IMPLEMENTING THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLE — WHAT GOOD LOOKS LIKE

POLICY RECOMMENDATIONS FROM THE BUSINESS COUNCIL OF BRITISH COLUMBIA'S INDIGENOUS AFFAIRS AND RECONCILIATION COMMITTEE

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1. Provincial Plan to implement UNDRIP

The Business Council of British Columbia Indigenous Affairs and Reconciliation Committee (IARC) has prepared this paper to convey our recommendations on the provincial legislative initiative to implement the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) into provincial law.

In a recent speech, the Premier expressed the context for the legislation in broad terms, as follows

> "Today and every day, our government recognizes our responsibility to advance reconciliation in partnership with Indigenous peoples, and we have taken significant steps forward. …
>
> ... A key step is legislation that will set the foundation for what comes next in our work together on reconciliation. This fall, British Columbia will be the first province to introduce legislation that enshrines the United Nations Declaration on the Rights of Indigenous Peoples into provincial law. The declaration articulates the inherent human rights that should be protected for Indigenous peoples, including self-determination, language, culture, education and territory. The legislation will form the foundation for the Province's work on reconciliation, mandating government to bring provincial laws and policies into harmony with the declaration.[1]

The IARC members recognize the importance of working with Indigenous peoples to make meaningful progress in the implementation of UNDRIP in Canada to answer the calls to action from the Canadian Truth and Reconciliation Commission – #43 and #44 in particular.

> **43)** We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement UNDRIP as the framework for reconciliation.
>
> **44)** We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations Declaration on the Rights of Indigenous Peoples.

The IARC would like to offer a business perspective to assist with the planning for the implementation of the legislation.

2. Summary of the IARC Recommendations

The IARC recommendations focus on the aspects of provincial UNDRIP policy that relate to land use, physical infrastructure projects, and resource development. Our recommendations support the Province's overall efforts on economic reconciliation and would help resolve some of the uncertainty in the business community associated with this legislative initiative.

In brief, IARC recommends the following

[1] *Premier's statement on National Indigenous Peoples Day*, 21 June 2019.

a) **Business Participation**: Allow the opportunity for the business community to participate in the planning for implementation measures and policy. The IARC would like to host a conversation with the UNDRIP implementation team about the Province's plans, and then follow up by participating in the subsequent rounds of consultation on specific implementation measures.

b) **Incremental Approach:** Follow an incremental approach to implementing the UNDRIP principles into provincial law to tailor the best fit solution for British Columbia. The UNDRIP principles affect many areas of provincial law and policy that, in many cases, have well-developed frameworks for aboriginal rights protection and reconciliation. The implementation should harmonize with those laws, which will require careful study to decide on the right incremental steps to advance reconciliation by building on existing work in this area.

c) **Provincial/Federal Coordination**: Coordinate the provincial approach with the federal approach to avoid creating conflicts.

d) **Policy Guidance:** Policy and interpretive guides would be helpful to:

   i. explain the intent and scope of the UNDRIP initiative, and how it will be resourced,

   ii. clarify the role of Crown, Indigenous group, and project developer on project approval – a process that is transparent, certain, efficient, timely and fair.

   iii. establish the circumstances that give rise to an obligation to consult or to seek consent,

   iv. define process for consultation and seeking consent, and how that work is documented,

   v. explain who bears the administrative and cost burden, and

   vi. establish clear directions for consistency in approach across government agencies.

e) **Crown Leadership:** The Crown and its agencies should take the lead on

   i. identifying the appropriate Indigenous group to consult, the nature and content of consultation, and where consent is provided, how that is ratified by the Indigenous community to ensure broad support,

   ii. revenue sharing (licence fees, rents, royalties related to a project) as accommodation, instead of transferring the economic burden primarily to project developers,

   iii. re-distributing economic benefits to other Indigenous groups to avoid the disparity between communities based on geographic circumstances. Economic development should help lift all through an economic strategy related to the UNDRIP initiative.

f) **Capacity Funding:** Support UNDRIP initiatives with capacity building, including education, training and administrative support for government agencies, Indigenous groups and industry on the policies and procedures.

g) **Communications**: Develop a strong communication plan for British Columbia, Canada and internationally to explain the UNDRIP initiative and the implications for the broader community of interests and rights, including: Aboriginal rights and title, resource use, land use, property rights, operating rights, and governance in the province. The government could promote British Columbia as a leader in reconciliation through a transparent, efficient, understandable and collaborative decision-making process that will resolve uncertainty for project development.

