the Constitution and *Canadian Charter of Rights and Freedoms*. Yet Canada refuses to substantiate this claim. 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”.²⁰ These are core principles and values in international law and in Canada’s Constitution, including the *Canadian Charter*.
11. Canada has raised concerns regarding five hundred treaties that have been signed over the past 250 years with Indigenous peoples. It has publicly stated: “The government does not support the [UN] declaration because that declaration jeopardizes those treaties, the enforceability and the meaning of them.”²¹ Such claims have no merit. The government’s statements are contradicted by the *Declaration* itself.²² In addition, the treaty rights of Indigenous peoples are protected by Canada’s Constitution and cannot be “jeopardized” by any international human rights instrument.
12. At the Human Rights Council²³ and the General Assembly,²⁴ Canada has declared that the *UN Declaration* “has no legal effect in Canada, and its provisions do not represent customary international law”. These statements are erroneous and contrary to Canadian and international law. While the *Declaration* is generally a non-binding instrument, it has legal effect in Canada.²⁵ In many respects, it is declaratory of existing customary international law.²⁶ The Canadian government has refused to provide any written legal analyses to substantiate its statements. It is inappropriate for Canada to behave as if it has a right of veto.
13. Canada maintains that the *UN Declaration* has no application in Canada, simply because the Canadian government did not vote in favour of its adoption. As emphasized by Amnesty International Canada, this position is “deeply troubling” and “provides a debilitating model for others to follow”.²⁷ It adds: “Canada’s position, in many ways, drives a stake through the very integrity of the international human rights system, for indigenous peoples and everyone.”²⁸
14. At the Human Rights Council session in September 2007, Canada insisted that the Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous people be mandated to promote the *UN Declaration* “where appropriate”.²⁹ Since Canada had voted against the adoption of the *Declaration*, Canada erroneously concluded that: “It is therefore inappropriate for the Special Rapporteur to promote the implementation of this

Declaration with respect to Canada.”³⁰ It is wrong for Canada to be attempting to affect the “objectivity, independence and discretion” of the Special Rapporteur.³¹

15. Canada is repeatedly making false public statements about the *UN Declaration* both at home and abroad. This serves to generate serious misunderstandings of, and unjust opposition to, Indigenous peoples’ human rights. Such actions are the exact opposite of promoting human rights education³² and learning, which is an important part of the Human Rights Council’s mandate. Canada is failing to cooperate with the Council in this important aspect.
16. Canada has opposed the explicit affirmation of Indigenous peoples’ rights as human rights.³³ This position is inconsistent with UN practice which, for approximately thirty years, has addressed Indigenous peoples’ rights as human rights under the international human rights system. In accordance with the Human Rights Council’s “Agenda and Framework for the Programme of Work”,³⁴ the “Rights of peoples” are permanently considered under Item 3 – “Promotion and protection of all human rights”.
17. In regard to the *UN Declaration*, the excessive and unsubstantiated positions have been repeatedly criticized by Indigenous peoples and human rights organizations, as well as the former UN High Commissioner for Human Rights³⁵ and the Committee for the Elimination of Racial Discrimination.³⁶ In addition, an Open Letter signed by more than 100 legal scholars and experts in May 2008 underlines the far-reaching impacts of Canada’s “misleading claims”:

We are concerned that the misleading claims made by the Canadian government continue to be used to justify opposition, as well as impede international cooperation and implementation of this human rights instrument.³⁷

18. At the ECOSOC session in July 2008, Canada indicated that the term “implement” in regard to the *UN Declaration* refers to “those States that have chosen to support it”.³⁸ According to Canada, when the UN Permanent Forum on Indigenous Issues is required to implement the *Declaration*, it cannot do so in relation to States that voted against this instrument. Canada’s position challenges the universality³⁹ of the *Declaration* as a human rights instrument,⁴⁰ which explicitly indicates that it applies to all Indigenous peoples and individuals worldwide.⁴¹ Canada also seeks to limit unjustly the mandate of the Permanent Forum in a manner that would contradict the global context of the *Declaration*.⁴²
19. Canada has unsuccessfully sought to prevent⁴³ the Organization of American States (OAS) from using the *UN Declaration* as the “baseline for negotiations and ... a minimum standard”⁴⁴ in the negotiations regarding the draft American Declaration on the Rights of Indigenous Peoples.⁴⁵ In its April 14, 2008 Statement to the Working Group, Canada indicated that it would attempt to block consensus, unless: “the document adopted clearly indicated that Canada did not give its support and as long as there was an explicit understanding that the Declaration text therefore did not apply to Canada.”⁴⁶ These prejudicial actions were severely criticized by the Indigenous Peoples’ Caucus of the Americas.⁴⁷
20. On April 8th, 2008, the House of Commons in Canada adopted a Motion calling on the Canadian Government to “endorse the United Nations Declaration on the Rights of Indigenous

Peoples as adopted by the UN General Assembly on 13 September, 2007 and that Parliament and Government of Canada fully implement the standards contained therein”.⁴⁸ The minority government of Canada continues to ignore the democratic will of its own Parliament.

