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129 St.Clair Ave. W.  
Toronto Ontario  
Canada M4V 1N5  
tel: 416.463.5312  
toll-free: 1.877.403.8933  
fax: 416.463.5569  
www.kairoscanada.org



## Canada's Aboriginal Policy: Discriminatory and Disingenuous

### A Brief to the U.N. Committee on the Elimination of Racial Discrimination on the Occasion of the Examination of the Seventeenth and Eighteenth Periodic Reports Submitted by Canada.

Submitted by:

#### **KAIROS: Canadian Ecumenical Justice Initiatives Aboriginal Rights Program**

211 – 211 Bronson Avenue,  
Ottawa, Ontario, CANADA K1R 6H5  
613.235.9956  
[ebianchi@kairoscanada.org](mailto:ebianchi@kairoscanada.org)  
[www.kairoscanada.org](http://www.kairoscanada.org)

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## Summary

The Canadian churches and church organizations that form KAIROS remain profoundly concerned by Canada's longstanding refusal to comply with its international human rights obligations, particularly in regards to the promotion and enforcement of the human rights of Aboriginal peoples. Admittedly, Canada's reputation as a protector of human rights both domestically and internationally is, for many reasons, well deserved. However, it continues to abuse the human rights of Aboriginal peoples by adhering to discriminatory policies that have been repeatedly condemned by both national and international human rights organizations, and despite repeated recommendations from UN treaty bodies to change those policies and have them comply with international human rights treaties, including the Convention on the Elimination of All Forms of Racial Discrimination.

Recent decisions by the federal government since its election in 2006 at both the international and national levels indicate a profound lack of commitment to Aboriginal peoples' rights. Internationally, Canada's decision to oppose adoption of the UN Declaration on the Rights of Indigenous Peoples at both the Human Rights Council in June and the Third Committee in December, not only jeopardizes the Declaration's survival, but also leaves Aboriginal peoples in Canada with little hope of seeing their rights promoted and protected. Notably, Canada's decision was taken unilaterally, and without consultation with Aboriginal peoples in Canada. In this regard, according to the Assembly of First Nations, the government "failed to uphold the honour of the Crown in its dealings with Indigenous Peoples in Canada. At the very least, it also violated its constitutional duties to consult Indigenous peoples and, where appropriate, accommodate our concerns."<sup>1</sup>

Canada's stated reasons for blocking the Declaration are particularly disturbing. Apart from being largely erroneous and misleading,<sup>2</sup> they also reinforce discriminatory myths and stereotypes about Aboriginal peoples. As well, Canada's arguments for opposing the Declaration represent a systemic pattern of government misinformation designed to generate fear and apprehension among Canadians by associating the protection and promotion of Aboriginal rights with a loss of rights and a drop in standard of living for non-Aboriginal Canadians.

Domestically, one of the current federal government's first decisions was to abandon support of the Kelowna Accord, an historic agreement reached in November 2005 between Aboriginal peoples and all levels of government in Canada. Celebrated as an example of shared, government-to-government decision making that included Aboriginal peoples, it was designed to address Aboriginal poverty and marginalization in the areas of education, health, housing and economic opportunities. Significantly, it would have implemented programs and initiatives created by Aboriginal peoples. The federal

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<sup>1</sup> *Patterns of Deception: Canada's Failure to Uphold the Honour of the Crown. A Commentary on the Government of Canada's Paper: "Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples-June 29, 2006."* Assembly of First Nations, November 2006. Page 2.

<sup>2</sup> *Ibid.* Page 1.

government's unilateral decision to not fulfill the agreement reached in Kelowna with the leaders of the provincial and territorial governments and Aboriginal leaders has been met with broad criticism from all sectors of society, including the provinces that signed the Accord.

Although troubling, Canada's actions should not be surprising to those familiar with its record of ignoring the recommendations of treaty bodies designed to enhance compliance with its human rights obligations. As Canada's refusal to protect Aboriginal peoples' rights is a major factor in their ongoing impoverishment, it is essential that all steps be taken to ensure that Canada enhance its compliance with human rights obligations. As one of the world's richest nations, Canada has no excuse for failing to uphold these obligations. Rather than be the target of repeated condemnation by both national and international human rights bodies for violating Aboriginal peoples' rights, Canada should be an example to the rest of the world of how all peoples can benefit from the promotion and protection of human rights.

