September 23, 2014

Prime Minister Stephen Harper,
Foreign Affairs Minister John Baird
AANDC Minister Bernard Valcourt

We are writing to you on an urgent basis to express our extreme disappointment in Canada's positions and conduct yesterday at the High-Level Plenary Meeting known as the World Conference on Indigenous Peoples at the General Assembly in New York.

In his Opening Remarks, UN Secretary Ban Ki-moon set a high standard and principled tone for the Conference: "Indigenous peoples are central to our discourse of human rights and global development. Your deliberations and decisions will reverberate across the international community … The success of this Conference is integral to progress for all humanity."

All States in the General Assembly agreed by consensus to the Outcome Document. Canada was the sole State in the world that requested an Explanation of Vote (EOV). Since Canada was unprepared to speak, it indicated that it would provide its EOV in writing.

Our deep-seated concerns with Canada's EOV include the following.

Canada cannot accept para. 3 of Outcome Document on FPIC. Para. 3 reflects article 19 of the *UN Declaration*. Yet Canada indicated in its EOV: "Agreeing to paragraph 3 of the Outcome Document would commit Canada to work to integrate FPIC in its processes with respect to implementing legislative or administrative measures affecting Aboriginal peoples. This would run counter to Canada's constitution, and if implemented, would risk fettering Parliamentary supremacy." However, with the enactment of the *Constitution Act, 1982*, "the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy." (*Reference re Secession of Québec*, para. 72) In *Tsilhqot'in Nation*, the Supreme Court ruled that, in the absence of Aboriginal consent, "legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title." (para. 92)

FPIC constitutes a "veto". The term "veto" does not exist in the *UN Declaration*. Canada has never explained what constitutes "consent" and what "constitutes a "veto". Is "veto" absolute? Is "veto" synonymous with "consent"? The government has refused for years to discuss or explain its positions. The right to FPIC is not absolute. No rights in the *Declaration* are absolute, except for the right not to be subjected to genocide. In international human rights law, human rights are generally relative and not absolute.

Canada interprets FPIC as only consultation – not consent. This is incorrect. In *Tsilhqot'in Nation*, the Supreme Court used the term "consent" in 9 paragraphs and the "right to control" the land in 11 paras. The Court added that the "right to control" means "consent" must be obtained from Aboriginal titleholders. It is wrong for Canada to claim that para. 3 of the Outcome

Document – which reflects FPIC in the *Declaration* – would "run counter to Canada's Constitution". Canada cannot disregard the rulings of its highest Court.

Canada cannot support para. 4 of Outcome Document. Para. 4 indicates that States will "uphold the principles of the Declaration". The government is treating the principles in the *UN Declaration* as absolute and therefore inconsistent with Canadian law. In regard to the *Declaration*, Canada indicated in 2012 to the UN Committee on the Elimination on Racial Discrimination: "While [the *Declaration*] had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution." (CERD, Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39)

Canada contradicted its own endorsement. All of the above arguments by Canada contradict its own endorsement of the *UN Declaration*. In its endorsement, the government ultimately concluded: "We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework." In its EOV, Canada reproduced many aspects of its endorsement. However, the government intentionally omitted the above key conclusion. This constitutes bad faith. Canada has failed to uphold the honour of the Crown. Canada has misled the General Assembly, member States and Indigenous peoples globally.

Further, on 1 May 2008, over 100 scholars and experts in Canadian constitutional and international law signed an "Open Letter" indicating that the *Declaration* was "consistent with the Canadian Constitution and Charter ... Government claims to the contrary do a grave disservice to the cause of human rights and to the promotion of harmonious and cooperative relations." Your government was provided with a copy of the Open Letter in May 2008.

No customary international law in *Declaration*. According to the September 2010 Report to the UN Human Rights Council by former Special Rapporteur James Anaya, this position of Canada on customary international law is "manifestly untenable" (UN Doc. A/HRC/15/37/Add.1 (15 September 2010), para. 112). For example, it is widely accepted internationally that the prohibition against racial discrimination and the right of self-determination constitutes customary international law – both of which are in the *Declaration*. In regard to the right of self-determination, Canada argued it was customary international law before the Supreme Court in *Reference re Secession of Québec*. Moreover, according to the two human rights Covenants, Canada has an affirmative obligation to promote and respect this collective human right.

Canada as protector of Indigenous rights. It is inaccurate for Canada to claim that it "is committed to promoting and protecting the rights of Indigenous peoples at home and abroad". For example, Canada's impoverished position in the *Tsilhqot'in Nation* case that Aboriginal title as limited to small spots was soundly rejected by the Supreme Court. Canada's current attempt to undermine Indigenous peoples' status as "peoples" within the Convention on Biological Diversity is one of many international examples.

Canada's failure to consult Indigenous peoples. The ongoing failure to consult Indigenous rights-holders for many years leaves Canada in a position where it continues to violate the *UN*

Declaration and – before the "ink is dry" – the consensus Outcome Document for the WCIP. This repeated failure to consult violates Canada's duty under Canadian constitutional and international law.

As you are aware, Indigenous peoples in Canada and globally worked diligently and cooperatively with States for 30 years on the formulation, adoption and implementation of the *UN Declaration on the Rights of Indigenous Peoples*. It is unacceptable that Canada is the sole State in the world challenging this consensus human rights instrument – particularly with false arguments.

In light of the seriousness of the actions of the Canadian government, we respectfully call for a complete retraction of Canada's EOV without qualification. Should Canada fail to retract its EOV by 6 p.m. today, we will have no choice but to immediately write to the President of the General Assembly, member States and Indigenous peoples globally to express the above concerns and challenge the veracity of Canada's EOV.

Respectfully,

Assembly of First Nations

Native Women's Association of Canada

Grand Council of the Crees (Eeyou Istchee)

First Nations Summit

Federation of Saskatchewan Indian Nations

Indigenous World Association

Amnesty International Canada

Canadian Friends Service Committee

Union of BC Indian Chiefs

American Indian Law Alliance