HOUSE OF COMMONS
CHAMBRE DES COMMUNES
OTTAWA, CANADA

39th Parliament, 1st Session

39e Législature, 1re Session

The Standing Committee on Aboriginal Affairs and Northern Development has the honour to present its

Le Comité permanent des affaires autochtones et du développement du Grand Nord a l'honneur de présenter son

FOURTH REPORT

QUATRIÈME RAPPORT

That, pursuant to Standing Order 108(2), the Committee recommends that the Government immediately pledge its support for the United Nations Declaration on the Rights of Indigenous Peoples.

Que, conformément à l'article 108(2) du Règlement, le Comité recommande que le gouvernement accorde immédiatement son appui à la Déclaration des Nations Unies sur les droits des peuples autochtones.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 18, 20 and 22) is tabled.

Un exemplaire des *Procès-verbaux* pertinents (séances nos 18, 20 et 22) est déposé.

Respectfully submitted,

Respectueusement soumis,

Le président,

COLIN MAYES
Chair

Canada's Position:
United Nations Draft Declaration on the Rights of Indigenous Peoples

Introduction:

On June 29, 2006, Canada voted against adoption of the Draft Declaration on the Rights of Indigenous Peoples at the inaugural session of the United Nations Human Rights Council.

Canada has a strong record of supporting and advancing Aboriginal and treaty rights domestically and is committed to continuing to work internationally on indigenous issues. Since the mid-1980s, successive Canadian governments have worked for a Declaration that would promote and protect the human rights and fundamental freedoms of every indigenous person without discrimination and recognize the collective rights of indigenous peoples around the world.

Just as important was our commitment to produce a Declaration which would promote partnerships and harmonious relations between indigenous peoples and the States within which they live; strike a balance between the rights of various parties; clarify respective responsibilities and commitments; and provide practical guidance to States.

Unfortunately, portions of the current Declaration do not help in providing practical guidance to States, indigenous peoples and multilateral organizations as parts of the text are vague and ambiguous, leaving it open to different, and possibly competing, interpretations. Canada sought further negotiations, particularly on new text proposed by the Chairman-Rapporteur which had not been discussed by States and others, in order to achieve a more effective and acceptable document.

In proposing to return to negotiations, Canada had hoped to help craft a Declaration that more clearly sets out the rights of indigenous peoples and the commitments of States in relation to such rights. Canada wanted to build a broader consensus on the text so that the Declaration could eventually be adopted and supported by as many States as possible.

As additional time to discuss the Declaration was not supported by a majority of the Human Rights Council, Canada opposed its adoption due to the extent of our concerns and the fact that it does not meet our objective of an effective Declaration.

This paper discusses the history of Canada's participation in the Draft Declaration negotiation process to date, articulates the reasons Canada took this principled position, and outlines the nature of the changes to the text that would be necessary to gain Canada's support for its adoption. In addition, the positions and statements of other States in relation to the Draft Declaration are also discussed.

Background

The process of arriving at a Draft Declaration dates back more than twenty years, starting in 1985 when the United Nations Working Group on Indigenous Populations (WGIP) decided it should aim to produce a Draft Declaration on indigenous rights for eventual adoption and proclamation by the General Assembly.

A group of independent experts led this process, in which thousands of indigenous representatives contributed proposals. While States, including Canada, participated in the experts' process, it was clear to Canadian representatives that the experts were crafting a Declaration by and for indigenous peoples, and that the concerns of States were not given adequate consideration in this process.

In 1993, the WGIP submitted a Draft Declaration to the Sub-Commission on the Promotion and Protection of Human Rights. This text became known as the "Sub-Commission text." Canada quickly ascertained this text would not be feasible within the Canadian context. Provisions on lands and resources, recognition of indigenous legal systems, and self-government, among others, would not be able to be applied in Canada without jeopardizing our current legal and policy frameworks for addressing Aboriginal issues.

The Sub-Commission text was submitted to the Commission on Human Rights in 1994, and in 1995 the Commission on Human Rights set up the Working Group on the Draft Declaration (WGDD), an open-ended inter-sessional working group to consider the Draft Declaration. States made a commitment to elaborate and adopt a Declaration by the end of the International Decade of the World's Indigenous People (1994-2004), and procedures were instituted to ensure the active participation of indigenous peoples' organizations. Throughout this process, Canada showed leadership in advocating changes to the Sub-Commission text in an effort to make it a more practical document.

