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Measuring the Federal Government's Commitment to Aboriginal Rights

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The Kelowna Accord and the UN Declaration on the Rights of Indigenous Peoples are regarded as two important instruments to address human rights issues facing Aboriginal peoples in Canada. This briefing paper examines the current federal government's position on these two agreements as a way of measuring its commitment to Aboriginal peoples' rights.

The UN Declaration on the Rights of Indigenous Peoples has been under development for more than 20 years, making it one of the most intensely debated and carefully scrutinized human rights instruments in UN history. Uniquely, the primary beneficiaries of the Declaration, Indigenous peoples themselves, have been an integral part of its development. Unfortunately, the Conservative government of Prime Minister Stephen Harper decided to oppose the Declaration at several key UN votes, which could prevent the UN General Assembly from ever adopting the Declaration.

The Conservative government has also demonstrated a lack of commitment to Indigenous peoples' rights in its decision to not honour the Kelowna Accord, a move that has drawn widespread condemnation from Aboriginal peoples and their supporters, as well as from federal and provincial politicians who were involved in its creation.

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 \$1.2 billion over the next ten years towards Aboriginal housing.

At a recent meeting of the parliamentary Standing Committee on Aboriginal Affairs and Northern Development (SCAAND), AFN National Chief Phil Fontaine described the \$5.1 billion deal reached in Kelowna, British Columbia as a "comprehensive, practical approach" to ad-

ressing the mass poverty in Aboriginal communities, which he called "the single most important social justice issue facing the country."¹

Western premiers also lamented the Conservative government's decision to abandon the Accord. At the NDP convention in Quebec City in September, Manitoba Premier Gary Doer said: "It's the first time we had that kind of consensus and plan to move forward. With the wealth we have in Canada today, we have a moral obligation to invest...in inclusion for aboriginal people."²

However, the Kelowna Accord has some shortcomings of its own, one being that it is not a rights-based approach to Aboriginal issues and instead, is a charitable response to the basic human rights of Aboriginal people. Furthermore, even the Liberal commitment of \$5.1 billion is insufficient in fully addressing the immense challenges being faced by many Aboriginal people and communities in Canada.



AFN National Chief Phil Fontaine with Premiers at the Kelowna First Ministers' Meeting (Nov. 2005)
Photo: Russell Diabo

Canada's deficit on Aboriginal Housing

The inadequacy of Aboriginal housing is one manifestation of the marginalization and poverty experienced by Aboriginal peoples in Canada. In 1996, the Royal Commission on Aboriginal Peoples (RCAP) reported that "aboriginal housing...[is] in a bad state, by all measures falling below the standards that prevail elsewhere in Canada and threatening the health and well-being of Aboriginal people."³ On reserve there is an estimated shortage of nearly 35,000 housing units and this is expected to increase by 2,200 units every year.⁴ In 1996, approximately 13,400 homes needed repairs on reserve and 6,000 needed outright replacement.⁵

It is for these reasons that the UN Declaration on the Rights of Indigenous Peoples is so important. The Declaration establishes a set of international standards that provide guidance for governments in terms of how certain rights relate to the specific situations of Aboriginal peoples. In the case of the Conservative government, their position on the Kelowna Accord reflects their disregard of the right of Indigenous peoples to an adequate standard of living. Thus, the Declaration, if adopted, could become a practical tool to hold the Canadian government accountable for their policy towards Aboriginal peoples, one that pushes the federal government to move beyond charitable impulses towards long-term, rights-based solutions.

Not quite Kelowna

Although the Conservative government professes a commitment to the benchmarks of the Kelowna Accord, the current federal budget reveals a significant gap between rhetoric and financial commitment. Released on May 2, 2006 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.⁶

Recognizing the gap between Conservative rhetoric and financial commitment, former prime minister, Paul Martin, introduced Private Member's Bill C-292, *An Act to Implement the Kelowna Accord*. This Bill encourages the Conservative government to implement the \$5.1 billion committed at the First Ministers' Meeting (FMM). The Bill is currently being discussed at SCAAND, after which it will go back to the House of Commons for a final vote. If approved, Bill C-292 may serve to pressure the government to invest more money into Aboriginal housing, education, health and economic development.

Critics of the Accord

While Phil Fontaine, Grand Chief of the Assembly of First Nations (AFN), is an avid supporter and proponent of the Kelowna Accord, Fontaine's position is not fully representative of the opinions of Aboriginal peoples, or of the AFN

itself. In fact, for some Aboriginal people the Accord represents the Canadian government's failure to fully recognize their rights.

