

## **Canada Opposes The United Nations' Declaration Of 2007 Recognizing The Rights Of Indigenous Peoples: Is Canada's Strident Opposition An Anomaly Or A Symptom Of A Troubling Transformational Shift In Canadian Values?**

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When most of us talk about a clash of civilizations, we think of Samuel P. Huntington's 1993 prophesy that the most likely pending source of cultural conflict would be between the followers of Islam and Christianity (Huntington 1993). But, with the advancement of a new era of globalization in the 1980s, another clash has re-emerged. Three hundred and seventy million indigenous people, located in over 5,000 distinct cultural communities, are required increasingly to defend their historical claims and rights against the encroaching global economic interests coveting access to their resource-rich lands. Capping 22-years of raucous debate, on September 13, 2007 the General Assembly passed the United Nations Declaration on the Rights of Indigenous Peoples. Only Canada and three other developed countries, the United States, Australia, and New Zealand remain strongly opposed to this long awaited, non-binding UN declaration. This paper examines the case for Canada's continued opposition to what, on its face, seems to be an anomaly in the support for cultural and human rights' values long espoused by Canada; and further, if this position is not an anomaly, is it a symptom of a much deeper and more troubling transformational shift in Canadian values?

### **Introduction**

Following 22-years of strident debate, on September 13, 2007 the General Assembly passed the United Nations Declaration on the Rights of Indigenous Peoples as adopted by the Human Rights Council in June 2006 (Stewart 2001). The Declaration was adopted by an overwhelming majority of the General Assembly, with 143 countries voting in support, four voting against (Australia, Canada, New Zealand and the United States) and 11 abstaining (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and the Ukraine).

The voting results to many Canadians appeared on its face to be an anomaly. Why these dissenting opinions from well respected and recognized developed countries; nations who were acknowledged in the past for their human rights activism - why would they now stand opposed to this Declaration?

This paper examines the merits of the case for Canada's continuing opposition and asks: is this position just as such an anomaly and out of Canada's national character; or is it a symptom of a much deeper and more troubling transformational shift in Canadian values?

### **Human Rights in Canada**

Many outside of Canada are not aware that the principal author of the Universal Declaration of Human Rights was John Peters Humphrey, a native of New Brunswick, Canada. Humphrey wrote the first draft of what would eventually become perhaps the most important human rights

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document in history. Indeed it has been said that this document, as amended by United Nations' Commission on Human Rights, has become the international Magna Carta for all men (Roosevelt 1998). Eleanor Roosevelt chaired, and with her Committee successfully advocated that the United Nations General Assembly adopt the Universal Declaration of Human Rights on December 10, 1948 (Roosevelt 1998).

Globally many human rights supporters view "The Universal Declaration of Human Rights as the primary international articulation of the fundamental and inalienable rights of all members of the human family. It represents the first comprehensive agreement among nations as to the specific rights and freedoms of all human beings. The Declaration has become a cornerstone of customary international law, binding all governments to its principles" (Roosevelt 1998). Canada has demonstrated over many decades support for this international perspective regarding human rights and the fundamental values found in nature for man. Nationally there have been many initiatives recognizing and establishing Human Rights. Canada's Prime Minister, John G. Diefenbaker's Bill of Rights, 1960 (*The Canadian Bill of Rights* 1960) aligns closely with the United Nations' Universal Declaration. This Act was the earliest expression of human rights law at the Federal level in Canada. Two decades later, Prime Minister Pierre Elliot Trudeau recognized shortcomings in Diefenbaker's legislation and replaced the earlier Act with The Canadian Charter of Rights and Freedoms in 1982 (*Canadian Charter of Rights and Freedoms* 1982). The Charter is contained within a statute entitled The Canada Act 1982. The Act's fundamental rights and freedoms include: the freedom of conscience and religion; the freedom of thought and belief, the freedom of opinion and expression; and the freedom of assembly and association. The Charter's rights include: equality rights embrace the right not to be discriminated against on the basis of gender, age, religion, race or colour; and a guarantee of equality before the law. The legal rights provided by the Act include: the rights of life, liberty and security of person; security against unreasonable search and seizure; and the prevention of arbitrary imprisonment in detention. In addition to the Charter's provisions there have been many regional and provincial human rights initiatives enacted to protect minority rights against abuse by members of the public.

The Federal Government's Canadian Human Rights Act, (*Canadian Human Rights Act* 1976-77) established the "principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted." Unfortunately the Federal Act applies only to businesses regulated by Federal legislation such as the broadcast industry and chartered banks. Provincial governments have adopted somewhat similar piece of legislation for areas within their constitutional competencies, as set out in the Constitution Act of 1982 e.g. professional organizations and unions. Interestingly, the first statute of this nature was adopted by the Ontario Provincial Parliament in 1944, well prior to the Federal Act.

Both Federal and Provincial governments have established human rights commissions to investigate and adjudicate alleged human rights abuses. These commissions are empowered to

make binding decisions and provide sanctions and remedies within their constitutional mandate.

The best of Canadian values are grounded in the natural law espoused by stoic philosophers and political scientists such as John Locke over 300 years ago. This natural law advocates that there exists universally accepted laws derived from the nature of man and the world. Natural law was at the very core of the political theory influencing the drafters of the Magna Carta; was the rationale for the United States Revolution; and today is intended to be the essence, the very core of the constitutional rights and freedoms within Canada.