Negotiations were tough, and progress slow. In 1997, two Articles[1] were provisionally adopted. Article 6 indicates that "Every indigenous individual has the right to a nationality," while Article 44 states that "All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals."

In an attempt to reinvigorate negotiations, in 2000 Canada began chairing informal inter-sessional consultations between States, which were generally well attended by the major players in this process. Although criticized by indigenous groups, these consultations resulted in increased understanding among States of the issues Canada and some others had with the Sub-Commission text. These meetings continued until 2003.

1 Please note that this paper uses the numbering for the articles of the Draft Declaration which appears in Resolution 2006/2 of the United Nations Human Rights Council, dated June 29, 2006.

In 2002, Canada assisted the Chairperson-Rapporteur in producing a report that recorded alternate text on the core issues of the Draft Declaration for the first time. During negotiations it became clear for the first time that all States and most indigenous groups had accepted that the Working Group process would be reviewed, and perhaps terminated, at the Commission on Human Rights session in 2005 if significant progress had not been made by then. As a result, some indigenous groups indicated for the first time that they were prepared to accept changes to the Sub-Commission text.

In 2003, Canadian, Australian and U.S. officials met several times to discuss alternate language on lands and resources. These meetings resulted in a proposal on lands and resources which, when tabled, was greeted very negatively by many States and indigenous representatives alike. It was successful, however, in bringing more States to the realization that the Sub-Commission text on lands and resources was flawed and that changes would be necessary.

In 2004, faced with the end of the Working Group's initial mandate, Canada renewed its domestic dialogue on the Draft Declaration with National Aboriginal Organizations, with the aim of finding common ground during the final phase of negotiations. Meanwhile, a group of States including Norway, Denmark, Sweden, Finland, Iceland, New Zealand and Switzerland produced a full alternative text of a Declaration based on a "minimal change" approach to the existing text under consideration at the WGDD. An indigenous proposal on self-determination was tabled, and Canada was among the first States to support it.

While consensus was not achieved on any of the core issues during the 2004 negotiations, there was sufficient progress to support a one-year extension of the Working Group mandate. The Commission on Human Rights subsequently reviewed the mandate of the Working Group in 2005 and, after difficult negotiations in which some States advocated an end to the Working Group process, a resolution was passed which gave the WGDD a one-year extension.

In 2005, in an attempt to bridge the differences on the most difficult portions of the Draft Declaration, the Chairperson-Rapporteur brought forward proposals for the consideration of all parties. The 11th Session of the Working Group (December 5 to 16, 2005 and January 30 to February 3, 2006) constituted a breakthrough in negotiations. All parties, State and indigenous alike, showed a willingness to engage in substantive negotiations with the goal of achieving consensus text, using the proposals of the Chairperson-Rapporteur as the basis for discussion.

Provisional agreement was reached on much of the Draft Declaration. Agreement on core issues such as self-determination and lands and resources, however, was not able to be reached, given the diversity of opinion among Working Group participants.

At the end of the 11th Session, the Chairperson-Rapporteur informed the Working Group that he would make proposals regarding articles that were still pending, based on the discussions held during the sessions. The Chairperson-Rapporteur concluded that the revised proposals would be presented to the Commission on Human Rights with the hope that it would be considered as a final compromise text.

The Chairperson-Rapporteur's text was released at the end of February 2006 and transferred to the newly created United Nations Human Rights Council (which replaced the Commission on Human Rights) for consideration. States and indigenous representatives did not have the opportunity to discuss these proposals.

Canada's Position at the Human Rights Council

Canada came to the Human Rights Council in June 2006 hoping to achieve additional consultations on the Draft Declaration. The aim of these consultations would have been to clarify substantive issues and to develop specific proposals to achieve the broadest possible agreement and to report back to the Human Rights Council.

Regrettably, this proposal did not receive the necessary support, even though Canada, some other countries, and a few indigenous representatives noted in their statements difficulties with a process where proposed language on several key issues had not been discussed by all parties.

Canada stated that further improvements were both possible and necessary and that more time was necessary to work with other States and indigenous peoples to arrive at a document that could be adopted by consensus before the Human Rights Council forwarded the Draft Declaration to the General Assembly for adoption.

Particularly in the past few years, work on the Draft Declaration has shown that State and indigenous representatives from around the world can work together, that we can put aside our differences in order to pursue a common goal.

