# IMPLEMENTING UNDRIP IN CANADA: CHALLENGES WITH BILL C-262

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On December 5, 2017, Member of Parliament Romeo Saganash proposed that Bill C-262 be read a second time and referred to a committee. 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 (UNDRIP), is a private members bill, now supported by the Liberal government and the NDP, promoting the full adoption of UNDRIP into Canadian law.

**Mechanics of Bill C-262**

Bill C-262 is a reaction to the growing chorus of support for the implementation of UNDRIP within Canada. Though the mechanics of Bill C-262 are simple in design, that simplicity is problematic. UNDRIP is a blunt instrument, developed in an international setting, that is not reflective of Canada's world-leading legal protections for Indigenous rights; Canada is the only nation with an established system for limiting unilateral state action against Indigenous peoples. By simply adopting UNDRIP in its entirety into the Canadian context, Bill C-262 misconstrues Canada's existing and sophisticated Indigenous rights regime and, by adding new uncertainties, risks hindering the pursuit of reconciliation.

*Uncertain Preamble Language*

The preamble to Bill C-262 sets out the overall intention and objectives of the Bill. While the preamble refers repeatedly to UNDRIP, only one reference is made to section 35 of the *Constitution Act, 1982* (s. 35), which is the constitutional source of Canada's protection of Aboriginal and treaty rights. No explanation is provided in the Bill on how the adoption of UNDRIP in the Canadian context will co-exist, modify, or alter existing Canadian law. The objective of Bill C-262 is similarly unclear, being first phrased as enshrining "the principles" of UNDRIP in Canadian law, and later describing a process of legislative, policy and administrative measures "to achieve the ends" of UNDRIP. There are no expressly stated "principles" within UNDRIP and the "ends" of UNDRIP are also unclear.

*Extinguishment of Aboriginal and Treaty Rights*

Subsection 2(1) of Bill C-262 states that the proposed Act does not "diminish or ***extinguish*** existing aboriginal or treaty rights" under s. 35. The phrasing is peculiar given that it appears to under-represent the substantial protections granted through s. 35 to Aboriginal and treaty rights in Canada, under which the Crown no longer has the ability to unilaterally extinguish Aboriginal and treaty rights.

*Defining "Indigenous"*

By referring to Indigenous rights within the context of UNDRIP, and Aboriginal and treaty rights within the context of s. 35, section 2(1) of Bill C-262 creates a larger uncertainty: is UNDRIP intended to apply to peoples

other than the "aboriginal peoples of Canada" currently covered by s. 35? As recently noted in our publication in the Supreme Court Law Review,[1] the Supreme Court of Canada (SCC) suggested in its 2016 decision of *Daniels v Canada*[2] that the term "Indigenous" may apply to peoples who do not hold s. 35 rights. In this context it is unclear whether UNDRIP is intended to apply to those Indigenous peoples holding s. 35 rights in Canada ***and*** non-s. 35 rights-bearing Indigenous peoples.

*Discretion and Nuance*

Section 3 of Bill C-262 states that UNDRIP is affirmed as an "international human rights instrument with application in Canadian law." This statement is followed by section 4 which obliges Canada to "take all measures necessary" to ensure its laws are consistent with UNDRIP. The standard of "all measures necessary" is broad and lacks the flexibility to abrogate or derogate from UNDRIP where direct application is impractical, illogical, or otherwise incompatible with Canada's constitutionally protected Indigenous rights regime.

*Uncertain "Objectives"*

Section 5 requires that Canada must implement an action plan to achieve the "objectives" of UNDRIP. A search through UNDRIP reveals no description of "objectives." Instead, UNDRIP provides 24 preambular statements and 46 articles, most of which are broadly phrased and none of which are referred to as "objectives" or "principles" (the word used in the preamble to Bill C-262).

*Uncertain Results*

Bill C-262 does not state what the actual intended outcome of the adoption of UNDRIP will be and how it will compare with those protections already existing under s. 35. Generally, it appears that the Bill is intended to expand the protection of Indigenous rights in Canada, however the specific intended outcomes, and the benchmarks used to determine whether implementation is successful, are not disclosed. As a consequence, Bill C-262 offers a "wait and see" approach to determining what the actual consequences of the Bill may be. Such an approach appears inconsistent with the basic expectations of government in a democratic society. It also risks creating substantial uncertainty regarding the vast amount of existing law in Canada dealing with Aboriginal and treaty rights.

The drafting challenges within Bill C-262, noted above, are symptomatic of a larger issue: incorporating a deliberately general document (designed to address realities for Indigenous peoples throughout the world) into the sophisticated Canadian Indigenous rights regime using a broadly drafted and simplistic legislative tool.

**UNDRIP into Canadian Law: The Need for a Nuanced Approach**

The creation of UNDRIP, and the embrace of the principles therein, has been a critical international step forward for the recognition and protection of the rights of Indigenous peoples globally. In this context, UNDRIP provides an important benchmark in a world which has too often harmed, mistreated, and exploited Indigenous peoples.

