

# New Tools for Reconciliation: Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples

Michael Hudson

## IN BRIEF

The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) aims at repairing the ongoing consequences of the historical denial of the fundamental rights of Indigenous peoples. In 2019, British Columbia led the way on applying the UN declaration through its *Environmental Assessment Act* and a Bill specifically on implementation. This legislation represents a fundamental change in how the BC government approaches relations with Indigenous nations. Two federal environmental laws adopted in 2019 referenced UNDRIP, but reflect a more cautious approach. Ottawa has said it will introduce UNDRIP legislation by the end of 2020. It will be an important testing ground for Canada's commitment to a new relationship with Indigenous Canadians.

## EN BREF

La Déclaration des Nations unies sur les droits des peuples autochtones (DNUDPA) de 2007 vise à réparer les conséquences historiques persistantes du déni des droits humains fondamentaux des peuples autochtones. En 2019, la Colombie-Britannique a ouvert la voie à son application dans le cadre de sa loi sur les évaluations environnementales (*Environmental Assessment Act*) et d'un projet de loi centré sur sa mise en œuvre. Ces lois ont marqué pour la province un changement d'approche fondamental au chapitre de ses relations avec les peuples autochtones. Deux lois fédérales sur l'environnement adoptées cette même année se réfèrent aussi à la DNUDPA, mais elles reflètent une approche plus prudente. Ottawa a annoncé qu'il présenterait avant la fin de l'année 2020 une loi sur la DNUDPA. Celle-ci donnera la mesure de l'engagement réel du Canada en faveur de liens renouvelés avec les Autochtones du pays.

## ABOUT THIS PAPER

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## INTRODUCTION

Article 38 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) calls upon all states in consultation and cooperation with Indigenous peoples to “take the appropriate measures, including legislative measures” to achieve its ends. The federal, provincial and territorial governments have committed, with varying degrees of specificity, to act on the calls to action by Canada’s Truth and Reconciliation Commission (TRC), which include making UNDRIP the framework for reconciliation.<sup>1</sup> Relatively few jurisdictions, however, have expressly committed to implement the declaration in their laws and policies.

Hard work is needed to translate UNDRIP’s ambitious vision of a new role for Indigenous nations in Canada’s governance and economy into concrete action. Given the breadth of issues covered by the declaration, its implementation is and will continue to be an important test of how committed governments are to establishing a new relationship with Indigenous peoples. Indigenous responses to those efforts will inform governments whether they are moving in the right direction. The reaction of non-Indigenous Canadians to government actions will, in turn, signal how they see Indigenous peoples fitting into the national fabric of Canada.

In the best-case scenario, UNDRIP implementation will generate new, practical tools that over time will transform the place of Indigenous nations in Canada. In the future, we may look back to today as an inflection point that disrupted long-standing assumptions about how the country should work and opened the door to constructive changes in governance.

It would be less ideal if its implementation contributes little in the way of new thinking or tools, and simply continues existing policies and practices with minor cosmetic tweaks. In the worst case, UNDRIP implementation could be a source of new misunderstandings. Before the process of UNDRIP implementation advances further, Canadians should understand what is at stake.

In this paper, I examine UNDRIP implementation through legislative measures taken or proposed by the federal and British Columbia (BC) governments. The BC government was the first to introduce legislation (adopted in 2019) explicitly implementing the declaration. The lens I use to assess these measures is the degree to which they are meaningful changes, providing new, practical, on-the-ground tools that can help build a broad understanding among Indigenous and non-Indigenous Canadians.

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<sup>1</sup> All the Canadian premiers meeting in July 2015 as the Council of the Federation affirmed the commitment of their province or territory to ongoing reconciliation between the Indigenous peoples of Canada and non-Indigenous Canadians. The premiers applauded the role of the TRC in facilitating this process. They also promised continued leadership in ongoing reconciliation efforts, including actions relating to matters in the TRC summary report. Council of the Federation, “Premiers Affirm Commitment to Action in Response to Truth and Reconciliation Commission Report,” July 16, 2015, <https://www.releases.gov.nl.ca/releases/2015/exec/0716n11.aspx>.

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The paper reviews the context for governments, examines the legislation described by the federal and BC governments as furthering UNDRIP implementation, and then briefly considers the potential implications of these measures.

