

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

c/o Petitions Team

Office of the High Commissioner for Human Rights
United Nations Office at Geneva
1211 Geneva 10, Switzerland

September 9, 2021

PART I. INFORMATION ON THE COMPLAINANT

A. *The Author*

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. The vision of the Congress is that all Indigenous peoples in Canada should experience the highest quality of life, through the rebuilding of Nations and the institution of self-government for off-reserve Status and Non-Status Indians, Métis, and Southern Inuit communities (referred to collectively as “off-reserve Indigenous people”). CAP brings this complaint on its own behalf and on behalf of the off-reserve Indigenous people that it represents.

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”).

B. *Legal Representatives of the Author*

3. This claim is submitted by Paliare Roland Rosenberg Rothstein LLP, who are duly authorized legal representatives of the Author.

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PART II. STATE CONCERNED

5. This communication is submitted against Canada, which acceded to the International Covenant on Civil and Political Rights in 1976. The Optional Protocol entered into force for Canada on August 19, 1976.¹

PART III. SUMMARY OF THE CLAIM

6. 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. For decades prior to the Supreme Court of Canada's 2016 decision in *Daniels v. Canada (Indian Affairs and Northern Development)*,² 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. 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. Canada calls this its "distinctions-based approach" towards Indigenous policy-making, which 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" groups, none of whom

¹ *Mclvor and Grismer v. Canada*, UNHRC, Communication No. 2020/2010, UN Doc. CCPR/C/124/D/2020/2010, [para. 1](#) ("Mclvor and Grismer v. Canada, UNHRC").

² [2016 SCC 12](#) ("Daniels SCC").

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.

7. 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 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.

8. As a result, Canada has violated the International Covenant on Civil and Political Rights as follows:

(a) *Article 1, paragraphs 1-3*: Canada has failed to honour the Authors' right to self-determination, in that Canada fails to consult with and involve the Authors in decision-making in a meaningful way with respect to Indigenous policy-making;

(b) *Article 2, paragraphs 1-3*: Canada has failed to ensure that its measures to advance the rights and condition of its Indigenous peoples are extended on an equal basis without distinction of any kind, such as race..., national or social origin... birth or other status, and has failed to take such

measures as may be necessary to give effect to the rights recognized in the Covenant, including the provision of effective remedies;

- (c) *Article 25, paragraph (a)*: Canada has failed to allow CAP's constituents to take part in the conduct of public affairs through their freely chosen representative, CAP;
- (d) *Article 26*: Canada has failed to provide its off-reserve Indigenous people with equal and effective protection against discrimination on any ground such as race... national or social origin..., birth or other status; and
- (e) *Article 27*: Canada has failed to positively ensure the effective participation of CAP's constituents in policy decisions that affect their right to exercise and enjoy their cultural rights.

9. This communication is admissible because it is within the temporal jurisdiction of this Committee, Canada is a State Party to the Covenant and the Optional Protocol, and because Canada's Supreme Court has already determined that Canada has no obligation to engage CAP or other representative organizations in policy-making discussions or negotiations. Further, even if a case could be brought in the Canadian courts to challenge Canada's policy, it would take many years to litigate to the Supreme Court of Canada, thereby depriving some of Canada's most vulnerable Indigenous persons of any possible timely remedy.

PART IV. FACTS OF THE COMPLAINT

10. Canada's off-reserve Indigenous people make up the majority of Canada's Indigenous population. Increasingly, they reside in urban centres. However, Canada's policy-making is largely focused upon reserve-based "Indian" communities legally established under the *Indian Act*, beneficiaries of land claims agreements with Inuit organizations in Canada's Far North, and Métis communities in the "Métis Nation Homeland" of West Central North America. This excludes vast numbers of off-reserve Indigenous people, and in particular urban Indigenous people, who are represented by CAP and its Provincial and Territorial Organizations ("PTOs").

A. *The Federal Government's Responsibility for Indigenous Peoples of Canada*

11. Under s. 91(24) of the *Constitution Act, 1867*, the Federal Government has jurisdiction over "Indians, and lands reserved for the Indians."³

12. Historically, the Federal Government chose to exercise its jurisdiction only with respect to "Indians" (now often referred to as "First Nations") that it recognized as falling under federal responsibility. In 1939, the Federal Government and Québec Provincial Government were in dispute over who was responsible for the Inuit population of Far Northern Québec, which faced conditions of severe food insecurity. The Federal Government brought a reference case to the Supreme Court of Canada ("*Re Eskimos*"), which determined that Canada's Inuit fell within the definition of "Indians", and were thus a federal rather than provincial responsibility.⁴ Following this ruling, the Federal Government has generally treated Northern Inuit comparably to reserve-based Indians.

³ *The Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, [s. 91\(24\)](#).

⁴ *Reference as to whether "Indians" includes in s. 91(24) of the B.N.A. Act includes Eskimo inhabitants of the Province of Quebec*, [1939] SCR 104 ("*Re Eskimos*").

13. Despite the 1939 ruling in *Re Eskimos*, the Federal Government continued to take the position that Canada's Métis and Non-Status Indians, who live almost exclusively off-reserve, did not fall within federal jurisdiction over "Indians, and lands reserved for the Indians", but rather were a provincial responsibility. The result was that Métis and Non-Status Indians were "collaterally damaged", since the provinces often took the contrary position.⁵

14. Faced with the continuing exclusion of many of its constituents from federal programming, support for Indigenous self-determination, and recognition of Indigenous rights, CAP commenced the *Daniels* case in 1999, seeking a declaration that Métis and Non-Status Indians were also "Indians" that fell within federal jurisdiction over "Indians, and lands reserved for Indians". In 2016, after CAP underwent 17 years of drawn-out litigation against the Federal Government, the Supreme Court of Canada ruled in CAP's favour, and granted the declaration sought. Beyond the formal declaration granted, the Supreme Court also held that "it is the federal government to whom [Métis and Non-Status Indians] can turn" for policy redress.⁶

15. In response to *Daniels*, the Federal Government has increased its recognition, programming, and support of some Métis. However, consistent with its earlier pattern, the Federal Government has taken the narrowest possible approach to the *Daniels* ruling. The Federal Government has engaged significantly with those organizations that refer to themselves as the "Métis Nation", and which comprise the Métis National Council ("MNC"). These organizations are present in the "Métis Nation Homeland" of

⁵ *Daniels* SCC, [para. 14.](#)

⁶ *Daniels* SCC, [para. 51.](#)

West Central North America, which is defined by the MNC as covering the three Prairie Provinces (Manitoba, Saskatchewan, Alberta), as well as parts of Ontario, British Columbia, and the Northwest Territories.⁷ This area accounts for only a part of Canada, and only 3 of Canada's top 10 census metropolitan areas (5 of the top 20) are located in this area.⁸ A substantial majority of Canada's urban Indigenous people live outside of this area.

16. However, the Federal Government has not engaged significantly with Métis who live outside of the "Métis Nation Homeland", or who are not members of the organizations that make up the MNC,⁹ nor has it engaged significantly with Non-Status Indians. Federal Government recognition, programming, and support for Métis who do not belong to the MNC organizations (all of which are voluntary), and for Non-Status Indians, remains minimal, despite the *Daniels* decision.

B. Classification of Canada's Indigenous Peoples

17. Section 35(2) of Canada's *Constitution Act, 1982* defines Canada's "Aboriginal peoples" as follows, for the purpose of recognizing constitutionally-protected Aboriginal rights:

Definition of *aboriginal peoples of Canada*

(2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada.¹⁰

⁷ Metis National Council, "FAQ", online: <www2.metisnation.ca/about/faq>.

⁸ Statistics Canada, *Population and Dwelling Count Highlight Tables*, 2016 Census, Catalogue no. 98-510-X2016001 (Ottawa: Statistics Canada, 2018), online: <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/hltfst/pd-pl/Table.cfm?Lang=Eng&T=201&SR=1&S=3&O=D&RPP=150>>.

⁹ These are the Métis Nation of British Columbia, the Métis Nation of Alberta, the Métis Nation–Saskatchewan, the Manitoba Métis Federation, and the Métis Nation of Ontario.

¹⁰ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, [s. 35\(2\)](#).

18. As set out in more detail below, the *Indian Act*, originally introduced by the Federal Government in 1876, separates “Indians” into two categories: Status and Non-Status.¹¹ Registration for Indian Status is based on the degree of descent from ancestors who were registered or entitled to be registered under the *Indian Act*. Those who are considered Status Indians are eligible for many programs and services offered by the Federal government. Indigenous persons who identify as “Indian” or “First Nations” but are not entitled to registration under the *Indian Act* are Non-Status Indians, and are typically excluded from the programs and services that are available to Status Indians.

19. The Inuit are Indigenous people primarily from Canada’s present-day Inuvialuit Settlement Region (Northwest Territories), Nunavut, Nunavik (Northern Quebec), and Nunatsiavut (Northern Labrador). The Southern Inuit, or NunatuKavut people, are resident throughout central and southern Labrador.

20. The Métis are Indigenous persons of mixed Indigenous and European heritage who are bound by a common culture or cultures, giving rise to one or more distinct Indigenous peoples. The 1996 *Report of the Royal Commission on Aboriginal Peoples* observed that “[t]here are many distinctive Métis communities across Canada, and more than one Métis culture as well.”¹² The Supreme Court of Canada has held that “[t]he term “Métis” in s. 35 [of the *Constitution Act, 1982*] does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and

¹¹ [R.S.C. 1985, c. I-5](#).

