CONGRESS OF ABORIGINAL PEOPLES SUBMISSION TO UNITED NATIONS HUMAN RIGHTS COUNCIL

CANADA'S FOURTH UNIVERSAL PERIODIC REVIEW, 44TH SESSION, APRIL 5, 2023[i]

CONGRESS OF ABORIGINAL PEOPLES

1. The Congress of Aboriginal Peoples ("CAP" or the "Congress") is a national organization in Canada, with a mandate to be the **national voice for off-reserve Status and Non-Status Indians, Métis, and Southern Inuit peoples**.

2. CAP is **one of five national Indigenous representative organizations** recognized by the Canadian Federal Government. CAP is Canada's second-oldest national Indigenous representative organization, **formed in 1971** (as the Native Council of Canada) to represent the interests of Canada's off-reserve Indigenous peoples. CAP also holds consultative status with the United Nations Economic and Social Council ("ECOSOC").

3. CAP primarily **represents non-status Indian (First Nations) peoples, Metis and Southern Inuit peoples** who are not represented by the other National Indigenous organizations.

DISTINCTION-BASED POLICY APPROACH

4. Canada's off-reserve Indigenous people have long been **the subject of discrimination and disadvantage on the basis of their indigeneity**, and the inaccurate and stereotypical assumption that they are less Indigenous than their reserve-based counterparts.

5. For decades prior to the Supreme Court of Canada's 2016 decision in *Daniels v. Canada (Indian Affairs and Northern Development)*,[1], Canada took the position that it had no jurisdiction over off-reserve Indigenous people, and in particular Non-Status Indians, Métis and Southern Inuit. Rather, Canada's position was that these Indigenous people were a provincial responsibility.

6. When the Supreme Court ruled against Canada's position in *Daniels*, Canada pivoted to a new position, whereby it accepts its responsibility for Status Indians (at least on reserve), some Métis, and Inuit who are registered beneficiaries of land claims agreements, but ***draws arbitrary distinctions between and among Indigenous people and communities***.

7. Canadas **"distinctions-based approach"** towards Indigenous policy-making, has been in place since approximately 2016. As part of this policy, Canada has chosen only to engage in consultation and negotiation with three "recognized" political groups, none of whom represent the interests or voices of all off-reserve Indigenous peoples. **In particular, Canada has failed to engage with or meet the needs of its urban Indigenous people.**

8. Canada recognizes that it has international and domestic constitutional obligations to facilitate Indigenous self-determination and also that direct negotiation with Indigenous communities is necessary to the achievement of this goal. Despite these explicit acknowledgements, **Canada denies this right to CAP and its constituents by failing to involve them adequately or at all in**

[1] 2016 SCC 12 ("*Daniels* SCC").

consultation or negotiations about self-government, land claims, healthcare, education, infrastructure, or natural resources – the foundation upon which off-reserve peoples may advance towards self-government and the security of which enables Indigenous peoples to exercise and express their culture.

UNDRIP IN CANADA

9. The abandonment of the distinctions-based approach is essential to achieving UNDRIP's unequivocal guarantee of **equality for *all* Indigenous peoples** and the complete and effective implementation of UNDRIP in Canada.

10. The distinctions-based approach is a federal government policy that **unequally distributes access, resources, and consultation depending on group membership**. The policy recognizes only the federal government's preferred groups, which does not include national representation of Canada's off-reserve status and non-status Indigenous people. As a result, the distinctions-based policy and has the **effect of segregating, devaluing, and/or ignoring off-reserve status and non-status Indigenous peoples**. It also **imposes the government's choice of representatives** on Indigenous peoples, rather than recognizing their own freely chosen representatives.

11. **The distinctions-based approach remains the largest hurdle to achieving equality** for the off-reserve status and non-status Indian, Métis, and Southern Inuit peoples that comprise CAP's membership.