3. Necessary Conditions for Success in British Columbia

We appreciate the Province's commitment to make reconciliation a cross-government priority and we support government policy that leads towards true reconciliation and certainty in decision-making on the provincial land base. However, we urge the Province to establish the conditions under which economic reconciliation works best, and to involve industry participants in the design of those conditions.

Merely adopting UNDRIP in provincial legislation is not feasible given the nature and context of UNDRIP (See more details in Appendix A). Any effort to "implement" or "enshrine" UNDRIP into provincial law can only succeed if the legislative and policy mechanisms align with the real-world circumstances, including: societal expectations, institutional structures, Canadian law and the capacity challenges in business, government and Indigenous communities in this province. The key drivers of our collective economy need to be considered in this legislative and policy initiative.

The legislation and related policy must set the conditions to encourage a diverse community of interests in British Columbia – Indigenous and others – to support this initiative by recognizing and building on common interests. The Province can set the policy foundation, but true innovation and change will come from the non-government participants. Government policy can set the conditions for other participants to apply their creativity, knowledge and skills to tailor economic partnerships to the unique circumstances of each relationship. At the core of this initiative, the essential elements for success will include transparency, certainty, efficiency and timeliness in the decision-making process on projects and land use.

4. Leading by Example – Best Practices

Government legislative and policy development on economic reconciliation are best informed through the study of successful partnerships involving Indigenous communities, and then showcasing these examples and sharing the best practices in other situations to continue to promote economic reconciliation. Government can facilitate this process since it is involved in the decision-making on projects across all sectors, and has the administrative, fiscal and policy tools to gather and share information, and promote best practices.

As part of the effort to achieve economic reconciliation on the land base, the Province should focus on identifying successful relationships, assessing the reasons for their success, and then encouraging best practices through policy tools that create opportunities for Indigenous communities to collaborate with others to accelerate transformative change and advance economic reconciliation in real terms. There are good examples of decision-making processes, relationship-based agreements, and higher-level planning/decision processes that already reflect the concepts of UNDRIP across British Columbia.

We have included a copy of the recent document entitled *Reconciliation in Action: First Nations – Industry Partnerships across British Columbia*[2] which sets out examples of successful relationships. The examples are drawn from different sectors of our economy, and the projects have different impacts based on their environment, geographic and social footprint. Among the examples, however, there are common elements that contribute to success.

The IARC can work with the Province to identify the elements of successful relationships that can be transferred to other situations, including: a clear process for engagement, a detailed action plan, adequate resources, and a commitment to execution – all founded on trust, respect and understanding each party's interests specific to each relationship.

The UNDRIP concepts reflected in these relationships grew from approaches that recognized and valued the unique circumstances of each relationship rather than simply "checking a box" to fulfil a consultation obligation. The process of seeking consent is based on building a relationship. Indigenous and business leaders share the view that consent is best viewed as an ongoing relationship in which the participants can disagree on various aspects but can rely on the underlying strength of the relationship to resolve differences. As long as the relationship participants continue to share the interests, goals and commitment to engagement that support the relationship, then they can achieve successful outcomes despite challenges.

The UNDRIP legislative framework should clarify how the Province will reconcile the diverse resource and land use interests with the UNDRIP standards in its decision-making, and the roles that the Indigenous people and others participants will play. The framework must explain how the Province will manage expectations, share decision-making, and build transparency and confidence for capital markets, operators on the land base, Indigenous peoples, local communities and the broader public. It must also reconcile UNDRIP principles with other federal and provincial laws.

[2] Indigenous Business and Investment Council and Business Council of British Columbia, *Reconciliation in Action: First Nations – Industry Partnerships across British Columbia,* 2019.

5. Practical Challenges with "Implementing" UNDRIP

The Pre-amble to UNDRIP indicates that the obligations in UNDRIP are to be implemented, rather than UNDRIP itself.

> *Encouraging* States to comply with and effectively implement all their obligations as they apply to Indigenous peoples under international instruments, in particular, those related to human rights, in consultation and cooperation with the peoples concerned,[3]

Further, the individual circumstances of each state should be considered.

> *Recognizing* that the situation of Indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,[4]

Finally, the Pre-amble recognizes the importance of treaties, agreements and other constructive arrangements.

