

Implementing *the UN Declaration on the Rights of Indigenous Peoples* Myths and Misrepresentations

The federal government has committed to introduce legislation to implement the *United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration or Declaration)*. Our organizations strongly support such a measure, provided that the legislation contains, at minimum:

1. A clear requirement for the federal government to work in collaboration with Indigenous peoples in the implementation of the *Declaration*.
2. A commitment to collaboratively review federal laws and policies and bring them into line with the minimum global standards set out in the *UN Declaration*.
3. A commitment to collaboratively develop a national action plan setting priorities and timelines for implementation.

These were the key features of Bill C-262, a private Member's bill that was passed by the House of Commons in 2018 but then

blocked by a filibuster in the Senate. Similar legislation was adopted in British Columbia in 2019.

With these important developments, the *Declaration* has become the subject of a welcome focus of public discussion and policy debate. Unfortunately, this debate is taking place in the context of widespread confusion and misinformation about the *Declaration* and what it means to adopt implementation legislation.

The Coalition for the Human Rights of Indigenous Peoples is made up of Indigenous Nations, Indigenous peoples' organizations, human rights groups and individual experts that have been deeply involved with the development of the *Declaration* or the subsequent ongoing work of its interpretation and application both in Canada and internationally. The Coalition has prepared this document to address some of the myths and misrepresentations that have clouded the debate.

This factsheet was produced by the Coalition for the Human Rights of Indigenous Peoples and endorsed by the following members: Amnesty International Canada; Assembly of First Nations, Assembly of First Nations British Columbia; Canadian Friends Service Committee (Quakers); First Nations Summit; Grand Council of the Crees (Eeyou Istchee)/Cree Nation Government; KAIROS: Canadian Ecumenical Justice Initiative; Union of BC Indian Chiefs.

1. 'The UN Declaration is merely aspirational and there is no current obligation for governments in Canada to actually implement it'

This is simply false.

The UN General Assembly adopted the *UN Declaration on the Rights of Indigenous Peoples* in 2007 as minimum standards for all States. The intent that all States should live up to these standards has been repeatedly reaffirmed through subsequent UN General Assembly resolutions. The *Declaration* is now a consensus international human rights instrument unopposed by any State.

The *Declaration* was developed through an extensive, more than two-decade long process of research, drafting and deliberation in which Canada was an active participant. For the government to participate in this process, support resolutions calling for its implementation, and then ignore the *Declaration* in policies and decisions would be exactly the kind of bad faith conduct that the Supreme Court has said is incompatible with the constitutional duty to act honourably in respect to the rights of First Nations, Inuit and Métis peoples.

In fact, the *Declaration* already has legal effect in Canada. Canadian courts have established that declarations and other sources of international human rights law are relevant and persuasive sources for interpretation of human rights in Canada's Constitution. What's more, Canadian courts generally favour interpretations of domestic law that are consistent with Canada's international obligations. Canadian courts and tribunals have already used

the *Declaration* to help interpret Canadian laws and ensure that their application complies with Canada's international obligations.

The *Declaration* is a particularly powerful source of interpretation of Canada's legal obligations with regard to Indigenous peoples. The lengthy deliberations leading to its adoption, and the direct role that Canada and First Nations, Inuit and Métis peoples played in its creation, makes the *Declaration* especially authoritative. Furthermore, all the provisions in the *Declaration* were developed on the basis of existing standards in international law. Many of these standards were already legally binding on Canada, either due to their acceptance as matters of customary international law, or because they are necessary to fulfil obligations under the human rights treaties that Canada has ratified.

For example, the right of self-determination of all peoples was already established in the UN Charter and in two core, legally-binding, human rights treaties, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. The Inter-American Commission on Human Rights has concluded that the duty to protect the land rights of Indigenous peoples is a matter of customary international law. The *Declaration's* provisions on free, prior and informed consent mirror how these and other international human rights instruments, such as the *International Convention on the Elimination of All Forms of Racial Discrimination*, have been interpreted by the very bodies set up by the UN to oversee their implementation.

2. ‘The UN Declaration leads to Indigenous peoples having rights that other people don’t.’

The *Declaration* is based on universal principles such as the right of self-determination and the right to live free from discrimination – rights guaranteed to all peoples and all individuals respectively. However, like other international human rights instruments, the *UN Declaration* interprets and applies these rights to a specific context – in this case, the distinct needs of Indigenous peoples resulting from the long history of colonialism, dispossession, marginalization and impoverishment. The *Declaration* also requires States to uphold the commitments that they have made to Indigenous peoples through Treaties and other agreements.

The *Declaration* also includes numerous balancing provisions to ensure that when the *Declaration* is interpreted and applied in diverse national contexts, the human rights of all shall be respected.

3. ‘The UN Declaration undermines the careful balancing of rights that has characterized Canadian constitutional tradition.’

Nothing could be farther from the truth.