¹² *Report of the Royal Commission on Aboriginal Peoples*, Vol. IV, “Perspectives and Realities” (Ottawa: 1996), [p. 190](#).

recognizable group identity separate from their Indian or Inuit and European forebears.”

¹³ The Supreme Court has observed that there is no consensus on who is considered “Métis”.¹⁴ For the purpose of this Complaint, no precise definition is needed.

21. The Federal Government has regulated Indian affairs since Confederation in 1867. At Confederation and for many years thereafter, assimilation of “Indians” into settler society was the avowed policy of the Federal Government.¹⁵ An early post-Confederation statute, the 1869 *Act for the gradual enfranchisement of Indians, the better management of Indian Affairs and to extend the provisions of the Act 31st Victoria Chapter 42*,¹⁶ introduced the “marrying out” rule for the first time in legislation, reflecting this policy.¹⁷

22. The marrying out rule provided that Indigenous women who married non-Indigenous men, and their children, would lose their “status” as “Indians”, though they could still be “Indians” for the limited purpose of entitlement to receive annuity payments. The marrying out rule was a feature of federal Indian legislation from 1869 until 1985. The 1869 *Act* also provided for “enfranchisement” of other Indigenous persons, including those who entered professions such as the clergy or law. Enfranchised Indians also lost their status, as did their wives and children.

23. Parliament enacted the first *Indian Act* in 1876. The *Indian Act* was repeatedly amended over the decades, for example to provide for compulsory enfranchisement of

¹³ *R. v. Powley*, 2003 SCC 43, [para. 10](#).

¹⁴ *Daniels* SCC, [para. 17](#).

¹⁵ *Daniels v. Canada (Min. Indian and Northern Affairs)*, 2013 FC 6 (“*Daniels Trial*”), [paras. 278, 354](#).

¹⁶ [32-33 Vict., c. 6](#).

¹⁷ *Daniels Trial*, [para. 365-67](#).

“Indians” at the order of the Department of Indian Affairs. The purpose of amendments to the *Indian Act* in 1920 providing for compulsory enfranchisement was described as follows by Deputy Superintendent-General Duncan Campbell Scott:

Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department, that is the object of this Bill.¹⁸

24. The assimilationist policy was also reflected in the terms on which the Province of Newfoundland entered into Confederation in 1949. All Indigenous persons in Newfoundland entered Confederation “fully enfranchised” – that is, without any status as Indians.¹⁹ The first recognition of “status” Indians in Newfoundland did not occur until 1984, with the creation of the Conne River Band (Miawpukek First Nation) by federal Order-in-Council.²⁰

25. The current registration system for “Indians” with status under the *Indian Act* was not introduced until 1951. The 1951 Act established a central Indian registry, under the control of the Department of Indian Affairs. Those who were registered effectively became a charter population. From that point on, eligibility for registration would depend upon demonstrating the required relationship to parents or other ancestors who were already registered. Band lists were created in and following 1951, but not all Indigenous persons were able to or chose to register.²¹ The 1951 *Indian Act* also ended annuity payments for women who had married out, and introduced the “double mother” rule,

¹⁸ J. Leslie, *The Indian Act: An Historical Perspective*, 2002 Canadian Parliamentary Review 23, p. 25, [2002 CanLII Docs 236](#).

¹⁹ *Daniels Trial*, [para. 466](#).

²⁰ *Daniels Trial*, [para. 511](#).

²¹ Band lists were based in many cases on Treaty Paylists, which have been described as being “the product of *ad hoc* record keeping, fluctuating interpretations of the *Indian Act*, and ongoing policy changes dating back to pre-Confederation” *Daniels Trial*, [para. 168](#).

whereby children whose mother and paternal grandmother both acquired status through marriage to a status Indian, would lose status at age 21.²²

26. Under the registration system introduced in 1951, even if an Indigenous person was entitled to register in fact, they could face difficulty in establishing their rights to do so through lack of written records. In cases where parentage was unknown or unstated, an Indigenous person could be unable to register.²³ Many Indigenous persons lost their links to their communities when they were sent to residential schools, or were subjected to the “Sixties Scoop”.²⁴

27. Some, but not all, of the restrictions on registration were addressed in 1985 with Bill C-31. Those who had married out or enfranchised, and their first-generation descendants, became entitled to register as “status” Indians. However, Parliament imposed a “second-generation cut-off” rule through ss. 6(1) and 6(2) of the *Indian Act*. A first-generation descendant of an Indian who had married out or enfranchised was entitled to be registered, but only under s.6(2), which meant that they could not pass on status to their children, unless the other parent also had status under the *Indian Act*. A prior version of the legislation (Bill C-47) would have extended status to second-

²² Government of Canada, Crown-Indigenous Relations and Northern Affairs Canada, “Background on Indian registration”, online: <<https://www.rcaanc-cirnac.gc.ca/eng/1540405608208/1568898474141>> (“Background on Indian Registration”).

²³ Background on Indian Registration

²⁴ Truth and Reconciliation Commission of Canada, “Final Report of the Truth and Reconciliation Commission, 2015, Vol. 2, *What We Have Learned: Principles of Truth and Reconciliation*”, pp. 104-5, online: <https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Principles_English_Web.pdf>.

generation descendants, which would have included approximately 55,000 more Indigenous persons in the status Indian population.²⁵

28. Further amendments following *Mclvor v. Canada (Registrar of Indian and Northern Affairs)*²⁶ and *Descheneaux v. Canada (A.G.)*²⁷ removed some aspects of residual sex discrimination arising from the marrying out rule, and allowed some, but not all, second-generation descendants to become eligible for status, but the legacy of settler-society interference remains and continues. The very concept of status represents an ongoing form of Federal Government interference and control of Indigenous people and communities.

29. The result of this history of massive government interference with Indigenous people and communities is that there is now a significant population of Non-Status Indians,²⁸ who may or may not have retained substantial links to *Indian Act* bands (which now more frequently refer to themselves as “First Nations”). These legislative developments have also taken place against the backdrop of migration of Indians from the reserves, and increasing urbanization of Indigenous people.

30. The *Indian Act* also imposed the band system on Indigenous people, whereby each First Nation is governed by an elected chief and band council (regardless of which one of the many traditional governance structures that particular First Nation may have employed pre-*Indian Act*). Most bands hold reserve lands. Status Indians are also generally Band members, with rights under the *Indian Act* to live on reserve, vote for

²⁵ *Daniels* Trial, [para. 549](#).

²⁶ [2009 BCCA 153](#).

²⁷ [2015 QCCS 3555](#).

²⁸ Estimated in *Daniels* Trial at between 300,000 and 450,000: [paras. 117-118](#).

band councils and chiefs, share in band money, and own and inherit property on reserve. However, the Federal Government maintains a “general list” of Indians who have status under the *Indian Act*, but are not members of any *Indian Act* band. Many “general list” Indians are members of CAP’s PTOs.

C. CAP

31. CAP is one of five national Indigenous representative organizations recognized by the Federal government. The others are the Assembly of First Nations (“AFN”), Inuit Tapiriit Kanatami (“ITK”), MNC, and Native Women’s Association of Canada (“NWAC”).

32. CAP is Canada’s second-oldest national Indigenous representative organization. CAP was formed in 1971 under the name the Native Council of Canada (“NCC”). CAP was incorporated in 1972, initially with a focus on representing the interests of Canada’s Métis and Non-Status Indians. The objects of the NCC included:

- (a) to advance on all occasions the interest of the Métis and Non-Status Indian Peoples of Canada;
- (f) the discussion of, and recommendation to the Government of Canada, legislation or amendments to Acts or Regulations affecting the interests of the native people of Canada, and to cooperate with the respective Governments, Provincial and Federal for the welfare of Métis and Non-Status Indian people; and
- (g) to enter into any agreements or arrangements with any Government or Authority that may seem conducive to the Council’s objects.

33. In 1989, the NCC amended its Letters Patent, to broaden its objects to advancing the interests of the Aboriginal People of Canada, and to provide that its objects are to be carried out throughout Canada and, as required, internationally. This followed the Federal government's amendment of the *Indian Act* in 1985 ("Bill C-31"), and the Committee's decision in *Lovelace*, which had the effect of granting status to many women, men and children who were formerly Non-Status Indians. As set out below, the vast majority of those who obtained status as a result of Bill C-31 remained off-reserve. Many of them retained their connection and affiliation to the NCC and one of its ten PTOs.

34. In 1994, the NCC reorganized and changed its name to CAP, to better reflect its mandate. Since 1994, CAP has represented the interests of off-reserve Status and Non-Status Indians, Métis and Southern Inuit Indigenous Peoples throughout Canada.

35. CAP's PTOs have their own individual members. The PTOs provide services and advocate for the rights of their members; they deliver assistance to off-reserve and Non-Status Indigenous people throughout the country in areas such as housing, education, employment, mental health and language.