> *Considering* also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between Indigenous peoples and States,[5]

Both the Federal Principles and Provincial Principles reflect the concept set out in this UNDRIP preamble.[6] IAR Committee can offer helpful insight into the topic of constructive agreements since our members have developed and implemented successful examples. We want to build on this success, and avoid any legislative changes that will undermine the ability to establish these relationships and diminish business confidence in project and land use development in British Columbia.

The Provincial statements to date about "implement" or "enshrining" UNDRIP create considerable uncertainty because of the ambition underlying those statements and the broad scope of UNDRIP. As some authors have cautioned

> There is a major distinction between a literal acceptance of the Declaration by codifying the UNDRIP articles and clauses in a single statute or a series of laws, which would be impractical and could undermine real progress, and a political interpretation that uses UNDRIP as a guideline for addressing Indigenous needs and aspirations.[7]

To date, the federal approach has been incremental, building on Canada's existing rights framework.[8] The Province should also follow an incremental approach, and coordinate its efforts with the federal approach to avoid creating conflicts in the approach. In the area of environmental assessment, the line

[3] Preamble to UNDRIP
[4] Preamble to UNDRIP
[5] Preamble to UNDRIP
[6] Federal Principles – Principle 5, and British Columbia, *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, 2018 ("**Provincial Principles**") – Principle 5.
[7] UNDERSTANDING UNDRIP, footnote 5, page 2.
[8] See Appendix B for more details.

between federal and provincial jurisdiction of the environment becomes blurred in practice. Project developers must respond to federal and provincial requirements in a comprehensive manner. A harmonized approach is preferable to achieve certainty and efficiency in the decision-making.

6. Seeking Free, Prior, and Informed Consent ("FPIC")

The question of how the concept of FPIC will be incorporated into provincial law creates considerable uncertainty in the business community – domestically and internationally. Canada and British Columbia have a deep body of law – developed over several decades – governing how the Crown interacts and consults with Indigenous peoples in its decision-making.

The Provincial implementation of FPIC must not raise expectations about consent and decision veto rights. Otherwise, the cost, effort and uncertainty associated with resource and land development projects will increase since the ability to reach agreements would become more challenging. Project proponents shoulder most of this burden now since governments download the cost of accommodation to proponents. Any suggestion that FPIC contemplates a decision veto will create unworkable negotiations and will increase this “informal” project approval cost. Both the federal and provincial governments must be careful in their legislation, policies and public statements to avoid giving the impression of a veto right.

The current case law on upholding the honour of the Crown and the duty to consult sets out procedural and substantive rights for both established and asserted aboriginal rights, and the content of the duty is calibrated to the nature of the right and the potential effects on that right. In no case, however, do aboriginal rights include an absolute veto on Crown decision-making. Aboriginal rights may be infringed for compelling public interests that meet the test of justification.

The current law on the duty to consult is more comprehensive than the concept of FPIC in UNDRIP, which applies only to established rights and contemplates "consulting and cooperating in good faith with Indigenous peoples … in order to obtain their free and informed prior consent".[9]

Some researchers caution about the approach to implementing FPIC, and the need to clarify the circumstances of its application and the limits

> There is not a strong case that FPIC currently applies to resource development in Canada, or that it would bestow a veto on resource projects, but the new federal government’s embrace of the concept creates a welcome opportunity to further clarify the terms for Indigenous support for resource projects on their traditional lands. It would be a mistake to simply attempt to adopt FPIC as a new standard. The potential for further confusion and disruption in the resource economy is significant.

[9] See UNDRIP, Articles 19 and 32.

> What is needed is a made-in-Canada implementation plan for FPIC that furthers understanding of the conditions for partnerships with Indigenous communities.[10]

Other researchers have advanced this idea further

> A more careful reading of UNDRIP also shows that FPIC does not require consent for a project to proceed, but instead only requires good faith effort to obtain consent. It is also only applicable to a narrower range of circumstances to lands that are owned by Indigenous communities, as opposed to those that have asserted claims. On this issue, Canada already meets or exceeds UNDRIP's requirements for FPIC – by applying the duty to consult framework over lands over which there are asserted claims, and by applying something close to consent in certain circumstances.[11]

On the FPIC issue, the Federal Principles related to FPIC seeks to reconcile the FPIC concept with the existing legal concepts of "honour of the Crown" and "duty to consult". For example, the narrative associated with Principle 6 puts FPIC into the context of existing law.