To demonstrate how Canada continues to abuse Aboriginal peoples' rights and violate its international human rights treaty obligations, KAIROS' submission will look at two federal government policies that are crucial to ensuring Aboriginal peoples have access to and use of lands and resources – the Comprehensive Land Claims Policy and the Specific Land Claims Policy. Rather than address the human rights concerns of Aboriginal peoples by revising these discriminatory policies, Canada insists on retaining them, thereby impeding the efforts of Aboriginal peoples in Canada to promote and protect their rights, including their right to self-determination, and contributing to their social and economic displacement.

KAIROS' submission will also examine the specific case of the Lubicon Cree, a situation that is well known to the United Nations. Further, as an example of how Canada perpetuates racism against Aboriginal Peoples, this submission will look at Canada's reasons for blocking UN adoption of the Declaration on the Rights of Indigenous Peoples. Finally, the failure to fulfill the Kelowna Accord, a recent illustration of the Canadian government's disregard for Aboriginal peoples' rights, will be explored.

### **Federal Comprehensive Land Claims Policy**

In paragraph 38 of its 17<sup>th</sup> and 18<sup>th</sup> periodic report Canada states: "Certainty with respect to the content and scope of ownership of and land rights to use land and resources is one of the primary goals" of the Comprehensive Land Claims Policy.<sup>3</sup>

As such, the Comprehensive Land Claims Policy speaks directly to CERD's General Recommendation No. 23 which calls on States "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally

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<sup>3</sup> 17<sup>th</sup> and 18<sup>th</sup> periodic reports to CERD, CERD/C/CAN/18, 5 April 2006, page 13, paragraph 38.

owned or otherwise inhabited or used without their informed consent, to take steps to return those lands and territories.”

In the Rapporteur’s advance questions in connection with the consideration of it’s report, Canada is asked to comment on “the concern expressed by the Committee on Economic, Social and Cultural Rights (CESCR) in its concluding observations that the new approaches adopted by the State party to the issue of the Aboriginal rights on land and resource ownership do not differ much from the previously taken extinguishment and surrender approach.”<sup>4</sup>

This concern was echoed by the Human Rights Committee (HRC) following its review of Canada in December, 2005: “The Committee, while noting with interest Canada’s undertakings towards the establishment of alternative policies to extinguishment of inherent aboriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of aboriginal rights.” The HRC recommended that Canada “re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights.”<sup>5</sup>

Similar recommendations were made by the Committee on the Rights of the Child in 2003, by CERD in 2002, by the Human Rights Committee in 1999, and by CESCR in its 1998 Concluding Observations on Canada’s third periodic report wherein it recommended that “policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.”<sup>6</sup>

In paragraph 39 of its 17<sup>th</sup> and 18<sup>th</sup> periodic report Canada states that it no longer requires the extinguishment of Aboriginal rights in the negotiation and settlement of land treaties with Aboriginal peoples. “The ‘cede, release and surrender’ approach, which requires Aboriginal groups to give up all undefined Aboriginal rights in exchange for a set of defined Aboriginal rights set out in a negotiated treaty, has not been a requirement for the Government of Canada in treaty negotiations since 1998.”<sup>7</sup>

Instead of the extinguishment approach, Canada says it has developed “alternative techniques” whereby certainty is achieved while Aboriginal rights are maintained. These techniques include a ‘modified rights model’ and a ‘non-assertion model’. According to Canada, under the ‘modified rights model’ “aboriginal rights are not released, but are modified into the rights articulated and defined in the treaty,” while under the ‘non-

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<sup>4</sup> CERD, Questions put by the Rapporteur in connection with the consideration of the 17<sup>th</sup> and 18<sup>th</sup> periodic reports of Canada (CERD/C/CAN/18), Seventieth session, 19 Feb-9 Mar 2007. Question 19, page 3.

<sup>5</sup> UN HRC, Concluding Observations, 2005. CCPR/C/CAN/CO/5, paragraph 8.

<sup>6</sup> *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, UN CESCR, 1998, UN Doc. E/C.12/1/Add.31, paragraph 18.

*Concluding Observations of the Committee the Elimination of Racial Discrimination*, UN CERD, 2002, A/57/18, paragraphs 330-331.

*Concluding Observations of the Committee on the Rights of the Child*, UN CRC, 2003, CRC/C/15/Add.215, paragraph 59.

