



## **Brief for Discussion with Government of Canada**

*Considerations for Implementation in Canada of the  
United Nations Declaration on the Rights of Indigenous Peoples*

### **Context**

The Government of Canada is committed to introduce legislation co-developed with national Indigenous organizations to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the end of 2020. The Minister of Justice, the Honourable David Lametti, has been tasked by the Prime Minister to deliver on this priority, with the support of the Minister of Crown-Indigenous relations, the Honourable Carolyn Bennett.

Legislation to implement UNDRIP will be based on Bill C-262, an *Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples* that died on the Order Paper in the 42<sup>nd</sup> Parliament. Bill C-262 is seen as the foundation of UNDRIP implementation legislation; the new Bill will look to enhance or build upon the former one.

Under such an approach, legislation would first establish the general intent of Parliament—a commitment to align past and future federal legislation with UNDRIP. This will be followed, over time, by initiatives focusing on adapting and conforming specific legislation according to priorities set out by national Indigenous groups. In the meantime, federal courts will be invited to use UNDRIP as an interpretive aid for legislation that remains unchanged.

Canada is on a path of reconciliation with Indigenous Peoples based on recognition of rights, respect, cooperation, and partnership. Industry has played, and continues to play, an important role in this process. While more still needs to be done, businesses have been at the forefront of advancing Indigenous economic reconciliation, working closely and building relationships with Indigenous communities to enhance economic opportunities and partnerships. This work is part of the process of achieving a better quality of life for the families and communities of Indigenous Peoples. UNDRIP legislation must be in step with this collective pursuit of reconciliation and inclusive prosperity for Canada.

The Business Council of Alberta (BCA) believes strongly in the value and importance of Indigenous reconciliation. We see UNDRIP as a vital and important declaration that, properly implemented, could help to heal wounds inflicted as a result of injustices committed on the lives of Indigenous Peoples. Our aim is to work alongside the Indigenous Peoples in Canada and the business community to advance the principles and intent of UNDRIP: reconciliation, self-determination, equal rights and generation of prosperity.

Reconciliation has been a long, ongoing process. Within the framework of Section 35 of the Constitution Act, 1982, governments, industry and Indigenous Peoples have advanced on a journey of recognition of rights, and partnerships, enabling economic development. The

evolving jurisprudence, including judgements by the Supreme Court of Canada, has established a strong body of case law surrounding the duty to consult and accommodate.

Indigenous Peoples and industry have entered into numerous relationships and partnerships that advance economic reconciliation. This progress is consistent with the Call to Action (92) of the Truth and Reconciliation Commission that called upon “*the corporate sector in Canada to adopt UNDRIP as a reconciliation framework and to apply its principles, norms and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.*”

Within this context, legislation to implement UNDRIP on the model, or as a variant, of Bill C-262 poses specific issues upon which all interested parties legitimately will seek clarity.

- The Declaration, an international instrument, uses many terms that are not defined in Canadian law and that cannot readily be transposed into Canadian law.
- It interacts potentially with a wide range of federal legislation, and the Government of Canada has not defined the contours of this universe, nor the extent to which it may encompass domains of shared jurisdiction with provinces and territories.
- The Declaration, including the principle of free, prior and informed consent (FPIC), draws into question how implementation may affect, even under current law, processes of decision making, including consultation and accommodation, for public and private sector undertakings.

While industry has expressed some concerns about the meaning of FPIC and uncertainty as to how it interacts with existing practices, it is evident that the federal government views this as limited risk, and that clarity has already been provided under current legislation such as Section 35 and the Impact Assessment Act. While these certainly provide guidance, absent a clear definition of FPIC, there remains a possibility that the question will be left to judicial interpretation. Such a result would only increase divisions rather than bringing Indigenous Canadians and non-Indigenous Canadians closer together.

The implementation of UNDRIP, including the recognition of the principle of FPIC, must be founded on a shared understanding of how the Declaration is given expression in Canadian law and practice today, and what specific further steps may be taken on the path of reconciliation. There must be, from the Government, a clarity of intent, process, and message. Such clarity should be provided early. It will assist in fostering positive engagement and decision making that is transparent, consistent, efficient, and timely, ensuring that Canada may advance reconciliation and shared prosperity.

