



CAPP Submission to the Standing
Committee on Indigenous and Northern
Affairs

*Bill C-15: An Act respecting the United
Nations Declaration on the Rights of
Indigenous Peoples*

April 8, 2021

1 Introduction

CAPP and our member companies appreciate the opportunity to provide comments on Bill C-15: *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*. The Canadian Association of Petroleum Producers (CAPP) represents companies, large and small, that explore for, develop and produce natural gas and oil throughout Canada. CAPP's member companies produce about 80 per cent of Canada's natural gas and oil production.

Resource development has been one of the most vital paths for building Indigenous prosperity. Business and job opportunities provided by our member companies support the development of strong local economies and, as expressed by many Indigenous community leaders in Canada, are important to increased self-determination. Indeed, in Western Canada, the oil and gas sector is "central to Indigenous plans for poverty reduction, improved autonomy from Ottawa, employment and business development."¹

Today, the oil and natural gas industry procures more from Indigenous businesses than does any other industry in Canada, and far more than the federal government as a whole. In 2017-19 aggregate spending with Indigenous companies was \$5.9 billion. In 2019, 11 per cent of our total procurement was from Indigenous businesses. We are also one of the largest employers of Indigenous people, and these workers earn on average the highest wages compared to any sector in the country. For the Fort McKay First Nation, as an example, involvement in the oil sands has translated into a median income of \$61,248 in 2016 exceeding that of every Canadian province except Alberta.²

While the industry's most observable contribution is as a driver of economic opportunity, CAPP member companies' efforts to support the development of sustainable Indigenous communities range from housing initiatives to environmental monitoring programs to standing discussion forums in our operating areas. The sector also works closely with Indigenous communities to support locally identified priorities. From 2017-2019, total funding for community investment in the oil sands was \$85.2 million, which includes training programs, environmental initiatives, infrastructure and cultural funding.

CAPP and its members seek to be constructive and supportive partners in reconciliation and we support an approach to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada that preserves and enhances economic, social, and environmental benefits for Indigenous peoples and communities. In 2016, CAPP issued a discussion paper endorsing the principles of UNDRIP as an essential framework for reconciliation.³ We continue to support its implementation in a manner that is consistent with the Canadian Constitution and law.

Bill C-15 provides an important opportunity to advance reconciliation, establishing a framework and a process for the implementation of UNDRIP in Canada. However, as currently written, the Bill introduces uncertainty, including around project consultation and approvals, which will lead to litigation in areas of established jurisprudence in Canada. This increased uncertainty will compromise the ability of the natural resource sector to attract the investment that supports reconciliation, Canadian prosperity and Indigenous self-determination.

We propose the following amendments and recommendations to assist Parliament in addressing these concerns and supporting successful implementation of UNDRIP in Canada.

2 Application in Canadian Law and the Constitutional Division of Powers

Bill C-15 includes the full text of UNDRIP as a schedule. UNDRIP's text contains language and concepts – such as references to rights of redress, Indigenous governing institutions, and rights related to land and resources – that already have meaning in Canadian law. Instruments like historic and modern treaties, the development of decades of jurisprudence, and Section 35 of the Constitution Act, 1982 are important elements of Canada's legal framework.

The Bill also includes language that could be understood to imply the immediate application of the whole of UNDRIP in Canadian law, ahead of the co-development of the proposed federal Action Plan. This creates uncertainty as to what will change when Bill C-15 passes for Indigenous peoples, industry and investors as well as for government officials who must continue to implement other legislation associated with resource development. For investors, in particular, uncertainty about what the law requires will lead them to avoid investing in Canada. This will mean good projects, including ones supported by the majority of Indigenous communities, will not go ahead. **The legislation should be amended to affirm UNDRIP as an instrument to assist in the interpretation of the federal laws of Canada.**

Finally, language in some sections of Bill C-15 are ambiguous regarding the government's intent to respect provincial and territorial jurisdiction. Consistency with the Canadian Constitution requires respect for the ability of provinces and territories to take their own approaches to UNDRIP implementation, as British Columbia has done. **We recommend replacing references to “Canadian law” in Bill C-15 with references to “federal law.”**

3 Free, Prior and Informed Consent (FPIC)

The Supreme Court of Canada (SCC) has, over many court cases, clarified the principles for meaningful engagement with respect to Section 35 rights under the Constitution. In a given context, the (1) “strength of claim” and (2) “degree of impact to rights” are assessed by federal or provincial governments to determine requirements for meaningful consultation and appropriate accommodation. Having fulfilled their duties, federal, provincial and territorial governments assess information and interests in conformity with the law and make final decisions with respect to project approvals.

Today, as the federal government seeks to implement the principles of UNDRIP, there is already confusion and contradictory direction from officials as to what FPIC requires as it relates to federal consultation. In some cases, additional Indigenous groups are identified for inclusion in consultation processes where they have no known rights in the areas affected by the project. Indigenous groups with clearly understood rights and longstanding relationships with producers are now negotiating with new groups with unclear claims. This is an abandonment of principles established by the Courts and leads to conflict.

These issues will be exacerbated without a definition in Bill C-15 to guide application and frame expectations with respect to FPIC.

The Government of Canada worked closely with the Assembly of First Nations, the Metis National Council and Inuit Tapiriit Kanatami to co-develop Bill C-15. Its communications have made clear that FPIC does not constitute a veto over federal or provincial/territorial government decision making. Instead,

FPIC is about the meaningful participation by Indigenous people in decisions that impact their rights. With the adoption of Bill C-15, the federal government expects to retain its authority to make final decisions related to resource projects under federal jurisdiction.

