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Canada's Failure to Support the United Nations Declaration on the Rights of Indigenous Peoples:

an intersectional analysis of the repercussions as seen through the inter-woven lenses of women's rights, environmental rights, and poverty alleviation

by

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Introduction

Canada has historically enjoyed a prominent place on the world stage as a leader in human rights advocacy. That reputation is in jeopardy. Canada's refusal to support contemporary human rights instruments threatens to damage the reputation of this nation and impede its progress toward a more just society. By denying the protection of basic human rights to Indigenous Peoples through voting 'no' on the *United Nations Declaration on the Rights of Indigenous Peoples* (The *Declaration* or UNDRIP) the government of Canada is taking a step backward not forward.

This paper is divided into six main parts. Part I summarizes the role that Canada has played historically in the creation and promotion of The *Declaration*. Part II of this paper outlines the government of Canada's current stance against the *Declaration*. Part III consists of an intersectional analysis of the *Declaration* itself as well as relevant issues in Canadian Aboriginal rights law. An intersectional analysis focusing on the inter-related concepts of gender, poverty, and environmental concerns permeate throughout this work, however, Part III focuses primarily on this analysis as a means toward better understanding the implications of the *Declaration* and

the government of Canada's current stance against this human rights instrument. Part IV analyses the strengths and weaknesses of the Government of Canada's excuses for voting 'no' to the *Declaration*. Part V entitlted "Canadian Government's discomfort with the *Declaration*" considers revisions that could have been made by the United Nations to make the *Declaration* more appealing to the Canadian Governement without altering the focus and strength of the *Declaration*. Part VI provides conclusions focusing around the argument that the Federal Government's interactions with Canadian Indigenous individuals and Canadian Indigenous communities needs to be guided by the principles in the *Declaration* in light of the Federal government's failure to ensure that Canadian Indigenous peoples have a standard of living comparable to non-Indigenous peoples in Canada at the present.

The focus of this paper will be on the effect of this governmental decision for Canadian peoples as evident through the intersections of poverty, gender, and environmentalism. It is recognized that Canada's abstention from this instrument has global effects in impeding the advancement of human rights work internationally; however the scope of this paper will focus on the effects on Canadians in particular. This narrowing of scope is done deliberately so that the arguments presented in this paper can be used to persuade the Canadian government to support the *Declaration*.

In this paper, the words 'Indigenous,' 'Aboriginal,' 'Native,' and 'First Nations' can be used interchangeably. At some points the word 'Indigenous' is used when referring to the *Declaration* directly as applying to the Aboriginal peoples of Canada because the *Declaration* uses the word 'Indigenous.' The Supreme Court of Canada, on the other hand, more often uses the term 'Aboriginal' in reference to the first peoples of Canada when articulating concepts such as Aboriginal rights and Aboriginal title. The words 'Indigenous' and 'Aboriginal' are capitalized in this document generally. Even though "Indigenous" is not a proper name in the way that names such as Cree or Algonquin are proper names, the terms 'Indigenous' and 'Aboriginal' are often used to promote solidarity among various Aboriginal nations in the advancement of Aboriginal interests. However, when the words 'Indigenous' or 'Aboriginal' are used in a quote and the source of the quote does not capitalize the word, the case is left as it appeared in the original text.

Part I: Canada's role in originally promoting the *Declaration*

Canada was originally a strong proponent of the creation of a *Declaration* supporting the Human Rights of Indigenous peoples. The process of creating the *Declaration* began in 1985 with the United Nations Working Group on Indigenous Populations decided to begin the drafting process for an eventual *Declaration* to be adopted by the General Assembly.[i] By 1993 the UN Working Group on Indigenous Populations submitted a Draft *Declaration* to the UN Sub-Commission on the Promotion and Protection of Human Rights.[ii] This document was referred to as the Sub-Commission text. Canada was an active participant in the deliberations that went into shaping the future drafts of the Sub-Commission text. Through Canada's work, the following provisions were added to the text: Article 6 indicates that "Every indigenous individual has the right to a nationality," while Article 44 states that "All the rights and freedoms recognized herein

are equally guaranteed to male and female indigenous individuals." Both of these important provisions were ultimately adopted in the final draft of the *Declaration*.[iii]

From 2000-2003 Canada chaired informal intersessional consultations between States[iv] in an attempt to make the Draft *Declaration* amenable to Canadian governmental concerns regarding the preservation of state authority while enhancing the human rights of Indigenous peoples. By 2004 Canada began renewed efforts in working with National Aboriginal Organizations in trying to find a common ground that would meet the needs of Canadian Indigenous peoples and the Government of Canada.[v]

It was becoming increasingly evident however that the views of the Canadian Government were not in step with the United Nations Human Rights Council which was ultimately in control of deciding when the vote on the *Declaration* would take place and the content of the text. In June 2006 Canada went to the Human Rights Council in an attempt to delay the vote before further consultations. By this point it was quite clear that Canada would not accept a *Declaration* that recognized Indigenous rights to the extent that the UN Human Rights Council and voting states deemed to be appropriate. A discussion of Canada's excuses for voting against the *Declaration* on September 13th 2007 will follow in Part III of this paper.