21. For over two years, the current government of Canada has refused to consult Indigenous peoples on every position and action that it took to actively oppose the *UN Declaration*.⁴⁹ The government has ignored its constitutional duty to consult Indigenous peoples and, where appropriate, accommodate their concerns.⁵⁰ To date, the government has refused to even discuss its constitutional duties. At the international and regional levels, Canada has repeatedly failed in its “commitment” to advance the human rights of Indigenous peoples through “consultation and collaboration”.⁵¹
22. Canada failed to attract any significant support for its positions on the *UN Declaration*.⁵² In encouraging opposition against the *Declaration*, the government focused especially on those States with abusive human rights records.⁵³ At the time of the General Assembly vote, only Australia, New Zealand and the United States – three of the most actively obstructionist States during the standard-setting process – joined Canada in voting against this human rights instrument.⁵⁴
23. Canada has continuously engaged in politicization of Indigenous peoples’ human rights. In relation to the *UN Declaration*, Canadian government actions demonstrate disregard of its commitments and responsibilities as a Human Rights Council member. In particular, Canada is ignoring the “importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of ... politicization”.⁵⁵
24. Instead of accepting responsibility for its own sub-standard conduct and taking genuine steps to change, Canada is criticizing the UN for not achieving a stronger *Declaration*. The following statement unjustly undermines the reputation of the UN General Assembly:

Canada regrets that the General Assembly was willing to adopt a Declaration that falls short of what is required to truly address the interests of Indigenous peoples around the world. Nonetheless, Canada will continue to take effective action, at home and abroad, to promote and protect the rights of Indigenous peoples.⁵⁶
25. The Canadian government has stated that it will continue to improve quality of life for all Aboriginal peoples. Such domestic actions are expected of any national government that assumes constitutional responsibility for Indigenous peoples. These measures are not a defence to the government’s attempts to deny any application in Canada of an international human rights instrument, such as the *UN Declaration*. As illustrated in the following paragraphs, the *Declaration* remains highly relevant to the Canadian domestic context.
26. For over a century, the policies and practices in Indian residential schools in Canada caused “incredible damage” that continues to have intergenerational impacts.⁵⁷ For many residential school survivors and their families, the Canadian government apology⁵⁸ in June 2008 was essential in order to move forward towards reconciliation and healing. However, it is inconsistent with reconciliation for the government to oppose application of the *UN Declaration* in Canada – which affirms many of the human rights that were violated in residential schools and provides a principled framework for the future.

27. Further, as part of the court-approved Settlement Agreement,⁵⁹ the Canadian government created a Truth and Reconciliation Commission (TRC). TRC Chair Harry LaForme has cautioned that the government is putting in jeopardy the Commission's independence. The government unilaterally decided to transform the TRC Secretariat into a federal government department and then have that department report to the Minister of Indian Affairs.⁶⁰
28. In June 2008, the Parliament of Canada amended⁶¹ the *Canadian Human Rights Act* so as to remove an exemption⁶² that prevented First Nations and individuals from filing human rights complaints for any matter under the *Indian Act*.⁶³ This positive initiative occurred in spite of the fact that, for over a year, the minority government of Canada had attempted without success to amend this legislation without any consultation with First Nations or accommodation of their concerns.⁶⁴ In particular, the government had refused to consider any interpretative clause that would balance the collective and individual rights of the Indigenous peoples and individuals concerned. Ultimately, the federal opposition parties, in collaboration with Indigenous organizations, compelled the Canadian government to reach a reasonable compromise.
29. In opposing the *UN Declaration*, the Canadian government has consistently failed to respect its international and constitutional obligations and commitments. Rather than uphold principles relating to human rights, democracy and the rule of law, the government has opted to use any means in pursuing its own ideology. By continuing to engage in untruthful, misleading and unsubstantiated positions, the government is undermining the principles of justice, good governance and accountability.⁶⁵