36. On December 5, 2018, following the *Daniels* decision, the Federal Government entered into a renewed political accord with CAP, entitled the Canada-Congress of Aboriginal Peoples Political Accord ("Political Accord"), in which the Federal government

recognized CAP's mandate as a national voice for off-reserve Status and Non-Status Indians, NunatuKavut Inuit, and Métis peoples.²⁹

D. CAP's Constituents

37. A large majority of Canada's Indigenous Peoples, and a majority of Status Indians, live off-reserve.

38. CAP represents the interests of hundreds of thousands of Indigenous persons in Canada who are (i) off-reserve Status Indians who are not members of any First Nation (i.e., *Indian Act* band), or who have little or no connection to a First Nation and who do not benefit significantly or at all from funding or ameliorative programs for First Nations, (ii) Non-Status Indians throughout Canada, (iii) Métis who are not members of MNC organizations, or (iv) Southern Inuit. These groups are not represented adequately or at all by the other national Indigenous representative organizations.

E. The Needs of the Off-Reserve Indigenous Peoples of Canada

39. A large majority of Canada's Indigenous people, and a majority of Status Indians, live off-reserve. Off-reserve Indigenous people have faced a history of disadvantage and neglect in Canada.

²⁹ Canada-Congress of Aboriginal Peoples Political Accord (05 December 2018), online: <<http://www.abo-peoples.org/wp-content/uploads/2019/02/Political-Accord-ENG.pdf>>.

40. According to Statistics Canada, there were approximately 1.6 million Indigenous people in Canada as of the 2016 Census. Of that number, 51%, or 853,000, were not classified as Registered or Treaty Indians (i.e., Status Indians).³⁰

41. 81% of the total Indigenous population in Canada, or approximately 1.3 million people, live off-reserve. An estimated 60% of Status Indians, approximately 489,000, live off-reserve.³¹

42. Whether or not they have status under the *Indian Act*, Indigenous people increasingly reside in urban centres. In 2016, an estimated 41% of the total Indigenous population in Canada lived in population centres with at least 30,000 residents.

43. Indigenous people in Canada who live off-reserve, whether Status or Non-Status, face different challenges than those who live on-reserve. In 2016, 30% of Indigenous people and 36% of Indigenous children and youth in urban areas were living in low-income households. Indigenous children living in urban, single-parent homes, were even more likely to be below the poverty line, with more than half (56%) living in a low-income household.³²

44. Off-reserve Indigenous people in Canada are particularly at risk of being food insecure. For example, in 2017, among Indigenous people aged 18 and older living in urban areas, 38% lived in a food insecure household. Specifically, 43% of off-reserve

³⁰ Statistics Canada, *Aboriginal Population Profile*, 2016 Census, Catalogue no. 98-510-X2016001 (Ottawa: Statistics Canada, 2018), online: <<https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/index.cfm?Lang=E>>.

³¹ Statistics Canada, *Focus on Geography Series*, 2016 Census, Catalogue no. 98-404-X2016001 (Ottawa: Statistics Canada, 2017), online: <<https://www12.statcan.gc.ca/census-recensement/2016/as-sa/fogs-spg/Facts-CAN-Eng.cfm?TOPIC=9&LANG=Eng&GK=CAN&GC=01>> (“*Focus on Geography Series*, 2016 Census”).

³² *Focus on Geography Series*, 2016.

First Nations people lived in food insecure households, while 53% of Inuit and 31% of Métis people were similarly food insecure. These rates are much higher than those reported for the general population.

45. Off-reserve Indigenous people are also more likely than the general population to suffer chronic health conditions. In 2012, 63% of off-reserve First Nations people aged 15 and older reported having at least one chronic condition, compared with 49% of the total population of Canada. In 2017, 32% of off-reserve First Nations peoples, 30% of Métis people, and 19% of Inuit people had one or more disabilities that limited them in their daily activities.³³

46. Off-reserve Indigenous people are also at particular risk of living in precarious and substandard housing. For example, in 2016, 11% of Indigenous people living in urban areas were in housing that was in need of major repairs, compared to 6% of Canada's non-Indigenous population.³⁴

47. Off-reserve Indigenous people are also at particular risk of experiencing mental health issues. In 2012, one in five (20%) of off-reserve Indigenous people 18 years and

³³ Statistics Canada, *Indigenous people with disabilities in Canada: First Nations people living off reserve, Métis and Inuit aged 15 years and older*, Aboriginal Peoples Survey, Catalogue no. 89-653-X201900 (Ottawa: Statistics Canada, 2019), online: <<https://www150.statcan.gc.ca/n1/en/pub/89-653-x/89-653-x2019005-eng.pdf?st=0ydz5fAT>>.

³⁴ Statistics Canada, *Housing Income and residential dissimilarity among Indigenous people in Canadian cities*, Insights on Canadian Society, 2016 Census, Catalogue No. 75-006-X (Ottawa: Statistics Canada, 2019), p. 3, online: <<https://www150.statcan.gc.ca/n1/pub/75-006-x/2019001/article/00018-eng.htm>>.

older had experienced suicidal thoughts in their lifetime. In non-Indigenous adults, this number is only 11.5%.³⁵

48. The needs of Canada's off-reserve Indigenous people are comparable to those of Status Indians on reserve. Like Status Indians who live on reserve, off-reserve Indigenous people face discrimination, lower incomes, higher levels of inadequate housing and food insecurity, and greater health challenges than Canada's non-Indigenous population. Yet the off-reserve population, including Status and non-Status Indians and Métis, has access to fewer supports and programs.

F. The long-standing disadvantage of off-reserve Indigenous people in Canada

49. The current disadvantaged state of off-reserve Indigenous people in Canada is not a new development. These socioeconomic facts have been recorded in government documents, commission reports, submissions from CAP and other organizations, and judicial decisions, for the past 50 years.

1. Métis and Non-Status Indians

50. A Memorandum to Cabinet dated July 6, 1972 from the Secretary of State, described the situation of Métis and non-status Indians in the following terms:

The Métis and non-status Indian people, lacking even the protection of the Department of Indian Affairs and Northern Development, are far more exposed to discrimination and other social disabilities. It is true to say that in the absence of Federal initiative in this field they are the most disadvantaged of all Canadian citizens.³⁶

³⁵ Statistics Canada, *Lifetime and past-year suicidal thoughts among off-reserve First Nations, Métis and Inuit adults, aged 18 years and over, Canada, 2012*, Aboriginal Peoples Survey, Catalogue no. 89-653-X2016012 (Ottawa: Statistics Canada, 2016), pp. 3, 5, online: <<https://www150.statcan.gc.ca/n1/en/pub/89-653-x/89-653-x2016012-eng.pdf?st=1azdvuvvm>>.

³⁶ Memorandum to Cabinet dated July 6, 1972 from the Secretary of State, cited in *Daniels Trial*, [para. 84](#).

51. Cabinet further considered the situation of Métis and non-status Indians in 1976, and noted:

1. The special problems and needs of all classes of native people are similar (recognition, cultural security, socioeconomic needs, participation, self-determination).
2. native people have very inadequate access to social, economic, and political resources...
5. the Indian Act which defines the Indian people to whom the federal government addresses special programs is in some ways arbitrary, anachronistic and harsh in excluding certain categories of individuals;...
8. the non-status Indians and Métis suffer severe disadvantage such that provincial authorities alone are unlikely to significantly ameliorate their situation in the foreseeable future.³⁷

52. In October 1978, a task force of Canadian federal officials was established called the Consultative Group on Métis and Non-Status Indians' Socio-Economic Development ("Consultative Group").

53. The Consultative Group produced a staff paper on August 15, 1980, entitled *Métis and Non-Status Indian Database: A Review of the Data and Information Situation with Recommendations for Improvements*. The Staff Paper noted as follows:

[Métis and Non-Status Indians] share with Status Indians such demographic, social and economic circumstances as high birth and death rates, high dependency ratios, low educational attainment, high under-employment and unemployment and low labour force participation rates relative to other Canadians. The various surveys and research studies are consistent in their descriptions of the disadvantaged conditions facing Canada's native peoples and the sharp increase in disparities over the last few decades.

The 1976 survey undertaken jointly by the Native Council of Canada and Canada Employment and Immigration shows that the structural and educational characteristics of [Métis and Non-Status Indians] are closely similar to those of Status Indians but sharply different from those of the overall Canadian population. The native population is significantly younger, less educated, less employed, earns less, and contains more dependents per household than the Canadian population as a whole.

³⁷ Memorandum to Cabinet dated May 27, 1976 entitled "Native Policy: A review with Recommendations", cited in Joseph Magnet, *Daniels v Canada: Origins, Intentions, Futures*, (2017), 6 Aboriginal Policy Studies 26-47, Ottawa Faculty of Law Working Paper No. 2017-39, p. 9, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2847298> ("Magnet Daniels Article").