Part II: The Government of Canada's stance regarding the *Declaration*

On September 13th of 2007, the United Nations General Assembly adopted the *Declaration*. The overwhelming majority of United Nation's member states voted for the *Declaration*, 144 states to be exact, eleven states abstained from the vote, and four countries voted against the *Declaration*. Canada was one of those four countries. In response to the media inquiry regarding Canada's position, Ambassador Paul Meyer said, "When you're doing the right thing, you don't really worry about whether you're isolated or not. I think there were a number of countries that indicated they shared some of our concerns about the process and the substance and some of the deficiencies…"[vi] Interestingly, the other three countries that voted against the *Declaration*, namely, the United States of America (U.S.A), New Zealand, and Australia, all share a history marred by largely unremedied human rights violations against their Indigenous people including: abuse of Indigenous children in Residential schools,[vii] unjust legal treatment,[viii] and land deprivation[ix]. It can be argued that these are four of the countries who had the most to gain from supporting the *Declaration* by demonstrating to their populations that abuse and exploitation of Indigenous peoples will no longer be sanctioned by the state. All four countries who voted 'no' to the *Declaration* have subjected the Indigenous peoples of their countries to the social upheaval of Residential School assimilation institutions. Supporting the *Declaration* would have helped these four countries improve their reputation internationally by demonstrating a clear commitment to remedying a legacy of abuse against Indigenous Peoples at the hands of the state.

Despite twenty years of negotiations and collaboration in contemplation of designing a *Declaration* recognizing the rights of Indigenous Peoples, Canada failed to support and vote for the *Declaration* when it was adopted by the United Nations. Canada had been actively participating in the negotiations when the first draft of the *Declaration* was submitted on August

9th 1995.[x] Yet, Canada withdrew from negotiations during the last amendments to the *Declaration* for the final draft. In truth, Canada gave up on the *Declaration* before it was even in its final form.

Part III: Intersectional analysis of the *Declaration* itself

The theoretical framework informing the approach taken in this paper is "intersectionality," which can be defined as "the relationships among multiple dimensions and modalities of social relations and subject formations."[xi] For instance, an Aboriginal person in Canada may be affected by gender marginalization, economic marginalization from poverty, and environmental vulnerabilities such as the inability to have her or his land and resources protected. Each of these three intersectional considerations work fluidly to reinforce and redefine each other. For example, an Aboriginal person who is vulnerable because of her gender in a patriarchal society is further marginalized by environmental factors such as her inability to retain land on a First Nation's Community (also known as a Reservation) because of the Matrimonial Real Property Act's denial of a woman's right to property. Both of these considerations increase her vulnerability to poverty and having been made vulnerable by living in poverty may increase the likelihood that she will be exploited based on her gender and inability to control or access environmental resources.

The *Declaration* consists of forty-six Articles and a twenty-four paragraph pre-amble. The pre-amble focuses on the suffering Indigenous Peoples have experienced from "historic injustices as a result of, inter alia, their colonization and dispossession of their lands," as well as ameliorating current and future concerns in "Recognizing and reaffirming…that Indigenous Peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples."[xii]

This recognition of the great suffering that follows from the deprivation of land and the need to recognize and maintain collective rights makes a strong stride toward poverty alleviation among Indigenous populations. Land ownership is one of the primary means by which peoples sustain themselves and accumulate wealth. The dispossession from their lands and the current lag in land claims settlement are great barriers to the advancement of Indigenous populations in terms of health, political representation, education, economic participation, and gender equality. The *Declaration* clearly recognizes the importance that poverty alleviation plays in recognizing the rights of Indigenous peoples.

Mr. Richard Osburn addresses issues of land disruption for Aboriginal peoples in his article entitled "Problems and Solutions Regarding Indigenous Peoples Split By International borders" published in The American Indian Law Review.[xiii] Osburn addresses the injustices of Aboriginal communities being artificially divided by state borders. He cautions Canada and the United States of America that Canadian and American Aboriginal peoples have the right to freely cross the Canadian-American border and the right to carry personal goods duty free as legally protected by the Treaty of Ghent of 1812[xiv] and the Jay Treaty.[xv] These rights have not been upheld consistently however. In 1937 Ms. Annie Garrow, a full-blooded member of the Canadian St. Regis Tribe of Iroquois Indians was denied protection for duty fees under the

Treaty of Ghent.[xvi] Garrow was attempting to cross into the U.S.A. from Canada in pursuing her trade in handcrafted baskets. When she attempted to cross the American border an import duty was levied. Garrow fought the fee but the case was decided against her.[xvii] Here the intersections of gender, poverty, and environmental concerns come into play. The United States Supreme Court held that the Ghent Treaty and the Jay treaty allotted no protection to Ms. Garrow and her economic interests.[xviii] In a similar case involving a male accused the Court held that the Treaties protected Mr. Paul Diabo based on his Aboriginal ancestry.[xix] The fact that these two people held similar claims to protection of the Treaties and only the man's claim was recognized should not go unnoticed. The denial of women's freedom of movement and economic autonomy feed into the vicious cycle of gender discrimination, poverty, and an inability to own and access environmental resources.

The *Declaration* recognizes in the pre-amble "that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment."[xx] Further to this, Articles 25, 29(1), 29(2), 31(2), and 31(3) directly address environmental concerns.[xxi] These Articles speak of the need to conserve resources, lands, and waters "to uphold…responsibilities to future generations" (Art.25), the need for states to "take effective measures to ensure that no storage or disposal of hazardous materials shall take place…in the lands of Indigenous Peoples without their…consent" (Art. 29(2)), as well as specific provisions relating to state "exploitation of mineral, water or other resource" (Art.32(1)).[xxii]

The strength of the *Declaration*'s focus on environmental concerns as well as poverty is very encouraging. Issues of poverty and environment are indeed not divisible. Absence of the ability to own, isolate, and use land is directly linked to poverty. Being landless often means being penniless. If a people have the ability to own land and resources they can choose to conserve or commercially exploit those resources in keeping with state laws to increase the sustainability and strength of their community. Indigenous peoples in Canada have traditionally held a strong connection to the land. The land and environment have spiritual significance to many Indigenous peoples in Canada.[xxiii] Land is necessary to support traditional modes of life such as fishing and trapping. It can provide a sense of belonging and the means by which to prosper in Canadian society through exercise of Aboriginal rights.

