

This resolution has been approved by the Aboriginal Chamber of Commerce Board of Directors on June 18, 2020 and by the ACC membership at the Annual General Meeting June 25, 2020. V8 2020-06-25.

Canada's Harmonizing Federal Law with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The Aboriginal Chamber of Commerce¹ (ACC) focus is on the Indigenous business community throughout all of Manitoba. Its objects include:

- To serve the Indigenous business community and express positions and opinions on business issues and other public issues relevant to Indigenous business, on behalf of its membership.
- To provide a forum for the Indigenous business community to develop policy positions and programs which contribute to the social, economic and physical quality of life in Indigenous and all communities in Manitoba and Canada.
- To promote a society and economy primarily based on competitive enterprise and on concern for the individual in our society.

The vast majority of ACC's members are Indigenous owned businesses. These businesses stand to gain significantly from improved economic development for Indigenous communities, along with all Manitobans and Canadians.

In the most tangible of terms, as noted in the Nov 25, 2016 article by the National Aboriginal Economic Development Board,² there is the \$2.8 billion gain available when First Nations achieve the same economic status of living as other Canadians. With Manitoba's population of about 1.3 million persons, and its share of the national First Nations population, it is about \$2,150 per Manitoban every year, forever! This is by far MB's largest economic development opportunity and is why all Manitobans should support this resolution.

What is UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples is a document that describes both individual and collective rights of Indigenous peoples around the world. It offers guidance to governments (and others) on creating cooperative relationships with Indigenous peoples based on the principles of:

- equality
- partnership
- good faith, and
- mutual respect.

It addresses the rights of Indigenous peoples on issues such as:

- culture
- identity

¹ Legal name is Aboriginal Chamber of Commerce – Grand Rapids

² http://naedb-cndea.com/reports/naedb_report_reconciliation_27_7_billion.pdf. This economic gain is very similar to that estimated by the "Effect of Increasing Aboriginal Education", 2009, by the Centre for the Study of Living Standards.

- religion
- language
- health
- education
- community

The UNDRIP was adopted by 144 countries, with 11 abstentions and 4 countries voting against it in 2007. These four countries were Canada, the USA, New Zealand, and Australia. For nearly a decade, Canada refused to endorse the Declaration. Since 2009 Australia, New Zealand and the US have also reversed their positions and now support the Declaration. In 2010, Canada announced a statement of support for the principles of UNDRIP but it was not until 2016 that Canada announced its full endorsement of UNDRIP and its intention to harmonize Canadian law with its principles.

Proposed Canadian legislation on implementation died when the 2019 Canadian election was called. After the election, the Federal Government announced its intention to introduce new legislation for implementing UNDRIP within a year.

As of June 2020, BC is the only Canadian province which has legislated the implementation of UNDRIP.

Contentious Points

As summarized by Senator Murray Sinclair, the focal point of discussion “has become the question of whether respecting Indigenous rights might be bad for Canada’s economy. The principle of free, prior and informed consent, in particular, has been a concern for some.”

Debate in the Senate noted, “that there are significant unanswered questions over the impact of this bill, not because of a lack of support for the aspirations of UNDRIP but because of the lack of clarity and agreement on what its implementation could mean to Canada.”

Some people are concerned that Indigenous communities would get increased/new rights that would impact natural resource development and other projects and industries. E.g. Impact Assessment, Fisheries, etc.

However, many advise that the above is not the case:

- UNDRIP reaffirms what the Supreme Court of Canada has already said – that governments must consult Indigenous groups prior to making decisions that might impact their lives³
- UNDRIP is in line with Section 35 of Canada’s Constitution that says, “The existing Aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed.”

³ Brenda Gunn, Assoc. Professor at the University of Manitoba at <https://globalnews.ca/news/6101723/undrip-indigenous-relations-canada/>

- UNDRIP does not take any rights away from anyone else⁴
- As Janes⁵ and other legal experts say, many of the rights in UNDRIP are already protected by Section 35 of the Canadian Constitution, which guarantees treaty rights.

Government-to-government negotiations and agreements are already in place and/or continue to be negotiated and developed between local, provincial, national, and international governments. Where that joint decision-making fails, dispute resolution mechanisms are developed and invoked to prevent issues from going straight to court.

Yet while shared decision-making is not a novel concept, the requirement for shared decision making with Indigenous governments is largely absent in Canadian law outside of some specific agreements between governments and Indigenous governments, including but not limited to the development of natural resources.

