



Mining Association of Canada Comments on the Subject Matter of Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*

Submitted to the Standing Committee on Indigenous and Northern Affairs

March 18, 2021

The Mining Association of Canada (MAC) welcomes the opportunity to provide views on Bill C-15, *United Nations Declaration on the Rights of Indigenous Peoples Act*, being studied by the Standing Committee on Indigenous and Northern Affairs. The following provides context related to the mining sector's relationships with Indigenous peoples and considerations for Bill C-15.

MAC'S APPROACH TO INDIGENOUS RELATIONSHIPS

MAC is the national organization representing the Canadian mining industry, comprising companies engaged in mineral exploration, mining, smelting, refining and semi-fabrication. Our members account for most of Canada's production of base and precious metals, uranium, diamonds, steelmaking coal, and mined oil sands. MAC members are among the largest industrial employers of Indigenous peoples and are major customers of Indigenous-owned businesses. Beyond MAC, the nearly 500 mining relationship agreements with Indigenous communities in place are helping to advance economic reconciliation.¹

MAC members demonstrate their commitment to building respectful and mutually-beneficial relationships through participation in MAC's *Towards Sustainable Mining* initiative (TSM). Established in 2004, TSM is mandatory for all MAC members and requires the assessment and independent verification of 30 distinct in-depth performance indicators addressing eight critical aspects of social and environmental performance.² TSM is overseen by a Community of Interest (COI) Advisory Panel, which includes participation of individuals from Indigenous organizations and governments.³

In 2019, a significant enhancement to TSM was introduced with the *TSM Indigenous and Community Relationships Protocol*.⁴ Developed in collaboration with the COI Panel, the protocol is designed to facilitate strong relationships through effective engagement and decision-making processes. It establishes good practice that includes striving to achieve free, prior and informed consent (FPIC) before proceeding with development where impacts to rights may occur.

CONSIDERATIONS FOR BILL C-15

MAC supports the Government's commitment to advancing reconciliation and sees potential for Bill C-15, if well implemented and properly resourced, to result in improved Crown Indigenous relations.

¹ Natural Resources Canada, Lands and Minerals Sector – Indigenous Mining Agreements:

<https://atlas.gc.ca/imaema/en/> (accessed: March 4, 2021).

² Mining Association of Canada, *Towards Sustainable Mining Progress Report*:

<https://mining.ca/towards-sustainable-mining/tsm-progress-report/> (accessed: March 2, 2021).

³ Mining Association of Canada, *Community of Interest Advisory Panel Membership*:

<https://mining.ca/towards-sustainable-mining/community-interest-advisory-panel/> (accessed: March 2, 2021).

⁴ Mining Association of Canada, *TSM Indigenous and Community Relationships Protocol*:

<https://mining.ca/towards-sustainable-mining/protocols-frameworks/indigenous-and-community-relationships/> (accessed: March 2, 2021).

MAC is concerned, however, that misinterpretations of the intent of the legislation and key UNDRIP Articles (including FPIC) combined with an undefined action planning process could distract from addressing priority challenges and undermine recent progress. As expectations related to this Bill continue to diverge, so does the risk of uncertainty and the potential for unmet expectations, all of which could jeopardize the transparency, consistency and timeliness of decision-making processes.

It is in this context that MAC provides the following recommendations with respect to C-15.

Intent of C-15

Section 4 of Bill C-15 establishes the purpose of the Act. MAC interprets section 4, read in connection with the preamble statement “the Declaration is affirmed as a source for the interpretation of Canadian law”, to mean that:

- The intent is to implement UNDRIP over time through implementation of a codeveloped action plan.
- UNDRIP is already used as a source for the interpretation of Canadian law and C-15 is not meant to give UNDRIP immediate force and effect.

MAC’s understanding is that over time, as other laws are modified or built, they will be aligned with UNDRIP. Existing Canadian laws will not change immediately, as bringing federal laws into alignment with UNDRIP will take time and involve further consultation with Indigenous peoples and other sectors of society. MAC recognizes, however, that there are differing views as to the force and effect of UNDRIP in Canadian law and that arguments around BC’s adoption of UNDRIP through its *Declaration on the Rights of Indigenous Peoples Act* are being made in court.

A common understanding of the purpose of the legislation is essential to ensure that future interpretation reflects the intent of the Bill.

Free, prior and informed consent (FPIC)

Much of the discussion on UNDRIP implementation relates to the interpretation of FPIC which often leads to a narrow conversation about what UNDRIP implementation means in the Canadian context. There remains a spectrum of interpretations of what FPIC means in practice.

MAC views FPIC as a process of engagement that enables Indigenous peoples to genuinely influence the decision-making process with a goal of achieving and maintaining broad support. This view recognizes that despite reasonable and good faith efforts, consent may not always be achieved. FPIC, as described in UNDRIP, is consistent with the law developed in respect of Indigenous rights in Canada pursuant to Section 35 of the *Constitution Act, 1982*, including the concept of the spectrum of consultation and the balancing of interests as described in the *Haida* decision from the Supreme Court of Canada. These obligations are complementary, as UNDRIP provides more context for the already existing duty to consult, which means that when

Canada undertakes its duty to consult one of the goals is to try to obtain consent. It should be noted that FPIC as an objective is consistent with Canada's constitutional framework and the decisions of the Supreme Court of Canada on Indigenous rights. It does not grant a veto over government decision-making.

On February 17, 2021, during Second Reading of Bill C-15, the Minister of Justice described FPIC as:

...a way of working together to establish a consensus through dialogue and other means and of enabling indigenous peoples to meaningfully influence decision-making.

Free, prior and informed consent does not constitute veto power over the government's decision-making process. After all, human rights and the resulting obligations and duties, particularly those provided for in the declaration, are not absolute.