So it would seem fair to conclude that Canadian citizens have an arsenal of statutes and regulations protecting their human rights and freedoms. Canadian indigenous people, as Canadian citizens, should have the same protection. So for all Canadians human rights protection should not be a problem, right? What is the reality?

### **Indigenous Canadian Citizens—What is the Reality?**

Canada is the second largest land mass in the world and has a wide range of indigenous enclaves which include Canada's Arctic's indigenous people. While the following observations I believe have equal application to Canada's Northern indigenous citizens I have restricted my examination to the facts and circumstances surrounding Canada's First Nations indigenous people.

Let me commence my examination by sharing this observation. I am angry with myself, and disappointed in Canadians. Let me share this article that I have previously published.

“On Sunday afternoon, while driving along the seaside near Victoria on Vancouver Island, I was enjoying the view and admiring the million-dollar homes when, without demarcation and for no apparent reason, I saw two large tracts of economically depressed land that jarred my sensibility. Within moments, it became apparent: These were First Nations' Reserves. Why, I asked myself, would these people choose to live in substandard conditions when they clearly had wealth? They appeared to "own" hectares of prime residential waterfront land. I believe most Canadians, without serious reflection, reach the same conclusion as they view the 600-plus Aboriginal land reserves across Canada. But to draw such a conclusion would be wrong. The situation exists because we let it exist. Canadians have permitted this social injustice to thrive for almost 130 years. The Indian Act segregates First Peoples from Canadian society, and since 1876 has prevented First Nations people from buying and selling their reserve lands.

According to Statistics Canada, about 1.2 million aboriginal people (Metis, Inuit and First Nations) live in Canada—with approximately one-third of them on reservations, (Canada 2007). It is not only the segregation that is appalling but also the standard of living on these reserves. In fact, according to an Indian and Northern Affairs Canada study that applied First Nations' statistics to United Nations' Human Development Index, determined the living conditions on Canadian reserves are a third-world quality of life (INAC) 1998). Canada has dropped from first to eighth as the best country in the world as a result of the poor health and housing conditions experienced by First Nations people on reserves.

Peruvian economist Hernando de Soto observed in his best seller *The Mystery of Capital* that citizens of developing and under developed countries remain poor because they cannot access capital (DeSoto 2000). These countries do not have property law and its supporting infrastructure. He could have been writing about Canada's First Nations people. Sara MacIntyre, B.C. Director of the Canadian Taxpayers Federation commented, "There is opposition for change within the industry. Chiefs and councils currently control federal funding and the band's wealth. It is the chiefs and councils that determine who on the reservation gets housing. The Indian industry is big business."

According to Statistics Canada, the Federal Government turns over to the chiefs and councils about 90 per cent of the \$6.9 billion budgeted annually for Aboriginal spending (Canada 2008-09). "Little wonder there is resistance among some native leaders" (Power 2005). Because of our political leaders' inability or unwillingness over the past 130 years to right this wrong, Canada's First Nations people have missed the opportunity for wealth creation. Many First Nations communities still worry about having their most basic needs met, let alone worry about wealth creation. Over 107 communities in Canada live under a constant "Boil Water Advisory" for drinking water (Canada Boil Water Advisories) and mould continues to contaminate almost half of First Nations households (Survey 2002-03). While you and I have seen our home values rise dramatically prior to the global financial meltdown, federal legislation and the surrounding Canadian public policy have prevented First Nations people from participating in this asset appreciation, and continue to trap indigenous Canadian citizens in a poverty cycle. This cycle of poverty and depression needs to end. Statistics Canada reports that the suicide rates of "Status Indians" in British Columbia are almost three times that of other British Columbian residents (Health 1999).

As a Canadian, to permit this apartheid, to permit segregation of one class of our citizens, to permit these forms of ghettos, is repugnant. Canadian history is littered with examples of how the government has tried to repress First Nations people. One of the worst examples in Canadian history are the residential schools that existed from 1928 until the last one closed in 1996 (News 2008). In all, about 150,000 children were forced to attend these Catholic-operated schools with the purpose of assimilating First Nations children into 'civil' society. Regretfully a high number of physical, mental and sexual abuse cases arising from residential schools are still before the courts today. As a result, the education levels amongst First Nations people lag well behind those of their non-aboriginal counter parts. According to Indian and Northern Affairs Canada, almost 70% of First Nations students on-reserve will not graduate from high-school (Canada 2001) and only 4% of the aboriginal population will acquire a university degree. Of the Canadian non-aboriginal population, 16% will obtain this level of education (Jod-Annes Brzozowski 2005).

Unfortunately these atrocities do not end with residential schools. Under the 1928 Sexual Sterilization Act, thousands of Canadian indigenous people were involuntarily sterilized. It is impossible to ascertain a specific number as thousands of files were destroyed by the Provincial Archives Administration in 1987 (Jana Grekul 2004). In Alberta for example, 4739 cases were presented to the Eugenics Board, and a total 2832 sterilization operations were performed. A disproportionate number of these cases were indigenous people. Out of all of sterilization procedures performed on indigenous people, it is speculated that 77% were deemed "mentally

defective” and therefore did not require prior consent (Jana Grekul 2004). Similar sterilization practices were enforced in other Canadian provinces, as well as in the United States.