UNDRIP Compared to ‘Duty to Consult and Accommodate’

What is the difference between UNDRIP’s ‘free, prior, and informed consent’ and the Supreme Court’s ‘Duty to Consult and Accommodate,’ which is what already exists in Canadian law right now?

Some insights may be available from what BC has already implemented. Like Bill C-262 (the Federal Government’s legislation that failed in the Senate before the election), B.C.’s Bill 41 mandates⁶:

- "Action plans" for each government department, and
- Annual reporting on their progress toward fulfilling the rights specified in the declaration, and
- More importantly, government departments get the authority to share decision-making with Indigenous governments

That removes a significant roadblock to "free, prior and informed consent" as spelled out in UNDRIP, and to complying with the Supreme Court’s many rulings on ‘Duty to Consult and Accommodate’.

In the past, Canadian courts have repeatedly affirmed the duty of governments to consult with and accommodate First Nations before making decisions. This has frequently been the basis of First Nations successful legal challenges.

The Supreme Court of Canada has already declared that fulfilling the government’s ‘duty to consult and accommodate’ includes gaining Indigenous peoples’ consent. That happened first in 1997. It occurred again in 2004, when Canada’s highest court clarified that consent may be required in relation to both proven and asserted-but-not-yet-proven rights.

⁴ Lori Campbell, director of the Waterloo Indigenous Student Centre at St. Paul’s University College, added “UNDRIP doesn’t take away human rights standards that the average citizens receive,” she told Global News. “It’s not an either-or situation.” <https://globalnews.ca/news/6101723/undrip-indigenous-relations-canada/>

⁵ <https://www.cbc.ca/news/canada/north/implementing-undrip-bc-nwt-1.5344825>, Robert Janes, an expert in Indigenous law with JFK Law in Victoria,

⁶ <https://www.cbc.ca/news/canada/north/implementing-undrip-bc-nwt-1.5344825>

The Supreme Court also stated in 2014 that “once aboriginal title is established, section 35 of the Constitution Act, 1982, permits incursions on it only with the consent of the aboriginal group.”

Indigenous peoples’ right to free, prior, and informed consent is not even new to international human rights law. UNDRIP is not even the first international instrument to have recognized this right. Several international human rights treaties that Canada is a party to – the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, for example – already recognize Indigenous peoples’ right to consent, and the UN declaration simply reiterates this standard.

This is one of the reasons experts say that UNDRIP does not provide any new rights to First Nations.

Many of the concerns by those that oppose implementation of the declaration are largely driven by the uncertainty of implementation and the changes to legislation that may be needed. If poorly designed and implemented, the Federal Government changes could hold significant negative impacts by only adding to the current lack of clarity that exists around the responsibilities of industry and government, and the rights of Indigenous Peoples.

Closing

The work of the Truth and Reconciliation Commission stated in its 2015 final report: “We remain convinced that the United Nations Declaration provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada.”⁷

By addressing the power imbalances between Indigenous peoples and the Canadian state through UNDRIP, consent can become the key to ensuring that Indigenous peoples can exercise their fundamental human rights. Right now, too many Canadians are taking that for granted.

The Federal Government must support nation building and capacity building to enable Indigenous Peoples to fully participate in the decision-making process; and at the same time, ensure the legislation creates needed clarity and certainty for businesses, investors, and all Canadians.

Recommendations

That the Canadian government:

1. Implement UNDRIP by harmonizing all federal legislation, regulations, and practices to be consistent with the declaration
2. Collaborate extensively with Indigenous communities, Indigenous and non-Indigenous businesses and Chambers of Commerce to jointly develop the implementation action plans (including timeline) for each department
3. Prior to proposing any legislative or regulatory change, it clarifies:

⁷ The Truth and Reconciliation Commission of Canada, “Honouring the Truth, Reconciling for the Future: Volume 1: Summary,” p. 21

- a. If it's interpretation of the FPIC provisions are materially different from what is required to comply with the existing Supreme Court's 'duty to consult and accommodate'
 - b. What actions will be taken to coordinate with all provincial and territorial related implementation actions
 - c. What the roles are for industry in a process to seek Indigenous peoples' consent
- 4. Ensure there is sufficient annual reporting by each Federal Government department to create incentive and accountability for achieving the action plan objectives.