<sup>7</sup> 17<sup>th</sup> and 18<sup>th</sup> periodic reports to CERD, CERD/C/CAN/18, 5 April 2006, page 13, paragraph 39.

assertion model' "aboriginal rights are not released; the Aboriginal group agrees to exercise only those rights articulated and defined in the treaty and to assert no other Aboriginal rights."<sup>8</sup>

While Canada may no longer use the word "extinguishment", the effects are the same. While the rights and title of the Nisga'a and Tlicho peoples may continue to "exist" after signing a treaty under the 'modified rights model' and the 'non-assertion model' respectively, those peoples can no longer exercise those rights. As the U.S. representative on the Human Rights Committee asked during Canada's review in December 2005, how does this differ from extinguishment?

According to UN Special Rapporteur Rodolfo Stavenhagen in his Report on his Mission to Canada, some Aboriginal Peoples "consider releasing their constitutionally recognized and affirmed rights through a negotiated settlement as unacceptable." Mr. Stavenhagen adds that notwithstanding assurances from the Government of Canada that land rights agreements (modern treaties) do not imply the extinguishment of rights, "a number of Aboriginal representatives who met with him consider that the modern treaties approach does in fact continue to lead to the 'release' or extinguishment of rights."<sup>9</sup>

In its responses to the CESCR's list of issues in connection with its fourth periodic report, Canada explains that it was "within the context of the Tlicho negotiations [that] the non-assertion certainty technique was developed" and states that "the Tlicho nation does not surrender Aboriginal rights, rather they agree not to exercise or assert any land or natural resource rights other than those set out in the agreement. With respect to Aboriginal rights other than land rights, the Tlicho agreement provides an orderly process for bringing additional rights into the treaty by agreement or as a result of a court decision."

The Tlicho Land Claims and Self-Government Act (Bill C-14) received Royal Assent on February 15, 2005. Section 2.6.1 of the Act says the Tlicho "will not exercise or assert (a) an Aboriginal right, other than any right set out in the Agreement; (b) any Treaty 11 right, other than the right respecting annual payments to the Indians or the right respecting payment of the salaries of teachers ...; (c) any right under another treaty concluded before 1975; or (d) any right ...in relation to Métis or half-breed scrip or money for scrip."

Section 2.6.2 states the purpose of 2.6.1 is "to enable the Tlicho (a) to exercise and enjoy all their rights...that are set out in the agreement; and (b) to release all other persons and governments of any obligation in relation to any right that, under 2.6.1, the Tlicho First Nation and the persons who comprise it agree not to exercise or assert and to enable all other persons and governments to exercise and enjoy all their rights...as if the rights, that under 2.6.1 the Tlicho First Nation and persons who comprise it agree not to exercise or assert, did not continue to exist." In addition, the Agreement forces the Tlicho Nation "to release government and all other persons from all claims...in relation to (a) any land right

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<sup>8</sup> Idem.

<sup>9</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN CHR, 61<sup>st</sup> Session, E/CN.4/2005/88/Add. 3 (2004), paragraphs 20 & 91 [*Mission to Canada*]

that is an Aboriginal right; (b) any land right that is a treaty right and that, under 2.6.1, they agree not to exercise or assert; or (c) any right that is described in 2.6.1 (d).”<sup>10</sup>

The federal government has so far refused to change its Comprehensive Land Claims Policy, which covers Aboriginal land claims not covered by treaty. Notwithstanding Canada’s assurances, the policy requires Aboriginal peoples to relinquish their rights or title to significant shares of their traditional lands as a condition of settlement. Not surprisingly, Aboriginal peoples do not agree that these rights should be relinquished in order to share their territories with others. Often, the land base that remains with the Aboriginal community is insufficient to allow Aboriginal peoples to promote their right to development and self-determination and for this reason many communities refuse to participate in the federal comprehensive claims negotiation process.

In 1999, the UN Human Rights Committee asked that the federal practice of extinguishing inherent Aboriginal rights be abandoned because it violated Article 1 of the International Covenant on Civil and Political Rights. Article 1 requires that all peoples “... must be able to freely dispose of their natural resources and wealth and ... may not be deprived of their own means of subsistence.” Extinguishment also violates several significant principles of Canadian law and the Constitution (section 35), which recognize and affirm the treaty and inherent rights of Aboriginal peoples, including the right of self-determination.

Despite repeated requests by various UN Treaty Bodies, Canada seems to be moving towards broadening the scope of extinguishment. For their part, Aboriginal peoples continue to seek a process where Aboriginal title and rights to land are acknowledged, and where resource revenue sharing is a consequence of negotiating treaties with governments.

**QUESTIONS for Canada:**

- Why does Canada continue to implement a policy that is in violation of the human rights of Aboriginal peoples?
- Why does Canada continue to delay the resolution of land rights issues in Canada by adhering to a policy that prevents Aboriginal peoples from being able to implement their rights to self-determination?