Canada had worked toward a Declaration that would promote and protect the human rights and fundamental freedoms of every indigenous person without discrimination and recognize the collective rights of indigenous peoples around the world.

To be truly effective, a Declaration must clearly set out expectations for the States in which indigenous peoples live. Unfortunately, portions of the text presented to the Human Rights Council did not meet this test.

As Canada expressed in its statement to the Human Rights Council, the current provisions on lands, territories and resources are broad, unclear and capable of a wide variety of interpretations. They could be interpreted to support claims to broad ownership rights over traditional territories, even where rights to such territories were

lawfully ceded through treaty. These provisions could also hinder our land claims processes in Canada, whereby Aboriginal land and resource rights are premised on balancing the rights of Aboriginal peoples with those of other Canadians, within the Canadian constitutional framework – our framework for working together.

In addition, the concept of free, prior and informed consent is used in many contexts within the Draft Declaration. It could be interpreted as giving a veto to indigenous peoples over many administrative matters, legislation, development proposals and national defence activities which concern the broader population and may affect indigenous peoples.

Also, in relation to self-government provisions, the text does not provide effective guidance about how indigenous governments might work with other levels of government, including laws of overriding national importance and matters of financing.

Canada has a long and proud tradition of not only supporting, but actively advancing, Aboriginal and treaty rights domestically and is fully committed to continuing to work internationally on indigenous issues.

Regretfully, however, Canada had to call a vote on the Draft Declaration. The official results were as follows: 30 in favour, 12 abstentions, and 2 against (Canada and Russia). A number of States made statements of interpretations which highlighted a number of on-going concerns with the Draft Declaration, many of which were shared by Canada. At the time of the vote, Canada took the position that the Declaration will have no legal effect in Canada and does not represent customary international law.

In response to a media inquiry regarding Canada's position, Ambassador Paul Meyer said "When you're doing the right thing, you don't really worry about whether you're isolated or not. I think there were a number of countries that indicated they shared some of our concerns about the process and the substance and some of the deficiencies of both aspects that led us to take the vote we did."

Positions of other States at the Human Rights Council[2]

Both prior to and after the vote at the Human Rights Council, a number of States made statements in relation to the Draft Declaration. Even among those States voting for adoption, there were clearly issues with both process and substance. The quotes below are illustrative of such issues.

Argentina abstained from the vote, citing lack of time to deal with certain provisions of the declaration, which were of particular importance, namely self-determination and territorial integrity.

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2 These statements are available at the website of the Indigenous Peoples' Center for Documentation, Research and Information, at the following URL: http://www.docip.org/.

Bangladesh, while recognizing the importance of the Declaration, abstained from voting because “the text has not followed the usual procedures required before a document becomes mature for a decision.”

Brazil, in supporting adoption, underlined its understanding that the exercise of the rights of indigenous peoples “is consistent with the respect for the political unity and territorial integrity of the sovereign and independent States which they inhabit.”

France supported adoption, but indicated that “collective rights cannot prevail over individual rights” and that the right of self-determination must be exercised within the context of domestic constitutional norms.

Germany also supported adoption of the Declaration, but nuanced this support with a statement underlining “the primary importance of individual human rights.” They also understand that self-determination within the Declaration is a new right for indigenous peoples only, which will not affect sovereignty or territorial integrity. Germany stressed the non-legally binding nature of the Declaration and indicated that ethnic and minority groups within Germany do not qualify as indigenous.

India, while supporting adoption, defined the entire population of India as indigenous, and indicated that the self-determination clauses apply “only to peoples under foreign domination, and that this concept does not apply to sovereign independent states…” They went on to indicate that “this right to self-determination will be exercised by indigenous peoples in terms of their right to autonomy or self-government…”

Indonesia also gave its support to adoption, with the understanding that self-determination “should not be construed as authorizing or encouraging any action which would dismember …totally or in part, the territorial integrity or political unity of sovereign and independent states.”

Japan also supported adoption, but expressed “serious concern about a procedural matter, which is that the Working Group has not yet discussed the last proposal of this draft declaration.” In addition, Japan articulated concerns with some of the substance of the Declaration. In relation to self-determination, they said that this does not give “indigenous peoples the right to be separate and independent from their country of residence,” and also stated concerns regarding territorial integrity and political unity. Japan also said that “Japan does not accept the concept of collective rights at international law… but that indigenous individuals bear the rights contained in this Declaration.” Japan also viewed rights to lands and resources “as restricted within due reason in light of harmonization with third party rights.”