Important litigation has occurred in the area of land, and land use in social justice law as seen in the seminal cases of *Sparrow*, *Delgamuukw*, *Van Der Peet*, and *Gladstone*. Each of these cases will be briefly elaborated on in order to demonstrate important Canadian jurisprudence regarding Indigenous rights.

In 1990 the Supreme Court of Canada decided *Sparrow*. The *Sparrow* decision stands for three main points. Firstly, it holds that Aboriginal rights, such as the right to fish, are protected regardless of whether such specific rights are mentioned in a treaty. Secondly, it verifies that the *Constitution Act, 1982*, section 35(1) applies to rights in existence when the *Constitution Act* came into effect. Thirdly, it clarified for Canadians that the phrase "existing Aboriginal rights" must be interpreted flexibly so as to permit the evolution of rights over

time.[xxiv] The *Sparrow* decision is relevant to the *Declaration* in that it shows the current push and pull factors between Aboriginal people trying to exercise Aboriginal rights and the government attempting to limit those rights through law. The Supreme Court of Canada has indeed been an influential player since the *Charter* and the *Constitution Act, 1982* were passed. If the Canadian government would support the *Declaration* and the Indigenous rights set out therein, litigation costs in Canada regarding Aboriginal rights would arguably decrease freeing up government resources and decreasing the economic hardship suffered by many Indigenous communities.

Delgamuukw v. British Columbia was decided by the Supreme Court of Canada in 1997.[xxv] It determined issues of Aboriginal title, the protection of such title under the *Constitution Act, 1982*, and stipulated what requirements are necessary to prove Aboriginal title. The Court in *Delgamuukw* held that Aboriginal title is sui generic (unique), that it is to be held communally, that it existed at common law prior to the *Constitution Act, 1982*, and that such Aboriginal title cannot to alienated to anyone but the Crown. Aboriginal title encompasses the right to exclusive use and occupation of the land. Importantly, however, the court held that the use cannot be adverse to the nature of the group's attachment to the land. This basically means that the use of the land under exercise of Aboriginal title cannot significantly harm the land so as to impair the ability of the community to enjoy their attachment to the land. It is left to be seen how the courts will define this limitation on enjoyment of Aboriginal title in terms of land conservation. For instance, the stipulations seem to imply that Aboriginal peoples could not use their land under Aboriginal title to exploit the land to the extent that corporations in the Alberta and Saskatchewan tar sands are permitted to exploit land. While such a limitation promotes environmental concerns it makes for an uneven economic playing field. One wonders why it is that the government would place a ceiling on the use of land by Indigenous peoples who constitute the most impoverished group in Canada as opposed to corporations.

Two important cases regarding Indigenous rights were decided by the Supreme Court of Canada on August 21st, 1996, namely, *Van Der Peet*, and *Gladstone*.[xxvi] Both of these decisions involved Aboriginal individuals who had been charged with contravening laws regulating fishing resources. In both cases the individuals claimed that they had the right to access fish resources based on Aboriginal rights guaranteed by the *Constitution Act, 1982*. Ms. Van Der Peet was unsuccessful in her appeals to the Supreme Court of Canada. Mr. Donald Gladstone and his co-accused Mr. William Gladstone were successful. The fact that in both the Van Der Peet and Gladstone cases the individuals were charged with very similar fishery offences, the same defense was argued, and yet only the men passed the test established in *R. v. Sparrow* so that they would not be punished by the state and could preserve their economic well-being through this commercial fishing activity while the female defendant's rights were not recognized is not without significance.

A gender and poverty analysis needs to be taken of the *Van Der Peet* and *Gladstone* decisions. Ms. Van Der Peet was charged with selling ten salmon caught under the authority of an Indian food fish licence, contrary to s. 27(5) of the *British Columbia Fishery (General) Regulations*, which prohibited the sale or barter of fish caught under such a

licence. Ms. Van Der Peet alleged that the restrictions imposed by s. 27(5) infringed on her Aboriginal right to sell fish and accordingly were invalid because they violated s. 35(1) of the *Constitution Act, 1982*. The trial judge held that the Aboriginal right to fish for food and ceremonial purposes did not include the right to sell such fish and found Ms. Van Der Peet guilty. The British Columbia Court of Appeal and the Supreme Court of Canada dismissed Ms. Van Der Peet's appeals.

The Gladstones, were charged under s. 61(1) of the *Fisheries Act* with attempting to sell herring spawn on kelp caught without the proper license contrary to s. 20(3) of the *Pacific Herring Fishery Regulation*s. They had been part of a group of Aboriginal individuals who shipped a large quantity of spawn to the Vancouver area and approached a fish dealer with a sample to see if he was "interested." On arrest, an Indian food fish license was presented permitting one of the Gladstones to harvest 500 pounds. The Supreme Court of British Columbia and the Court of Appeal upheld the convictions. However, the Supreme Court of Canada held that s. 20(3) of the *Pacific Herring Fishery Regulations* was of no force or effect in the circumstances, in virtue of s. 52 of the *Constitution Act, 1982*, by reason of the Aboriginal rights within the meaning of s. 35(1) of the *Constitution Act, 1982*. The academic distinction drawn between the Gladstones' acquittal and Ms. Van Der Peet's conviction is that the Supreme Court of Canada recognized the Gladstones' activity as being an activity that was an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right that the group had engaged in this activity from pre-contact times and had been exercising it consistently to this day.