> This Principle acknowledges the Government of Canada's commitment to new nation-to-nation, government-to-government, and Inuit-Crown relationships that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Government recognizes the right of Indigenous peoples to participate in decision making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.
>
> The Supreme Court of Canada has clarified that the standard to secure consent of Indigenous peoples is strongest in the case of Aboriginal title lands. The Supreme Court of Canada has confirmed that Aboriginal title gives the holder the right to use, control, and manage the land and the right to the economic benefits of the land and its resources. The Indigenous nation, as proper title holder, decides how to use and manage its lands for both traditional activities and modern purposes, subject to the limit that the land cannot be developed in a way that would deprive future generations of the benefit of the land.
>
> The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands.
>
> To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of

[10] Blaine Favel and Brian Coates, *UNDERSTANDING FPIC – From assertion and assumption on 'free, prior and informed consent' to a new model for Indigenous engagement on resource development,* MacDonald-Laurier Institute, April 2016, page 2.
[11] Dwight Newman, *POLITICAL RHETORIC MEETS LEGAL REALITY – How to Move Forward on Free, Prior and Informed Consent in Canada,* MacDonald-Laurier Institute, August 2017, page 1.

Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.[12]

The Federal Principles clarify that the objective is to seek consent, but consent is not essential. The federal approach on FPIC will continue the concept that aboriginal rights are not absolute and may be infringed if the high threshold of justification is met.[13]

7. Specific Implementation Issues

The following issues must be resolved when implementing the UNDRIP legislation:

a) Federal/Provincial division of power: section 35, and sections 91 and 92 of the Constitution Act, 1982

i. Aboriginal rights protection under section 35 must prevail over any aspects of UNDRIP that are in conflict.

ii. Reconciliation of Crown and aboriginal rights has both federal and provincial aspects. The province cannot overreach its provincial jurisdiction under section 92.

iii. The provincial and federal approaches to implementing UNDRIP standards must be harmonized to avoid conflict and uncertainty.

b) Identifying the Relevant Indigenous Groups and the Authority to Consent

i. The Province must lead on identifying: the appropriate Indigenous groups to consult, the nature and content of consultation, and where consent is provided, how that is ratified by the Indigenous community to ensure broad support.

ii. The Province must establish a transparent and efficient process for resolving overlapping interests. Given the Province's resources and database of information, it must lead the process.

c) Consent

i. The Province must establish the circumstances that give rise to an obligation to seek consent, and define the form of consent and the manner in which it is obtained.

ii. The Province must have a process to resolve conflict if consent is withheld, and the process to justify any infringement in the greater public interest.

d) Conflicts of interest

i. The Province should have a policy on what constitutes a conflict of interest for Indigenous groups and government agencies in negotiations and agreements, and how to resolve the conflicts.

[12] Federal Principles, pages 12-13.
[13] *Ibid*, page 14.

e) Capacity building

i. The Province must support any UNDRIP initiative with capacity building, including education, training and administrative support for government agencies, Indigenous groups and industry on the procedures and policies.

f) Financial considerations

i. The Province must detail

A. how the UNDRIP initiative will affect the broader community of interests and rights, including: resource use, land use, property rights, operating rights, and governance at all government levels in the province.

B. the scope of the UNDRIP initiative and how it will be resourced and financed.

C. The administrative and cost implications for those affected by any changes.

g) Outcome-based regulation/process

i. The IAR Committee would be interested in exploring opportunities to increase efficiency and timeliness in government decision-making related to project approvals and reduce bureaucracy and other process and regulatory barriers amidst the UNDRIP/reconciliation conversation.

h) Communications

i. To reduce business uncertainty, the Province must clarify its plans, the implications for other rights and the timing of any change. It is impossible to over-emphasize the importance of clear and regular communication on the government steps to implement UNDRIP principles and the implications for those who are affected so they understand how their interests may be affected.

8. What Good Looks Like – Examples of Successful Approaches

The Provincial Principles explain the intent of the principles in the following terms

> B.C.'s principles are about renewing the Crown-Indigenous relationship. They are an important starting point to move away from the status quo and to empower the Province to fundamentally change its relationship with Indigenous peoples, a process that will take time and will call for innovative thinking and action.[14]

The IARC help identify examples where the successful relationships are already building the economic reconciliation that the Province seeks. The business community is one of the essential engines that will drive innovation and action forward.

[14] British Columbia, *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, 2018

The attached document *Reconciliation in Action: First Nations – Industry Partnerships across British Columbia* describes several examples from different sectors of the British Columbia economy that offer useful experience and practices that can be shared in future cases.