Yet it's ironic that our political leaders, with increasing frequency, visit developing countries and publicly comment about the importance of observing human rights, in the light of the historical treatment of First Nations people in Canada. During Vietnamese Prime Minister Phan Van Khai's visit to Canada, our then Prime Minister Paul Martin spent a considerable amount of time lecturing Van Khai on the importance of human rights. “Canadian officials said the tone of the talks shifted during the private portion as Martin brought up as many as 10 cases of Vietnamese people who were harassed or jailed for their political or religious beliefs” (Tân 2006). Of more recent date our current Prime Minister, Steven Harper, while on his way to an Asia-Pacific Economic Co-operation (APEC) conference in Vietnam admonished the Chinese leadership by stating; “I don't think Canadians want us to sell out important Canadian values—our belief in democracy, freedom, human rights. They don't want to sell that out to the almighty dollar” (Narvey 2006). “Harper remarked he will not tone down criticisms of China's human rights record to improve trade relations with Beijing. The Prime Minister made the comments to reporters after being apparently snubbed by Chinese President Hu Jintao (News 2006). How then can Harper now champion the opposition to the United Nations Declaration supporting human rights for indigenous Canadians? To some it seems Harper's 2008 public apology in regards to the treatment of First Nations was an isolated act of recognizing First Nations' rights (News 2008). How can these same political leaders drive daily past disenfranchised Canadians who have for almost 130 years been denied social justice and basic human rights? It's time to set this right” (Power 2005).

There have been some modest legal successes in Canada. First Nations in British Columbia have questioned the provincial title to Crown land successfully. This was definitively established in 1997 by the Supreme court case, *Delgamuukw v. British Columbia* (Delgamuukw v. British Columbia 1997). This case established that aboriginal title convey “ownership” of resources on the land, which overrides any government interest. As a result of cases such as this, governments and third parties must now consult with First Nations before undertaking development permits. Although in many cases, this consultation process has become another mechanism to confine First Nations' rights, rather than ensure them. This has left First Nations in need of capacity funding in order to understand the large, complex documents in regards to various government projects impacting their land. This right of consultation is provided for within the United Nations' Declaration. If Canada supported the Declaration, then First Nations' legal arguments would be strengthened.

Canada admits that the issues surrounding indigenous people are by far Canada's biggest human rights challenge, yet we are not prepared to adopt the United Nations' recommendations to implement a United Nations' Human Rights Council. Consider these cases. The Lubicon, a band of 500 people in Northern Alberta, have been negotiating with the government for more than 60 years regarding their land claim issues. The Canadian government, notwithstanding two reports from the United Nations urging them to settle the claim with the Lubicon, refused to settle. The reason, according to many, was simply that their land was scheduled for construction of a \$983 million pipeline to support Alberta's oil sands production (News 2008). The police shooting of Dudley George occurred in 1995, when the Stony Point band set up a barricade to

reclaim sacred burial land that was seized in order to build a military camp. Dudley George, one of the leaders of the protest, was unarmed at the time of his shooting. Justice Linden ruled that the Ontario Provincial Police, former Ontario Premier Mike Harris and the federal government were all responsible for George's death (News 2009). Domestic violence against indigenous women rates as one of the biggest human rights concerns for aboriginals. Statistics show that 24% of aboriginal women in Canada are victims of spousal violence, compared to 7% of non-aboriginals (Canada 2006). This is more than three times the average of non-aboriginals. Amnesty International has intervened in such cases as the land rights of the Lubicon Cree; the police shooting of Dudley George; and violence against indigenous women (International 2008). The United Nations and Amnesty International clearly recognize the severity of human rights issues facing Canadian aboriginals. It is troubling that the Canadian government, while cognizant of these shortcomings, continues to do little.

Canada is not the only country that faces challenges with First Nations' communities. Australia, New Zealand and the United States constantly adopt similar human rights positions, to the detriment of their indigenous citizens. These are the same countries opposed the UN Declaration. Arguably, Australian indigenous people experience some of the worst conditions, comparatively to indigenous citizens of the other three nations. "In 1999-2001 the life expectancy of Indigenous Australians was 17 years less than that of non-Indigenous Australians. Between 1999 and 2003, Indigenous people died at almost three times the rate of non-indigenous people" (Welfare National Aboriginal and Torres Strait Islander Health Survey, 2004-05). These life expectancy rates have been compared to those of developing countries such as Pakistan and Indonesia (Gerry St. Germain 2006). The indigenous people of Australia have yet to negotiate any treaty with their government, unlike their counterparts in the United States and Canada. The Declaration would lend moral support to the injustices experienced by Australian aboriginal people, and indigenous people world-wide.

### **What is the Essence of the Declaration?**

So it would seem that Canada, at all levels of government, has put legal protections in place to safeguard human rights for its citizens. So why is it that the Canadian government opposes this UN Declaration? To answer this question we need to examine the Declaration and consider its implications for Canada.

The genesis for the declaration arises from the United Nations' Economic and Social Council's (ECOSOC) Working Group on Indigenous Populations (WGIP). The WGIP's mandate was to develop a minimal set of standards that would protect indigenous people. Recognition of the need for standards and protection has been well documented. The WGIP was impacted by a study undertaken by José R. Martínez Cobo. Cobo, a Peruvian and onetime Secretary General of Prohibition of Nuclear Weapons in Latin America (OPANAL), outlined in a study the marginalization, exploitation and oppression suffered by indigenous people globally. Cobo's works had a significant impact on the WGIP.