In regard to Canada and the *UN Declaration on the Rights of Indigenous Peoples*, we respectfully submit the following recommendations to the Human Rights Council:

1. That Canada, in partnership with Indigenous peoples, endorse the *UN Declaration* and fully implement the standards contained therein (as called for in the House of Commons Motion of 8 April 2008).
2. That the *UN Declaration* be fully respected as a universal international human rights instrument.
3. That Canada fully support the mandate and work of the Special Rapporteur on the situation of the human rights and fundamental freedoms of Indigenous people and respect its objectivity, independence and discretion.
4. That Canada recognize the importance of regional human rights instruments in complementing the universal system of promotion and protection of human rights. A current example is using the *UN Declaration* in the ongoing negotiations on a draft American Declaration on the Rights of Indigenous Peoples, as has been decided within the Organization of American States.
5. That, as a member of the UN and Human Rights Council, Canada set a positive example consistent with its obligations, commitments and pledges. Members that are not willing to fully meet these responsibilities should withdraw from the Council.

Endnotes

[Note: These endnotes are included as a more detailed and factual report that is attached as a reference to the above 5-page document.]

¹ In this Submission, reference to the actions or positions of Canada refers to those of the current minority government since the spring of 2006.

² UNGA Res. 61/295, 13 September 2007, Annex.

³ It is added that such voluntary pledges and commitments of States include, but are not limited to, “those undertaken when presenting their candidatures for election to the Human Rights Council”.

⁴ UN General Assembly, *Human Rights Council*, A/RES/60/251, 15 March 2006, para. 9.

⁵ “Statement by Acting UN High Commissioner for Human Rights Kyung-wha Kang, and S. James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: International Day of the World's Indigenous People”, *United Nations Press Release*, retrieved 8 August 2008 at: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/10491F4417CB6875C125749C002EDB71?opendocument>:

The Declaration ... represents a significant contribution to the guiding principles of justice and dignity championed in the Universal Declaration of Human Rights, which celebrates its 60th anniversary this year.

⁶ See Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, CERD/C/USA/CO/6, 8 May 2008, p. 10, para. 29:

While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee ... recommends that the declaration be used as a guide to interpret the State party's obligations under the Convention relating to indigenous peoples. [bold in original]

As described in the text accompanying this endnote, the *UN Declaration* is similarly relevant to applicable international humanitarian law.

⁷ *Charter of the United Nations*, Art. 1(3). See also *UN Declaration*, PP1.

⁸ *UN Charter*, Art. 56.

⁹ See also *Id.*, Art. 2(2): “All Members ... shall fulfill in good faith the obligations assumed by them in accordance with the present Charter”.

¹⁰ See also Permanent Mission of Canada to the United Nations, “Canada's Commitments and Pledges”, Human Rights Council, New York, 10 April 2006: “Canada pledges: ... to give effect to the Council's *mandate to promote and protect human rights*, including ... by contributing to its work on norm development, and by encouraging cooperation and dialogue”. [emphasis in original]

¹¹ See also UN General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, A/60/270, 18 August 2005 (adopted without vote by General Assembly, 16 December 2005), para. 9:

... the goal for the Decade established by the General Assembly, namely strengthening international cooperation for the solution of problems faced by indigenous people in the areas of culture, education, health, human rights, the environment and social and economic development.

¹² UN General Assembly, *Human Rights Council*, A/RES/60/251, 15 March 2006, para. 4. These same principles are integral elements in the Council's work: see also Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex, V (Agenda and Framework for the Programme of Work), A (Principles).

¹³ See note 36, *infra*.

¹⁴ For a detailed refutation of Canada's "persistent objector" argument, see P. Joffe, "UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context", published in *Aboriginal Law Conference—2008*, Continuing Legal Education Society of British Columbia, June 2008.

¹⁵ Minister of Indian Affairs and Northern Development, Chuck Strahl, quoted in S. Edwards, "Tories defend 'no' in native rights vote", *The [Montreal] Gazette* (14 September 2007), available at <http://www.canada.com/montrealgazette/news/story.html?id=5a03839b-6ee5-4391-8cd8-fe9338ac7baf>:

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.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ There are 17 provisions in the *Declaration* that address individual rights: PP4, PP22 and Arts. 1, 2, 6, 7, 8, 9, 14, 17, 21, 22, 24, 33, 40, 44 and 46. The *Declaration* contains some of the most comprehensive balancing provisions that exist in any international human rights instrument. See, e.g., Art. 46.