**KAIROS calls on the Canadian government to:**

- Use Recommendation 2.2.6 of the Royal Commission on Aboriginal Peoples as the basis for a new comprehensive claims policy: *The federal government establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:*
  - (a) *The blanket extinguishment of Aboriginal land rights is not an option.*
  - (b) *Recognition of rights of governance is an integral component of new treaty relationships.*

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<sup>10</sup> *Land Claims and Self-government Agreement Among the Tlicho First Nation as Represented by the Dogrib Treaty 11 Council and the Government of the Northwest Territories and Government of Canada*, pages 25-27. Initialled September 4, 2002. Online: [http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr\\_e.html](http://www.ainc-inac.gc.ca/pr/agr/nwts/tliagr_e.html)

- (c) *The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Métis nations.*
- (d) *Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationship with the Crown.*

## **Federal Specific Claims Policy**

According to the Auditor-General of Canada, Specific Claims are claims “that arise from alleged non-fulfillment of Indian treaties already in place and other lawful obligations, or the improper administration of lands and other assets under the Indian Act or other formal agreements. Claims for alleged breaches of the government's obligations can include: The non-fulfillment of a treaty or other agreement provision [between a First Nation and the government]; the breach of an Indian Act or other statutory responsibility; the breach of an obligation arising out of government administration of First Nations funds or other assets; or an illegal sale or other disposition of First Nation land by government.”<sup>11</sup>

The need for an effective, independent claims body is indisputable. From 1970 to 2006 successive governments in Canada have resolved only 275 of the 1,337 Specific Claims submitted, leaving approximately 861 claims unresolved.<sup>12</sup> In other words, about seventy per cent (or approximately 445) First Nations in Canada have claims in the Specific Claims system.

In 2006 the Standing Committee on Aboriginal Peoples, of the Senate of Canada, was “authorized to examine and report on the general concerns of First Nations in Canada related to the federal Specific Claims process, the nature and status of the Government of Canada's Specific Claims policy, the present administration of the policy, the status of the Indian Specific Claims Commission, and other relevant matters with a view to making recommendations to contribute to the timely and satisfactory resolution of First Nations' grievances arising out both their treaties with the federal Crown and the Government of Canada's administration of their lands, monies, and other affairs under the *Indian Act*.”<sup>13</sup>

The federal government's Senate Standing Committee found the Specific Claims process to be “fraught with delay and so ineffective as to be working to the detriment of the government's stated objectives....one witness estimated it could take ninety years to deal with the backlog at the present rate of ten or less a year.”

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<sup>11</sup> *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 8 October 2006, Sheila Fraser, Auditor General of Canada.

<sup>12</sup> Canada: Department of Indian Affairs and Northern Development (DIAND), Specific Claims Branch, National Mini-Summary available on-line at: [http://www.aincinac.gc.ca/ps/clm/nms\\_e.pdf](http://www.aincinac.gc.ca/ps/clm/nms_e.pdf)

<sup>13</sup> NEGOTIATION OR CONFRONTATION: IT'S CANADA'S CHOICE - Final Report of the Standing Senate Committee on Aboriginal Peoples - Special Study on the Federal Specific Claims Process, page ii. December 2006



“The Committee heard that First Nations are extremely frustrated with the process. They see conflict of interest in a system wherein the government judges and compensates for claims made against it. Even though the policy is intended as an alternative to the courts, the Committee heard that the process is confusing, complicated, time-consuming, expensive, adversarial, and legalistic. As it stands, First Nations have little practical recourse to either mediation or the courts.”<sup>14</sup>

According to Rodolfo Stavenhagen, *the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, “Aboriginal critics indicate that at the current rate, outstanding land claims will take many centuries to be **addressed and that the settlements represent in total only a tiny fraction of the ongoing value of the lands and resources being accrued by non-native governments and citizens** (emphasis added).”<sup>15</sup>

This means that First Nations are denied the land and resources they need to implement their rights to health, employment, development and self-determination. As is stated in the Royal Commission “*Aboriginal nations need more territory to become economically, culturally and politically self-sufficient*”.