Again, the *Declaration* includes some of the most comprehensive balancing provisions in any international human rights instrument. The language of Article 46 of the *Declaration*, which calls for the *Declaration* to be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and

good faith is wholly consistent with Canadian constitutional traditions. In a May 2008 open letter, 100 Canadian legal scholars and other experts stated that the *Declaration* is consistent with the Canadian Constitution and Charter of Rights and Freedoms and profoundly important for fulfilling their promise.

4. ‘The UN Declaration’s provisions on free, prior and informed consent would create an absolute veto over resource development projects.’

The *Declaration* never uses the word veto. It is not credible to claim that the *Declaration’s* provisions on free, prior and informed consent (FPIC) are absolute. In fact, they are clearly subject to the same balancing provisions as all other articles in the *Declaration* and must be interpreted and applied in this light. The FPIC provisions are also not arbitrary: they are necessary to protect and uphold fundamental legal rights.

The *Declaration’s* FPIC provisions are an expression of the inherent right to self-determination. FPIC is also intended to provide a rigorous safeguard against State decision-making processes that ignore the consequences for the health, well-being and cultural integrity of Indigenous nations, communities, families and individuals. The necessity for such provisions should not be controversial in Canada, given the public acknowledgement of the tragic harms that have been repeatedly inflicted on Indigenous peoples through decisions imposed against their wishes.

Respect for FPIC puts Indigenous peoples in a more equitable position when their

representatives come to the table with government or industry. A commitment to move forward on the basis of mutual respect and agreement promotes reconciliation rather than conflict. FPIC also provides government, business and Indigenous peoples with the certainty that they seek for long-term planning.

To understand the implications of FPIC in any given situation, the specific facts and the law must be fully considered. Consistent with the need for rigorous protection of the rights of Indigenous peoples, any limitations on FPIC should be rare and never arbitrary. Article 46 affirms that the exercise of rights set out in the *Declaration* should be subject to only such limitations as are determined by law and in accordance with international human rights standards. Furthermore, such limitations must be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

5. 'The UN Declaration only requires States to seek the consent of Indigenous peoples which means States can freely ignore Indigenous peoples who refuse to grant such consent.'

During the discussions and negotiations on the *UN Declaration*, Indigenous peoples expressly rejected any reference to seek consent. The phrase seek consent does not appear in the *Declaration*.

As noted above, the free, prior and informed consent provisions of the *Declaration* are clearly intended to provide a meaningful standard of rights protection and

fulfillment. Even a good faith consultation process requires States to take the views and decisions of Indigenous peoples seriously. Free, prior and informed consent requires much more than that.

Articles 19 and 32.2 set out a requirement for States to consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent a) before adopting and implementing legislative measures that may affect them (Article 19) and b) prior to the approval of any project affecting their lands or territories or other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Article 32.2).

Clearly, there is nothing in these articles to imply that States are entitled to simply ignore the decisions made by Indigenous peoples. That would not be consistent with the requirement of good faith consultation and cooperation.

Critically, no article of the *Declaration* should be read in isolation. Articles 19 and 32.2 need to be interpreted and applied consistent with other provisions in the *Declaration* and in the larger body of international law. These include the *Declaration's* affirmation of Indigenous peoples' right of self-determination (Article 3) and the right to determine and develop priorities and strategies for exercising their right to development (Article 23), as well as numerous other articles affirming the right of Indigenous peoples to determine and control their own lives and futures. For example, Article 32.1 of the *UN Declaration* affirms Indigenous peoples have the right to determine and develop priorities

and strategies for the development or use of their lands or territories and other resources.

The *Declaration* must also be interpreted alongside the findings of the UN Committee on the Elimination of Racial Discrimination which – along with other independent, expert bodies charged with interpreting legally-binding international and regional human rights conventions and covenants – has explicitly called on States to ensure that, in regard to Indigenous peoples, no decisions directly relating to their rights and interests are taken without their informed consent [CERD General Recommendation 23, 1997].

It's also worth noting that there are instances where Canadian courts have already explicitly affirmed the right of Indigenous peoples to grant or withhold consent, including in respect to title lands (*Tsilhqot'in Nation*, 2014) and as part of the spectrum of the duty to consult and accommodate where there is potential for very serious impacts (*Delgamuukw*, 1997 and *Haida Nation*, 2004). There are also numerous contexts in which a requirement of consent is already accepted in Canadian practice, including Treaty-making.

6. 'FPIC should be rejected in favour of the standards of consultation developed by the Supreme Court of Canada.'

The idea that Canada must choose between domestic jurisprudence and international law is false. The Canadian Constitution is a living tree, meaning that its interpretation continues to evolve as Canadian society and the world changes. International human rights standards are part of that evolution.

International standards on consultation and consent predate the emergence of the duty to consult in Canadian jurisprudence and have helped shape the arguments that Indigenous peoples have brought into Canadian courts.