¹⁹ *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 4: "States Parties condemn all propaganda ... and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to ... the rights expressly set forth in article 5 of this Convention, inter alia: ... (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."

See also *UN Declaration*, Art. 8, para. 2: "States shall provide effective mechanisms for prevention of, and redress for: ... (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them."

²⁰ *UN Declaration*, Art. 46, para. 3. See also Art. 46, para. 2: "In the exercise of the rights enunciated in the ... Declaration, human rights and fundamental freedoms of all shall be respected."

²¹ House of Commons, *Debates* (Hansard), 39th Parl., 1st sess., November 21, 2006, No. 083 (Hon. Jim Prentice, Minister of Indian Affairs and Northern Development), available at <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2523934>

²² The provisions in the *UN Declaration* serve to honour, protect and enforce treaties with Indigenous peoples. For example, the preamble recognizes "the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties".

See also Art. 37 (1): "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"; and (2) "Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements".

²³ 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.

²⁴ Canada, “Statement by Ambassador John McNee, Permanent Representative of Canada to the United Nations to the 61st Session of the General Assembly on the Declaration on the Rights of Indigenous Peoples”, New York, 13 September 2007.

²⁵ Canada’s highest court has repeatedly ruled that international declarations, conventions, etc. may be relied upon to interpret human rights in Canada. See, e.g., *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 Supreme Court Reports 313, at p. 348:

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 [Canadian] Charter’s provisions. [emphasis added]

²⁶ Examples of existing customary international law include, *inter alia*: general principle of international law of *pacta sunt servanda* (“treaties must be kept”); prohibition against racial discrimination; right to self-determination; right to one’s own means of subsistence; right not to be subjected to genocide; *UN Charter* obligation of States to promote the “universal respect for, and observance of, human rights and fundamental freedoms for all”; and requirement of good faith in the fulfillment of the obligations assumed by States in accordance with the *Charter*. The former High Commissioner for Human Rights, among others, has highlighted that the rule banning gender discrimination is also now customary international law.

²⁷ A. Neve (Director General, Amnesty International Canada), “Shame on Canada for opposing the UN Indigenous Peoples declaration”, *The Lawyers Weekly*, June 6, 2008, p. 5.

²⁸ *Id.*

²⁹ Human Rights Council, *Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Res. 6/12, 6th sess., 28 September 2007, para. 1(g):

Decides to extend the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people for a period of three years:

...

(g) To promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate ...

³⁰ 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.

³¹ UN General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, Res. 62/165, 18 December 2007 (adopted without vote), preamble:

Affirming the importance of the objectivity, independence and discretion of the special rapporteurs and representatives on thematic issues and on countries, as well as of the members of the working groups, in carrying out their mandates ...

³² UN General Assembly, *Revised draft plan of action for the first phase (2005-2007) of the World Programme for Human Rights Education: Note by the Secretary-General*, A/59/525/Rev.1, 2 March 2005, para. 3:

... human rights education can be defined as education, training and information aiming at building a universal culture of human rights through the sharing of knowledge, imparting of skills and moulding of attitudes directed to: (a) The strengthening of respect for human rights and fundamental freedoms; ... (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups ...

³³ Canada’s opposition has been especially evident at the Organization of American States negotiations on a draft American Declaration on the Rights of Indigenous Peoples.

³⁴ Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex, V (Agenda and Framework for the Programme of Work), C (Framework for the programme of work), Item 3.

³⁵ See J. Brown, “UN human rights czar lashes Canada for vote against native rights”, October 22, 2007, available at http://ca.news.yahoo.com/s/capress/071022/national/arbour_cda_rights&printer=1:

[UN High Commissioner for Human Rights Louise Arbour] cited the aboriginal rights issue as one example of a deeper malaise, suggesting her native country is flagging in its historic commitment to rise above narrow self-interest on the world stage.

³⁶ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, CERD/C/CAN/CO/18, 25 May 2007, p. 8, para. 27:

In view of the positive contributions made and the support given by the State party in the process leading up to the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, the Committee regrets the change in the position of the State party in the Human Rights Council and the General Assembly.

The Committee recommends that the State party support the immediate adoption of the United Nations Declaration on the Rights of Indigenous Peoples ... [bold in original]

³⁷ “UN Declaration on the Rights of Indigenous Peoples: Canada Needs to Implement This New Human Rights Instrument”, Open Letter, May 1, 2008, available at <http://cfsc.quaker.ca/pages/documents/UNDecl-ExpertsignonstatementMay1.pdf>.