The current federal Minister of Indian Affairs, Jim Prentice, was the former Co-Chair of the Indian Claims Commission, which was responsible for the negotiation and settlement of Specific Claims. In 1991 Mr. Prentice said: “The settlement of specific land claims is fundamentally a human rights issue,” and Canadian society ultimately will be judged by how it handles settlement of such claims.<sup>16</sup> In November 2006 the Minister told the Senate Committee that: “At the end of the day, in cases where they are legitimate, [Specific Claims] are moral and legal obligations on the part of the people of Canada toward First Nations.”<sup>17</sup>

The Senate Committee noted that “Specific Claims settlements are not discretionary spending. They are compensation and remedy for a past wrong.

“First Nations cannot wait any longer to be empowered by the settlement of their Specific Claims. These settlements must provide First Nations with justice, with resources, and with a fair and reasonable opportunity to make important decisions about their own future and welfare.”<sup>18</sup>

The Senate committee concluded, “the current Specific Claims process is not an intelligent way to seek resolution, and that Specific Claims have moral, human rights, financial, economic, political, and legal dimensions.”

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<sup>14</sup> *NEGOTIATION OR CONFRONTATION*, page v.

<sup>15</sup> Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN CHR, 61<sup>st</sup> Session, E/CN.4/2005/88/Add. 3 (2004), paragraphs 45 [*Mission to Canada*]

<sup>16</sup> *Indian Claims Commission Media Release*, 3 December 2001, available at [http://www.indianclaims.ca/pdf/prenticeresignation\\_eng.pdf](http://www.indianclaims.ca/pdf/prenticeresignation_eng.pdf)

<sup>17</sup> *Proceedings*, 1 November 2006

<sup>18</sup> *NEGOTIATION OR CONFRONTATION*, page 40.

The Committee recommended:

- an increase in funds available for settlements
- the establishment of an independent body within two years
- adequate resources for the existing process
- the adoption of new guiding principles.<sup>19</sup>

In our 2002 submission to CERD, KAIROS cited this quotation from the 1996 Royal Commission on Aboriginal Peoples (RCAP): “*Aboriginal peoples must have room to exercise their autonomy and structure their own solutions. The pattern of debilitating and discriminatory paternalism that has characterized federal policy for the past 150 years must end.*” RCAP stressed, “*The rebalancing of political and economic power between Aboriginal nations and other Canadian governments represents the core of the hundreds of recommendations contained in this report* (RCAP 1996, Vol. 1:1-3). Among RCAP’s principal recommendations is that Aboriginal peoples be provided with lands sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy (Vol. 2:574).

**QUESTION for Canada:**

- The Senate Standing Committee on Specific Claims is warning of more blockades and violent confrontations between Aboriginal and non-Aboriginal peoples unless Ottawa starts setting aside \$250-million a year to settle land-claim disputes. Is Canada prepared to make this kind of investment?

**KAIROS calls on the Canadian government to:**

- Use Recommendation 2.4.2 of the Royal Commission on Aboriginal Peoples as the basis for revising the Specific Claims process: *Federal, provincial and territorial governments, through negotiations, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.*

**Lubicon Cree First Nation**

Over the last quarter century, the Lubicon Cree have seen the land on which they depend transformed by logging and large-scale oil and gas extraction to which they’ve never consented. The Lubicon, an Indigenous nation of 500 people living in northern Alberta, have never surrendered their rights to their traditional lands. The Lubicon were overlooked when a treaty was negotiated with other Indigenous peoples in the region in 1899.

In the 1970s, the Alberta government initiated a program of massive oil and gas development on what it considered to be Crown land. The Lubicon say that their health, their way of life and their culture itself have been devastated by these developments.

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<sup>19</sup> *NEGOTIATION OR CONFRONTATION*, page vi.

And the Lubicon have fought for respect of their rights in Canadian courts and before the United Nations Human Rights Committee (UNHRC).

In March 1990, the UNHRC concluded that “historical inequities” and “more recent developments” have endangered the way of life and the culture of the Lubicon Cree. The Committee ruled that “so long as they continue” these threats are a violation of the Lubicons’ fundamental human rights. At the time, the Canadian government assured the UNHRC that it was seeking a settlement that would protect the rights of the Lubicon. To date, however, no such settlement has been reached. In fact, it has been more than two years since there were any negotiations between the Lubicon and the Canadian government. In the meantime, licenses continue to be granted to allow resource extraction on the disputed territories, such as the rights granted to the oil sands industry as recent as June 14, 2006.

In October 2005, the UNHRC once again criticized the Canadian government for its failure to protect the rights of the Lubicon Cree. The Committee called on Canada to “make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licenses for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant.”