The close similarity in selected demographic characteristics of [Métis and Non-Status Indians] and Status Indian populations suggests that further similarities may be inferred in other areas such as population growth rates, health and general standard of living.... Whether based on directly available statistical data pertaining to [Métis and Non-Status Indians] or on the wider statistical data pertaining to [Métis and Non-Status Indians] and Status Indians, there is clear evidence of the relative disadvantages facing native peoples vis-à-vis the overall Canadian population.³⁸

54. In or about September 1980, the Consultative Group produced its final report, entitled *Report of the Consultative Group on Métis and Non-Status Indian Socio-Economic Development*. This Report noted as follows:

Numerous studies and other reports show that many native people must cope with severe disadvantages and sometimes desperate circumstances... A joint survey report of December 1977 by the NCC and the Canada Employment and Immigration Commission (CEIC) of [Métis and Non-Status Indian] demography and labour force shows that the labour force participation rate for native people under 45 is distinctly lower than for other Canadians. This situation will not improve quickly as [Métis and Non-Status Indians] are 10 times less likely to have completed high school. Low [Métis and Non-Status Indian] incomes are further compounded by a child dependency ratio twice that of the overall Canadian population.

Unemployment rates for native people are the highest in the country. Actual figures vary with geographical location and by season, but it is typical to find unemployment rates in [Métis and Non-Status Indian] communities over 35%, that is four times the national average and often much higher. Part of this condition is due to location but even in the cities and in the resource development centres of the mid-north, the percentage of [Métis and Non-Status Indian] people employed in both public and private industry is substantially below their percentage of the local population.

Status Indian policy is now heading in the direction of Indian "self-government" which is a significant departure from past experiences. The essence of such a thrust is self-reliance or assuming more responsibility for one's own future. The [Métis and Non-Status Indians] living alongside and often related by family ties of Status Indians, desire the same goal. Lacking a land base, such as the reserves, and an Indian Act, the extent to which the [Métis and Non-Status Indians] can hope to achieve greater self-sufficiency and self-reliance is more circumscribed.³⁹

³⁸ Consultative Group on the Metis and Non-Status Indian Socioeconomic Development, *Métis and Non-Status Indian Database: A Review of the Data and Information Situation with Recommendations for Improvements* (15 August 1980), pp. 2, 7, 9.

³⁹ Consultative Group on the Metis and Non-Status Indian Socioeconomic Development, *Report of the Consultative Group on Métis and Non-Status Indian Socio-Economic Development* (September 1980), paras. 11, 52.

55. In August, 1980, the Intergovernmental Affairs Corporate Policy section of the Department of Indian and Northern Affairs produced an internal discussion paper entitled *Natives and the Constitution* to address issues likely to arise in upcoming constitutional talks under the agenda item “Canada’s Native Peoples and the Constitution”. This discussion paper recommended that the Federal government support “an increased effort for rationalizing and better coordinating existing federal and provincial programs to ensure that Métis and non-status Indians are accorded maximum access to the full range of government services”, and that “particular attention should continue to be paid to joint federal provincial initiatives targeted at the urban disadvantaged and Métis and non-status Indians in particular”. The discussion paper emphasized “the desirability of removing anomalous and discriminatory distinctions that exist between the on and off reserve population in terms of entitlement to services”.⁴⁰

2. Off-reserve Status Indians

56. In 1983, the Federal Government prepared an internal memorandum in connection with the 1983 First Ministers Conference. The memorandum traced the development of the off-reserve Status Indian population, and commented on their circumstances:

Until about two decades ago, this focus on providing services to those [status Indians] living on-reserve did not arouse the kind of conflict evident today. Certainly services were limited, and living conditions were poor, at least in material terms. No doubt also, many of those who did live off-reserve faced discrimination and severe hardship. Nevertheless, the vast majority of status Indians lived on-reserve, having access to more or less of the same government (and missionary, in many cases) services no matter where they resided across Canada.

Since the mid-1960’s, however, the proportion of status Indians living off-reserve has grown dramatically. Although definitional and data-gathering problems make exact figures impossible to obtain, it appears that the status Indian population off-reserve grew

⁴⁰ Department of Indian Affairs and Northern Development, *Natives and the Constitution*, Intergovernmental Affairs, Corporate Policy (August 1980).

from about 42,000 in 1966 to about 93,000 in 1983, an increase from about 16% of the total in 1966 to over 29% in the latter year. Some forecasts predict that over one-third of the status Indians will be living off-reserve by the end of the 1980's.

The migration off-reserve has been most pronounced in the large and medium-sized cities of Western Canada, particularly Winnipeg, Regina, and Vancouver. In these cities, status Indians off-reserve, together with Métis and non-status Indians who have experienced similar urbanization, constitute a large, visible, and for the most part needy minority.⁴¹

57. This memorandum also predicted that “the situation will become worse when removal of sex discrimination from the Indian Act increases the number of off-reserve status Indians”, referring to the removal of the “marrying out” rule following the decision of the Human Rights Committee in *Lovelace v Canada*, which ultimately happened in 1985 with Bill C-31.

58. In 1985, the *Indian Act* was amended by Bill C-31, which resulted in many women, children and men who formerly did not have status acquiring or regaining status under the *Indian Act*. Most individuals who acquired or regained status remained off-reserve, substantially increasing the population of off-reserve Status Indians. The Federal Government reported in a discussion paper in 2009, that it was estimated that 117,000 people who had lost status through discrimination, or whose parent or earlier ancestor had lost status in that way, had been “reinstated” to Indian status between 1985 and 2007 under Bill C-31. The discussion paper reported that only 18% of those registered as a result of Bill C-31 resided on reserve or on Crown land, and that this

⁴¹ 1983 First Ministers Conference Memorandum, p. 49.

was a factor in the decline in the percentage of Status Indians living on-reserve, which had changed from 71% in 1985 to 56% in 2007.⁴²

59. In 2009, the B.C. Court of Appeal decided that Bill C-31 had not completely removed sex discrimination from the *Indian Act*, in *Mclvor v. Canada (Registrar of Indian and Northern Affairs)*.⁴³ As a result, it was necessary to amend the *Indian Act* further to recognize the right to status of previously excluded Non-Status Indians. According to a demographic analysis compiled for the Minister of Indian and Northern Affairs, amendments to implement *Mclvor* would mean that approximately 45,000 individuals would be newly entitled to status, of whom 94% lived off-reserve.⁴⁴

60. The result of Bill C-31, and legislation to implement *Mclvor* (as well as more recent legislation to implement the decision of the Québec Superior Court in *Descheneaux v. Canada (A.G.)*, 2015 QCCS 3555, which found yet another layer of sex discrimination in the *Indian Act*) is that there is now a large population of Status Indians who live off-reserve, who have never lived on-reserve, and who have little or no connection to reserves. Many of these off-reserve status Indians were members of or associated with CAP's PTOs before the legislative amendments – indeed, CAP advocated for their right to status by lobbying for the passage of Bill C-31 and by intervening in *Mclvor*. Many of these off-reserve status Indians have retained their

⁴² Indian and Northern Affairs Canada, *Discussion Paper: Changes to the Indian Act affecting Indian Registration and Band Membership* (Ottawa: 2009), p. 3, online: <https://publications.gc.ca/collections/collection_2010/ainc-inac/R3-106-2009-eng.pdf>.

⁴³ [2009 BCCA 153](#).

⁴⁴ Indian and Northern Affairs Canada, *Estimates of Demographic Implications from Indian Registration Amendment* (Ottawa: March 2010), p. 4, online: <https://publications.gc.ca/collections/collection_2010/ainc-inac/R3-122-2010-eng.pdf>.

connection to CAP and its PTOs since (re)gaining status, and maintain a closer connection to CAP and its PTOs than to the First Nations that they nominally belong to.

61. The socio-economic challenges for off-reserve Indigenous persons noted in the 1970s, 1980s, and every decade since are still with us today. Despite this, Canada continues to adhere to the “distinctions-based” approach that has been repeatedly denounced as exposing off-reserve Indigenous persons to discrimination, and as being “arbitrary, anachronistic and harsh”, or “anomalous and discriminatory” over the last 50 years.

G. The Federal Government’s Distinctions-Based Approach

62. In December 2016, the Federal Government made prioritizing the needs of Status Indians who are members of *Indian Act* bands living on-reserve, Inuit living in land claims areas in Inuit Nunangat, and citizens of the Métis Nation over other groups of Indigenous people, official government policy.⁴⁵ The Canadian Federal Government calls this its “distinctions-based approach.”

63. As part of its distinctions-based approach, the Federal Government has significantly engaged only three of the country’s national Indigenous organizations in consultation and decision-making: the AFN, MNC, and ITK. These three groups are labelled as the “Permanent Bilateral Mechanism” (“PBM”) parties.⁴⁶ Collectively, the PBM parties represent only a minority of Canada’s total indigenous population:

⁴⁵ Government of Canada, “New permanent bilateral mechanisms” (30 April 2021), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1499711968320/1529105436687>> (“New Permanent Bilateral Mechanisms”).

⁴⁶ New Permanent Bilateral Mechanisms.

- (a) AFN: the Assembly of First Nations represents First Nations citizens in Canada who belong to *Indian Act* bands. First Nation Chiefs from the 634 *Indian Act* bands in Canada direct the work of the AFN.⁴⁷ As a result of the history set out above, off-reserve Status Indians often have little or no connection to the *Indian Act* band to which they are nominally assigned, and General List Indians are not assigned to bands at all. While it is possible for Non-Status Indians to be band members, this is not common.
- (b) MNC: the Métis National Council's five "Governing Members" (provincial organizations) represent members of the Métis Nation in the "Métis Nation Homeland" described above. The MNC takes a restrictive view of who is "Métis", limited to those who have Métis Nation ancestry from the "Métis Nation Homeland". Further, the Governing Members are voluntary organizations, and not all Métis choose to belong to them even within their geographic scope. As a result, the MNC does not represent the interests of the Métis members of CAP.
- (c) ITK: ITK represents the rights and interests of Inuit living in areas defined by land claims agreements in Northern Canada. The ITK does not represent the interests of the Southern Inuit, Inuit-descended people of mixed ancestry who primarily reside in southern and central Labrador.