Mauritius, while voting for adoption, indicated they understood the apprehensions of others. They feared that some groups might use the right of self-determination to push for secession, and that some unqualified groups might self-designate as indigenous.

Morocco indicated they had abstained because they would have preferred that the resolution be adopted by consensus, and that there were ambiguities on essential issues which required additional time for discussion.

The Philippines abstained from voting, explaining that the complex issues contained within the Declaration merit additional study and consideration. They also wanted to ensure the text "is fully compatible with [their] Constitution and national laws, so that it can be implemented in a truly meaningful manner."

Russia joined Canada in voting against the Declaration, indicating the text did not enjoy genuine consensus, and had not been agreed to by all sides. They feared its adoption would set a negative precedent for future work of the Human Rights Council.

The United Kingdom, while supporting adoption, recorded "its regret that it has not been possible to reach wider consensus… and that some states with large indigenous populations have felt they have no recourse but to call a vote…" They indicated they "do not accept the concept of collective human rights at international law." The United Kingdom said the right to self-determination in the Declaration was "separate and different" from the current understanding of this concept at international law, and reiterated concerns regarding territorial integrity and political unity. The United Kingdom made further interpretive statements on cultural, intellectual, religious and spiritual property and redress and reiterated their understanding that the Declaration is not legally binding.

Ukraine abstained, indicating the Declaration "purports to create a new understanding of self-determination inconsistent with international law," which could "be interpreted and misconstrued as granting [indigenous peoples] a unilateral right to independence and secession." Ukraine also indicated they had concerns with the lands and resources provisions, and regretted that "the draft Declaration was tabled for adoption without providing the possibility for Member-States to comment formally on the text… and thus attempt to reach a consensus on the controversial elements of the text."

Finally, while not members of the Human Rights Council, Australia, New Zealand and the United States of America issued a joint statement indicating that the "fundamentally flawed" text of the Chairperson-Rapporteur did not enjoy consensus and there had not been an opportunity for States to discuss this text collectively. This statement also indicated that the current text is "confusing and would risk endless and conflicting interpretation and debate in its application." The statement indicated that the way the right of self-determination was articulated within the Declaration "could be misrepresented as conferring a unilateral right of self-determination and possible secession… thus threatening the political unity, territorial integrity and the stability of existing UN Member States." This statement also raised issues in relation to free, prior and informed consent, lands and resources, the possibility of separatist and minority groups identifying as indigenous, and the relationship between individual and collective

rights. In calling for additional negotiations, these States indicated that “adoption of this text risks a declaration that could be undermined, disowned or even reversed in its intent, through lengthy interpretive statements.”

Canada’s Interests with respect to the Draft Declaration

While Canada is generally supportive of the aims of the Declaration, Canada and some interested countries continue to have concerns regarding portions of the text of the Declaration as it currently stands. It is important to note that the Declaration included compromise text that was developed by the Chairperson-Rapporteur after the last session of the Working Group. These proposals were not received until the end of February, 2006, and there was no opportunity to discuss them with all interested parties. In light of this, Canada requested more time to work on the text with States and indigenous peoples.

Most importantly, parts of the current Declaration could be interpreted as being inconsistent with the *Canadian Constitution Act* 1982, the *Canadian Charter of Rights and Freedoms* and, previous decisions of the Supreme Court of Canada. Throughout negotiations, Canada consistently sought a Declaration that could be applied within Canada’s constitutional framework.

In Canada, the **Constitution** provides for the recognition and affirmation of existing Aboriginal and treaty rights. Canadian courts have interpreted and continue to interpret the content of these rights. Interpretive uses of the Draft Declaration could go beyond the current state of Canadian law. For example, wording in the Declaration regarding rights related to lands, territories and resources could be interpreted so as to support the extension of rights to Aboriginal peoples that are not currently recognized under the *Constitution Act*. In addition, the wording used in the Declaration does not take into account the different interests that indigenous peoples may have in the land, for example, and therefore may go beyond current Canadian law and practice and protections under the Canadian Constitution.