Again, on May 1, 2006 the Lubicon Cree made a submission to the 36<sup>th</sup> Session of the United Nations Committee on Economic, Social and Cultural Rights. Lubicon representatives pointed out that UNCESCR had called upon Canada in 1998 “to take concrete and urgent steps to restore and respect an Aboriginal land and resource base adequate to achieve a sustainable Aboriginal economy and culture”.

On May 19, 2006 the concluding observations of the 36<sup>th</sup> Session of the United Nations Committee on Economic, Social and Cultural Rights were released. Echoing the 2005 decision of UN Human Rights Committee which found Canada in continuing violation of the International Covenant on Civil and Political Rights, the UNCESCR decision reads as follows:

“The Committee strongly recommends that the State party (Canada) resume negotiations with the Lubicon Lake Band, with a view to finding a solution to the claims of the Band that ensures the enjoyment of their rights under the (International Covenant on Economic, Social and Cultural Rights). The Committee also strongly recommends the State party (Canada) conduct effective consultation with the Band prior to the grant of licences for economic purposes in the disputed land, and to ensure that such activities do not jeopardize the rights recognized under the (International Covenant on Economic, Social and Cultural Rights).”

**QUESTIONS for Canada:**

- Why has Canada not resumed negotiations in good faith with the Lubicon Cree First Nation, sixteen years after UNHCR's initial conclusions?
- Why does Canada continue to grant licenses to resource extraction on the territory of the Lubicon Cree First Nation without their free, prior and informed consent?

**KAIROS calls on the government to:**

- Do everything in its powers to halt and prevent further resource extraction on Lubicon lands that do not have their free, prior and informed consent.
- Ensure that federal representatives have a mandate to negotiate all outstanding issues with the Lubicon Nation in good faith and to proceed immediately with negotiations towards a full and final settlement of this issue.

**The UN Declaration on the Rights of Indigenous Peoples**

At the UN Human Rights Council in June 2006, Canada was one of two countries to oppose adoption of the Declaration on the Rights of Indigenous Peoples. Subsequently, Canada aligned itself with the U.S., Australia and New Zealand to actively lobby African and Asian states – many of who violate the human rights of Indigenous peoples – to vote against the Declaration. On November 28, at the UN Third Committee, Canada's efforts were rewarded when a majority of States voted to support a non-action motion by the Namibian delegation to delay consideration of the Declaration until next year.

In vigorously opposing the Declaration, the government of Canada has made erroneous interpretations of what Indian Affairs Minister Jim Prentice has described as a “very radical” document. For instance, the government has said it is concerned that the Declaration's provisions on lands, territories and resources are too broad and unclear and therefore could be interpreted as supporting claims of ownership to traditional territories that were lawfully ceded to the government by treaty. However, human rights instruments are generalized in order to apply to various contexts and the Declaration, in itself, could never effectively support a claim to territories that were *lawfully* ceded.<sup>20</sup>

Another concern voiced by Canada is that the concept of free, prior and informed consent (FPIC) could be interpreted as giving veto power to Indigenous peoples. Article 32 (2) explains that it is an obligation for States to “consult and cooperate in good faith with indigenous peoples...in order to obtain their free and informed consent prior” to making decisions that affect the rights of certain Indigenous groups. FPIC is therefore not a veto over all matters of legislation and development, but an important means to ensure

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<sup>20</sup> *Patterns of Deception: Canada's Failure to Uphold the Honour of the Crown. A Commentary on the Government of Canada's Paper: "Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples-June 29, 2006."* Assembly of First Nations, November 2006. Page 20-21.

that states cannot unilaterally implement decisions or conduct activities that affect the rights of Indigenous peoples.<sup>21</sup>

The government has also stated that it is concerned the Declaration does not meet Canada's objectives of affirming the rights of indigenous peoples as well as non-Indigenous peoples. However international human rights law already provides ample promotion and protection of individual human rights and Article 45 of the Declaration reinforces this safeguard.

Lastly, the government claims the Declaration is inconsistent with the Canadian Charter of Rights, but this claim is mistakenly based on the reading of certain provisions in isolation and interpreting them as "absolute rights." Each statement must be considered in the context of the whole Declaration and all international laws.

The arguments put forth by the Conservative government are unsubstantiated and, some would say, amount to an act of fear mongering. By reversing the principled human rights position formerly taken by Canada under Liberal leadership, this administration has violated its domestic and international legal obligations, including its constitutional obligation to consult with Aboriginal peoples.