64. The Federal Government has no PBM agreement with CAP. Despite *Daniels* and the fact that CAP represents arguably Canada's largest group of Indigenous people,

⁴⁷ Assembly of First Nations, "About AFN", online: <<https://www.afn.ca/about-afn/>>.

CAP was not invited or approached by the Federal Government to enter into such an agreement.

65. The result is that the Federal Government provides programming and funding in a manner that fails to address the needs of the largest Indigenous population in Canada - off-reserve Indigenous peoples, and particularly those in urban areas. This is despite the fact that the Federal Government explicitly recognized CAP as a national voice of off-reserve Indigenous peoples in the 2018 Political Accord, and despite the Federal Government's many decades of formal and informal recognition of CAP's representative role.

H. Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government

66. The Federal Government recognizes that self-government is an existing Aboriginal right under s. 35 of the *Constitution Act, 1982*, and also a fundamental Indigenous right and principle of international law, as set out in the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").⁴⁸

67. The Federal Government's *Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government Policy* (the "Self-Government Policy")

⁴⁸ Government of Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (15 September 2010), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>> ("Self-Government 2010"); Government of Canada, "Self-government" (25 August 2020), online: <<https://www.rcaanc-cirnac.gc.ca/eng/1100100032275/1529354547314>>.

states explicitly that there are only two routes to Indigenous self-determination: litigation or negotiation.⁴⁹ The Self-Government Policy states that Canada prefers negotiation.

68. Under the Self-Government Policy, Canada's stated objective is to reach agreements on self-government to permit Aboriginal jurisdiction or authority over matters that are internal to the group, integral to its distinct aboriginal culture, and essential to its operation as a government or institution. Under this approach, Canada acknowledges that a number of subjects are up for negotiation with Indigenous peoples including: the establishment of governing structures and internal constitutions, education, health, social services, land management, hunting, fishing and trapping on Aboriginal lands, housing, and conservation of natural resources, among many others.⁵⁰

I. The Federal government excludes CAP from self-government negotiations and programs

69. In 2019, the Prime Minister of Canada mandated that the Ministers of Indigenous Services and Crown-Indigenous Relations were to support Indigenous self-determination through, *inter alia*:

- (a) rebuilding and reconstituting historic nations, advancing self-determination and transitioning away from the *Indian Act*;
- (b) leading a whole-of-government approach on the continued renewal of a nation-to-nation, Inuit-Crown and government-to-government relationship with Indigenous Peoples;
- (c) establish a National Action Plan in response to the National Inquiry into Missing and Murdered Indigenous Women and Girls' Calls for Justice, in partnership with First Nations, Inuit and Métis Peoples;

⁴⁹ Self-Government 2010, [Part I – Policy Framework](#).

⁵⁰ Self-Government 2010, [Scope of Negotiations](#).

- (d) introducing co-developed legislation to implement UNDRIP by the end of 2020;
- (e) working with First Nations, Inuit and Métis to redesign the Comprehensive Claims and Inherent Rights Policies;
- (f) implementing the Truth and Reconciliation Commission's *Calls to Action*;
- (g) ongoing review, maintenance and enforcement of Canada's treaty obligations between the Crown and Indigenous communities;
- (h) continuing ongoing work with First Nations to redesign federal policies on additions to reserves, and on the Specific Claims process;
- (i) a new national benefits-sharing framework for major resource projects on Indigenous territory;
- (j) a new fiscal relationship with Indigenous Peoples that ensures sufficient, predictable and sustained funding for communities;
- (k) creating space for Indigenous Peoples in the Parliamentary Precinct;
- (l) a First Ministers' Meeting on Reconciliation with Indigenous Peoples; and
- (m) advancing meaningful inclusion of First Nations, Inuit and Métis partners in federal and intergovernmental decision-making processes that have an impact on Indigenous rights and interests.⁵¹

70. In 2021, the Prime Minister expanded the Ministers' priorities to include, *inter alia*:

- (a) development of a comprehensive "blue economy" strategy focused on growing Canada's ocean economy, while advancing reconciliation and conservation;
- (b) support additional capacity-building for First Nations, Inuit and the Métis Nation;
- (c) closing the infrastructure gap in Indigenous communities, particularly with respect to affordable housing; and

⁵¹ Office of the Prime Minister, Rt. Hon. Justin Trudeau, P.C., M.P., "Minister of Crown-Indigenous Relations Mandate Letter" (Ottawa: 13 December 2019), online: <<https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-crown-indigenous-relations-mandate-letter>>.

- (d) developing an Indigenous Justice Strategy to address systemic discrimination and the overrepresentation of Indigenous people in the justice system.⁵²

71. The Prime Minister also issued a number of co-mandates, shared between the Minister of Indigenous Services and a number of other Ministers, *inter alia*:

- (a) the co-development of distinctions-based Indigenous health legislation, to deliver high-quality health care for all Indigenous Peoples;
- (b) engagement with First Nations communities to ensure First Nations control over the development and delivery of services;
- (c) to support the transition of Indigenous communities from reliance on diesel-fueled power to clean, renewable energy by 2030;
- (d) amendments to the *Public Service Employment Act* to make the Canadian public service more inclusive;
- (e) support for First Nations, Inuit and Métis students to access and succeed at post-secondary education;
- (f) distinctions-based community infrastructure plans to address critical needs including housing, all-weather roads, high-speed internet, health facilities, treatment centres and schools in First Nations, Inuit and Métis communities by 2030; and
- (g) the co-development of programs with First Nations, Inuit and Métis Nation partners, to address food insecurity in Canada.⁵³

72. Both the 2019 and 2021 Mandates are clear on their face that the Federal Government intends to accomplish its priorities through the distinctions-based approach.

⁵² Office of the Prime Minister, Rt. Hon. Justin Trudeau, P.C., M.P., “Minister of Crown-Indigenous Relations Supplementary Mandate Letter” (Ottawa: 15 January 2021), online: <<https://pm.gc.ca/en/mandate-letters/2021/01/15/minister-crown-indigenous-relations-supplementary-mandate-letter>> (“Minister of Crown-Indigenous Relations Supplementary Mandate Letter, 2021”).

⁵³ Minister of Crown-Indigenous Relations Supplementary Mandate Letter, 2021.

73. On the priorities listed above, CAP has been engaged only twice by the Federal government.

74. With respect to the implementation of UNDRIP into Canadian law, the PBM partners were given six months in which to engage with the government and provide commentary on the draft implementing legislation. By contrast, CAP was given only a few days to comment, at the very end of the process. With respect to the implementation of the Truth and Reconciliation Commission's *Calls to Action*, CAP was again only consulted at a very late stage.⁵⁴ Only one week prior, CAP was invited to give testimony to the Standing Committee on Indigenous and Northern Affairs on the very last day of the Committee's hearing on Bill C-8, to amend the *Citizenship Act* in response to TRC Call to Action number 94.⁵⁵

75. Canada has also held a number of symposia and conferences on pressing topics facing Indigenous people in the past year from which CAP has been effectively excluded. For example, after a young Indigenous woman died in hospital after capturing nursing staff making racist remarks towards her, Canada conducted a series of Racism and Healthcare meetings in October 2020 and January 2021. CAP was invited only to listen, even after repeated demands that it be included; the PBM parties were each invited to speak. In January 2021, Canada also hosted an Indigenous Languages Symposium. CAP was excluded entirely: no warning that the symposium was

⁵⁴ One of the elements of the Indian Residential Schools Settlement Agreement was the establishment of the Truth and Reconciliation Commission ("TRC") of Canada. The mandate of the TRC is found in Schedule "N" of the Settlement Agreement, online:

<https://www.residentialschoolsettlement.ca/SCCHEDULE_N.pdf>.

⁵⁵ Canada, Parliament, House of Commons, Standing Committee on Indigenous and Northern Affairs, *Minutes of Proceedings and Evidence*, 43rd Parl, 2nd Sess, No 015 (02 February 2021), online: <<https://www.ourcommons.ca/DocumentViewer/en/43-2/INAN/meeting-15/evidence>>.

happening, and no invitation to participate. The PBM parties each were invited to host the symposium.

76. With very few exceptions, CAP has been entirely excluded from the Federal Government's programs: CAP has not been invited to meet or make submissions, nor has CAP received any funding directed at achieving any of the Federal Government's mandate. This, despite being the federally-recognized representative of Canada's off-reserve Indigenous peoples.

J. Breaches of the Covenant

1. Articles 1, 2, and 26

77. In accordance with the purposes and principles of the *Charter of the United Nations*, Article 1 of the *International Covenant on Civil and Political Rights* recognizes that all peoples have the right of self-determination.⁵⁶ The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.⁵⁷

78. Article 1 states that all peoples have the right of self-determination. By virtue of that right, they may freely determine their political status, freely pursue their economic, social and cultural development, and freely dispose of their natural wealth and

⁵⁶ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, ("ICCPR").

