



INDIGENOUS
RESOURCE NETWORK
BUILDING A SUSTAINABLE FUTURE FOR INDIGENOUS COMMUNITIES

DISCUSSION PAPER

FEDERAL LEGISLATION TO IMPLEMENT THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES:

POTENTIAL IMPACTS ON INDIGENOUS BUSINESSES AND WORKERS

NOVEMBER 2020

INTRODUCTION

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was written by and for Indigenous peoples, and negotiated with states, ultimately being adopted as a non-legally binding resolution by the United Nations General Assembly in 2007. While Canada initially voted against the resolution, arguing that it was incompatible with Canadian laws, it later endorsed the principles of the Declaration in 2010, and offered its full support in 2016. Indigenous organizations and peoples across Canada have worked hard to ensure Canada commits to UNDRIP's principles.

A private member's bill to implement UNDRIP, led by NDP MP Romeo Saganash, was introduced to the House of Commons as Bill C-262. However it died on the order paper when Parliament was dissolved ahead of the 2019 elections. The federal government has made a commitment to co-develop legislation that implements UNDRIP and re-introduce it before the end of 2020. Thus far that co-development has been focused on negotiations with the national advocacy organizations of the Inuit, Métis and First Nations, as represented by Inuit Tapiriit Kanatami, Métis Nation of Canada and the Assembly of First Nations.

The Indigenous Resource Network advocates for Indigenous entrepreneurs, businesses and workers engaged in the resource development sector. We do not support all resource development; rather we support resource development, including in oil & gas, mining, forestry, agriculture, and fishing, that benefits Indigenous communities economically while maintaining high standards of environmental protection. From our perspective this seems to be the position of most Indigenous peoples in Canada.

It is from that perspective that we have written this discussion paper. While we unambiguously support UNDRIP and its principles, and defend all efforts to protect and expand Indigenous rights, we are also concerned that the federal legislation as written (based on C-262 and new consultation versions, as the current federal legislation to implement UNDRIP is still secret) will negatively impact resource development in Canada, and as such the job, contract and ownership prospects for many Indigenous workers and businesses, as well as the opportunity for nations to earn own source revenues. Beyond jobs, we want opportunities for our people to expand their intellects and reach their full potential, while being in a position to ensure the environmental integrity of our territories.

UNDRIP provides new tools for Indigenous peoples to say no to development which goes against their interests; but it also provides for Indigenous peoples to say yes to economic development when our values and interests are reflected in the project. It protects our right:

- To own, use, develop and control the lands, territories and resources that we possess.
- To freely pursue our economic, social and cultural development.
- To be secure in the enjoyment of our own means of subsistence and development, and to engage freely in all our traditional and other economic activities.



INDIGENOUS RESOURCE NETWORK

BUILDING A SUSTAINABLE FUTURE FOR INDIGENOUS COMMUNITIES

While we support UNDRIP, we want our political representatives, both within Indigenous organizations and the within the federal government, to get the drafting of the legislation right. That means not compromising our best opportunities for economic development by making resource development in Indigenous territories more uncertain, complex and unattractive to investment than the Indian Act already makes it.

We obviously do not believe that resource development is more important than Indigenous rights. There are situations where Indigenous peoples should be able to deny consent to particular projects. However we think it should be possible, even necessary, for legislators to draft laws that allows Indigenous peoples and industry to come to mutually beneficial agreements on proceeding with development, without making our legal and regulatory environment too risky, vague or expensive to attract that investment.

The leaked legislation we have seen, and the wording of C-262, raises our concern. The following section outlines key areas requiring clarification in the legislation to ensure it is implemented in a way that focuses on practical, rather than symbolic, benefits for Indigenous workers, business and communities, and supports what we believe to be the real intent of UNDRIP. We believe clarification on these questions would play a constructive role in bridging the circle of our culture with the wheel of industry so that they mesh better in the future.