The declaration states that indigenous peoples have individual and collective rights equal to those of other peoples. That means that the provisions of the declaration, including those that refer to free, prior and informed consent, must be taken in context. Different initiatives will have different impacts on the rights of indigenous peoples and will require different types of approaches.⁵

These remarks helped clarify the Government's interpretation of FPIC to an extent. What remains unclear is whether existing processes for Indigenous engagement relating to projects may be changed and if so in what circumstances. It is also unclear how the government intends to deal with situations when efforts to obtain consent have not been successful or when consent is provided by some affected Indigenous communities but not all. While we recognize that, to some extent, government decisions will be made on a case by case basis by considering issues such as strength of claim, impacts on rights and overall project benefits, this lack of clarity does create uncertainty for investment. All parties need to understand whether and how the rules of engagement for projects may change. Consultation aimed at achieving consent needs clear, transparent and consistent processes and consultation activities and requirements should continue to be informed by strength of claim and potential impacts.

Without additional guidance, there will continue to be a range of expectations that can lead to conflict, tension and uncertainty at the project level and disputes that ultimately will be required to be decided by the courts. This is not helpful to the important objective of reconciliation. To improve clarity and certainty for Indigenous groups, industry and all Canadians, further guidance is needed and must be broadly communicated. If not adequately clarified before the legislation is passed, there will be continued uncertainty that could impact the viability of projects and investment decisions and their associated benefits to Indigenous

⁵ 43rd Parliament, 2nd Session, Edited Hansard No. 60, February 17, 2021:
<https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-60/hansard#11133850>.

individuals, communities, and businesses, including jobs, training, procurement, and other business and partnership opportunities.

The Government should clarify:

- **The circumstances that give rise to the obligation to consult and in some cases to seek consent and the specific processes for each, including identification of the relevant rights holders and their representatives.**
- **Whether there are gaps in existing Indigenous engagement processes and how they may be addressed.**
- **The process or approach that will be taken by Government when efforts to obtain consent have been unsuccessful, or when consent is provided by some Indigenous communities but not all.**

Action Plan

The action planning process could lead to a vast spectrum of potential outcomes and will have implications for both Indigenous communities and industry. Identifying and prioritizing which federal laws, policies, and programs require modification/development to align with UNDRIP is a significant undertaking, which may present its own process-related challenges. Without adequate resources available to advance implementation of the action plan, there is a risk that this legislation will result in unmet expectations and uncertainty for communities and industry.

Transparency and ensuring that the process is well defined may help mitigate some of the challenges that will inevitably emerge. As part of the action planning process, there should be open discussions about the pace of change to ensure that expectations are aligned with capacity to implement priority actions.

The action plan will require an all-of-government commitment to prioritize and coordinate implementation of this legislation, including cross-department collaboration.

Respecting and supporting the intent for the action plan to be the product of a nation-to-nation process, MAC and our members seek to be consulted on the development and implementation of the action plan.

As soon as possible, the Government, in collaboration with Indigenous leaders, should:

- **Define the specific process by which the action plan will be developed, including:**
 - **A transparent consultation plan.**
 - **A well-defined process for prioritizing actions.**
- **Ensure there is transparency with respect to the scope of the action plan, the required resourcing needed to implement priority actions, and meaningful consultation with industry on any elements of the action plan that may impact project proponents.**
- **Commit to engage Canadians on reconciliation, including ensuring there is a broad understanding of Bill C-15 and its intended objectives.**

- **Establish an all-of-government commitment to prioritize and coordinate implementation of this legislation and ensure appropriate resources are allocated.**

Guidance and Tools to Support Meaningful Consultation

Currently, the federal government's approaches to identifying Indigenous groups that may need to be consulted, the degree of consultation required, and when and what accommodation may be required are inconsistent. The respective roles of federal officials and industry continue to be unclear and there is a lack of consistent approaches to dealing with issues that go beyond individual projects like cumulative impacts. Enhanced guidance, training and policies are also needed to ensure that federal officials have the knowledge and expertise to engage in relationship building and consultation with Indigenous communities and can assess the adequacy of consultation to avoid further confusion.

There should be a directive to federal employees describing the government's interpretation of FPIC and the intent of Bill C-15 that provides practical guidance to ensure a consistent and transparent federal approach to consultation issued immediately. Additionally, oversight across the federal government is needed to ensure that guidance and directives are consistently followed.

Much of the groundwork is already complete. In 2015, the then Minister of Aboriginal Affairs and Northern Development appointed a Ministerial Special Representative to engage broadly on the government's approach to consultation and accommodation. This effort resulted in 47 recommendations⁶ that, if implemented, would help ensure consistent, good practice implementation of the duty to consult and directly support meaningful implementation of UNDRIP in Canada.

The Government should:

- **Expediently issue a directive to federal officials outlining its approach to FPIC.**
- **Develop and enhance guidance, training and policies to ensure that federal officials can adequately and consistently engage in consultation with Indigenous peoples, and to clarify the role of the Crown, Indigenous groups and proponents on project approvals.**
- **Undertake a process to update the *Aboriginal Consultation and Accommodation Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011).⁷**
- **Implement the 47 recommendations of *Building Relationships and Advancing Reconciliation through Meaningful Consultation* (2016).**

⁶ Gray, Bryn, Ministerial Special Representative, *Building Relationships and Advancing Reconciliation through Meaningful Consultation* (2016): <https://www.rcaanc-cirnac.gc.ca/eng/1498765671013/1609421492929> (accessed: March 2, 2021).

⁷ Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (2011): https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAMCNSLTENGE/STAGING/texte-text/intgui_1100100014665_eng.pdf (accessed March 16, 2021).