12. This policy approach results in laws, programs, and funding initiatives that short change or **ignore the largest population of Indigenous people in Canada, contrary to UNDRIP's** guarantee of equality among and between all Indigenous peoples, regardless of their origin or identity. The current approach does not reflect the lived reality of many off-reserve Indigenous people, who, through the colonial forces of assimilation and displacement, are no longer connected with the reserve-based communities to which they have been nominally assigned under the *Indian Act.*

13. A policy approach that reflects a broader understanding of the Indigenous peoples of Canada, as found in the Constitution (including non-status and general list Indians, Southern Inuit, and Métis not represented by the MNC), and of Canada's colonial history, **must** be adopted in the implementation of the Declaration. **All active and future laws and programs should be inclusive of representative Indigenous bodies that speak for their membership**, not only those Indigenous organizations that the government itself has imposed on Indigenous people under its "distinctions-based" approach.

14. Likewise, the federal government's treatment of Indigenous peoples increasingly reflects the "distinctions-based" categories of "Indigenous governing body" ("IGB") and "Indigenous organization". For example, both the *Department of Crown-Indigenous Relations and Northern Affairs Act* and the *Department of Indigenous Services Act* are organized around these categories, and other federal legislation uses the definition of "Indigenous governing bodies"

15. While many Indigenous organizations may in fact meet the definition of IGBs under this legislation, the federal government has largely defined **and imposed these categories through its own legislative and administrative practices**. For example, the government treats *Indian Act* bands, former or present governing members of the MNC, and land claims organizations belonging to ITK as IGBs, despite the fact that this **status reflects and arises from the government's own choices and imposes the government's chosen representative structures on Indigenous people**. Thus, the classification of Indigenous groups as IGBs or Indigenous organizations is an extension of and perpetuates the distinctions-based approach.

16. Also, the undue focus on what the government has (mis)classified as "rights-bearing" communities (in many cases, ignoring their lack of true representativeness and/or **ignoring the claims of other equally or more representative organizations**) has prevented the government from addressing the real needs of many thousands of Indigenous people. The Declaration includes the right to development (Article 23), which is particularly important to off-reserve and Urban Indigenous people, who are often not represented or poorly served by those that the government recognizes as IGBs.

17. As **Indigenous people living off-reserve comprise the largest population** of Indigenous peoples in Canada, CAP recommends that their needs are considered in **all aspects of the UNDRIP Action Plan**, no matter its structure.

18. An independent UNDRIP Act Monitoring and Oversight Committee (the "Committee") should be struck to monitor the implementation of the Action Plan and the Declaration more broadly. The Committee should include members from, at a minimum, each of the five NIOs recognized by the government of Canada.

19. An **independent commission or tribunal should be created** where Indigenous persons and groups can access recourse and remedies for the breach of their UNDRIP rights by the federal government. This tribunal should be headed by an Indigenous Chief Commissioner with expertise on the Declaration and an understanding of colonialism's various impacts on Indigenous identity in Canada. Further, the tribunal should provide timely, cost-effective remedies to Indigenous peoples and have the jurisdiction to make declarations on the validity/applicability of federal laws. To the extent that the tribunal can be a collaborative, non-adversarial forum for Indigenous peoples and the federal government to come to solutions on Declaration related issues, that should be provided for in the tribunal's enabling legislation.

20. **Non-status and off-reserve Indigenous peoples have been largely excluded from Canada's programs and policies.** Despite legal rulings and being the federally-recognized representative of Canada's off-reserve Indigenous peoples, CAP, continues to be left out of important programs and policies intended to make conditions better for Indigenous peoples. Today, most Indigenous people live off-reserve and in Urban centers, Canada's rarely acknowledges this fact and does not work directly with their representative organizations.

21. Canada refusal to work with the Urban communities honestly and intently has resulted in the further assimilation of Indigenous peoples by not supporting their rights or cultural expressions in that space. This **forced assimilation entrenches old colonial approaches and Indigenous peoples struggle to retain their identity and to be fully Indigenous**.

[i] Information in this report taken from ***Communication to the United Nations Human Rights Committee In the case of Congress of Aboriginal Peoples against Canada submitted for consideration under the Optional Protocol to the International Covenant on Civil and Political Rights to The United Nations Human Rights Committee (September 09, 2021) Attached, and CAP community engagement on the UNDRIP Implementation Action Plan,*** *please refer for further information and explanation.*