AREAS OF UNDRIP LEGISLATION REQUIRING CLARIFICATION

Because UNDRIP was written as an international Declaration, it is imperfectly suited as Canadian legislation. As former Justice Minister and Regional Chief of the BC Assembly of First Nations Jody Wilson-Raybould (Puglaas) asserted in 2016, "Simplistic approaches such as adopting the United Nations declaration as being Canadian law are unworkable," and "We can't just take all forty-six articles of the declaration and put it into legislation...We need to look at each article. We need to understand and seek clarification from Indigenous

communities around the questions I asked in my speech at the AFN, among other questions, and operationalize that based on the priorities that Indigenous communities are bringing forward, how they see it being operationalized and how we can, the federal government, partner in that."

With that in mind, these are the questions we would like answered to ensure that UNDRIP legislation is drafted in a way that does not pose unintended harm on the many Indigenous peoples who rely on resource development for their economic well-being.

Impact on existing rights

Aboriginal and treaty rights are affirmed in s. 35 of the Constitution, and have been further interpreted and clarified through many legal judgments. The affirmation of the duty to consult and accommodate in 2004, for example, has led to real progress in developing mutually acceptable benefit agreements between industry and Indigenous nations where resource development occurs.

- Will the federal legislation implementing the Declaration change the Canadian law regarding the duty to consult? If so, how?
- Will the federal legislation implementing the Declaration change the Canadian law regarding our right to compensation (redress) when our rights have been violated?

Indigenous authorities

The Declaration calls on states and others to work with Indigenous peoples through the representative institutions of their own choosing. As we have seen with the Wet'suwet'en MOU with the B.C. and federal governments, this is a question many struggle with. If it's not clear who has the authority to represent a nation, this has the potential to delay or prevent many major projects which would otherwise provide jobs, contracts and own source revenues to our communities. It's important to understand what, if any, changes the proposed UNDRIP legislation will have on this issue.



INDIGENOUS RESOURCE NETWORK

BUILDING A SUSTAINABLE FUTURE FOR INDIGENOUS COMMUNITIES

- Who can grant consent to go ahead on a project?
- How do governments and corporations know who to deal with?
- How do we avoid another Wet'suwet'en scenario? If a small group of people in a nation is against a project, does that stop it for everyone else?
- Free Prior and Informed Consent (FPIC)

Our industry partners say they understand FPIC to describe a process that provides for varying degrees of protection for our communities and our rights depending on the degree of impact on our rights. They see UNDRIP as requiring government to balance the interests of Indigenous peoples with the interests of broader society. However many Indigenous peoples have argued that FPIC provides our communities with the right to stop projects.

- How should we properly understand FPIC? Does consent mean a veto?
- If one community vetoes a project under the auspices of UNDRIP, can that stop linear projects? Is the unanimous approval of every Indigenous community along a linear project required in order for the project to go ahead?
- What happens if a community says no to project? Is that project halted or does government retain the power to make a decision? Is the government required to take the community decision into account?

CONCLUDING THOUGHTS

We support UNDRIP and want to see the Canadian government commit to its implementation. However we are concerned that it is being drafted in a way that will negatively impact our opportunities in the resource development sector. It is our hope that federal UNDRIP legislation can provide clarity on the questions above so that Indigenous peoples can say yes to development, as well as no.

Many of us have seen activists use our nations' legal rights as a tool to stop development in our territories, through legal challenges and delays. We do not want the affirmation of Indigenous rights as described by UNDRIP to become a weapon for those opposed to any resource development, regardless of whether our communities support it or not. We have a right to economic development. We are concerned that the UNDRIP legislation as drafted will take away many of our best opportunities for jobs, business, revenues and equity. We call on the federal government and the Indigenous organizations co-developing it to make sure the legislation provides clarity to Indigenous-industry partnerships rather than more confusion.

1 APTN National News. (July 12, 2016). *Justice Minister Jody Wilson-Raybould says adopting UNDRIP into Canadian law 'unworkable'* <https://www.aptnnews.ca/national-news/justice-minister-jody-wilson-raybould-says-adopting-undrip-into-canadian-law-unworkable/>

2 James Munson. (July 22, 2016). *Wilson-Raybould defends stand on UNDRIP adoption.* <https://ipolitics.ca/2016/07/22/wilson-raybould-defends-stand-on-undrip-adoption/>