The Declaration addresses indigenous collective rights, and in some instances it addresses the individual rights of indigenous people. The ***Canadian Charter of Rights and Freedoms*** provides for the protection of the rights and freedoms of all individuals, including Aboriginal individuals, and the way that they should be balanced with the public interest as part of the fundamental values of Canadians. However, the rights provisions in the Declaration could be interpreted to provide for a different balance than that already provided for under the Charter. For example, certain language in the Declaration is very prescriptive. While the Supreme Court of Canada has established tests for the sometimes necessary infringement of individual rights, Article 46 of the Declaration, which provides for balancing collective and individual rights, could be interpreted as allowing less flexibility than that provided under section 1 of the *Charter*, or by jurisprudence under section 35 of the *Constitution Act, 1982*.

Decisions of the **Supreme Court of Canada** have found Aboriginal rights ranging from rights that respect traditional practices, such as hunting or fishing, to Aboriginal title, which is a right to exclusive use and occupancy of land. Certain provisions of the Declaration could be interpreted to go beyond existing jurisprudence of the Supreme Court of Canada regarding the collective rights of Aboriginal peoples pursuant to section 35 of the *Constitution Act, 1982*, such as the right to hunt, to fish and to gather. There are other central issues, most notably in relation to lands and resources, the use of the concept of free, prior and informed consent, and the Declaration's approach to self-government, among others.

The current text on **lands and resources** is ambiguous, and open to a wide variety of interpretations that might not take into account the different types of rights which indigenous peoples may enjoy with respect to lands and resources in Canada, as well as the different legislative regimes and protections which apply to these lands. This encompasses lands held by Aboriginal peoples as a result of treaties, legislation or other processes, including lands held and administered as Indian reserves and lands held in fee simple ownership by Aboriginal peoples. Aboriginal peoples may also have rights to use lands and resources for hunting, fishing and for other purposes. In areas of Canada where Aboriginal interests in lands and resources have not been addressed by treaty or other lawful means, Aboriginal peoples may have a variety of rights in relation to lands and resources within territories traditionally used. These rights can range from Aboriginal title or ownership of certain lands to rights to use lands and resources for various purposes. Since Declarations are non-binding, they are often drafted with aspirational language. The text in relation to lands and resources, however, is written in such a manner as to raise questions about its potential retroactive application.

With respect to Article 25, Canada would have preferred the Declaration contained a more explicit confirmation that the purpose of this article is to affirm the spiritual relationship, as opposed to the creation of material rights. This is particularly problematic in relation to the use of the term "waters and coastal seas."

Article 26 is 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." This text does not take into account the different interests that indigenous peoples may have in the land as well as the different legislative regimes and protections which apply to these lands. Also, the text does not recognize that rights to lands and resources need to be balanced with the rights of others. In a later paragraph of the same article, the duty on States concerning the scope of legal recognition is unclear. This article is another example of the text not providing practical guidance on key provisions.

The current text of Article 27 could be interpreted as requiring specific adjudication mechanisms for determining land rights and as being so prescriptive as to preclude other successful approaches for resolving land claims issues, such as direct negotiations between representatives of indigenous peoples and governments. At the

final Working Group, the Canadian delegation noted that representatives of governments and indigenous groups in claims negotiations were neither "independent nor impartial." The Supreme Court of Canada has consistently stated that negotiations are the preferred means for achieving reconciliation. Canada's policy is to support negotiations as the preferred means for recognizing and clarifying the land and resource rights of Aboriginal peoples. Since Canada had long advocated for inclusion of wording referring to processes to resolve and clarify land rights, the proposed text is disappointing.

With respect to Article 28, in relation to rights to redress for loss or damage to lands, territories or resources, Canada would have preferred the Declaration include confirmation that this article does not contemplate retroactive application, and could not be interpreted as applying to lands formerly held but over which rights were legally extinguished by treaty or other lawful means. Had Canada been successful in achieving additional negotiations, Canada would have worked to ensure the lands and resources provisions could not be interpreted to open up existing agreements, and to ensure that provisions relating to redress could not be interpreted as having a retroactive effect.

Article 29 recognizes rights that are not recognized at international law, specifically the right to the conservation and the protection of the environment. Canada would have preferred text that ensured that the duties of States with respect to the protection of the environment generally are consistent with those in relation to indigenous lands. Other changes to this text to ensure that indigenous peoples have a right to equal access to available assistance programs for environmental protection and conservation would also have been desired to meet Canada's interests.