The first draft declaration on the rights of indigenous people was completed by the WGIP and received approval in 1994 from the UN Sub-Commission on the Prevention of

Discrimination and Protection of Minorities. From 1994 to 2007 the process moved forward at a snail's pace.

The breakthrough came in the 11th session of the working group during 2005/6 when the Peruvian Chairperson, Mr. Luis-Enrique Chavez, consolidated the earlier proposals into a final document for negotiation. The final document was adopted by the Human Rights Council in June, 2006 and submitted for consideration by the General Assembly at the 61st session in 2007. At that session on September 13, 2007 the Declaration was approved.

There are a number of offending and contentious provisions identified by Canada's Federal government contained within the Declaration. The Declaration included the right to self-determination of indigenous people and control over the natural resources existing on their traditional lands. It provides inter alia comprehensive provisions addressing issues including cultural rights, collective rights, rights to education, rights to health, rights to employment and language rights. Further, the declaration provides that indigenous people have the right to maintain and strengthen their own institutions, cultures and traditions. The Declaration recognizes indigenous people have the rights of free men to develop as they choose in accordance with their own aspirations and needs (natural law). The Declaration specifically prohibits discrimination against indigenous people and further provides for full and effective participation as stakeholders in all matters that are likely to impact them. The United Nations recognized the tension that would be created in developed countries such as Canada with a large indigenous citizenry if they adopted the declaration. Accordingly the global institution included the provision, '...to encourage harmonious cooperative relations between states and indigenous people' in order to mitigate the impact of the Declaration.

And therein lies the problem. The human rights and freedoms contained within the declaration, it would seem, significantly enhance the human rights and freedoms currently enjoyed by indigenous citizens of Canada. While the declaration is non-binding, it would provide judicial weight to the increasing number of cases brought before the courts as indigenous citizens attempt to implement and exercise control over what is or was formally their lands, rights and freedoms. The UN declaration, for example, could possibly influence legal disputes over fishing rights, land claims, residential schools and self-government.

Statistics show that the Canadian government stands to lose money, land and resources if these cases are settled in favour of First Nations people. From 1970 to 2006 there have been approximately 1300 land claims filed in Canada, and 900 of these are currently in the court system at one stage or another (Gerry St. Germain 2006). Only 275 of the 1,337 Specific Claims filed by the end of 2006 have actually been resolved. About seventy per cent of the First Nations in Canada have claims in the Specific Claims system. That is, "roughly 445 First Nations have a direct interest in future government action on the Specific Claims policy and process." In total, unresolved specific claims constitute a potential multi-billion dollar liability for Canada.<sup>2</sup>

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<sup>2</sup> At 31 December 2005 there were 615 First Nations in Canada. As of late 2006, roughly 445 First Nations of the approximately 615 First Nations in Canada have Specific Claims in the system, according to Louise Poitras, Claims Coordinator, Negotiations Directorate, DIAND. The contingent liability figure for Specific Claims alone has not

Currently, for unsettled Specific Claims, the federal government's liability to First Nations is estimated at over \$1.5 billion. "Resolving the current backlog of claims in three years would, therefore, require a financial commitment of approximately \$500 million per year; or \$300 million per year over five years or [\$150 million] per year over 10 years" (Nations 2006). Several experts claim that it will take over 130 years to settle all existing land claims at the current rate of progress.

Recall Prime Minister Harper's admonishment to the Chinese Premier: "I don't think Canadians want us to sell out important Canadian values—our belief in democracy, freedom, human rights." It is difficult, it seems to me, to reconcile the Federal government's position and our Prime Minister advocating global human rights to other world leaders while rejecting the UN Declaration on what seems to be purely economic grounds. Let us examine closer the tension between these positions.

## Pros and Cons

The UN Declaration would not be legally binding in Canada as it is only a declaration, not a treaty. Even if the Canadian government decided to make the declaration a treaty, treaties cannot be implemented without Canadian legislation. Notwithstanding, it does provide legal weight to any judicial and / or moral case put forward by indigenous people regarding a vast array of outstanding contentious issues, some of which have been outlined above.

The case for the Declaration internationally was best articulated by the United Nations Under-Secretary-General for Economic and Social Affairs, Mr. Sha Zukang. Undersecretary Zukang claimed the Declaration was "tangible proof of the increasing cooperation of States, Indigenous Peoples and the international community as a whole for the promotion and protection of the human rights of indigenous peoples" (UNPFII 2007). Mr. Sha Zukang went on to say that the UN "has fulfilled its role as the world's parliament and has responded to the trust that Indigenous Peoples around the world placed in it, that it will stand for dignity and justice, development and peace for all, without discrimination" (UNPFII 2007).

In Canada, at the forefront supporting the Declaration is Phil Fontaine, former national chief of the assembly of First Nations. Fontaine told the CBC news that "Canada's stance, ... , it's a stain on Canada's reputation internationally" (News 2007). The Indian Act, it seems to this writer, is archaic and perpetuates destruction of indigenous culture. Even the name of the Act 'Indian' does not represent its constituency. These are Canadian First Nations citizens, not Indians.

Some supporting evidence for the declaration might be helpful. Maynard Harry, a chief with Sliammon First Nations in British Columbia observed, "The Federal Indian Act is archaic

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been made available to the Committee. The contingent liability for Indian and Northern Affairs Canada in "claims and pending and threatened litigation" is listed as \$15B (\$15,354.8M) in the 2004-05 Departmental Performance Report. Canada, Department of Indian Affairs and Northern Development, 2004-05 Departmental Performance Report, 47.