### **Early Engagement by Natural Resources Canada**

In mid-October, Natural Resources Canada (NRCan), with support from the lead departments of Justice and Crown-Indigenous Relations and Northern Affairs (CIRNA) completed an engagement process with the natural resources sector consisting of four 2-hour roundtables—one each with representatives of mining, forestry, clean energy, and petroleum (which included natural gas and distribution). Feedback from those sessions will

be compiled into a summary report that will be considered and potentially reflected in the final wording of the legislation once it is tabled. There would be continued engagement post-introduction in tandem with the Parliamentary process.

NRCan states that its purpose is to “build awareness of the proposed UN Declaration legislation and of its intended scope and effect”. This is a sensible objective, but it requires that the Government itself first enunciate clearly the intended scope and effect of legislation it proposes to introduce. To date, what is available publicly is the high-level intent of the Government to use Bill C-262—a three-page bill, plus annexes—as the framework for legislation. The legislation would aim to ensure “consistency” of federal laws with UNDRIP. It would be followed by the development of an “action plan” with Indigenous Peoples to achieve the objectives of UNDRIP. As stated in the industry engagement exercise, this would be followed over time by changes to specific acts or regulation.

Such high-level intentions that may secure broad support in principle are not a basis for informed engagement. As stated above, UNDRIP is an international declaration that does not readily fit in Canadian law. The goal of “consistency” with UNDRIP is open to multiple approaches or interpretations. The ensuing action plan may be wide and indefinite, or focused and finite. The Government must have—and communicate—at the outset at least the beginning of a vision, a plan, specific interim or ultimate objectives and goals. It must be able to identify where and how changes to federal law may be necessary, on what timeline, and how the changes will impact the Crown, Indigenous Peoples, and other parties.

Since the Government has committed to co-develop the legislation with national Indigenous organizations, it no doubt has consulted extensively with representatives of Indigenous Peoples and has an understanding of the expected outcomes of the legislation that, in of itself, will be an important factor for implementation. Is there alignment with the objectives and goals of the Government? What issues merit attention by all parties?

Lack of clarity on issues of intent and expected outcomes will engender a wide diversity of expectations and weigh on next steps in the process of implementation that may then be protracted and divisive. This would hinder, rather than assist, the wider process of reconciliation, as well as economic development and opportunity.

There are lessons from the B.C. experience to date that lack of clarity and specificity prior to, and with introduction and passage of legislation, may raise more questions than solve actual problems or advance substantively the process of reconciliation.

Mindful of this backdrop, this note sets out, as early contribution to a discussion that must become more specific soon, some key considerations to guide a principles-based approach to implementation.



## **A Principles-Based Approach**

UNDRIP is a wide-scoping international declaration and its implementation in Canadian law will require that Parliament enact or amend many pieces of legislation over time.

Clarity will require that the Government and Parliament adopt and be guided at every step of this process by a core set of principles that promote a spirit of partnership and mutual respect. The principles could be reflected, for example, in a preamble to the legislation to promote alignment of expectations and goals. Alternatively, they could be incorporated into the government's action plan for implementation.

The following principles are proposed:

- 1. *The implementation of UNDRIP will be situated within the body of Canadian law established by the Constitution Act, 1982, including Section 35, the Charter, and the related jurisprudence.***

Legislation to implement UNDRIP, an international declaration, will be consistent with the recognition and protection of Indigenous and treaty rights, including those enshrined in the *Constitution Act, 1982*, and the Charter. In particular, jurisprudence flowing from Section 35 of the *Constitution Act* anchors Indigenous and treaty rights within Canada's wider constitutional and legal framework, carefully delineating rights, duties, and obligations, and defining key concepts and terms. Legislation to implement UNDRIP, and related actions, should confirm and not confuse, rewrite, or erase this body of law that is foundational for reconciliation.

- 2. *The principle of free, prior and informed consent (FPIC) is given clear expression in Canadian law through the Crown's duty to consult and accommodate, established through the jurisprudence and practice flowing from Section 35.***

Legislation must ensure that FPIC is pursued under this established legal framework to engage Indigenous Peoples in the process of decision making, including for the review and approval of major projects that may adversely impact their established or asserted rights.