⁵⁷ Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 12*, Twenty-first session (13 March 1984), [para. 1](#), ("*General Comment No. 12*").

resources.⁵⁸ All States Parties to the Covenant have a positive obligation to promote the realization of the right of self-determination.⁵⁹

79. Canada has breached Article 1 of the Covenant, by virtue of its total failure to include CAP in its processes explicitly designed to facilitate Indigenous self-determination (and which Canada acknowledges is one of the only ways for Indigenous people to achieve self-determination). Specifically, Canada:

- (a) breached Article 1, paragraph 1, by denying the right of CAP members to freely determine their political status and their economic, social, and cultural development as a self-governing people, which can only be accomplished through negotiations with the Federal Government; and
- (b) breached Article 1, paragraph 3, in that Canada failed to promote the realization of the right of self-determination of CAP's members.

80. Canada's Distinctions-Based Approach has discriminated against CAP and its constituents, on the basis of [lack of] Indian Status and residence off-reserve, which is itself an independent breach of Article 2, paragraph 1, in that it arises because of a distinction based on "race... national or social origin... [or] birth or other status." For the same reasons, this constitutes a breach of the right in Article 26 to be free from discrimination on any ground such as "race... national or social origin... [or] birth or other status."

81. Canada itself acknowledges that there are only two routes for self-determination by Indigenous peoples: litigation or negotiation.⁶⁰ CAP has brought litigation against

⁵⁸ ICCPR, [Article 1\(1\)-\(2\)](#); *General Comment No. 12*, [paras. 2, 5](#).

⁵⁹ ICCPR, [Article 1\(3\)](#); *General Comment No. 12*, [para. 2](#).

⁶⁰ Self-Government 2010, [Part I – Policy Framework](#).

Canada seeking meaningful negotiation on behalf of its constituents for many years.⁶¹ While incremental gains have been won, self-determination remains elusive. For those that Canada is willing to negotiate with, there is a clear path to self-determination. Indeed, Canada has laid out that path in its official policies and Ministerial mandates. However, Canada has declined to engage or negotiate meaningfully with CAP, which represents the largest population of Indigenous peoples in the country. In doing so, Canada has effectively foreclosed self-determination to CAP's constituents.

82. Canada's only basis for refusing to engage meaningfully with CAP in achieving self-determination for its constituents is the identity and residence of those whom CAP represents. Canada's decision appears to be based on the fact that CAP's constituents are:

- (a) not Status Indians under the *Indian Act*;
- (b) not represented by Canada's chosen negotiation partners, MNC and ITK; and/or
- (c) not resident on reserves.

83. Canada's actions, in facilitating self-determination for some Indigenous peoples but not others, are discriminatory under both domestic Canadian law and the jurisprudence of the Committee. Canada's approach creates a distinction on the basis of "aboriginality-residence" which was recognized by the Supreme Court of Canada in *Corbiere* as the distinction between Aboriginal persons who live on-reserve and those

⁶¹ For example, in *Daniels*, CAP also sought a declaration that Métis and Non-Status Indians "have the right to be consulted and negotiated with, in good faith, by the federal government on a collective basis through representatives of their choice, respecting all their rights, interests, and needs as Aboriginal peoples". The Supreme Court declined to grant the declaration on the basis that prior cases had already recognized a context-specific duty to negotiate when Aboriginal rights are engaged, so the declaration would lack practical utility: *Daniels* SCC, [paras. 54-56](#).

who do not.⁶² The Supreme Court also held in *Corbiere* that as between Indigenous persons, an off-reserve Indigenous person cannot change their status to on-reserve or can only do so at such great personal cost that Canada could have no legitimate interest in expecting them to change.⁶³

84. The Canadian Human Rights Tribunal also recently concluded that a distinction between Status and Non-Status Indians for the purpose of providing health and social services constitutes an impermissible distinction, based in whole or in part on the grounds of race and/or national or ethnic origin. In so ruling, the Tribunal specifically relied upon the Covenant to support its interpretation of the *Canadian Human Rights Act*. The Tribunal held:

Thirdly, as demonstrated above, race and national or ethnic origin is a factor in the denial of services namely above normative standard and culturally appropriate and safe under Jordan's Principle. A child with a parent who is registered under 6(2) of the *Indian Act* and with a parent with no status or eligibility to status will be treated differently than a child who has a parent registered under 6(1) of the *Indian Act*. No other children in Canada will be categorized in this manner, only First Nations children. Therefore, "finding a mirror group may be impossible, as the essence of an individual's or group's equality claim may be that, in light of their distinct needs and circumstances, no one is like them for the purposes of comparison"... Moreover, the same reasons and findings in the Merit Decision in terms of substantive equality and race and/or national or ethnic origin apply to this unilaterally created by Canada category of eligible First Nations children, (see for example 2016 CHRT 2 at paras. 395-467).

In General Comment 18, thirty-seventh session, 10 November 1989 at paragraph 7, the UNHRC stated that the term "discrimination" as used in the ICCPR should be understood to imply:

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Moreover, the Panel relied on General Comment No. 18 of the UNHRC's stating "that the aim of the protection is substantive equality, and to achieve this aim

⁶² *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] 2 SCR 203, [para. 6](#), ("*Corbiere*"); See also *Ardoch Algonquin First Nation v. Canada (Attorney General)*, 2003 FCA 473, [paras. 29-33](#).

⁶³ *Corbiere* at [para. 13](#).

States may be required to take specific measures” (see at paras. 5, 8, and 12-13).

(see Merit Decision at para. 440, emphasis added).⁶⁴

85. In CAP’s submission, these distinctions are also discriminatory under the Covenant. As the Committee has observed in General Comment 18, not every differentiation amounts to discrimination, so long as it is based on reasonable and objective criteria and is in pursuit of a legitimate aim under the Covenant. The test is therefore whether, in the circumstances, the distinctions based on Indian Status and residence meet the criteria of reasonableness, objectivity, and legitimacy of aim.⁶⁵ In CAP’s submission, they do not.

86. The distinctions are not *objective*; many of CAP’s constituents have Status under the *Indian Act* but choose not to live on a reserve, are unable to live on a reserve, or have no connection to their ancestral First Nation, due to the widespread policies of displacement and assimilation that Canada pursued against its Indigenous peoples. Indigenous people without Status under the *Indian Act* are no less indigenous than those with Status, just as the indigeneity of those Indigenous people who live off-reserve is no less than that of those who live on reserve. In fact, in the Self-Government Policy, Canada itself recognizes that off-reserve peoples “have long professed their

⁶⁴ *First Nations Child & Family Caring Society of Canada v. Canada*, 2020 CHRT 20, [para. 239](#).

⁶⁵ *Mclvor and Grismer v. Canada*, UNHRC, [para 7.7](#); Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 18*, Thirty-seventh session (10 November 1989), [para. 13](#), (“*General Comment No. 18*”).

desire for self-governance” and that the Government is prepared to negotiate with them.

⁶⁶ There is now no objective basis to refuse to do so.

87. The distinctions are also not *reasonable* for the same reasons reviewed immediately above. It is not reasonable for Canada to refuse to facilitate self-determination for off-reserve Indigenous peoples, particularly when Canada has recognized the legitimacy of CAP as their representative and the legitimacy of off-reserve peoples’ desire for self-determination.

88. Finally, Canada’s own Self-Government Policy admits that it is a legitimate aim of off-reserve peoples to desire self-government. There can be no legitimate aim in now refusing to permit off-reserve Indigenous people even to engage in the process which Canada admits is one of the only ways to achieve that outcome.

89. CAP submits also that under Article 3 of UNDRIP, Indigenous people have the right to self-determination. By virtue of that right, they have the right to freely determine their political status and their economic, social and cultural development. Under Article 18 of UNDRIP, they have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures. In June of 2021, UNDRIP was officially affirmed as a universal international human rights instrument with application in Canadian law.⁶⁷ As found by this Committee, Article 1 of the Covenant is interrelated with the rules of

⁶⁶ Self-Government 2010, [Métis and Indian Groups off a Land Base](#).

⁶⁷ *United Nations Declaration on the Rights of Indigenous Peoples Act*, [S.C. 2021, c. 14, s. 4](#).

international law and should be interpreted in light of other instruments, including UNDRIP.⁶⁸

90. Accordingly, the Committee should conclude that Canada's wholesale exclusion of CAP from negotiations and programs designed to provide one of the only available routes to self-determination for Indigenous peoples in Canada is in violation of both Articles 1 and 2.

2. Article 25

91. Canada's actions described above also constitute a breach of Article 25, paragraph (a), in that Canada has prevented CAP's members from having the right and opportunity, without discrimination contrary to Article 2, to take part in the conduct of public affairs through their freely chosen representative.

92. As observed by the Committee in General Comment 25, the conduct of public affairs is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.⁶⁹

93. Regardless of the form of government or constitution in place in a State Party, the Covenant requires States to adopt such "legislative or other measures" as may be

⁶⁸ *Sanila-Aikio v. Finland*, UNHRC, Communication No. 2668/2015, UN Doc. CCPR/C/124/D/2668/2015, [para. 6.9](#), ("*Sanila-Aikio v. Finland*, UNHRC").