Article 32 indicates that "indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources," that States shall obtain consent "prior to the approval of any project affecting their lands or territories," and that States shall "provide effective mechanisms for just and fair redress" for such activities. Canada would have liked this article to articulate that indigenous peoples may have varying interests in lands and territories and, in some cases, may be one of many groups with interests in a particular territory. Further, to meet Canada's interest, this article would need to reflect that the potential impacts of developments may vary. The use of the term "free, prior and informed consent" is also at issue in this article.

In the provision relating to **self-government** (Article 4), the current text recognizes rights to funding of self-government. Also, the text is not clear with respect to the need for paramountcy of federal or provincial laws of overriding national or provincial importance. Canada views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution. In negotiating self-government, Canada has an interest in ensuring the harmonious relationship of laws between federal, provincial and Aboriginal government laws. To meet these interests,

Canada would have preferred the Declaration clarify that while negotiated rules of priority may provide for the paramountcy of indigenous peoples' laws in specific circumstances, in matters of national interest and where impacts extend beyond communities, State laws would prevail over conflicting Aboriginal laws. In addition, the Declaration should have clarified that indigenous governments share responsibility for financing their functions.

The concept of **free, prior and informed consent** (Articles 10, 11, 19, 28, 29 and 32) is referred to in relation to administrative and legislative measures, redress, development, environmental protection and military activities. The Draft Declaration could be interpreted as giving a veto to indigenous peoples over many matters which affect them, including matters which also affect the broader population. This could be interpreted as going beyond the *Constitution Act, 1982*. While a veto, or consent, may be appropriate in some instances (for example, Article 29 indicates that no hazardous materials should be stored or disposed of on indigenous lands without the consent of the indigenous peoples concerned), it is clearly not an appropriate standard in all instances. Canadian jurisprudence has found a requirement for the Crown to justify infringement of Aboriginal rights and a duty to consult and, where appropriate, accommodate claimed Aboriginal rights when the Crown contemplates action that could affect such rights.

The Declaration provides that States are to consult and cooperate with indigenous peoples in order to obtain consent with regard to many issues. This is particularly problematic in relation to Article 19, which could be interpreted as requiring States to obtain consent with regard to virtually any government action that may affect indigenous peoples.

As previously indicated internationally, and consistent with recent Supreme Court rulings, Canada undertakes consultations in good faith, with account taken of the varying rights or interests indigenous peoples might have in the lands under consideration. It is more useful to conceptualize a “continuum” of approaches, of which consent is one important option. Canada believes that what is of fundamental importance here is that indigenous communities and peoples become more fully involved and consulted and, where appropriate, accommodated on development and other decisions that directly affect their rights.

Set against this interest, the Draft Declaration requires clarification to the concept of free, prior and informed consent in order to ensure that its use is consistent with Canada’s understanding of the concept. In relation to Article 19, for example, provision for consent on general legislative or administrative matters may not be warranted or realistic. Deleting the term “free, prior and informed consent” from Article 19 or using less prescriptive wording would result in a more realistic provision without losing its spirit and intent.

In relation to **military issues** (especially in Articles 10 and 30), Canada has an interest in ensuring that the removal of indigenous peoples from their lands or territories during

times of disaster, armed conflict or other emergencies is not prevented, and to ensure that the Draft Declaration does not prohibit military activities from taking place over and on the lands or territories of indigenous peoples as permitted under domestic law or by treaty or any agreement negotiated with indigenous peoples. However, the Declaration could be interpreted in a manner which could limit the military's ability to fulfill its mandate under the *National Defence Act*, especially with respect to relocation during times of disaster, armed conflict or other emergencies in accordance with Canadian or international law.

Article 36 provides for broad **contacts across borders** without specifying that it should be done "in accordance with border control laws," wording which was proposed by Canada with the support of several States. This provision could be interpreted to allow an unfettered right of transit and commerce across borders. While Canada supports cross-border contact between indigenous peoples, any such right must respect the sovereign right of States to control their borders, including through the imposition of immigration and customs controls and duties. The Draft Declaration should have reflected this fact, and Canada would have supported the use of the phrase "in accordance with border control laws" in this context.

There are also other provisions that do not meet Canada's interests, including the manner in which provisions with respect to language and culture, education, intellectual property, and indigenous legal systems have been drafted. Had Canada been successful in achieving additional negotiations, other such concerns could have been dealt with in the context of a statement delivered at the time of adoption.