**QUESTIONS for Canada:**

- Despite evidence contrary to the arguments put forth by the government, why does Canada continue to oppose the Declaration on the Rights of Indigenous Peoples?
- In opposing the Declaration, does Canada oppose these same human rights standards as they are represented in other human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, among others?
- How is Canada planning to increase awareness and understanding of Aboriginal peoples' history and rights in order to address the myths and stereotypes that contribute to their ongoing discrimination and oppression?

**KAIROS calls on the Canadian government to:**

- Reverse its position on the UN Declaration on the Rights of Indigenous Peoples and work to ensure the General Assembly adopts the Declaration at the earliest time possible.

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<sup>21</sup> *Patterns of Deception: Canada's Failure to Uphold the Honour of the Crown. A Commentary on the Government of Canada's Paper: "Canada's Position: United Nations Draft Declaration on the Rights of Indigenous Peoples-June 29, 2006."* Assembly of First Nations, November 2006. Page 21-23.

## **The Kelowna Accord**

Established in November 2005, the Kelowna Accord was an agreement between Aboriginal peoples and federal, provincial and territorial First Ministers that set out benchmarks for addressing Aboriginal poverty and marginalization in the areas of education, health, housing and economic opportunities. For example, government and Aboriginal leaders agreed to reduce the housing gap between Aboriginal and non-Aboriginal people through new housing initiatives, changes to current housing delivery and provisions for social and affordable housing. In the spirit of the Accord, the Liberal government committed to investing \$5.1 billion over the next ten years to closing social and economic rights gaps between Aboriginal and non-Aboriginal people in Canada.

With the release of the federal budget last May, titled “Budget 2006 – Focusing on Priorities”, it was apparent that the Kelowna Accord is not one of the government’s priorities. The budget designates only \$150 million to Aboriginal communities for 2006-2007 (housing, water, and education) and \$300 million in 2007-2008. To reassure Aboriginal peoples, Indian Affairs Minister Jim Prentice has stressed that another \$600 million is earmarked for housing off-reserve and in the north, but this is contingent on the existence of a surplus in excess of \$2 billion from the 2005-2006 fiscal year. Regardless, the current budget falls far short of the \$5.1 billion Kelowna-pact.

The Conservative Members of Parliament and the Cabinet continue to skirt the Kelowna Accord by suggesting that it was not a formal agreement in the first place. However, Opposition parties and Premiers alike, lament the loss of this unprecedented, collaborative agreement to address the significant inequalities between Aboriginal and non-Aboriginal people. While the Conservative government admits the need to address the many socio-economic challenges facing Aboriginal peoples, it has not implemented alternate measures to ensure Aboriginal peoples are accorded the same rights and opportunities as non-Aboriginal people. This semantic debate illustrates the politicization of Aboriginal rights in Canada, which has been used to excuse government inaction on the most pressing social justice issue in Canada.

In its 2002 Concluding Observations on Canada’s thirteenth and fourteenth periodic reports (paragraph 15), the CERD expressed concern that “the process of implementing the recommendations adopted in 1996 by the Royal Commission on Aboriginal Peoples has not yet been completed” and that “no in depth information was provided.” This issue is raised again in paragraph 3 of the Rapporteur’s questions, which asks Canada to “Please indicate in detail which recommendations of the Royal Commission on Aboriginal Peoples were responded to and in what way.” The Kelowna Accord was an attempt by both federal and provincial governments to work with Aboriginal peoples in Canada on implementing some of those RCAP recommendations.

In its 2002 submission to CERD, KAIROS maintained that Canada had not made sufficient progress in complying with the CERD recommendation to expedite land rights negotiations, or in implementing the RCAP recommendations. The Government of Canada's decision to abandon the Kelowna Accord demonstrates a serious lack of commitment to the promotion and protection of Aboriginal peoples' economic, social and cultural rights.

**QUESTIONS for Canada:**

- Why has the Conservative government not supported the Kelowna Accord with sufficient funding?
- What is Canada's alternative plan for addressing the socio-economic gaps between Aboriginal and non-Aboriginal people?
- Is Canada prepared to report back to this Committee before its next scheduled review on how it plans to replace the funds promised under the Kelowna Accord?

**KAIROS calls on the Canadian government to:**

- Ensure sufficient funding to achieve the targets established at the meetings held in Kelowna, British Columbia in November 2005.

## Compilation of Suggested Questions & Recommendations for Canada

### Federal Comprehensive Land Claims Policy

#### QUESTIONS for Canada:

- Why does Canada continue to implement a policy that is in violation of the human rights of Aboriginal peoples?
- Why does Canada continue to delay the resolution of land rights issues in Canada by adhering to a policy that prevents Aboriginal peoples from being able to implement their rights to self-determination?

