

33. Adopting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Into Federal Law

DESCRIPTION

In its December 2019 Speech from the Throne, the federal government announced its intention to introduce legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) within the first year of its mandate (i.e., before the end of 2020). This follows unsuccessful Private Member's Bills in the previous two parliaments seeking to harmonize Canadian laws with UNDRIP.

The Canadian Chamber supports, in principle, the adoption of UNDRIP into Canadian laws, policies and regulations.

BACKGROUND

To date, British Columbia is the only Canadian jurisdiction to legislate the implementation of UNDRIP, which it did in 2019.¹⁰⁹ While UNDRIP addresses many aspects of nations' relationships with Indigenous peoples, it is generally articles referencing the issue of Free, Prior and Informed Consent (FPIC) which are the subject of the most debate.

There is a lack of consensus and certainty on how the collective FPIC provisions in UNDRIP should be interpreted. Some assert that UNDRIP provides a right to veto projects or government decisions. Others understand FPIC as a set of principles to ensure the protection of the rights of Indigenous peoples through the process of meaningful engagement and consultation. In the latter case, the role of duly elected governments to make decisions which balance the interests of all aspects of society remains unchanged.

The prospect of a lack of consistency across Canadian jurisdictions significantly increases the potential for contradictory interpretations and/or expectations of businesses' role with respect to FPIC. It is also likely to increase legal challenges in the court system, burdening parties with added cost and delays and negatively affect Indigenous businesses and economies which depend on certainty in the business environment.

¹⁰⁹ <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>

The absence of a clear and transparent federal strategy regarding the implementation of UNDRIP remains a significant obstacle to industry in engaging with Indigenous peoples. There have been hundreds of court cases to clarify the scope and content of the duty to consult. UNDRIP, particularly FPIC, and the principle of self-determination, has the potential to fundamentally change business and government/Crown obligations with respect to the consultation process, depending on how it is interpreted and implemented. It has also created the potential for future disputes given conflicting understandings and expectations relating to the implementation of UNDRIP. The lack of federal government direction on this matter serves to complicate the efforts of other Canadian jurisdictions in implementing UNDRIP, and contributes to the risk of introducing contradictory and incompatible approaches throughout the country.

The Impact Assessment Act, which replaced the Canadian Environmental Assessment Act, is premised on improving Indigenous engagement and partnership throughout the environmental assessment process. This legislation only references UNDRIP in the preamble and it is unclear whether the federal government believes that this legislation achieves the objectives of UNDRIP, including FPIC, or whether it will be introducing new legislative or policy requirements to further change the impact assessment process. The federal government's current lack of a comprehensive and transparent approach on how it will be interpreting and implementing the FPIC provisions of UNDRIP will undoubtedly lead to increasing disputes among business, government and Indigenous peoples which will ultimately be resolved in the courts rather than through considered legislative and policy development.

Compounding this problem is the potential for the provincial/territorial governments to revise their own environmental assessment processes to address and implement UNDRIP in potentially different ways, which contradicts the federal government's objective of "one project, one assessment".

The adoption of UNDRIP into federal law would provide the federal government with the opportunity to clarify, (as the BC legislature did in the case of Bill 41) that it will adopt and implement the declaration in accordance with the Constitution while not creating new rights beyond what is presently recognized in Section 35.¹¹⁰

This resolution replaces the 2019 resolution Pan-Canadian Framework to Clarify Businesses' Role in Supporting the Crown in Seeking Free, Prior and Informed Consent from Indigenous Peoples.

110 Section 35 of the Constitution Act 1982 states:

(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

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

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (Source: <https://laws-lois.justice.gc.ca/eng/const/page-16.html#h-52>)

RECOMMENDATIONS

That the Government of Canada:

Prior to introducing any legislation adopting the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP):

1. Publicly discloses how it interprets all of the FPIC provisions of UNDRIP (including any specific situations where consent may be required), including whether – in the context of more than 30 years of Canadian jurisprudence - it interprets the FPIC provisions (including its expectations of the Crown, Indigenous peoples and business) in a way that is materially different from what is required for the duty to consult and, if so, how;
2. Clarifies that the role of federal and/or provincial/territorial governments as the final decision-making authority(ies) with respect to the approval of natural resource projects will remain unchanged by any legislation; and
3. Develops a comprehensive strategy and schedule to engage non-Indigenous and Indigenous business, Indigenous peoples and provincial/territorial governments to establish jurisdictionally-aligned frameworks to clarify and support the expectations and roles of industry in a process to seek Indigenous peoples' consent on the Crown's behalf,
4. Provide clarity around what constitutes an appropriate level of First Nations engagement; and
5. Provide clarity around who/how Capacity Funding is provided and how much funding is considered appropriate to enable First Nations to obtain the necessary expertise on subject matters.