9. Next steps

The IARC would like to:

a) host a conversation with the UNDRIP implementation team about the Province's plans,

b) participate in the subsequent rounds of consultation on specific implementation measures, including the opportunity to have a formal mechanism for discussing implementation (e.g. a table, taskforce, working group, etc.) and

c) invite representatives from the UNDRIP implementation team to the next BCBC Champion's table discussion to see first-hand the development of a pilot program between Indigenous communities and industry.

Appendix A – The Nature of UNDRIP

UNDRIP is a declaration, not a treaty or a convention. It declares certain standards related to rights of Indigenous people. It cannot be implemented as it is written; that was never its intent. It must be interpreted to determine how it may be applied into Canadian law – a process that will take considerable time. Various government statements, court decisions, and UNDRIP itself offer guidance on the interpretation.

Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC)) describes UNDRIP as follows

> 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 on cooperative relationships with Indigenous peoples to states, the United Nations, and other international organizations 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
> - religion
> - language
> - health
> - education
> - community[15]

The CIRNAC website further describes the non-binding nature of a declaration, as follows.

> A United Nations General Assembly declaration is a document expressing political commitment on matters of global significance. A declaration is not legally binding, unlike a treaty or a covenant. Declarations are not signed or ratified by states.
>
> … Declarations only represent political commitment from the states that vote in favour of adopting them.[16]

UNDRIP sets standards for governments related to the rights of Indigenous peoples, and is a guidance document rather than a document that can be transferred directly into Canadian law. UNDRIP spans many subject areas, so implementing UNDRIP standards would touch on many areas of legislation.

To get a sense of the broach reach of UNDRIP, one need only look at the diverse subject areas covered by the articles, including:

- The right to full employment (Article 1)
- The right to freedom from any discrimination (Article 2)
- The right to self-determination and to freely determine political status and freely pursue economic, social and cultural development (Article 3)
- The right to self-government relating to internal and local affairs (Article 4)

[15] Indigenous and Norther Affairs Canada website, 3 September 2019.
[16] Indigenous and Norther Affairs Canada website, 3 September 2019.

- The right to distinct political, economic, social and cultural institutions and the right to participate in the political, economic, social and cultural life of the State (Article 5)
- The right to nationality (Article 6)
- The right to life, physical and mental integrity, liberty and security of person (Article 7)
- The right to practise and revitalize their cultural traditions and customs (Article 11), and maintain their cultural heritage, traditional knowledge and traditional cultural expression (Article 31)
- The right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures (Article 13), the right to control their educational systems (Article 14), and the right to establish their own media (Article 16)
- The right to maintain and develop their political, economic and social systems or institutions (Article 20), and the right to improve their economic and social conditions (Article 21)
- The right to their traditional medicines and health practices (Article 24), and spiritual practices (Article 25)
- The right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired (Article 26)
- That states must obtain free, prior and informed consent (FPIC) before adopting and implementing legislative or administrative measures that may affect Indigenous peoples (Article 19) and prior to approving any project affecting their lands or resources (Article 32).

Implementing these rights standards would cut across many areas of federal and provincial law and requires careful analysis to avoid constraining existing protection for Aboriginal rights and all Canadian in the current law.

Some researchers have commented the wide scope of UNDRIP and how to approach implementation of the standard, as follows

> The United Nations Declaration on the Rights of Indigenous Peoples sets out the individual and collective rights of Indigenous peoples, including their rights to culture, identity, language, employment, health, and education.[17]
>
> …
>
> UNDRIP is best understood as an expression of both positive and negative rights. That is, the Declaration sets out the right of Indigenous peoples to be subjected to actions by the government or other entities (positive rights) and the right of Indigenous peoples not to be subjected to actions by the government and other entities (negative rights).[18]

[17] Blaine Favel and Brian Coates, UNDERSTANDING UNDRIP – Choosing action on priorities over sweeping claims about the United Nations *Declaration on the Rights of Indigenous Peoples,* MacDonald-Laurier Institute, May 2016, Page 8 ("**UNDERSTANDING UNDRIP**")
[18] UNDERSTANDING UNDRIP, footnote 5, Page 8.

Given its guidance nature, UNDRIP requires considerable interpretation to transfer the ideas into domestic law.