⁶⁹ Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 25*, CCPR/C/21/Rev.1/Add.7 (27 August 1996), [para. 5](#) ("*General Comment No. 25*").

necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.⁷⁰

94. In CAP's submission, the process of negotiation with the Federal Government for the implementation of national policies regarding Indigenous peoples in Canada falls within the broad definition of "the conduct of public affairs." Status and Non-Status off-reserve Indians, Métis, and Southern Inuit peoples in Canada exercise their political power through their chosen representative, CAP.

95. Separate and apart from the negotiation of Indigenous self-government, the Federal Government's Distinctions-Based Approach has shut out CAP and its constituents from having a voice in policies that touch on all aspects of Indigenous political and social life, including:

- (a) education;
- (b) infrastructure;
- (c) healthcare;
- (d) sustainable economic development of fisheries and oceans; and
- (e) systemic inequalities in the criminal justice system.⁷¹

96. CAP's constituents are not represented adequately, or at all, by the PBM parties, a fact of which Canada is well aware. Despite this, Canada has taken an approach to all policy and political discussions with Indigenous groups that ignores them and their needs completely; in essence, Canada has removed from CAP's constituents the ability to assert themselves politically.

⁷⁰ *General Comment No. 25*, [para. 1](#).

⁷¹ Minister of Crown-Indigenous Relations Supplementary Mandate Letter, 2021; Government of Canada, "Post-Secondary Student Support Program" (16 April 2021), online: <<https://www.sac-isc.gc.ca/eng/1100100033682/1531933580211>>.

97. In accordance with General Comment No. 25, any conditions that apply to participation in public affairs must be based on objective and reasonable criteria.⁷² The exclusion of CAP's constituents from policy discussions and decision-making is not based on any objective or reasonable criteria. As reviewed above, it is CAP's submission that this exclusion from public affairs is done for a discriminatory reason, on the basis of "race... national or social origin...[or] birth or other status", and residence off-reserve, in breach of Articles 2 and 26.

98. Moreover, to exclude CAP's constituents from the exercise of public affairs because of how they identify themselves or whether they claim membership in one of the PBM parties is itself a standalone breach of UNDRIP. Article 9 of the Declaration provides that Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned, and that no discrimination of any kind may arise from the exercise of such a right. In accordance with Article 33 of UNDRIP, Indigenous people also have the right to determine their own identity or membership in accordance with their customs and traditions, and the right to determine the structures and select the membership of their institutions in accordance with their own procedures. Finally, in accordance with Article 8(1) of UNDRIP, Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

99. CAP's constituents with Status under the *Indian Act* do not live on reserve or identify with a First Nation for reasons directly attributable to Canada's legacy of dispossession of Indigenous peoples. Many of CAP's other constituents had no choice;

⁷² *General Comment No. 25*, [para. 4](#).

they are descendants of those who were taken from their communities or forcibly “enfranchised” under the *Indian Act* – severing governmental recognition of their rights and Indigeneity. Still others have never been recognized by Canada as being sufficiently “Indian”. CAP’s members are a distinctive and sizeable population of Canada’s Indigenous peoples. Canada should not be permitted to discriminate against them because of their membership in CAP – or their lack of membership in one of the PBM parties. Many are not eligible for membership in those organizations, though they are no less Indigenous. Those who are eligible should not be forced to join Canada’s choice of representative in order to have a say over their rights and interests as Indigenous people.

100. While Article 25 is, in one sense, an individual right, CAP notes that this Committee has held that the rights under Article 25 in the context of Indigenous peoples has a collective dimension.⁷³ The right of off-reserve Indigenous peoples in Canada to participate in public affairs is a right that can only be enjoyed in community with others. That is, a single off-reserve Indigenous person Canada has no particular right to be included in policy discussions. Rather, the duty owed by Canada to its off-reserve Indigenous peoples to facilitate their participation in public affairs is a duty owed to the group. In CAP’s submission, Canada has breached its obligation to all of CAP’s constituents under Article 25

⁷³ *Sanila-Aikio v. Finland*, UNHRC, [paras. 6.9-6.10](#).

3. Article 27

101. Article 27 establishes and recognizes a right which applies to individuals belonging to Indigenous groups and which is distinct from, and additional to, the other rights which all persons are entitled to enjoy under the Covenant.⁷⁴

102. In General Comment 23, the Committee recognized that the protection of rights under Article 27 is directed to ensure the survival and continued development of the cultural, religious, and social identities of minorities, thus enriching the fabric of society as a whole.⁷⁵ Accordingly, this Committee has recognized that rights under Article 27 must be protected as such and are not to be confused with other personal rights conferred on one and all under the Covenant.⁷⁶

103. As concluded by the Committee in *Sanila-Aikio*, in the context of Indigenous peoples' rights, articles 25 and 27 of the Covenant have a collective dimension and some of those rights can only be enjoyed in community with others. The rights to political participation of an Indigenous community in the context of internal self-determination under article 27, read in the light of article 1 of the Covenant, are not enjoyed merely individually. Consequently, the Committee must take into account the collective dimension of such harm. With respect to dilution of the vote of an indigenous community in the context of internal self-determination, harm directly imposed upon the collective may injure each and every individual member of the community.⁷⁷

⁷⁴ Office of the High Commissioner for Human Rights, Human Rights Committee, *General Comment No. 23*, CCPR/C/21/Rev.1/Add.5 (26 April 1994), [para. 1](#), (“*General Comment No. 23*”).

⁷⁵ *General Comment No. 23*, [para. 9](#).

⁷⁶ *Sanila-Aikio v. Finland*, UNHRC, [para 6.9](#).

⁷⁷ *Sanila-Aikio v. Finland*, UNHRC, [para 6.9](#).

104. Culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples, which may include such traditional activities as fishing and hunting, or the right to live on reserves.⁷⁸ In order to ensure that minority groups may enjoy these rights, positive legal measures are required to ensure the effective participation of members of minority communities in decisions which affect them.⁷⁹

105. As held by this Committee in *Sanila-Aikio*, Article 27 of the Covenant, interpreted in light of UNDRIP and Article 1 of the Covenant, enshrines an inalienable right of Indigenous peoples to freely determine their political status and their economic, social, and cultural development.⁸⁰

106. Canada's conduct as described above, in excluding CAP and its constituents from participation in policy-making and the path to self-determination, is a breach of Article 27.

107. As recognized by this Committee, culture has many dimensions and manifests itself in many forms.⁸¹ Canada's conduct has denied CAP and its constituents the right to control their own economic, social, and cultural development. Cultural development requires a minimum level of security and self-determination. Without policies to secure infrastructure, sustainable resource development, healthcare, and education, among many others, Canada's off-reserve Indigenous peoples cannot pursue cultural

⁷⁸ *General Comment No. 23*, [para. 7](#).

⁷⁹ *Mclvor and Grismer v. Canada*, UNHRC, [para. 7.10](#); *General Comment No. 23*, [para. 6.1](#).

⁸⁰ *Sanila-Aikio v. Finland*, UNHRC, [para. 6.8](#).

⁸¹ *Sanila-Aikio v. Finland*, UNHRC, [para. 6.8](#).

development, nor are they secure in their ability to enjoy their culture in community with others. Canada's reasons for doing so are neither objective nor reasonable.

108. This Committee should conclude that Canada has breached CAP's rights under Article 27 alone, and in conjunction with Article 2, as interpreted in light of article 1 and UNDRIP.

PART V. ADMISSIBILITY

109. This communication satisfies the requirements for admissibility under Article 5 of the Optional Protocol.

A. Temporal jurisdiction

110. Canada acceded to the ICCPR and the first Optional Protocol in 1976. While the Federal Government's pattern of failing to consult with CAP's constituents through their preferred representative has persisted for many decades, the violations of the ICCPR which are the subject of this communication commenced in late 2016 and are ongoing. This communication therefore falls within the temporal jurisdiction of the Committee.

B. No other international complaint

111. No complaint has been submitted to any other procedure of international investigation or settlement regarding the inadequacy of the Federal government's consultation with CAP. This communication therefore satisfies the admissibility requirement in Article 5(2)(a) of the first Optional Protocol to the ICCPR.

C. Exhaustion of domestic remedies

112. An applicant is required to exhaust those domestic remedies which are available and effective. The Committee has clarified that this refers “primarily to judicial remedies” which must offer “a reasonable prospect of redress”.⁸²

1. Legal challenges

113. CAP has not judicially challenged Canada’s distinctions-based approach. However, in CAP’s submission, this communication is admissible because CAP has already exhausted its domestic remedies, in that the Supreme Court of Canada has heard and dismissed a case on substantially the same subject matter.

114. In 1991, Canada set out 28 proposals for constitutional reform. One proposal was to amend Canada’s constitution to entrench a general justiciable right to Aboriginal self-government. A special joint committee of parliament was appointed to inquire into and make recommendations to parliament regarding that proposal.