In December 2005, chiefs from Quebec abstained from a resolution at the AFN general meeting affirming the Kelowna Accord on the basis that it did not effectively address the problem of Treaty Rights. Vice-chief Ghislain Picard explained that Quebec chiefs feel that respect and implementation of treaty and Aboriginal rights and the recognition of full access, control and jurisdiction over their lands, territories and resources is "the only sustainable means to alleviate the deplorable social and economic situations of many of [their] people."⁷ Also, the Quebec chiefs felt that the negotiation process must respect Canada's constitutional framework insofar as it creates a fiduciary obligation upon the federal government.⁸ Finally, Picard stated that the "pan-Aboriginal" process established at the FMM poses a threat to the status and rights of First Nations, since it neglects the distinct historical relationships and rights of First Nations.⁹

Former Neskonlith chief and Shuswap Nation Tribal Council chairman Art Manuel voiced a similar opinion at a protest in Kelowna during the FMM. He told *Windspeaker*, a national Aboriginal newspaper, that Assembly of First Nations National Chief Phil Fontaine was taking "totally the wrong approach" by meeting with the first ministers.¹⁰ Manuel argues that "the AFN...[has] let the Canadian government off-the-hook by unlinking programs and services from Aboriginal and Treaty Rights...[which] means we will be tied to cutbacks on services that the federal and provincial governments are presently subjecting Canadian citizens to."¹¹

There is also a fear that Phil Fontaine's preoccupation with the Kelowna Accord has trumped Aboriginal rights. As Mukwa argues in the *First Nations Strategic Bulletin*, issues such as land claims and self-government policy reform have become secondary, with program funding approaches taking up most of the time and resources of the AFN.¹²

Rights not charity

In 1996, RCAP emphasized that Aboriginal people do not want pity or handouts, but rather for Canada to assume responsibility for the problems resulting from the dispossession of Aboriginal lands and resources, destruction of their economies and social institutions, and denial of their nationhood.¹³ RCAP states that "for some years, organizations representing First Nations have contended that housing is part of compensation owed to them in return for giving up effective use of the bulk of the Canadian land mass, either through formal treaties or by other less formal means."¹⁴ For example, the Congress of Aboriginal Peoples argues that "they have a right to acquire housing with assistance provided by the Government as part of a fiduciary responsibility to Aboriginal peoples whether they are living on or off-reserve."¹⁵ These organizations further argue that if "the resources associated with the lands now

occupied by non-Aboriginal Canadians were still in the hands of its original possessors, there would be few serious housing problems among Aboriginal people today.”¹⁶ From this perspective, addressing the Aboriginal housing crisis as well as other poverty-related issues not only requires government funding, but the appropriate jurisdiction and restitution of land and resources necessary to develop sustainable solutions themselves.



Hon. Jim Prentice, then Aboriginal Affairs Critic for the Conservative Party, at Kelowna FMM protest (Nov 2005) Photo:Russell Diabo

The obligation of the Canadian government to address the poor social and economic conditions within many Aboriginal communities is articulated within its own Constitution. Section 35 (1) of the *1982 Constitution Act* states that “the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed.” Since many of the issues highlighted by the Kelowna Accord, such as housing and health, are recognized treaty rights, it is a Constitutional obligation of the federal government to provide the resources and create the circumstances necessary for Aboriginal people to achieve a decent standard of living. The large disparity in housing between Aboriginal and non-Aboriginal households is particularly damning of the government’s failure to live up to this obligation.

Furthermore, Canada needs to meet its international commitments. As a signatory of the United Nation’s International Covenant on Economic, Social and Cultural Rights, Canada recognizes “the right to an adequate standard of living...including adequate food, clothing and housing; and the right to the continuous improvement of living conditions” (Article 11). Canada’s commitment to the ICESCR is a legal obligation; therefore, failure to create the conditions for an adequate standard of living for Aboriginal people is a breach of international law.

Declaration on the Rights of Indigenous Peoples

Article 21 of the Declaration recognizes the right of indigenous peoples “to the improvement of their economic and social conditions, including...the areas of education, em-

ployment, vocational training and retraining, housing, sanitation, health and social security.” It also suggests that “states shall take effective measures and special measures to ensure continuing improvements of their economic and social conditions.” Furthermore, the Declaration affirms Indigenous peoples rights to self-determination, land, resources and development, all essential components to addressing Aboriginal poverty. The Declaration therefore effectively articulates the state’s responsibility towards the individual and collective rights of Indigenous peoples.

Unfortunately, the Canadian government continues to block progress on the Declaration. At the UN Human Rights Council in June 2006, Canada was one of two countries, the other being Russia, to oppose adoption of the Declaration. 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 the words of Grand Chief Ed John, “the most likely outcome [of the non-action motion] will be that the United Nations never formally adopts the Declaration.”¹⁷

In vigorously opposing the Declaration, the government of Canada has made erroneous interpretations of what Indian Affairs Minister 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.

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 that states cannot unilaterally implement decisions or conduct activities that affect the rights of indigenous peoples.