The Supreme Court of Canada asserted in these cases that selling fish is not unique enough to constitutive an activity integral to a distinctive culture. So, Ms. Van Der Peet had no Constitutional protection for her entrepreneurial activities. Ms. Van Der Peet's activities were on a much smaller scale than those engaged in by the Gladstones. Her profits would have been minimal at best. This case cannot be considered outside of the social reality that Aboriginal women are one of the most vulnerable groups in Canadian society to poverty, gender based violence, and, as seen here, deprivation of the ability to use the environment to participate actively in society.[xxvii]

These cases demonstrate the real barriers that Indigenous peoples face in Canada in trying to exercise their Indigenous or Aboriginal rights and participate meaningfully in today's economy. Aboriginal women face greater barriers because as a group they are statistically more vulnerable to suffer from poverty, violence based on their gender, and deprivation from environmental entitlement.

A gender based or feminist analysis of the *Declaration* itself is helpful in analyzing the document and comprehending the intersectional ramifications of the Declaration's adoption by the United Nations General Assembly. Articles 22(1), 22(2), and 44 all overtly address concerns specific to the empowerment of Indigenous women. Article 22(1) states that "particular attention shall be paid to the rights and special needs of Indigenous elders, women, youth, children and persons with disabilities" while Article 22(2) highlights the vulnerability of "Indigenous women and children" to "violence and discrimination." Such prominent recognition of the gender based

marginalization of Indigenous women is praiseworthy in this *Declaration*. The problem of widespread violence and legal marginalization of women is a glaring issue in Canada today.

The Native Women's Association of Canada is bringing awareness and taking action on this issue. In 2005, The Native Women's Association of Canada entered into a five year agreement with the federal government whereby the government will help to finance the Association's Sisters in Spirit Campaign.[xxviii] The main objective of the Sisters in Spirit initiative is to address violence against Aboriginal women, meaning First Nations, Inuit and Métis women, particularly racialized and or sexualized violence, that is, violence perpetrated against Aboriginal women because of their gender and Aboriginal identity.[xxix] The reality of violence for Aboriginal women in Canada is abhorrent. Over five hundred Aboriginal women and girls in Canada have gone missing or been murdered over the last fifteen years.[xxx]

In 2004 Amnesty International mounted a campaign entitled "Stolen Sisters" to bring awareness and action to the tragedy of the system that allows Aboriginal women to be killed with relative impunity. Take for instance the case of Helen Betty Osburne. Ms. Osburne was abducted in her home town of The Pas in northern Manitoba by four white men in 1971. These men sexually assaulted and then brutally killed her. A provincial inquiry held in 1999 found that Canadian authorities had failed Ms. Osburne. The racist indifference that was rampant among police led to a sloppy investigation that took fifteen years to bring only one of the four men to justice. Further, the inquiry concluded that police had been aware of the practice of white men in the town sexually preying on Indigenous women and girls but "did not feel the practice necessitated any particular vigilance."[xxxi]

The vulnerability of Aboriginal women in Canada is compounded by misogyny and patriarchal laws such as Bill C-31 which for many years disentitled Aboriginal women from protection under the *Indian Act* based on their gender. If an Aboriginal woman married a man who was not Aboriginal, she and her children lost any protections under the *Indian Act.* There was no corresponding deprivation of protections or ethnic legitimacy for Aboriginal men. Rather, an Aboriginal man had the ability to give his wife the status of being 'Aboriginal' herself for *Indian Act* protection purposes.

The manifestations of these patriarchal laws help to explain the current state of poverty suffered by many Aboriginal women. The *Declaration*'s clear recognition of the role that gender and poverty play in the implementation of state policy is commendable. A gender analysis should always inform Canadian government's policy especially as this country continues to be run by men with the percent representation of women in Parliament remaining low near the 20%[xxxii]-30%[xxxiii] mark over the last three years.

Importantly, the *Declaration* contains a strong provision in Article 17(2) which has the capacity to improve situations of poverty and gender-based exploitation. It reads as follows:

> States shall in consultation and co-operation with Indigenous Peoples take specific measures to protect Indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the

> child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education to their empowerment.

This Article specifically addresses the compound vulnerabilities of Indigenous children. Arguably, it also places a responsibility on the state to "take specific measures to protect" Indigenous children, especially girl children, from exploitation in the Canadian sex trade. The United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen found that rates of child prostitution and children living on welfare are much higher among Aboriginal populations than in any other sector of Canadian society.[xxxiv] These two indicators of social dysfunction can contribute to a positive feedback loop whereby poverty increases vulnerability to sexual exploitation and sexual exploitation can lead to vulnerabilities such as running away from home which often leads to greater impoverishment. Indeed, part of the vulnerability of Aboriginal women and girl children to poverty and sexual exploitation is implicated in the many Aboriginal women and girl children who have disappeared or died a violent death as evidenced in Amnesty International's Stolen Sisters Campaign and Native Women's Association of Canada's Stolen Sisters Campaign.

Part IV: Government of Canada's excuses for voting 'no' to the *Declaration*

There are many compelling reasons why the Canadian government should have voted 'yes' to the *Declaration*. The prevalence of violence against Aboriginal women is one such compelling reason. Yet, when the time came to vote, despite twenty years of deliberations, the Government of Canada under the leadership of Stephen Harper voted 'no' to the *Declaration*. This section of the paper analyses the government's excuses for voting 'no.' Cumulatively, the justifications provided by the government do not amount to a rational explanation for not supporting the *Declaration*.