³⁸ Canada, “Canadian Explanation of Position [on] Report from the United Nations Permanent Forum on Indigenous Issues, Economic and Social Council”, 2008 Substantive Session, New York, July 24, 2008.

³⁹ Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: Office of the High Commissioner for Human Rights*, E/C.19/2008/4/Add.14, 14 February 2008, p. 14, para. 25:

The OHCHR considers that the adoption of the Declaration on the Rights of Indigenous Peoples offers an opportunity to renew efforts to improve the situation of indigenous peoples worldwide, *establishing for the first time universal standards* that can guide public policy. [emphasis added]

⁴⁰ *UN Declaration*, Art. 1: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”

⁴¹ *UN Declaration*, Art. 43: “The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”; and Art. 44: “All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals”.

⁴² *UN Declaration*, Art. 42: “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

See also Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April – 2 May 2008)*, Economic and Social Council, Official Records, 2008 Supplement No. 23, E/2008/43, E/C.19/2008/13, p. 21, para. 132:

The Permanent Forum affirms that the United Nations Declaration on the Rights of Indigenous Peoples will be its legal framework. The Permanent Forum will therefore ensure that the Declaration is integrated in its own recommendations on the seven substantive mandated areas — economic and social development, environment, health, education, culture, human rights and the implementation of

the Declaration — as well as in the Forum’s work under the special theme for each session and in its ongoing themes and priorities. [emphasis added]

⁴³ In all of Latin America and the Caribbean, not a single country voted against the *Declaration* at the UN General Assembly. On November 26, 2007, Canada sought to prevent all of these States from using and respecting this human rights instrument in the ongoing OAS negotiations on a draft *American Declaration*.

In this regard, see Canada, “Notes for a Statement by the Government of Canada at the Special Session of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples”, Organization of American States, Washington, D.C., November 26, 2007:

... the Government of Canada cannot accept the UN Declaration text as the starting point or minimum outcome for these negotiations. Trying to impose the UN Declaration text will doom these negotiations to failure.

⁴⁴ 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, available at http://www.civil-society.oas.org/English/Indigenous/rep_chair_1107.doc, p. 3:

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.

⁴⁵ Canada should recognize the relationship of regional human rights instruments to the broader international human rights system. See, e.g., UN General Assembly, *International Covenants on Human Rights*, Res. 62/147, 18 December 2007 (adopted without vote), preamble:

Recognizing the importance of regional human rights instruments and monitoring mechanisms in complementing the universal system of promotion and protection of human rights ...

⁴⁶ Canada, “Canada’s Statement to the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples”, April 14, 2008, in Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), “Report of the Chair on the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington, D.C., April 14 to 18, 2008)”, OEA/Ser.K/XVI, GT/DADIN/doc. 339/08, 14 May 2008, available at <http://www.civil-society.oas.org/English/Indigenous/DADIN00217E08.doc>, Appendix V, p. 35.

⁴⁷ “The Positions of Canada and the United States Expressing Reservations and Opposing Consensus are Unacceptable: Response of the Indigenous Peoples’ Caucus of the Americas”, Washington, D.C., April 15, 2008 in Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), “Report of the Chair on the Eleventh Meeting ...”, note 46, *supra*, Appendix VII, 42, at p. 43:

Canada is seeking to create a dangerous precedent within the OAS. That is, any State that chooses to oppose the adoption of any declaration within the Inter-American system could simply opt to oppose it and prevent its domestic application. This would severely undermine the principle of international cooperation that is a crucial element of the *UN Charter* and the *OAS Charter*. It would also undermine the progressive development of human rights within the Hemisphere.

⁴⁸ The text of the Motion is reproduced in House of Commons Debates, *Hansard*, April 7, 2008, 39 Parl., 2nd sess., vol. 142, no. 074, available at: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=2&DocId=3394873>

⁴⁹ The Canadian government had meetings with Indigenous representatives, but not a single discussion constituted a “consultation” as required by Canada’s Constitution.

⁵⁰ See, e.g., *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, para. 25:

The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.

See also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 Supreme Court Reports 388, para. 54: “Consultation that excludes from the outset any form of accommodation would be meaningless.” On “very serious issues”, the Supreme Court has ruled that “full consent of [the] aboriginal nation” is required: see *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 24.