Although opponents of the *UN Declaration* often chose to ignore this fact, the earliest Supreme Court decisions that established the duty to consult in domestic jurisprudence, the 1997 *Delgamuukw* decision and the 2004 *Haida Nation* decision, both affirm that there are instances where federal, provincial and territorial governments have a constitutional obligation to obtain the consent of Indigenous nations. In the 2014 *Tsilhqot'in* decision, the Supreme Court concluded that consent is a requirement of Indigenous title to lands and resources. Rather than contradicting or supplanting this jurisprudence, implementation of the FPIC provisions of the *UN Declaration* will provide greater clarity and substance to standards already affirmed by the Supreme Court.

7. 'The inclusion of the principle of territorial integrity in Article 46 undermines the right of self-determination and other rights in the Declaration.'

Article 46.1 includes the statement that nothing in the *Declaration* may be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. This one phrase should not be interpreted in isolation. It is detrimental to the advancement of the rights of Indigenous peoples to exaggerate its significance.

The principle of territorial integrity already existed in international law when the *Declaration* was adopted; it was not created in the *Declaration*. Application of the principle of territorial integrity in the context of Indigenous peoples' right to self-determination and other rights must be consistent with the other provisions of the *Declaration* and with the wider body of international law.

The *Declaration* is clear that Indigenous peoples have the same right to self-determination as all other peoples. The first preambular paragraph affirms that, in adopting the *Declaration*, the General Assembly is: "Guided by the purposes and principles of the Charter of the United Nations". The Charter's purposes and principles include the principle of equal rights and self-determination of peoples. In addition, preambular paragraph 17 affirms that nothing in this *Declaration* may be used to deny any peoples their right to self-determination, exercised in conformity with international law.

As a principle of international law, the rights of Indigenous peoples cannot be interpreted in a discriminatory way that would create a lesser standard than that enjoyed by other peoples. This point of interpretation is explicit in the *Declaration* itself. Article 1 of the *Declaration* affirms: Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights as recognized in the Charter of the United Nations and international human rights law. Article 2 affirms: Indigenous peoples are free and equal to all other peoples and have the right to be free from any kind of discrimination. Article 45 stipulates: Nothing in this *Declaration* may be

construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Any effort to invoke the principle of territorial integrity to limit or diminish the rights of Indigenous peoples would also be subject to the important interpretative provisions found in the rest of Article 46. Article 46.2 expressly states that any limitations on the rights contained in the *Declaration* must not only be consistent with international law, but must also be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. Furthermore, Article 46.3 says that all provisions in the *Declaration* are to be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

8. 'Implementation of the UN Declaration would undermine existing rights of Indigenous peoples in Canada, including Treaty rights.'

International human rights standards are created to raise the bar for human rights, not lower it. States should always uphold the highest applicable standards.

The *Declaration* explicitly states that Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements (Article 37.1). Furthermore,

as noted above, Article 37.2 reiterates: Nothing in this *Declaration* may be interpreted as diminishing or eliminating the rights of Indigenous peoples contained in treaties, agreements and other constructive arrangements.

9. ‘Implementation legislation will create confusion and chaos by immediately making all of the UN Declaration Canadian law overnight.’

This is untrue.

Bill C-262, the model for future implementation legislation, expressed a strong, legal commitment to implement and comply with the *UN Declaration*. It did so in three ways.

First, Bill C-262 affirmed what is already the case, that the *Declaration* has application in Canadian law. This is consistent with the fact (see #1) that the *UN Declaration* already has legal effect in Canada and is already being used by Canadian courts and tribunals to interpret Canadian laws.

Second, Bill C-262 would have created a legislative framework for the federal government to collaborate with Indigenous peoples to establish a national action plan for implementation of the *Declaration*.

Third, the Bill would have required the government to work with Indigenous peoples to review existing laws and bring forward reforms to ensure their consistency with the *Declaration*.

In other words, rather than creating ‘chaos and confusion’, a legislative framework based on Bill C-262 would allow for an orderly, principled and cooperative framework for meeting the

existing requirement of implementing the *Declaration* and living up to its requirements.

This will be an ongoing process. An effective implementation framework must also require regular reporting to Parliament on the progress being made.

10. ‘The implications of implementation need further study before legislation is adopted.’

It’s important to be clear that legislation is intended to begin a process of collaborative implementation in which the priorities for implementation and the implications will be further examined. This is only a first step in implementation and it is long overdue.

Canada’s obligation to implement the *Declaration* began when the UN General Assembly adopted it more than a decade ago. Even then, the requirements of many of the *Declaration*’s provisions were already well established in international law. (see #1).

The *Declaration* has been subject to extensive public debate within Canada. When the government of Stephen Harper reversed its position and issued a formal statement of support for the *Declaration* in 2010, it stated that it had done so after discussions with Indigenous peoples and having examined the experiences of other countries. Bill C-262 was debated in Parliament and passed by the House of Commons in 2018 and would already be part of the law in Canada except for undemocratic stalling tactics by a handful of Senators. All parties in the House of Commons supported a motion urging the Senate to bring the bill to a vote.