Canadian Ambassador John McNee states the case for Canada's refusal to vote in favour of the *Declaration* on the United Nations' website.[xxxv] McNee argued that Canada had significant concerns regarding the provisions on land, territories and resources as being "overly broad, unclear and capable of a wide variety of interpretations."[xxxvi] One of Canada's main concerns as asserted by McNee is that the *Declaration* could put into question matters that have been settled by treaty. Further, the Conservatives asserted in parliamentary deliberations that Canada could not vote in support of the *Declaration* because it was a "flawed document" that lacked clear practical guidelines for states and was subject to competing interpretations.[xxxvii] Minister of Indian and Northern Affairs, Chuck Strahl suggested the *Declaration* was against Canadian interest when he said, "There's no sense of balance between other rights of other people, of governments' obligations, of…existing treaties. None of that is acknowledged in the document"[xxxviii] He also suggested erroneously that the *Declaration* conflicted with the *Canadian Charter of Rights and Freedoms.*[xxxix]

Mr. Paul Joffe, a barrister and solicitor practicing International Human Rights Law in Montreal, was part of the legal team and NGOs trying to convince countries to support the *Declaration.*[xl] Joffe rebuts the Conservative's assertion that the *Declaration* contradicts the

Canadian *Charter of Rights and Freedoms*, "we find that totally [incredible] because the *Declaration* expressly states that in the exercise of the rights, every right has to respect the human rights of others."[xli] Joffe states further that "there has never been a very clear explanation of Canada's position."[xlii]

The Conservative government maintains that Aboriginal people in Canada are sufficiently protected by the *Charter* and the new legislative measures introduced by their government. For example, Bill C-21 entitled *An Act to Amend the Human Rights Act* which was passed on June 17th 2008 and received Royal Assent on June 18th 2008 extends legal protection to Aboriginal people by making Canadian human rights tribunals accessible to Aboriginal populations by repealing s.67 of the Canadian *Human Rights Act*.[xliii] Section 67 of the Canadian *Human Rights Act* stipulated that "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." With the repeal of this section, the Human Rights Act now applies to people who are also covered by the *Indian Act.*

A second piece of legislation that was introduced by the Conservative government in the previous Parliament is Bill C-47: *An Act respecting family homes situated on First nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves*.[xliv] This Bill made it to first reading but debate about it ended when Parliament dissolved on October 13th 2008. It remains to be seen if the content of this Bill will be re-introduced in a sub-sequent Parliamentary session. This *Act* would allow First Nations Peoples to use provincial and territorial courts to address issues of matrimonial real property rights.

A third legislative initiative undertaken by the Conservative government is Bill C-30: *An Act to establish the Specific Claims Tribunal and to make consequential amendments to other Acts* (*Specific Claims Tribunal Act*). [xlv] Bill C-30 has been passed and is in effect. It established an independent specific claims tribunal to speed the process of land claim resolutions. Mr. Rod Bruinooge, Parliamentary Secretary to the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, who is of Métis descent himself, spoke for this Bill in the House of Commons.[xlvi] Bill C-30 was created through a partnership between the Government of Canada and the Assembly of First Nations. Other initiatives include housing, water, child and family services, education, and self-government initiatives. Why then, one wonders, did the Conservatives not ratify the *Declaration* given that the *Declaration* seeks to meet these goals.

Bruinooge states that the Canadian government would have signed onto the *Declaration*, if the *Declaration* had met the goals that the Canadian government wanted to see in such a Human Rights instrument, namely; the objective of "promoting partnerships and harmonious relations between the rights of Indigenous People and member states that would strike an appropriate balance between the rights of indigenous people and the rights of others." This Conservative MP argues that the final draft of the *Declaration* did not meet that objective.

Likely, the Conservative government felt the document allotted too many protections and rights to Indigenous Peoples leaving the Canadian state vulnerable to litigation. However, as the Conservatives make blatantly clear at the beginning of Mr. Bruinooge's speech in the House of

Commons, the *Declaration* is not a legally binding instrument. This causes one to wonder why the Harper Conservatives are so afraid of the *Declaration*. The *Declaration* would not override Canadian laws.

In reality, the Conservatives gave up on the idea of a *Declaration* on the Rights of Indigenous Peoples before the final draft was even proposed. Canada refused to participate in the negotiations that produced the final text. If Canada had truly wanted to make an effort to create a *Declaration* that would meet the needs of Indigenous peoples in Canada, Harper's Conservatives would have participated in the negotiations that led to the final text. Indeed, it was the coming into power of the Conservative party in Canada under Harper's leadership that signaled Canada's dismissive attitude toward the *Declaration*. Prior to Prime Minister Harper's election in 2006, over twenty years of Canada's successive governments have supported and participated in the drafting of a Declaration on the Rights of Indigenous Peoples. The Conservative government criticizes the *Declaration* for being unclear and "open to interpretation" in explaining why it does not endorse the *Declaration*. However, the *Declaration* is designed to address the needs of Indigenous Peoples in all of the United Nations' Member States. The Conservative government cannot expect this United Nations Declaration to dictate exactly how the Canadian government should work with Canadian Indigenous Peoples to ensure that a basic minimum of human rights is protected for Indigenous Peoples within the boarders of Canada. This paper argues that a degree of imprecision in the *Declaration* is necessary so that states are able to adopt measures that are effective in guaranteeing rights and ensuring appropriate implementation unique to each state.

The weakness of the Government's excuses for not supporting the *Declaration* have been scrutinized by lawyers from across Canada and internationally who have researched and worked in the fields of Indigenous rights and/or Constitutional law in Canada in an open letter to the Harper Government of Canada calling for the Canadian government to reassess its current stance of opposition. The open letter states a fear that signatories "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."[xlvii] This open letter was signed by over fifty prominent law professors from across the country such as Social Justice Law Professor Joanne St. Lewis, Constitutional Law Professor Joseph Magnet, and Aboriginal Law specialist Professor Bradford Morse as well as internationally renowned human rights advocate Professor William A. Schabas, Director of the Irish Centre for Human Rights at the National University of Ireland in Galway, and Professor Sakej Henderson, Research Director of the Four Direction Council at the Native Law Centre of Canada, to name a few.