... (it) is destroying our culture and our families. ... I think the UN declaration would give the aboriginals here in British Columbia and Canada another tool to use to our benefit. .... ” (Harry 2008). Patricia Moore, a member of the Haida Band also situated in British Columbia was asked to comment on sovereignty, human rights and freedoms. Moore stated, “Well... in an informal sense it means the right to live, love, laugh and govern our territory and all that is in it. And this inherent right cannot and is not infringed upon by those who were not given this right. For the Haida, our territory spreads further than any modern-day map would show. We have natural boundaries that cannot be challenged by any other nation. We are stewards of nature and have a duty to protect it. I know that it is far-fetched to believe that the Haida nation is, can, or ever will be a sovereign nation, but this does not mean that we do not feel it in our very being that we have this inherent right to be here” (Moore 2008). Moore continued, “... globalization is everywhere. Anything not native to this island (Vancouver Island) or the territory we claim is part of how globalization has affected us. There was once 18,000 Haida living in our territory. After smallpox killed off 90% of our nation we were moved to reserves. Our language is a language isolated. There are currently 14 fluent speakers left. The language is now at the brink of extinction” (Moore 2008). “I (Moore) have spent a month looking at every acquisition at the Chicago Field Museum, and the Museum of Natural History. In those acquisitions there were journals of explorers who came to the island and took what they wanted. Newcombe’s<sup>3</sup> group came in the middle of the night and took 147 human remains from the graves in the villages. This is how globalization has affected us” (Moore 2008).

The evidence suggests Canada's opposition to the declaration is rooted, it seems, primarily on economic grounds. The paramount concern is land and resources in a global ecosystem, and the provisions contained within the declaration dealing with these items. For example, the Declaration requires prior informed consent of indigenous groups before enacting any new laws or administrative measures. Canada's ambassador in 2007, John McNee noted that, “under that article 26 of the Declaration, indigenous people have the right to the lands, territories and resources as they have traditionally owned, occupied or otherwise used or acquired” (News 2007). McNee considers this clause as, “... overly broad, unclear and capable of a wide variety of interpretations” (News 2007). The Ambassador’s observation regarding the ambiguity and vagueness of the document are at the very core of the Canadian Government's opposition. It would seem, according to McNee and like minded opponents to the Declaration, that the document lacks specifics (Canada 2006) and this lack of specificity, they contend, gives rise to many different and possible competing interpretations.

The Federal minister charged with responsibility to represent Canada's indigenous citizens, Indian affairs Minister Chuck Strahl, is also a leading opponent to the Declaration. Strahl feels that there is insufficient guidance within the declaration to enable implementation. Furthermore, Strahl claimed that the provisions of the Declaration conflict with Canada's Charter

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<sup>3</sup> Dr. Charles Newcombe (1851-1924). Newcombe a long time resident of Victoria, Canada undertook many expeditions by boat to isolated locations on the British Columbia coast. Major museums in Europe and North America commissioned him to gather natural history specimens. He also found ready buyers in a growing museum market for ethnological artifacts and he avidly competed with other collectors for totem poles, ceremonial masks, regalia and more utilitarian items.

of Rights and Freedoms (News 2007). The Minister noted that Canadian citizens under this 1982 Act rely heavily on it to protect not just the rights of aboriginals but the rights of all Canadians. The problem, of course, is that after 130 years Canadian indigenous citizens have not had the protection Strahl refers to in the Charter and the Constitutional Act. The human rights' shortcomings for these Canadians have been very much in evidence.

The Canadian government argues the Declaration must be consistent with Canada's constitutional framework. If not, the government argues that section 26 of the Declaration supporting the land claims traditionally owned could result in reopening previously settled land and resource claims and existing treaties within Canada. Is there merit to this argument? The Canadian Constitution provides for recognition of existing original treaty rights. The Declaration being non-binding would only be persuasive in Canada's Supreme Court. Accordingly, while sensitive to the argument, on balance having full regard to the competing positions it seems to this author that it fails.

The response is similar to the government's Canadian Charter of Rights and Freedoms' argument that the Declaration may allow less flexibility than provided under section 1 of the Charter or under section 35 of the Constitution Act. Again I respond that while persuasive, the Declaration, never the less, is not binding. The evidence is irrefutable, after one hundred and thirty years of history this nation has not afforded basic human rights protections on a large number of issues for indigenous Canadians.

So the Federal opponents view article 26 as the most problematic of the lands and resources provisions, especially the phrase, "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired" (Canada 2006). It is the Declaration's support for indigenous people, their land, and their resource rights that this author feels are at the root of the opposition. The government suggests that implementation of the Declaration may raise serious questions about retroactive application of existing treaties. Existing and current treaty negotiations would be impacted by the global human rights spotlight if Canada was to support the declaration. But this is an economic rationalization. If this was to come to pass does this position justify diminishing Canadian indigenous people's human rights? That is the question. How will the courts of global public opinion judge Canada's position? How will Canadians view our political leadership's action?

There are many lesser clauses in the Declaration relating to conservation and protection of the environment (article 29); self-government (article 4); free, prior and informed consent (articles 10, 11, 19, 28, 29 and 32); military issues (articles 10 and 30); border control laws (article 36) unfettered right of transit and commerce across borders; language and culture, education and intellectual property and the indigenous legal system (Canada 2006); all of which raise concerns for the Federal government.