This framework includes, for example, the concept of the spectrum of consultation, and the balancing of interests. It recognizes that consent is sought through good faith and meaningful consultation, and that despite good faith efforts consent may not always be secured. Consent is a goal, not a requirement, of the consultation process informing decisions of the Crown. Ultimately, in various consultations, government officials have repeatedly insisted that FPIC does not constitute a veto. This statement, along with an interpretive definition of the term "veto," should be clearly set out in the legislation.



***3. Final decisions for major projects rest with the executive or regulatory authorities established in law or with bodies with formal delegation of authority as may be permitted under the law, based on clarity of process, transparency, and administrative fairness.***

The implementation of UNDRIP and the adoption of the principle of FPIC must also maintain clear legal jurisdiction and accountability for final decision making. For example, the Crown's authority over major projects, as exercised by the Governor in Council, a Minister, or a regulatory body, formally can only be shared with, or delegated to, another body under law, with clarity, transparency, and administrative fairness.

***4. The consultation and accommodation process will be aided by capacity building for Indigenous peoples and by the designation and empowerment of their chosen representative institutions.***

Reconciliation, including through implementation of UNDRIP, can only be advanced effectively in collaboration, and in partnership, with properly resourced institutions designated and empowered by Indigenous Peoples to represent their interests. The Crown must provide clarity on whom the proponent and the Crown engages and recognizes as rights holders, and representatives of such right holders, in meeting the duty to consult and accommodate and pursuing FPIC. This direction from the Crown must occur early in the planning process, rather than after engagement has already begun.

***5. There will be adequate consultation with national and regional Indigenous groups, industry and other stakeholders as the government introduces new, or adapts and aligns existing, legislation as part of its UNDRIP implementation action plan, as well as on all plans, programs, policies, and guidance related to the implementation.***

The objectives of UNDRIP may secure widespread support, consistent with the pursuit of reconciliation. It would be unfortunate that deficient drafting of legislation or uncertain follow-through create ambiguity and erode consensus in a manner that would be detrimental to the interests of Indigenous Peoples and to the wider public interest. Thus, there must be adequate and genuine consultation with all parties at every step: before introduction of legislation in Parliament, through the legislative process, and then at critical steps in the process of implementation of legislation. While we understand and support the government's intent to focus on engaging with Indigenous Peoples in drafting the legislation, non-Indigenous organizations may have valuable insight and can contribute toward legislation that advances the intent of UNDRIP for all Canadians.

## **Moving Forward**

It will be helpful, to encourage engagement and collaboration, for the Government of Canada, specifically the Minister and the Department of Justice, to communicate clearly the process whereby they plan to engage with Indigenous Peoples and other Canadians in advance of the tabling of UNDRIP legislation.

On the assumption that legislation will be aligned with the model of Bill C-262, early engagement should encompass not only the broad intent of the legislation and underpinning principles, but also the action plans that would follow.

For example, the government should clarify at the earliest opportunity that it envisages, in addition to a new act, amendments to existing legislation, and should set out the timelines for engagement on this wider legislative agenda. Throughout the process, from early consultation to implementation of specific legislative initiatives, the Government should provide to all parties the necessary guidance for constructive engagement and follow through.

Finally, we wish to thank the Government of Canada for its efforts to engage industry to date. The four sessions held in in mid/late October allowed natural resource sector representatives and other business groups to ask many questions about this legislation, its implications, and the government's action plan for implementation.

However, many outstanding questions remain. In consultation with our membership, the Business Council of Alberta has developed a list of such questions—included in the appendix to this submission. In our view, clear answers to these questions are critical to the success of UNDRIP implementation and the goals it is trying to advance. Our organization and its members support the principles of UNDRIP and have worked hard to advance Indigenous economic reconciliation. To the extent that UNDRIP legislation creates uncertainty, it could deter or delay industry investment, or create division within Canada as these unanswered questions are left to be settled in the courts. These outcomes would set back our shared goals of reconciliation and economic opportunity for all who live in Canada.

Supporting Document: Appendix - Inquiries Related to the Draft Legislative Proposal Regarding UNDRIP Implementation