#### KAIROS calls on the Canadian government to:

- Use Recommendation 2.2.6 of the Royal Commission on Aboriginal Peoples as the basis for a new comprehensive claims policy: *The federal government establish a process for making new treaties to replace the existing comprehensive claims policy, based on the following principles:*
  - (a) *The blanket extinguishment of Aboriginal land rights is not an option.*
  - (b) *Recognition of rights of governance is an integral component of new treaty relationships.*
  - (c) *The treaty-making process is available to all Aboriginal nations, including Indian, Inuit and Métis nations.*
  - (d) *Treaty nations that are parties to peace and friendship treaties that did not purport to address land and resource issues have access to the treaty-making process to complete their treaty relationship with the Crown.*

### Federal Specific Claims Policy

#### QUESTION for Canada:

- The Senate Standing Committee on Specific Claims is warning of more blockades and violent confrontations between Aboriginal and non-Aboriginal peoples unless Ottawa starts setting aside \$250-million a year to settle land-claim disputes. Is Canada prepared to make this kind of investment?

#### KAIROS calls on the Canadian government to:

- Use Recommendation 2.4.2 of the Royal Commission on Aboriginal Peoples as the basis for revising the Specific Claims process: *Federal, provincial and territorial governments, through negotiations, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.*



## **Lubicon Cree First Nation**

### QUESTIONS for Canada:

- Why has Canada not resumed negotiations in good faith with the Lubicon Cree First Nation, sixteen years after UNHCR's initial conclusions?
- Why does Canada continue to grant licenses to resource extraction on the territory of the Lubicon Cree First Nation without their free, prior and informed consent?

### KAIROS calls on the government to:

- Do everything in its powers to halt and prevent further resource extraction on Lubicon lands that do not have their free, prior and informed consent.
- Ensure that federal representatives have a mandate to negotiate all outstanding issues with the Lubicon Nation in good faith and to proceed immediately with negotiations towards a full and final settlement of this issue.

## **The UN Declaration on the Rights of Indigenous Peoples**

### QUESTIONS for Canada:

- Despite evidence contrary to the arguments put forth by the government, why does Canada continue to oppose the Declaration on the Rights of Indigenous Peoples?
- In opposing the Declaration, does Canada oppose these same human rights standards as they are represented in other human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, among others?
- How is Canada planning to increase awareness and understanding of Aboriginal peoples' history and rights in order to address the myths and stereotypes that contribute to their ongoing discrimination and oppression?

### KAIROS calls on the Canadian government to:

- Reverse its position on the UN Declaration on the Rights of Indigenous Peoples and work to ensure the General Assembly adopts the Declaration at the earliest time possible.

## **The Kelowna Accord**

### QUESTIONS for Canada:

- Why has the Conservative government not supported the Kelowna Accord with sufficient funding?
- What is Canada's alternative plan for addressing the socio-economic gaps between Aboriginal and non-Aboriginal people?
- Is Canada prepared to report back to this Committee before its next scheduled review on how it plans to replace the funds promised under the Kelowna Accord?

### KAIROS calls on the Canadian government to:

- Ensure sufficient funding to achieve the targets established at the meetings held in Kelowna, British Columbia in November 2005.

***Appendix A: Information on KAIROS***

***KAIROS: Canadian Ecumenical Justice Initiatives*** – KAIROS unites eleven churches and religious organizations in work for social justice with partners in Canada and around the world. KAIROS is formed by the Anglican Church of Canada, Canadian Catholic Organization for Development and Peace, Canadian Conference of Catholic Bishops, Canadian Religious Conference, Christian Reformed Church in North America, Evangelical Lutheran Church in Canada, Mennonite Central Committee Canada, The Presbyterian Church in Canada, The Primate’s World Relief and Development Fund (PWRDF), Religious Society of Friends (Quakers), and The United Church of Canada.

KAIROS is committed to promoting principles of justice, peace and the protection of human rights, and advocates for social change. For three decades KAIROS’ member churches have worked to improve the relationship between Aboriginal and non-Aboriginal peoples in Canada by calling for: (1) recognition of Aboriginal title and nationhood; (2) implementation of Aboriginal land, treaty and inherent rights; and (3) affirmation of the historic rights of Aboriginal peoples as they are recognized in international law and the Canadian constitution, including the right to exercise their autonomy, structure their own solutions, and have access to sufficient land and resources.