For me the inflection point in the dialogue between proponents and opponents came when Canada's prime minister Stephen Harper stated, "We shouldn't vote for things on the basis of political correctness; we should actually vote on the basis of what's in the document" (News 2007). Recall Undersecretary Mr. Sha Zukang's observation representing the other end of the

continuum stated, “It (the declaration) will stand for dignity and justice, development and peace for all, without discrimination”(UNPFII 2007). So the correct position according to Harper at its core is that Canadians are only required in this case to meet their social obligation, the bare minimum required at law and are not required to adopt a social responsibility stance - for Canada this would mean just to do the right thing. Regretfully it seems there is evidence to conclude that this decision is substantially grounded in economics and not on the fundamentals of natural justice. Remember Locke’s comment that “a ruler is legitimate so far as he upholds the law” (Locke 1690).

So reluctantly but firmly I reached the conclusion that the dissent to the Declaration is not about human rights, rather it's about money. It's an economic issue that is viewed by the Federal Canadian government as the paramount factor, rather than providing the basic natural justice rights to Canadian indigenous people.

Having reached this strategic inflection point the question then became: is Canada's position on the Declaration simply an anomaly in its long-standing march towards establishing global human rights or is it the symptom of something more sinister?

## **Transformation in Canadian Values**

In examining this emerging second hypothesis I found a number of antidotal pieces of evidence indicating that since 9/11 Canada's political leaders have turned a ‘Nelsonic eye’ to the human rights and freedoms and their duty to protect the rights of its citizens in order to support the war on terror, and to align Canada’s economic interests with those of the United States of America. Increasingly there are some observers who question the validity of whether or not there is ‘a war on terror’ as declared by the former Bush administration. Indeed a better descriptor might be a ‘war on peace’. Certainly grounds for dialog.

This contraction in Canadian human rights comes at a time when Spain’s parliament is in the process of extending some human rights to gorillas, chimpanzees, baboons, and orangutans. Spain is the first country to explicitly acknowledge the legal rights of non-humans. Spain’s declaration on great apes, developed in 1993 by a group of primatologists, ethicists, and psychologists, provides that nonhuman apes are entitled to the rights of life, liberty, and protection from torture. According to the Spanish declaration, apes may not be killed except under “strictly defined circumstances,” such as self-defense. They may not be imprisoned without due legal process, and they may not be subjected to the “deliberate infliction of severe pain,” even if doing so is said to benefit others. Incarcerating apes for circuses, or using them in television commercials or filming will also be forbidden. Sanctions for offenders are provided under Spain’s penal code. The Times of London notes that this initiative by Spain could be the beginning of a trend toward granting similar rights to other nonhuman animals (O’Carroll 2008).

Other countries have also taken steps in recent years toward recognizing nonhuman apes as moral persons who possess an inherent worth and dignity. In 2002, Germany’s parliament voted to add the phrase “and animals” to a clause in the country’s constitution requiring the state to uphold the dignity of humans. In 1992, Switzerland passed an amendment to its constitution that recognized animals as “beings,” and not “things” (O’Carroll 2008).

While Spain and other European nations, it seems, are embracing human rights and expanding the constituency they are willing to protect, in Canada it would seem this nation is incrementally withdrawing the protections afforded by the Canadian Constitution and the Charter of Rights and Freedoms. Evidence to support this observation appears daily in the Canadian national newspapers.

We need look not much further than Canada's The Anti-terrorism Act (*The Anti-terrorism Act* 2001) to support the position that there has been an encroachment on the human rights of Canadians. It is important, as we undertake this examination, to recall that the administration of justice and more specifically the protection of the rights of a nation's citizens is the firmest pillar of government. In the aftermath of the September 11, 2001, attacks on the United States, the Canadian Federal government created Canada's first anti-terrorism legislation, defining what constitutes terrorism and making it a punishable offence within Canada's Criminal Code. The Anti-terrorism Act (bills C-36 and C-42) was bulled through the House of Commons and the Liberal dominated Senate by the Liberal ruling party, using their majority, to pass a motion curtailing debate and rejecting all of the opposition's amendments. The fast track motion passed with a vote of 190 in favour and 47 against. The Act became part of the Criminal Code on December 18, 2001. The changes to the Code were said at the time to be "aimed at disabling and dismantling the activities of terrorists groups and those who support them." Many Canadians remain today unaware of this Act.

Increasingly politicians and protesters are raising concerns that the legislation trampled on civil liberties because it gave police sweeping new powers, including the ability to arrest people and hold them without charge for up to 72 hours if suspected of planning a terrorist act. These powers include electronic surveillance, and the provision for the designation of a group as a terrorist organization that in turn makes it a crime to knowingly collect or provide funds, either directly or indirectly, in order to carry out terrorist crimes. The justification for the legislation was provided by Liberal Justice Minister Anne McLellan who stated: "We believe that people everywhere are entitled to live in peace and security." McLellan noted the provisions had three main objectives: to suppress existing terrorist groups, provide police with new investigative tools, and strengthen prison sentences for terrorists. The bills also contained provisions to comply with new UN rules and similar laws that were adopted by the U.S. and Britain for combating terrorism. There are few human rights' checks and balances contained within the Act.