While UNDRIP reflects critical elements of Indigenous rights through a lens of human rights, it was designed as a global benchmark and guide, rather than a specific legal instrument to be directly implemented as law. The fact that UNDRIP is a declaration and not a convention makes this clear. Conventions are binding agreements intended to be a reflection of international law and to be incorporated into national laws. Declarations, in contrast, are statements of generally agreed-upon standards which are not themselves legally binding. UNDRIP was not negotiated or drafted to be a comprehensive, implementable, legal regime, and as such, in the Canadian context and the context of Bill C-262, it is inconsistent, deficient, and a potential hindrance to reconciliation.

*Canada's Indigenous Rights Regime Overview*

Indigenous rights are not new in Canada: through s. 35 and the general protections for human rights set out in the *Canadian Charter of Rights and Freedoms*, Canada has developed one of the world's most sophisticated legal regimes for protecting Aboriginal and treaty rights, including in its constraint of unilateral state action.

This has been accomplished in large part through the effective efforts of Indigenous peoples themselves litigating in Canada's courts. With a focus on reconciliation, the SCC has regularly constrained the exercise of Parliamentary authority for the purpose of protecting Indigenous rights (as seen in the SCC's 2017 *Peel River Watershed* decision), while also allowing for necessary and unavoidable infringement of Indigenous interests where such interests conflict with broader, substantial social interests.

*Section 35 and Reconciliation*

In introducing Bill C-262 to a second reading, Mr. Saganash said that the Bill promises "to at least provide the basis or framework for reconciliation in our country," suggesting a new approach to Indigenous rights focused on reconciliation. Yet, reconciliation between Canada and its Indigenous peoples has been a constitutional principle in Canada for more than two decades. In 1996, SCC Chief Justice Lamer said s. 35 "provide[s] the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown."[3] Significant progress on the road to reconciliation has been made in Canada in recent decades, and will continue through the pursuit of honest dialogue, transparency of process, and shared expectations.

Reconciliation is not a simple process. According to the SCC, true reconciliation seeks to take into account Indigenous perspectives and the common law perspective, placing equal weight on each.[4] Under Canada's existing Indigenous rights regime, the principle of reconciliation is used to constrain and limit government action when Indigenous interests may be impacted. However, the SCC has also used reconciliation as a vehicle for recognizing that at times, broader public interests will justify potential incursions on Indigenous rights. "[Since] distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), *some limitation of those rights will be justifiable* [emphasis added]."[5]

UNDRIP does not use the word "reconciliation" and does not give specific consideration to how Indigenous and non-Indigenous peoples can respectfully coexist. The omission of any reference to "reconciliation" within UNDRIP appears intentional: in countries without constitutional constraints on the exercise of power, the protections for Indigenous rights under UNDRIP, even when enacted into law, are subject to governmental discretion. This is different from Canada's internationally unique legal regime, where the principle of reconciliation means that **democratically elected governments are constrained from unjustified interference with Indigenous interests.**

*Free and Informed Prior Consent*

Within the Canadian context, certain elements of UNDRIP appear inconsistent with our highly-tuned concept of reconciliation. The most significant of these elements is the concept of "free and informed prior consent." UNDRIP requires governments to obtain "free and informed consent" prior to developing any project affecting (not merely on) lands and territories of Indigenous peoples.[6] All lands in Canada, from downtown Toronto, to the remote edges of the Arctic, are the traditional territories of one, and often more than one, Indigenous peoples. UNDRIP also requires that governments seek "free, prior and informed consent" before implementing legislative or administrative measures that may affect Indigenous peoples.[7]

UNDRIP's focus on free and prior informed consent appears to be generally unworkable in the Canadian context. While negotiation may be effective with a few Indigenous groups, larger projects such as pipelines may be unworkable where even a single Indigenous group objects. Similarly, requiring that any general legislation first receive the consent of Indigenous governments risks making Canada's democratic process unworkable and appears to be inconsistent with the general principles of Canadian federalism. Under the *Constitution Act, 1867*, governance powers were divided between federal and provincial governments. While courts have allowed both levels of government to regulate the same area, the SCC has been clear that conflicting regulation will be inoperative against the authorized government's regulations.[8] Allowing Indigenous governments to veto (the effect of requiring the consent of all Indigenous peoples involved) laws

and projects regulated by either the federal or provincial governments creates an overlap of authority unintended and incompatible with the principles of federalism developed over the past 150 years.

Interestingly, and suggestive of the global context in which UNDRIP was developed, while UNDRIP provides Indigenous peoples with a general veto power over legislation and economic activity, it provides only one justification for unapproved activities in Indigenous territories: military activities.[9] Other than a requirement to undertake consultation, UNDRIP provides no constraint on the conduct of military activities in Indigenous territories.