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 provi-

sions in isolation and interpreting them as “absolute rights.” Each statement must be considered in the context of the whole Declaration and all international laws.¹⁸

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, this administration has violated its domestic and international legal obligations, including its constitutional obligation to consult with Aboriginal peoples. More importantly, the government’s actions on the Declaration, especially when viewed as part of a larger strategy, including the Kelowna Accord, confirm what many Aboriginal peoples and their supporters have feared: this government is not committed to protecting Aboriginal peoples’ rights and is unwilling to take the necessary steps to alleviate their ongoing social and economic problems.

Beyond the Kelowna Accord: Recommendations to the Canadian Government

Because of the poverty experienced by many Aboriginal people and the federal government’s obligation to human rights, a greater commitment to the rights of Aboriginal peoples is required of the Canadian government. First, and most importantly, the federal government should ensure that Aboriginal peoples have the economic base necessary for them to address poverty issues, which involves the recognition of Aboriginal title to land and resources. Second, with regard to the right of self-determination, the Canadian government must financially and technically assist Aboriginal peoples to assume full jurisdiction over health, housing, education and governance, as has been detailed by RCAP. Third, the federal government has a moral and legal obligation to meet the basic human right of an adequate standard of living for all Aboriginal people, which requires the government to commit all the resources necessary to achieve this end. Finally, the Canadian government should reverse its position on the Declaration and work to ensure the General Assembly adopts the Declaration at the earliest time possible.

Ultimately, the federal government will need to move beyond the Kelowna Accord to fulfill its obligations to Aboriginal peoples. The poor social and economic conditions experienced by many Aboriginal people is not a matter of charity – it is a matter of justice. Therefore, with or without the endorsement of the United Nations, the Declaration on the Rights of Indigenous Peoples serves as a helpful standard for judging this government’s commitment to Aboriginal peoples’ *rights*, which, at this point in time, is very poor indeed.

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tice in Canada and around the globe. KAIROS Policy Briefing Papers are produced with the support of a grant from the International Development Research Centre, Ottawa, Canada.

Notes

¹ CBC News, Implement Kelowna deal on native poverty: Fontaine (Nov 21, 2006). Available on-line: <http://www.cbc.ca/canada/story/2006/11/21/fontaine-kelowna.html>

² Bruce Campion-Smith, “NDP slams Harper Tories: Conservatives have reversed gains, party,” Toronto Star, 9 September 2006.

³ Royal Commission on Aboriginal Peoples, Housing, vol. 3 of Report of the Royal Commission on Aboriginal Peoples (Ottawa: Government of Canada, 1996), 1.

⁴ Office of the Prime Minister, FMM – Government of Canada Invests in Immediate Action, 25 November 2005, available on-line: http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=archivemartin&Sub=newscommuniques&Doc=news_release_20051125_661_e.htm.

⁵ Royal Commission on Aboriginal Peoples, Gathering Strength from Report of the Royal Commission on Aboriginal Peoples; available on-line: http://ainc-inac.gc.ca/ch/rcap/rpt/g_s_e.html.

⁶ Department of Finance Canada, Budget 2006-Focusing on Priorities; Available on-line: <http://www.fin.gc.ca/budtoce/2006/budliste.htm>.

⁷ Paul Barnsley, “First Ministers’ Deal Gets Chiefs’ Approval,” Windspeaker, January 2006; Available on-line: <http://www.ammsa.com/windspeaker/articles/2006/wind-jan-06-2.html>.

⁸ Ibid.

⁹ Ibid.

¹⁰ Paul Barnsley, “Protests Mounted Outside First Ministers Meeting,” Windspeaker, January 2006; available on-line: <http://www.ammsa.com/windspeaker/articles/2006/wind-jan-06-1.html>.

¹¹ Art Manuel, “Grassroots Peoples’ Coalition and the 5 Billion Dollar Deal,” Dominion, 9 December 2005; Available on-line: http://dominionpaper.ca/weblog/2005/12/grassroots_peoples_coalition_and_the_5_billion_dollar_deal.html.

¹² Mukwa, “National Groveler,” First Nations Strategic Bulletin 4, no. 3 (2006): 17.

¹³ Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back from Report of the Royal Commission on Aboriginal Peoples; available on-line: http://ainc-inac.gc.ca/ch/rcap/rpt/lk_e.html.

¹⁴ Royal Commission on Aboriginal Peoples, 12.

¹⁵ Congress of Aboriginal Peoples, Urban Native Housing; available on-line: <http://www.abo-peoples.org/programs/housing.html>.

¹⁶ Royal Commission on Aboriginal Peoples, 12.

¹⁷ Assembly of First Nations, First Nations Leadership Council Troubled by Today’s Vote at the United Nations (Press Release: November 28, 2006).

¹⁸ Assembly of First Nations, “Positions of Indigenous Peoples and the New Conservative Government of Canada.” Appendix to November 10 2006 letter to Dept. of Indian Affairs Minister Jim Prentice.