Many questions arise surrounding interpretation of this Act, for example, who are the terrorist groups? What standards are used in identifying terrorist groups? These provisions and others are under the Criminal Code of Canada and are indictable offences. The maximum sentence for the offence of participating or contributing funds for example would be 10 years' imprisonment. The maximum sentence for facilitating would be 14 years in prison. For instructing anyone to carry out a terrorist act or an activity on behalf of a terrorist group (a "leadership" offence) would be subject to a maximum life sentence. For knowingly harbouring or concealing a terrorist the maximum sentence would be 10 years in prison (News.ca 2008). These sanctions seem to be too draconian for transgressions where the evidence is not required to be transparent; and that the elements of *actus reus* and *mens rea* are not clearly defined nor it seems always required.

In addition, Canada has made the changes to the Criminal Code to support this anti-terrorism legislation. “The Official Secrets Act—renamed to the Security of Information Act, creates new offences related to threats of espionage by foreign powers and terrorist groups and allows ministers to declare certain actions secret. The Canada Evidence Act—amendments include changes to courtroom and other proceedings to protect classified information. The National Defense Act—amended to clarify the mandate of the Communications Security Establishment to intercept communication of foreign targets and undertake security checks of government computer networks to protect them from terrorist activity” (News.ca 2008).

The Government adopted a position that the Act in total was not to have a sunset clause. Civil libertarians demanded that the original bill at least contained a five-year "sunset clause" on some of its more controversial elements. Such a clause would require certain identified sections to be reviewed by Parliament, prior to authorizing an extension past the initial five year term. When the time came to revisit these provisions another heated debate took place in Parliament. Two key clauses were at the heart of the debate. First, the provision that allowed police to arrest suspects without a warrant and detain them for three days without charges if police believed a terrorist act may have been committed; and the second identified section that allowed a judge to compel a witness to testify in secret about past associations or perhaps pending acts under penalty of going to jail if the witness didn't comply. Interestingly neither clause was used by police or prosecutors in the five years prior to the review. In October 2006, a parliamentary committee recommended extending the two provisions and the Conservative government of the day agreed. The rest of the House of Commons, however, did not. The three opposition parties to their credit united to *defeat a Conservative proposal* to keep these measures in place for three more years by a 159-124 vote. The rest of the legislation remained in force. On the evidence one might conclude, given that the identified hotly contested clauses that had not been applied since the inception of the Act that the government's stance might have really have another purpose. Many think it was to convey a message to the American audience that the Government of Canada is strong on the war on terror. Clearly an objective consideration as to whether or not the facts and circumstances warranted removing these two offending human rights causes from the provision of the Act was not present.

Surprisingly, in March 2009 the Harper government announced its decision to resurrect the anti-terrorism measures (Post 2009) which had lapsed for the previous two years. Despite the fact that these measures had still not been used, the government insisted on having them at their disposal. It seems that the Canadian government has not given up on the idea of infringing upon our human rights. Certainly this legislation is not consistent with the laws of a free and open transparent democracy.

So how have these Orwellian measures been implemented in the light of human rights provisions provided under the Canadian Constitution and the Charter of Rights and Freedoms? Recall that it is in troubled times following events such as 9/11 that constitutional rights and freedoms are needed to protect a nation's citizens, notwithstanding the political leaders of the day's onslaught. You decide.

## **Courts Test the Legislation (or...oh well I wasn't using my civil liberties anyhow)**

Canada's judiciary charged with a constitutional mandate to interpret legislation have provided their judicial thoughts as to which position prevails; either the security protections emerging as a result of the war on terrorism, versus the protection needed to prevent hemorrhaging of Canadian human rights. Recall Canada has not been the victim of a terrorist attack since 9/11. Here are some recent court decisions that address this dichotomy.

Canadian Mohammad Momin Khawaja, a software developer, was arrested March 29, 2004, and charged with seven criminal offences alleging that he participated in and gave assistance to a suspected British terrorist organization. He was accused specifically of being part of an extremist organization that is alleged to have plotted to blow up Britain's electricity supply network, trains, pubs and nightclubs. Khawaja was the first person charged under the Anti-terrorism Act. A terrorist act, as defined by The Canadian Anti Terrorism Act, is one committed "for a political, religious or ideological purpose, objective or cause (motive)." On Oct. 24, 2006, a Superior Court judge struck down the motive clause, saying it violates the Charter of Rights and Freedoms. Although the judge struck down part of the law used to arrest Khawaja, he said his trial on the charges could go on. Conservative Justice Minister Vic Toews said the government had no plans to toughen the law but said the government could consider changing its definition of terrorism, which makes up what is known as the Act's 'motive' clause. At the time, Toews said there were two problems with the definition: it could lead to profiling people of a particular religion, Islam especially, and it could be difficult for prosecutors to provide evidence of a suspect's personal beliefs. Khawaja's trial began in June 2008. He was convicted of five terrorism related charges in October of that year.

Second, consider Canada's adoption of a "No Fly" list. If an individual has the same, or even a similar sounding name, to a person on the "no-fly" list, the airline has the right to refuse transportation to that individual (Canada 2002). Canadian officials won't say how many people are on the list, but people who are denied boarding can contact an Orwellian sounding, "Office of a Reconsideration" to have their status reevaluated. Critics point out that no terrorist is going to fly under their own name, and that transport Canada has failed to show any proof that this "no-fly" list has accomplished anything except to infringe on basic human rights (News 2007). Nearly seven years after the 9/11 terrorist attacks, Canadians continue to have their names checked against an ever expanding secret no fly list. It's not clear if the airline is legally permitted to inform foreign authorities at overseas airports that a blacklisted person is trying to get on a flight to Canada, but I am left with the notion that this does take place (CTV.ca 2008). The list, in the works since 2002, has been supplemented until now by information gathered from United States authorities and other external sources. Indeed recently, "Transport Canada told the Air India inquiry that other countries have not yet asked for the Canadian list but that officials would consider sharing the information if a request was made" (CTV.ca 2008). So much for protection of our personal information, as provided for under the Federal and Provincial Freedom of Information Acts.