34. Addressing Canada's Unresolved Land Claims

DESCRIPTION

The lack of clarity or progress regarding the federal government's approaches to many Indigenous issues – including the duty to consult and unresolved land claims – threatens the future socioeconomic well-being of communities across Canada while hindering meaningful discourse on the development of natural resource sector projects.

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BACKGROUND

Negotiations and legal cases involving land claims in Canada have continued to be of critical importance. Many of Canada's Indigenous peoples are currently engaged in talks over land and self-government with the regions that encompass them. Government resource revenue sharing should consider the economic impact of natural resource projects, the strength of claim of individual communities and the number of Indigenous communities asserting rights in the development zone, the population of the impacted Indigenous communities, the future development potential of the area and the degree of impact on specific communities.¹¹¹

In need of immediate attention is the government's lack of progress in addressing unresolved land claims. The land claims process is a complex one, involving multiparty negotiations of complicated historical, property, legal, financial, and implementation issues,¹¹² which are often further complicated by other concerns such as bureaucratic issues and a lack of resources or capacity. As a result, the process is often lengthy: reaching a final agreement can take from 5 to 20 years. Indeed, since the federal government began negotiating modern treaties with Indigenous groups and provincial/territorial governments in 1973, 26 comprehensive land claims and three self-government agreements have been signed.¹¹³ Numerous land claims negotiations are currently underway across Canada, with 80 comprehensive land claims under negotiation with the federal government.¹¹⁴

¹¹¹ <https://mining.ca/wp-content/uploads/2019/07/MAC-Position-Statement-on-GRRS-Final-ENG.pdf>

¹¹² https://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_CH04.pdf

¹¹³ <https://www.aadnc-aandc.gc.ca/eng/1100100030577/1100100030578>

¹¹⁴ Public Accounts of Canada 2015, Vol. 1 – Summary Report and Consolidated Financial Statements; Receiver General for Canada, December 4, 2015

This backlog of long-standing legal issues poses significant challenges for the natural resources sector and Indigenous communities alike, creating considerable investment and operational uncertainties that inhibit meaningful progress. Resolving these issues is of benefit to all, as they allow for paving the way for effective dialogue on resource development, while also benefiting the communities themselves: the unemployment rate in self-governing communities has historically been 28 percent lower than non-self-governing communities, and the average family income for beneficiaries of a treaty appears to be double that of non-beneficiaries.¹¹⁵ Resolution and reconciliation with these communities are crucial, especially at a time where they represent Canada's youngest and fastest-growing population.¹¹⁶

The federal government has promised to develop a national strategy to address Indigenous land claims and duties to consult in a "reasonable timeframe,"¹¹⁷ and this commitment must be acted upon in order to provide both industry and the affected communities with the certainty required to derive appropriate economic and social benefits from resource-related projects. Given that the current liability for comprehensive land claims "that have progressed to a point where quantification is possible" is an estimated \$4.8 billion, this process must also be undertaken with due financial prudence and in a way that respects Canada's fiscal constraints.¹¹⁸

RECOMMENDATIONS

That the Government of Canada:

1. Accelerate the process of resolving land claims in a manner that reflects due financial prudence.
2. Elevate active participation by Indigenous communities through increased and improved access to clear and accessible information.

¹¹⁵ <https://www.aadnc-aandc.gc.ca/eng/1406824128903/1406824211834#key>

¹¹⁶ Kirkup, K. (2017, October 25). Canada's Indigenous population growing 4 times faster than rest of country. Retrieved from <https://globalnews.ca/news/3823772/canadas-growing-indigenous-population/>

¹¹⁷ <https://www.liberal.ca/policy-resolutions/61-priority-resolution-Indigenous-issues/>

¹¹⁸ Public Accounts of Canada 2019, Vol. 3 – Summary Report and Consolidated Financial Statements; Receiver General for Canada, 2019