115. At the same time, Canada also established a parallel process of consultation within the Aboriginal community of Canada. Canada provided funding to four national Aboriginal organizations: the AFN, MNC, and ITK (then known as the Inuit Tapirisat of Canada), and CAP (then known as the Native Council of Canada), and invited representatives from each of the four organizations to participate in a multilateral

⁸² *R.T. v. France*, UNHRC, Communication No. 252/1987, UN Doc. CCPR/C/35/D/262/1987, [para. 7.4](#); *Vicente et al v. Colombia*, UNHRC, Communication No. 612/1995, UN Doc. CCPR/C/60/D/612/1995, [para. 5.2](#); *Mariam Sankara et al. v. Burkina Faso*, UNHRC, Communication No. 1159/2003, UN Doc. CCPR/C/60/D/1159/2003, [para. 6.4](#); *Patiño v. Panama*, UNHRC, Communication No. 437/1990, UN Doc. CCPR/C/52/D/437/1990, [para. 5.2](#) (“*Patiño v. Panama*, UNHRC”); *Potter v. NZ*, UNHRC, Communication No. 632/1993, UN Doc. CCPR/C/60/D/632/1995, [para. 6.3](#). See also *Torres Ramirez v. Uruguay*, UNHRC, Communication No. R. 1/4, UN Doc. CCPR/C/10/D/4/1977, [para. 5](#) (requiring that the state demonstrate “a reasonable prospect that such remedies would be effective”) (“*Ramirez v. Uruguay*, UNHRC”).

process of constitutional discussions.⁸³ The appellant, the Native Women's Association of Canada ("NWAC") was not included.

116. NWAC challenged the decision, in part on the basis that their exclusion threatened the equality of Aboriginal women. In response, the then-Minister Responsible for Constitutional Affairs responded that because the national organizations that were invited represented both men and women, NWAC should work with them to ensure its views were represented.⁸⁴ Further, he also stated that "the concerns of NWAC would not be rectified through the addition of another seat at the constitutional table."⁸⁵

117. NWAC brought a challenge in Federal Court, seeking an order of prohibition to prevent further funding to the four Aboriginal organizations, as well as the right to participate in the constitutional review process on the same terms as the four recipient groups.⁸⁶ NWAC alleged that by failing to provide equal funding or participation rights, Canada had violated NWAC's freedom of expression and right to equality.

118. On appeal, the Supreme Court held:

- (a) NWAC had no constitutional right to receive government funding aimed at promoting participation in the constitutional conferences, and the invitation to participate in constitutional discussions facilitated and enhanced the expression of Aboriginal groups (at large), as opposed to stifling the expression of NWAC;

⁸³ *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627, [pp. 634-635](#), ("*Native Women's Assn. of Canada*").

⁸⁴ *Native Women's Assn. of Canada*, [p. 636](#).

⁸⁵ *Native Women's Assn. of Canada*, [p. 636](#).

⁸⁶ *Native Women's Assn. of Canada*, [pp. 636-637](#).

- (b) the provision of a platform of expression to the four national Aboriginal organizations did not require the government to fund or provide a specific platform of expression to any other individual or group; and
- (c) the fact that the funded groups did include some women meant that NWAC could not say that their viewpoint was not represented. Instead, NWAC could express its view to the four Aboriginal groups or to the government directly.

119. In CAP's submission, the precedent established by this case makes it unlikely that CAP could succeed on a direct challenge to the distinctions-based approach. The Supreme Court of Canada has already determined that no particular Indigenous group has a right to be heard and dealt with by the Federal Government in its policy decisions, even where that right has been extended to other Indigenous groups who cannot or do not effectively represent all viewpoints.

120. In the Committee's decision in *Lovelace*, the author had not herself challenged the constitutionality of the impugned provisions of the *Indian Act*, under which a Status Indian woman who married a non-Indian lost her Status. However, the issue had previously been considered by the Supreme Court of Canada in *AG of Canada v. Lavell*, in which the Court upheld the provisions of the *Indian Act*.⁸⁷

121. The Committee determined that Ms. Lovelace's complaint was admissible because Article 5(2)(b) of the Optional Protocol "does not impose on the alleged victim the obligation to have recourse to the national courts if the highest court of the State

⁸⁷ *Sandra Lovelace v. Canada*, UNHRC, Communication No. 24/1977, UN Doc. CCPR/C/OP/1 at 83 (1984), [para. 10](#), ("*Lovelace v. Canada*, UNHRC"); [\[1974\] SCR 1349](#); *AG of Canada v. Lavell*, [1974] SCR 1349

party concerned has already substantially decided the question in issue.”⁸⁸ The same reasoning applies in this case.

2. Any new claim would be unduly prolonged and ineffective

122. Any new claim against the Federal government would be unduly prolonged and likely ineffective. An individual is not required to exhaust domestic remedies that are unreasonably prolonged.⁸⁹ Whether delays are considered unreasonable will depend on the complexity of the case. The Human Rights Committee has stated that “a delay of over three years for the adjudication of the case at first instance, discounting the availability of subsequent appeals, was ‘unreasonably prolonged’ within the meaning of article 5, paragraph 2(b), of the Optional Protocol.”⁹⁰

123. The kind of case that CAP would need to bring to challenge the distinctions-based approach would in all likelihood take longer than 3 years to bring to trial, and much longer to work its way through the courts to the Supreme Court of Canada. The litigation in *Daniels* spanned 17 years from the date of commencement of the claim to the Supreme Court’s decision; advancing the case to trial at first instance took 12 years. Other cases involving off-reserve Indigenous peoples have had similarly lengthy timelines. In *Manitoba Metis Federation Inc. v. Canada (A.G.)*, the case was commenced in 1981, reached the Supreme Court for the first time in 1990 on a

⁸⁸ *Lovelace v. Canada*, UNHRC, [para. 10](#).

⁸⁹ UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (5 March 2009), A/RES/63/117, [Article 5\(2\)\(b\)](#) (“This shall not be the rule where the application of those remedies is unreasonably prolonged.”).

⁹⁰ *Fillastre and Bizouarn v. Bolivia*, UNHRC, Communication No. 336/1988, CCPR/C/43/D/336/1988, [para. 5.2](#).

procedural point,⁹¹ went to trial in 2007, and was finally decided on the merits by the Supreme Court in 2013.⁹² The case spanned 32 years in total.

124. While other litigation may not necessarily take as long as *Daniels* or *MMF*, which were landmark constitutional cases, CAP expects that the Federal Government would vigorously contest any litigation challenging the scope of its obligation to consult and engage significantly with CAP, and would appeal to Canada's Supreme Court any adverse rulings.

125. It is also unlikely that any challenge to the systematic exclusion and unequal treatment of CAP and its constituents under the distinctions-based approach would be effective. Although the Federal Government has recognized CAP in the CAP-Canada Political Accord, this document clearly provides that it does not create binding legal obligations. CAP may be able to challenge the availability of a particular program or benefit for its constituents, but even these more limited challenges take years to resolve.⁹³ CAP simply does not have the resources to bring individual challenges to all aspects of the distinctions-based approach that are discriminatory, and in any event it is the *systematic* exclusion and/or unequal treatment of off-reserve Indigenous peoples that are the focus of this complaint. CAP contends that its relationship with the Federal Government must be reset entirely. A claim of this kind is bound to fail in the Canadian courts.

⁹¹ *Dumont v. Canada (A.G.)*, [1990] 1 SCR 279.

⁹² *Manitoba Metis Federation Inc. v. Canada (A.G.)*, 2013 SCC 14.

⁹³ See e.g. *Quebec (A.G.) v. A*, 2013 SCC 5 – claim arguing that spousal support provisions were discriminatory filed in 2002; decided at trial in 2009; decided by the Supreme Court of Canada in 2013.

3. Further domestic remedies would not be effective

126. Applicants are only required to exhaust those remedies that are effective; they need not exhaust remedies that do not offer a reasonable prospect of redress or where there is no reasonable expectation that the remedies would be effective.⁹⁴ There are no further effective domestic remedies that apply in these circumstances.

4. Other domestic remedies are not adequate or available

127. While the Committee's jurisprudence is clear that domestic remedies refer primarily to judicial remedies, the Author has pursued alternate remedies for many years, without success.

128. CAP has repeatedly sought engagement with the Federal Government on a par with the level of engagement enjoyed by the PBM parties, but without success.

129. CAP's attempts at negotiation with the Federal government have failed. In any event, the Committee has been clear that negotiations proceeding on the basis of extralegal considerations, including political factors, are not analogous to judicial remedies. Even if such negotiations could be regarded as an additional effective remedy to be exhausted before CAP's complaint were admissible, in light of CAP's years of attempts at negotiation without result, the remedy has been so unreasonably prolonged that this communication is admissible by the Committee.⁹⁵

⁹⁴ *Patiño v. Panama*, UNHRC, [para. 5.2](#); *Ramirez v. Uruguay*, UNHRC, [para. 5](#); *Monika v. Cameroon*, UNHRC, Communication No. 1965/2010, CCPR/C/112/D/1965/2010, [para. 11.4](#).

⁹⁵ *Howard v. Canada*, UNHRC, Communication No. 879/1999, CCPR/C/84/D/879/1999, [para 8.4](#).

PART VI. CHECKLIST OF SUPPORTING DOCUMENTATION

- Written authorization to act
 - **see attached signed authorization of CAP National Chief Elmer St. Pierre, dated September 8, 2021, at Tab B.**

- Decisions of domestic courts and authorities
 - **see attached index of documents, at Tab C.**

- International authorities
 - **see attached index of documents, at Tab D.**

- Any documentation or other corroborating evidence
 - **see attached index of documents, at Tab E.**