There have been horrendous examples of Canadians who have had their human rights

taken away under non transparent allegations of terrorism. Canadian Maher Arar, a Canadian citizen born in Syria, was pulled off a connecting plane in the US when he was on his home to Canada from a vacation in September 2002. US officials accused Arar of having ties to Al-Qaeda and sent him back to Syria where he was tortured in jail for over a year. In January of 2007, Harper publicly apologized to Arar for Canada's involvement and made an announcement that he would receive \$12.5 million in compensation. Despite being cleared in a Canadian inquiry into the matter, Arar remains on a United States watch list (News 2007). Some contend taking away basic rights for Canadians under the guise of protecting the country should only be allowed with due process through the court system. No anti-terrorism measures should be able to infringe upon these fundamental freedoms and rights. This is a stain on Canadian human rights history.

Canadian Omar Khadr, now 22, is still at Guantanamo Bay, Cuba. Khadr was 15 in 2002 when he was shot and taken into U.S. custody in Afghanistan, and accused of killing an American soldier. Five years later in April 2007 as global public scrutiny intensified on Guantanamo's incarceration operations, Khadr was formally charged with murder, attempted murder, conspiracy, providing material support for terrorism and spying. He displayed wounds he says he received during torture at the hands of US and other interrogators, during a recent interview. US interrogators, when asked about these allegations which included depriving Khadr of sleep to weaken him before interrogation in 2008, said: "We don't respond to every allegation. He was treated humanely" (World 2008). Khadr will be the last citizen of a Western nation detained at Guantanamo. His defense team has been attempting to have him returned to Canada for trial without success (World 2008). His lawyer, Nathan Whitling remarked: "Every other Western leader, and many non-Western governments, have recognized that Guantanamo Bay is an affront to the rule of law and has demanded the return of their citizens to face justice at home" (World 2008). In 2009 the Supreme Court of Canada overturned two lower court rulings and directed the Harper government to ask Washington to release Mr. Khadr from Guantanamo and hand him over to Canadian authorities. The Harper government appealed the decision. Amnesty International and federal opposition parties strongly condemning the Harper government's decision, warning the move will further stain Canada's international reputation when it comes to defending human rights (Curry 2009). Is this another situation that in order for Canada to build a relationship with the Bush / Obama Administration it does so at the expense of a Canadian's human rights?

I am left to conclude that Harper's position regarding the Declaration and the Government's anti-terrorist actions since 9/11 are clearly at odds with Undersecretary Mr. Sha Zukang observation regarding the overall arching objective of the document, "It will stand for dignity and justice, development and peace for all, without discrimination" (UNPFII 2007). It is here that we have synapses, a point of light in the darkness! It seems to me upon reflection that here lie the seeds of the discontent felt by many Canadians for our government's position regarding the UN Declaration. Removing the instant case of the Declaration and reflecting on Harper's words on their face value in a broader context, it does not seem to be a stretch to conclude that the current Canadian government is only concerned with the letter of the law and not with doing something because it is just the right thing to do - social obligation vs. social responsibility.

But is there more than just antidotal evidence to support this hypothesis? An examination

of various indices reveals support for this hypothesis.

**Democracy Index.** The Economist study examines the state of democracy in 167 countries against the Economist Intelligence Unit Index of Democracy. This Index focuses on five general categories; free and fair election process, civil liberties, functioning of government, political participation and political culture. In 2006 Canada ranked 9<sup>th</sup> behind Sweden, Iceland, Netherlands, Norway, Denmark, Finland, Luxembourg and Australia. The United States ranked 17<sup>th</sup> (Kekic 2007). This is not good enough for either country.

**Freedom House Index.** This index is maintained by a United States-based international non-governmental organization. It conducts research and advocacy on democracy, political freedom, and human rights. It publishes an annual assessment of the degree of democratic freedoms in each country. The report observes Canada has taken important steps to protect the rights of native groups, although some contend that indigenous people remain subject to discrimination. It specifically supports this paper's hypothesis with its statement, "Indigenous groups continue to lag badly on practically every social indicator, including those for education, health, and unemployment. There are frequent controversies over control of land in various provinces" (House 2008). This most recent report notes and fully aligns with the paper's hypothesis that since the 2001 terrorist attacks on the United States, Canada has been struggling to find a balance between ensuring the nation's security and safeguarding civil liberties" (House 2008).

## Conclusion

Accordingly, if these facts and cases are true, then it seems there is strong evidence to support the proposition that the Canadian government's position regarding this Declaration, regrettably, is not an anomaly. The evidence suggests that when viewed in its totality, we must conclude reluctantly but again firmly that Canada's unwillingness to accept the Declaration is a symptom of a much deeper and troubling transformational shift in Canadian values. The words of Jean Jacques Rousseau must be in the minds of Canadians as we make our way through this troubling period in our history: "Man is born free, but everywhere he is in chains" (Rousseau 1762).

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