On February 17, 2021, during Second Reading of Bill C-15 Minister David Lametti stated:

“Arising from the right to self-determination, “free, prior and informed consent”, as it appears in various articles of the declaration, refers specifically to the importance of meaningful participation of indigenous peoples, through their own mechanisms, in decisions and processes affecting them, their rights and their community. (...)

[FPIC] does not constitute veto power over the government's decision-making process. (...) If passed, this bill will not change Canada's existing duty to consult with indigenous peoples or the other consultation and participation requirements under other legislation such as the new Impact Assessment Act.”⁴

This is consistent with Principle 6 of Justice Canada's *Principles respecting the Government of Canada's relationship with Indigenous peoples*, which were developed by a Ministerial committee led by former Justice Minister Jody Wilson-Raybould. It describes FPIC as an objective of meaningful consultation but not a requirement [*bold added*]:

“The Government of Canada recognizes that meaningful engagement with Indigenous peoples **aims to secure** their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.”⁵

Some Indigenous organizations, including the Metis National Council, have expressed an understanding of FPIC similar to the Government of Canada:

“This (FPIC) is not a veto and we made that public to all industry and we still stand by the position and we always will.”⁶ – David Chartrand, MNC National Spokesperson, December 3, 2020

At the same December 3rd event, the heads of the Assembly of First Nations and Inuit Tapiriit Kanatami affirmed, along with the Metis National Council, that Bill C-15 is about creating space for the full engagement of rights and title holders, and providing certainty, including to investors. We share this objective.

While the Government of Canada seems clear in articulating FPIC as an objective of a meaningful consultation process, other intervenors have expressed differing views, including that: UNDRIP supersedes the Constitution⁷; that federal, provincial or territorial governments are not the final decisions makers⁸; that FPIC changes the Crown's Duty to Consult as established by the SCC.⁹

Parliament has the opportunity to write Bill C-15 in a way that provides clarity on the definition of FPIC in Canada. This will provide guidance to all parts of society, including the Courts on the meaning of this important concept. We propose the following definition based on our understanding of the government's intent, the principles developed through decades of jurisprudence in Canada, as well as feedback received on our initial definition:

FPIC is a meaningful consultative process that aims to secure the consent of Indigenous peoples and provides them with a degree of participation and protection corresponding to the strength of the claimed right or treaty entitlement and the seriousness of the impact on the claimed right or treaty entitlement.

4 Action Plan Process and Practical Implementation

CAPP strongly supports the co-development of an Action Plan with Indigenous peoples to implement UNDRIP in Canada, and we and our members seek the opportunity to participate in this dialogue where appropriate to our industry. Done well, the process can be a powerful tool to build alignment, understand mutual expectations and close existing, significant socio-economic gaps for Indigenous peoples.

The Action Plan should:

1. Ensure the provision of adequate resources for the Action Plan process and create clear government accountability;
2. Define expected performance improvement metrics and timelines to close the existing and significant gaps (e.g. housing, health care, infrastructure, etc.) for Indigenous Canadians; and,
3. Promote consistency and efficiency between government departments and various levels of government.

It will also be important to clarify which Indigenous institutions are recognized as those with whom the Crown will meaningfully consult in the context of a project, and under what circumstances those institutions might change. The process for changing authorized representatives should be independent of project adjudications and forward looking.

CAPP also urges that engagement by the federal government with provinces and territories continues in approaching UNDRIP implementation. Based on lessons learned from British Columbia's experience, priorities should establish:

1. How to effectively advance and support cross-government approaches to implementation;
2. How to manage expectations between governments, Indigenous peoples and all Canadians;
3. The means to support bureaucratic capacity and consistency in implementing and administering the legislative obligations of Bill C-15; and,
4. The necessary measures to mitigate potential future litigation related to federal or provincial UNDRIP implementation.

5 Conclusion

CAPP hopes our recommendations will support the Committee in making improvements to Bill C-15 and we look forward to continued engagement.

¹ “How Canada’s oil and gas industries assist in the project of reconciliation,” JP Gladu and Ken Coates, The Globe and Mail (September 2, 2020). <https://www.theglobeandmail.com/opinion/article-how-canadas-oil-and-gas-industries-assist-in-the-project-of/>

² <https://www.canadianenergycentre.ca/research-brief-canadas-oil-sands-and-local-first-nations/>

³ <https://www.capp.ca/publications/capp-discussion-paper-on-implementing-the-united-declaration-on-the-rights-of-indigenous-peoples-in-canada/>

⁴ <https://www.ourcommons.ca/DocumentViewer/en/43-2/house/sitting-60/hansard>

⁵ <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

⁶ CPAC, “Federal Ministers and Indigenous leaders discuss UNDRIP Bill” – December 3, 2015 (starting at 1:19 in the video: <https://www.youtube.com/watch?v=mcRdZn5B8qY>)

⁷ Page 5, <https://www.ourcommons.ca/Content/Committee/432/INAN/Brief/BR11188494/br-external/O'ChieseFirstNation-e.pdf>

⁸ “First and foremost, in terms of free, prior and informed consent, (...) no government has a veto. (...) Really, I think [FPIC is] a recognition that our authority is there. It equalizes everything in terms of our sovereignty (...)” - Regional Chief Terry Teegee, BCAFN, INAN Committee Hearing on the Subject Matter of Bill C-15, March 23, 2021 <https://www.ourcommons.ca/DocumentViewer/en/43-2/INAN/meeting-24/evidence#Int-11198485>

⁹ “Canada’s own legal and constitutional frameworks must adapt to the UN Declaration, especially Indigenous peoples’ free, prior and informed consent (FPIC) based on our inherent and inalienable rights pursuant to our Indigenous laws and authorities. FPIC is the right to say yes and the right to say no to development on our lands and territories (...)” - Grand Chief Stewart Phillip, UBCIC https://www.ubcic.bc.ca/humanrightsday_sitec