The signatories challenge the Conservative Government's assertion that the *Declaration* favours Indigenous interests above state interests:The *Declaration* contains some of the most comprehensive balancing provisions that exist in any international human rights instrument. Article 46 of the *UN Declaration* states that every provision must be interpreted "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith". These are the core principles and values of not only Canada's Constitution, but also the international system that Canada has championed…*The Declaration* also states that the rights of Indigenous peoples may be limited when strictly necessary "for the

purpose of securing due recognition and respect for the rights and freedoms of others." This approach allows for both flexibility and balance.[xlviii]

The signatories on this document have extensive experience and legal knowledge both of Indigenous rights, Constitutional matters, as well as Canadian law and international law. Their legal opinion hold weight. These scholars and practitioners are convinced that the *Declaration* "is consistent with the Canadian *Constitution* and *Charter* and…that the Government claims to the contrary do a grave disservice to the cause of human rights and to the promotion of harmonious and cooperative relations."[xlix]

The *Declaration* is no doubt in the best interests of the Indigenous Peoples of Canada. The Conservatives have given several excuses for why they do not support the *Declaration*, but none of these excuses stand up to close scrutiny. For instance, in Canada the existence of Bill C-30 *Specific Claims Tribunal Act* as well as the Residential School Settlement Agreement[l] will influence the ways in which the *Declaration* will manifest itself in this country. The intersections of poverty, feminism and environmentalist concerns become glaringly apparent in the Canadian context. The fact that some Aboriginal individuals have been compensated for the injustice of being subjected to Residential School assimilation policies through the Common Experience Payment (CEP) as part of the Indian Residential Schools Settlement Agreement[li] effects the interpretation of Articles such as Article 7(2) of the *Declaration* relating to Indigenous Peoples collective right to be free from forcible removal of children of the group.

The Common Experience Payments are designated under section 5.02 of the Indian Residential Schools Settlement Agreement. The Indian Residential School Settlement Agreement is between Canada, as represented by the Honourable Frank Iacobucci and Plaintiff Aboriginal peoples as represented by the National Consortium and the Merchant Law Group and Independent Counsel and The Assembly of First Nations and Inuit Representatives and the General Synod of the Anglican Church of Canada, the Presbyterian Church of Canada, the United Church of Canada, and Roman Catholic Entities.[lii] The Common Experience Payments are meant to compensate Aboriginal individuals who suffered because they were taken away from their families and forced to spend their childhood in assimilation institutions. This is recognized by the Canadian government as having constituted a harm. The Common Experience Payments are allotted as follows:

> **5.02 Amount of CEP**
> The amount of the Common Experience Payment will be:
>
> (1) ten thousand dollars ($10,000.00) to every Eligible CEP Recipient who resided at one or more Indian Residential Schools for one school year or part thereof; and
> (2) an additional three thousand ($3,000.00) to every eligible CEP Recipient who resided at one or more Indian Residential Schools for each school year or part thereof, after the first school year; …[liii]

Many Aboriginal women will be eligible for Common Experience Payments as well as Independent Assessment payments if they were subjected to particular gender based abuse above

what is contemplated as abuse in the Common Experience Payments such as gender based sexual violence.[liv]

The Conservative government sets out clearly its excuses for voting 'no' to the *Declaration* in the House of Commons report entitled "Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples."[lv] In its opening remarks the government criticizes the *Declaration* as being overly pro-Indigenous peoples. It states that, "it was clear to Canadian representatives that the experts were crafting a *Declaration* by and for indigenous peoples, and that the concerns of States were not given adequate consideration in this process."[lvi] A person whose identity includes being Aboriginal means that statistically this person will be among the most vulnerable people in Canadian society. If this person is also a woman, a child, a person living with a disability, suffering from mental health challenges, or part of the Lesbian, Gay, Bi-sexual, Trans-gendered community, the risk of vulnerability this person faces increases. Rates of poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, children living on social assistance, women victims of abuse, and child prostitution are all *much* higher among Aboriginal people than in any other sector of Canadian society.[lvii] Educational attainment, health standards, housing conditions, family income, access to economic opportunity and access to social services are all lower among Aboriginal populations in Canada.[lviii] The time is long overdue for the Canadian state to put the interests of Indigenous peoples to the forefront of Canadian priorities. How dare the Canadian state assert that it is threatened by the prospect of improving the lives of Canadian Indigenous peoples.

The Conservative government makes an attempt at fear mongering when it implies that the *Declaration* would have the power to override Canadian laws and treaties. Article 26 of the *Declaration* states that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[lix] Bruinooge interprets this as though this statement "could be used to support Aboriginal [sic] claims to ownership rights over much of Canada, even where such rights have been dealt with lawfully and in good faith in the past." The Conservatives are wrong. The *Declaration* does not override treaty rights, or the laws of Canada. Firstly, the *Declaration* would be a non-legally binding instrument. Secondly, Article 46 of the *Declaration* makes it clear that local laws are to be respected as is demonstrated in the following:

> **Article 46**
>
> 1. Nothing in this *Declaration* may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the *Charter* of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
>
> 2. In the exercise of the rights enunciated in the present *Declaration*, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this *Declaration* shall be *subject only to such limitations as are determined by law and in accordance with international human rights obligations.* Any such limitations shall be non-discriminatory and strictly necessary solely for

> the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. (emphasis added)
>
> 3. The provisions set forth in this *Declaration* shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

The criticisms by the Conservative government against the *Declaration* are weak. They ask for "explicit direction on matters of jurisdiction and financing." It is the duty of the Government of Canada itself and the courts of Canada to determine matters of jurisdiction and financing. The Conservatives could not possibly expect a *Declaration* from such an international body as the United Nations General Assembly to spoon-feed them a step-by-step plan for how to govern their own people. The *Declaration* was never intended to do that. Rather, the *Declaration* provides guidelines and goals for meeting the needs of Indigenous peoples, a population that in Canada has been subjected to widespread poverty, violence, deprivation of environmental rights, disenfranchisement, under-employment, and abhorrent living conditions for generations.