> But there has been significant confusion and uncertainty about what it means to implement the *Declaration*. There is particular concern about the compatibility of certain elements of UNDRIP with Canada's legal, political, and constitutional architecture. This poses a major challenge for the government as it seeks to meet such heightened expectations.[19] …
>
> As with all major international declarations, there are no clear international standards as to what the specific articles and elements mean; furthermore, there is no clear international standard as to the timing, nature, and extent of implementation.[20]

The Assembly of First Nations has expressed the view that UNDRIP "sets out minimum standards necessary for the 'dignity, survival and well-being' of Indigenous peoples".[21] On implementation, the AFN suggested that governments review legislation and policy against UNDRIP standards, rather than implement UNDRIP itself.

> As we actively engage with the full and effective implementation of the UN Declaration on the Rights of Indigenous Peoples, we urge that:
>
> **Governments**, in conjunction with Indigenous peoples, use the Declaration as the basis for reviewing and reforming laws and policies to ensure that Indigenous peoples' rights are upheld without discrimination.[22]

More recently, the AFN has reaffirmed the implementing UNDRIP is the path to reconciliation, and called for the re-introduction of Bill-C262 (on the implementation of UNDRIP) as a government bill and not a private member's bill, and that it be at least as strong as Bill C-262.[23]

Article 38 of UNDRIP also contemplates a range of measures including legislative measures, rather than the adoption of the declaration itself. The implementation of the UNDRIP standards is meant to be an on-going process.

> **Article 38**
> States, in consultation and cooperation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

One researcher has noted – as of November 2018 – UNDRIP has been referred to in over 50 court cases and about 15 tribunal decisions in Canada. Those cases dealt with a variety of issues including adoption, self-government, control of funds, duty to consult, education, medical treatment and discrimination.

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[19] UNDERSTANDING UNDRIP, footnote 5, page 1.
[20] UNDERSTANDING UNDRIP, footnote 5, page 5.
[21] Assembly of First Nations, *United Nations Declaration on the Rights of Indigenous Peoples – Coalition Handbook*, 2011, page 3.
[22] *Ibid*, page 5.
[23] Honouring Promises, 2019 Federal Election Priorities for First Nations and Canada, page 12.

After assessing these references, the author concluded that a consensus has yet to emerge from the case law as to the normative weight that should be accorded to the Declaration.[24]

Several federal and provincial statutes have also referred to UNDRIP, including the federal *Impact Assessment Act,* the *Canadian Energy Regulatory Act,* and the proposed provincial *Environmental Assessment Act* which are most relevant to the IAR Committee discussion since the review of projects always involves a review of impacts on Indigenous community rights and interests.

[24] Nigel Bankes, *Implementing UNDRIP: some reflections on Bill C-262*, in ABlawg, Law School, University of Calgary, 27 November 2018

Appendix B – The Federal UNDRIP Initiative

The federal government has also embarked on its own approach to implementing UNDRIP. On 20 November 2017, the federal government announced that it will support Private Member's Bill C-262, introduced by NDP MP Romeo Saganash, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (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, First Session, 42nd Parliament, 2015-2016).

Bill C-262 lapsed in Senate in June 2019 as the 42nd Parliament was dissolved in preparation for the October 2019 election. Nonetheless, we expect that similar legislation may be introduced in a new federal session, so C-262 provides some useful guidance.

Bill C-262 establishes a legislative framework for national reconciliation, a central component of the Truth and Reconciliation Commission's Calls to Action. It created only general obligations on the federal government without explaining how UNDRIP will be implemented procedurally and substantially into Canadian law.

The objectives and work described in the Bill were intended to be consistent with Canada's constitutional obligations to Indigenous peoples under section 35 of the Constitution Act, 1982. The Bill states

> … nothing in this Act is to be construed so as to diminish or extinguish existing aboriginal or treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in section 35 of the Constitution Act, 1982.

The Bill required that:

- The government, in consultation and cooperation with Indigenous peoples in Canada, to take all measures to ensure that the laws of Canada are consistent with UNDRIP.
- The government, in consultation and cooperation with Indigenous peoples in Canada, to develop and implement a national action plan to achieve the objectives set out in UNDRIP.
- The Minister of Indian Affairs and Northern Development to report annually to each House of Parliament on the above two points.

Canada elaborated somewhat on its approach in a subsequent policy document outlining federal principles related to its relationship with Indigenous people.

> The Government will fulfil its commitment to implementing the UN Declaration through the review of laws and policies, as well as other collaborative initiatives and actions. This approach aligns with the UN Declaration itself, which contemplates that it may be implemented by States through various measures.[25]

[25] Department of Justice, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, Canada, 2018, page 3, ("**Federal Principles**")