⁵¹ UN General Assembly, *2005 World Summit Outcome*, A/RES/60/1, 16 September 2005 (adopted without vote), p. 29, para. 127:

We [Heads of State and Government] reaffirm our commitment to continue making progress in the advancement of the human rights of the world’s indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them ...

⁵² Despite its active lobbying, Canada was able to find only three other States that would join together in proposing specific amendments to the *UN Declaration*. See Letter, dated August 13, 2007, and accompanying proposed amendments, from the Permanent Missions of Canada, Colombia, New Zealand and the Russian Federation, to the President of the United Nations General Assembly. In regard to Indigenous peoples, there was no prior disclosure by Canada of these joint proposed amendments.

⁵³ Amnesty International (Canada), “Canada and the International Protection of Human Rights: *An Erosion of Leadership?*”, An Update to Amnesty International’s Human Rights Agenda for Canada”, December 2007, available at <http://www.amnesty.ca/themes/canada/overview.php>, p. 7: “Canada aligned itself with states with poor records of supporting the UN human rights system and with histories of brutal repression of Indigenous rights advocates.”

⁵⁴ See also Quaker United Nations Office (R. Brett), “Righting Historic Wrongs: First Session of the UN Human Rights Council (19-30 June 2006)”, July 2006, available at <http://quono.org/geneva/pdf/humanrights/RightingHistoricWrongs200606.pdf>, p. 4:

Canada’s Shame: Short-term political expediency seems to have been the basis for Canada’s change of position from supporting to opposing the draft declaration – encouraged by Australia, New Zealand and the USA, none of whom are on the Council and thus needed a Council member who could be persuaded to call a vote after the failure of a blocking move to gain support. Canada and the Russian Federation were the only States to vote against adoption.

⁵⁵ UN General Assembly, *Human Rights Council*, A/RES/60/251, 15 March 2006, preamble.

⁵⁶ Indian and Northern Affairs Canada, “Update Paper: United Nations Declaration on the Rights of Indigenous Peoples”, January 10, 2008, available at: http://www.ainc-inac.gc.ca/ird/2007/updir_e.html. No page numbering in text.

⁵⁷ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 1, pp. 601-602:

No segment of our research aroused more outrage and shame than the story of the residential schools. ... the incredible damage – loss of life, denigration of culture, destruction of self-respect and self-esteem, rupture of families, impact of these traumas on succeeding generations ... will deeply disturb anyone ...

⁵⁸ For the text of Prime Minister Stephen Harper’s apology, see House of Commons Debates, *Hansard*, 39th Parl., 2nd sess., vol. 142, no. 110, June 11, 2008.

⁵⁹ A copy of the Indian Residential Schools Settlement Agreement is available at: <http://www.ainc-inac.gc.ca/rqpi/a3-eng.asp>.

⁶⁰ “Remarks by Justice Harry S. LaForme”, July 15, 2008, Assembly of First Nations, 29th Annual General Assembly, Quebec City, Quebec, available at <http://www.trc-cvr.ca/mediaroomjuly15en.html>. Justice Laforme adds:

Unless the Commission can reach out to survivors as being truly independent, the integrity of its work will be undermined and the validity of its findings and conclusions will be suspect ... for its work to have integrity and value the Commission must not only be independent, it must be seen to be independent ...

...

There’s a potential for making the operation of this quite small Commission unduly cumbersome and by burdening it with expensive machinery of government. And most importantly, a potential for creating inconsistencies with the Settlement Agreement, with the court judgments and with the mandate.

⁶¹ See *An Act to amend the Canadian Human Rights Act* (Bill C-21), Statutes of Canada 2008, c. 30, assented to 18 June 2008.

⁶² *Canadian Human Rights Act*, Revised Statutes of Canada 1985, c. H-6, s. 67: “Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.”

⁶³ Revised Statutes of Canada 1985, c. I-5.

⁶⁴ See, e.g., “Assembly of First Nations, Native Women’s Association of Canada call for full consultation before the repeal of Section 67 of Canadian Human Rights Act”, News release, December 13, 2006: “Both the Assembly of First Nations and the Native Women’s Association of Canada (NWAC) ... support the repeal ... but only after proper consultation.”

⁶⁵ In regard to the Canadian government’s constitutional duty to act honourably, see *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 Supreme Court Reports 550, para. 24: “In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect ... “.

See also *R. v. Badger*, [1996] 1 S.C.R. 771, para. 41: “... the honour of the Crown is always at stake in its dealing with Indian people. ... No appearance of "sharp dealing" will be sanctioned.”