The poverty and gender-based violence that many Indigenous women currently suffer from in Canada is augmented by the fact that the Conservative government is depriving Indigenous Peoples of the environmental resources and lands to which they are entitled. This deprivation of real property and resources makes the situation increasingly precarious for Indigenous communities as a whole and particularly for Indigenous women in a patriarchal society. The potential ramifications of Bill C-47: *An Act respecting family homes situated on First nation reserves and matrimonial interests or rights in or to structures and lands situated on those reserves*, also known as the *Matrimonial Real Property Act*, remain to be seen. If this Act is passed, it has the potential to improve the standard of living among Aboriginal women by improving their ability to secure property and the corresponding form of personal security that flows from having one's rights to a home protected. There is currently no applicable legislation or guidelines for the division of matrimonial property under the *Indian Act*[lx]. The present absence of federal legislation for matrimonial real property on federally designated Indian Reservations keeps Aboriginal peoples, especially women, in a vulnerable and disadvantaged position. The Native Women's Association has issued a report on Matrimonial Real Property stating that federal legislation is needed to immediately address the human rights issues occurring due to the dissolution of marriages on-reserve.[lxi]

Part V: Canadian Government's discomfort with the *Declaration*

Certain Articles in the *Declaration* help to partially explain why the Government of Canada does not support the *Declaration*. Certain Articles could be clearer to ensure they are not interpreted as contradicting state laws. For instance, Article 19 appears to place a positive obligation on the Canadian government to obtain Indigenous Peoples' consent before implementing legislative or administrative measures that might affect them. It reads as follows:

> Article 19

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

This Article may have been less intimidating for the Countries that refused to sign onto the *Declaration*, such as Canada, if it had read instead "in *hopes* of obtaining their free…consent before adopting…measures that may affect them" (emphasis added). The Government of Canada addressed directly the Articles dealing with issues of free, prior, and informed consent. They assert that the *Declaration*'s provisions that States are to consult and cooperate with Indigenous peoples in order to obtain consent is particularly problematic in relation to Article 19 "which could be interpreted as requiring States to obtain consent with regard to virtually any government action that may affect indigenous peoples."[lxii] The Government appears to be concerned that it could be prevented from acting if the consent of the concerned Indigenous group was not given. Indeed, Canada's United Nations ambassador, Mr. John McNee singled out the Government of Canada's concerns specifically with Article 19 in his address to the United Nations General Assembly prior to the vote on September 13th 2007. He stated that Canada had "significant concerns" over the *Declaration*'s wording in the Article calling on states to obtain prior informed consent with Indigenous groups before enacting new laws or administrative measures.[lxiii]

While it is an important goal to make decisions according to consensus, especially since consensus is an important tenant of many Aboriginal justice systems, the Canadian government has not advanced to a stage of reaching consensus before making legislative and administrative decisions. Rather, in Canada the principles of democracy, good governance, and judicial justice are the ways in which decisions are reached. As mentioned earlier, the *Declaration* is to be interpreted "in accordance with the principles of justice, democracy,...good governance and good faith" maintaining that the "exercise of the rights set forth in this *Declaration* shall be subject only to such limitations as are determined by law…" Indeed, in other sections of the *Declaration* the standard is more consistent with current Canadian forms of governance in that the *Declaration* requires that "States shall undertake *effective consultations* with the indigenous peoples concerned" (emphasis added).

In general, the *Declaration* is both well balanced and flexible. It articulates repeatedly that it is to be interpreted so as to be in keeping with state laws and procedures so long as those laws and procedures are in keeping with international human rights obligations.[lxiv] Yet, this paper argues that the Canadian Government may have been more willing to support the *Declaration* if the wording had been less prescriptive as outlined in this section. Perhaps less threatening language could have been arrived at if the Canadian Government had continued to participate in the negotiations that led to the final wording of the *Declaration* instead of abandoning the project during the drafting process.

Part VI: Conclusion: The Canadian Government needs to be guided by the *Declaration* given the Government's failure to protect the interests of Aboriginal peoples to date.

In conclusion, this paper argues that the government of Canada would do well to govern itself by the principles articulated in the *Declaration*. This section focuses on the ways in which the Canadian government has failed as of yet to protect, preserve, and promote the interests of its Aboriginal people.

As already articulated in this paper, there is much support for the *Declaration* both within Canada and internationally. On April 8th 2008 the House of Commons passed by majority vote a resolution to support the *Declaration*.[lxv] The minority Conservative government were the one party that opposed the resolution. The Conservative party is under continued pressure to support the *Declaration*. In June 2008, a Liberal Member of Parliament introduced Bill C-659. Bill C-659 if passed would ensure Canadian domestic laws are consistent with the *Declaration*.[lxvi]

Aboriginal leaders Regional Chief Picard, National Chief Phil Fontaine, and the Native Women's Association of Canada, to name a few, continue to lobby for support of the *Declaration*. Even without formal support by the Canadian government, they see promise in the international adoption of the *Declaration*. Fontaine argues that the *Declaration*'s international standing can benefit Aboriginal Canadians despite Canada's refusal to vote in favour of the *Declaration*:

> This *Declaration* prescribes an internationally accepted standard for dealings between States and their Indigenous peoples. At the end of the day, despite its opposition to the *Declaration* on September 13th [2007], Canada's actions and relationship with the Aboriginal peoples in Canada will be judged in accordance with the norms set out in the *Declaration*. [lxvii]

Fontaine goes on to encourage Aboriginal Peoples of Canada to rely on the *Declaration* along with the Canadian *Constitution Act, 1982* in pursuing recognition of Aboriginal rights.