*Indigenous Rights and Human Rights*

In introducing Bill C-262, Mr. Saganash discussed how the fundamental rights of Indigenous peoples are human rights. "This is the main objective of Bill C-262, to recognize that on one hand they [Indigenous rights] are human rights."[10]

In the Canadian context, describing Indigenous rights as human rights may not be helpful. Human rights, including those protected by the *Canadian Charter of Rights and Freedoms*, are the creation of, and may be derogated through, the democratic process enshrined in our Parliamentary system. Aboriginal rights are of a different kind, resulting not from our Parliamentary system but rather from the fact that "when Europeans arrived in North America, aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries [emphasis in original]."[11] By failing to reflect the important distinction between Indigenous rights and human rights generally, UNDRIP appears, once again, to be a unsophisticated tool in comparison to the highly tuned Canadian Indigenous rights regime which has evolved over 25 years and through more than 70 decisions by the SCC.

*Variety and Substance of Rights*

Not all Indigenous rights, and impacts to rights, are equal. Within the Canadian context there exists Aboriginal rights (including Aboriginal title) and treaty rights. Oftentimes these rights will overlap, with multiple Indigenous peoples holding Aboriginal and treaty rights over a single area of land. The Canadian Indigenous rights regime has developed processes for prioritizing these rights as against government activity. This process ensures that appropriate protections are provided for Indigenous rights and that those most impacted are the greatest beneficiaries of any resulting accommodation measures.

UNDRIP does not contemplate overlapping rights, a variety of rights, or the degree such rights may be impacted by government action. This causes several challenges when contemplating the adoption of UNDRIP into Canadian law. First, UNDRIP provides veto powers unrelated to Indigenous rights: Indigenous consent is required whether or not a traditional right is impacted. This may require governments to provide the same degree of deference and accommodation to Indigenous governments with substantially different interests in a region, and may, as a consequence, inhibit Indigenous peoples from advancing their own economic interests on their traditional territories. Second, by disassociating the power to constrain government actions from the actual harm incurred, accommodation or other benefits obtained by Indigenous groups in exchange for the solicited consent are likely to be measured in relation to the benefits received by non-Indigenous persons, potentially undermining reconciliation by creating long-term ongoing conflict between the interests of Indigenous and non-Indigenous peoples.

**Concerns with UNDRIP**

Indigenous rights are a fundamental element of Canada's legal system. They have evolved to reflect First Nations, Inuit, and Métis, the history of this nation, and the reality of Crown sovereignty. In 1982 Canada enshrined the protection of Aboriginal and treaty rights within its Constitution, and in the years following, courts have, through many hundreds of judicial decisions, developed a legal regime intended to justly and effectively protect the rights of Indigenous peoples in a manner consistent with the principles of a free and democratic society.

UNDRIP should be embraced as a benchmark for enhancing global protections for Indigenous peoples. Within Canada, governments should consider the concepts of UNDRIP and the importance of Indigenous rights.

However, by mandating the imposition of UNDRIP into the highly tuned Canadian Indigenous rights regime, Bill C-262, ***as it is currently drafted***, risks introducing substantial uncertainty and further rhetoric into the Canadian Indigenous rights regime in the pursuit of opaque objectives.

The suggestion that Bill C-262 offers an avenue for reconciliation must be examined critically. "Reconciliation" has become *le mot de jour* for all Indigenous rights efforts. Reconciliation is more than creating goodwill or the implementation of government through consensus. Reconciliation requires truth, clarity, forthrightness, and predictability for Indigenous and non-Indigenous peoples alike. Reconciliation must help Indigenous and non-Indigenous peoples move forward, in confidence and with certainty, together towards a sustainable future. As presently drafted, Bill C-262 appears incapable of advancing the objectives it sets out to achieve. All peoples in Canada, Indigenous and non-Indigenous, should insist upon clear, precise, and nuanced approaches to legislation addressing such important and foundational matters to our country as reconciliation and the respect for Aboriginal and treaty rights.

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[1] Thomas Isaac and Arend Hoekstra, "Identity and Federalism: Understanding the Implications of *Daniels v. Canada*" (2017) 81 Sup Ct L Rev 27 [Identity and Federalism] at 35-36.

[2] *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] SCJ No 12.

[3] *R v. Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at para 31 [*Vander de Peet*].

[4] *Ibid* at para 50.

[5] *R v. Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 at para 73.

6 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 107th plenary meeting (13 September 2007) [UNDRIP] at art 32.

[7] *Ibid*, art 18.

[8] *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 SCR 3 at para 4.

[9] UNDRIP, *supra* note 6 at art 30.

[10] *House of Commons Debates*, 42nd Parl, 1st Sess, No 245 (5 December 2017) (Romeo Saganash).

[11] *Van der Peet, supra* note 3 at para 30.