The Native Women's Association of Canada also asserts that the *Declaration* can be used to protect Indigenous interests despite the Government of Canada's disapproval of the *Declaration*. In an open letter to all political parties dated September 12th, 2008, the Native Women's Association of Canada stated that "Human rights Declarations become universally applicable upon their adoption by the UN [United Nations] General Assembly, regardless of how individual states vote."[lxviii] The overwhelming support for the *Declaration* among United Nations member states definitely gives credence to the international support and recognition for the rights of Indigenous peoples. The issue of whether or not the *Declaration* is automatically a human rights instrument that can be applied internationally regardless of individual member states' disapproval of the *Declaration* is a hotly contested issue. The fact that the *Declaration* is not

legally binding is important to keep in mind when determining to what extend human rights advocates in Canada should rely on the *Declaration* when advocating for Indigenous rights.

Upon reading the *Declaration*'s goals, it is difficult to decipher why the Canadian Government would oppose its implementation. A non-binding text, the *Declaration* sets out individual and collective rights of Indigenous peoples. The *Declaration* emphasizes the rights of Indigenous peoples to maintain and strengthen their own institutions, cultures and traditions and to pursue their development in keeping with their own needs and aspirations. Further, it asserts Indigenous people's rights to culture, gender equality, land, resources, identity, language, employment, education, and health.[lxix] All of these factors are areas the Canadian government fails to adequately address given the present glaring statistical inequality between Canada's Aboriginal and non-Aboriginal peoples.

In Canada, Indigenous people are listed as sixty-third on the United Nations international living index despite the Canadian population in general ranking as the ninth richest country in the world.[lxx] This great disparity is unacceptable and contradicts Canada's commitment to achieving the United Nations Millennium Development Goals.

In 2000, the United Nations set out eight Millennium Development Goals to improve the standards of living of people around the world in an attempt to end the great disparity between those who have excessive wealth and those whose basic needs are not met. These goals are the eradication of extreme poverty and hunger, universal primary education, promotion of gender equality and empowerment of women, insuring environmental sustainability, improving maternal health, reducing child mortality, combating life threatening diseases such as HIV/AIDS, and developing global partnerships for development.[lxxi] All of the indicators of health and development of the Millennium Development Goals are markedly worse among Canadian Aboriginal peoples than the non-Aboriginal Canadian society.[lxxii]

Take for instance the deplorable situation for the Algonquins of Barriere Lake, Quebec. At the United Nations Permanent Forum on Indigenous Issues the observer from the Algonquins of Barriere Lake made the situation known to the world. In 1962, the population of approximately 450 Algonquin people of Barriere Lake were marginalized onto a tiny fifty-nine acre reserve.[lxxiii] A 1991 agreement with the governments of Canada and Quebec had provided for an integrated resource management plan for the Algonquin territory, but in 2001 the federal government had withdrawn its support for the agreement. This constituted a serious violation of domestic and international obligations in respect of Indigenous peoples.[lxxiv]In a letter submission to the United Nations Permanent Forum on Indigenous Issues dated April 29th, 2008, the people of Barriere Lake outlined the dire straights they are facing.[lxxv] They have a population of 450 people living in only sixty homes. Most of these homes have been condemned by Health Canada. Quebec's Youth Protection Agency is refusing to allow infants born in Quebec hospitals to return to this Indigenous community from the hospital because of the dangerous housing conditions. This situation is deplorable. In a wealthy country like Canada, no one, let alone the majority of an entire community, should be forced to live in sub-standard housing that is deemed unsafe for infants by Health Canada. Further, the Federal Government's decades of neglect and

mismanagement of the community's education services is evident in the serious age-grade deficiencies under the Federal administration of the school on the reservation.

The life expectancy of an Aboriginal person in Canada is a full seven years shorter than a non-Aboriginal Canadian. The Canadian Department of Indian and Northern Affairs Canada sites this seven year life expectancy gap as an issue of social development.[lxxvi] Most Aboriginal people live at or below the poverty line.[lxxvii] In Western Canada, four times as many Aboriginal people in urban centres as non-Aboriginal citizens live in poverty.[lxxviii] First Nations advocate Vera Pawis Tabobondung, president of the National Association of Friendship Centres, points to the fact that First Nations children are the poorest in the country.[lxxix]

In terms of physical health, Aboriginal peoples suffer a rate of tuberculosis six times greater than the national incidence of this disease[lxxx] which is more characteristic of developing countries than an industrialized country such as Canada. Rates of disabilities for Aboriginal children are double that of other Canadians.[lxxxi] Many of these statistics were released in the 2006 report entitled Oh Canada! Too Many Children in Poverty for Too Long[lxxxii] which was compiled by a coalition of Aboriginal advocacy groups nationally.

All of these statistics speak to the fact that the Canadian Government needs to seriously reform policies affecting Aboriginal peoples to close these social gaps. Supporting the Declaration and embracing its vision of empowerment for Aboriginal peoples is imperative. This paper has employed an intersectional analysis of how the Government of Canada's decision to not support the *Declaration* affects Canadian Aboriginal peoples and Canada as a whole from the inter-related concepts of gender, poverty, and environmental consequences.

The Aboriginal peoples of Canada are not benefiting equally from Canada's wealthy economy and social safety nets. Ratification of the *Declaration* would be a strong step toward actually addressing the systemic inequalities that culminate in the fact that Aboriginal peoples in Canada have a life expectancy seven years shorter than their non-Aboriginal contemporaries. The Government of Canada has failed to adequately protect, preserve, and promote the interests of Indigenous peoples. Supporting the *Declaration* through passing Bill C-659 to ensure that Canadian domestic laws are consistent with the *Declaration* would be a strong step in the right direction toward improving the lived reality of Indigenous peoples in Canada as well as returning Canada to its previous place as an international leader in human rights advocacy.

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