### GOAL OF THE DECLARATION

The declaration reflects a decades-long struggle for Indigenous rights, led in large part by representatives from Canada's Indigenous peoples. The Government of Canada also played a key role in advancing the idea for a declaration and in shaping its content.

Under the Conservative government led by Stephen Harper, Canada opposed the final version of the declaration approved by the UN General Assembly in 2007. Canada raised many concerns, including about "provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, states and third parties."<sup>2</sup>

The Conservative government decided in 2010 to endorse UNDRIP, largely due to pressure from Indigenous organizations. It continued to raise the concerns mentioned above but expressed confidence that the declaration's principles could be interpreted in a manner consistent with Canada's Constitution and legal framework.<sup>3</sup> It described the declaration as aspirational, not legally binding and not a statement of customary international law. While not explicitly stated, the government saw implementation as a matter for government discretion, albeit in cooperation with Indigenous organizations. Following the 2015 election, the Liberal government led by Justin Trudeau stated that it would unreservedly support and implement the declaration. In a May 2016 speech to the UN Permanent Forum on Indigenous Issues, Canada cited the existing protection of Indigenous rights under section 35 of the *Constitution Act, 1982* and promised "implementation done in full partnership" with Indigenous peoples.<sup>4</sup>

Echoing the 2010 Conservative position, the Liberal government characterized free, prior and informed consent in a manner consistent with Canadian law and policy:

*Canada believes that our constitutional obligations serve to fulfil all of the principles of the declaration, including "free, prior and informed consent." We see modern treaties and self-government agreements as the ultimate expression of free, prior and informed consent among partners.*

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<sup>2</sup> United Nations, "General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President," September 13, 2007, <https://www.un.org/press/en/2007/ga10612.doc.htm>.

<sup>3</sup> Canada, Aboriginal Affairs and Northern Development, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (Ottawa: Aboriginal Affairs and Northern Development, November 12, 2010), <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

<sup>4</sup> C. Bennett, "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10" (Ottawa: Indigenous and Northern Affairs, Government of Canada, 2016), <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/speech-delivered-at-the-united-nations-permanent-forum-on-indigenous-issues-new-york-may-10-.html>.

The government's review of laws and policies, to be led by the minister of justice, was cited as the main mechanism to ensure that Canada was "adhering to international human rights standards, including [UNDRIP]."<sup>5</sup>

It is worth recalling the declaration's purpose when discussing its implementation. James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2014, describes its purpose as "essentially remedial."<sup>6</sup> Rather than affirming special rights, the declaration "aims at repairing the ongoing consequences of the historical denial of the fundamental human rights of Indigenous peoples, particularly the right of self-determination." It therefore does not create new or special rights separate from fundamental human rights, but rather elaborates on the latter in the specific cultural, historical, social and economic circumstances of Indigenous peoples.

The declaration thus frames the fundamental human rights of Indigenous peoples within the process of decolonization. This requires a different relationship between states and Indigenous peoples from those rooted in earlier colonial attitudes. To implement the declaration, states and Indigenous peoples must collaborate on adapting and even creating new mechanisms and processes to support and reflect new ways of relating to each another.

Decisions affecting traditional territories offer a prime example of the need for a different relationship between the state and Indigenous peoples. Anaya wrote about the need for consensual decision-making. "A good faith effort towards consensual decision-making requires that States endeavor to create a climate of confidence with indigenous peoples that allows a productive dialogue," he wrote. "In order to achieve a climate of confidence and mutual respect for the consultations, the consultation procedure itself should be the product of consensus."<sup>7</sup>

The importance of UNDRIP implementation was echoed by the Truth and Reconciliation Commission, which called it a "framework for reconciliation":

*Aboriginal peoples' right to self-determination must be integrated into Canada's constitutional and legal framework and civic institutions, in a manner consistent with the principles, norms, and standards of the Declaration...In the face of growing conflicts over lands, resources, and economic development, the scope of reconciliation must...encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land.*<sup>8</sup>

<sup>5</sup> Canada, Office of the Prime Minister, "Prime Minister Announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples" (Ottawa: Office of the Prime Minister, February 22, 2017), news release, <https://pm.gc.ca/en/news/news-releases/2017/02/22prime-minister-announces-working-group-ministers-review-laws-and>.

<sup>6</sup> J. Anaya, UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples, A/66/288, August 10, 2011 (New York: UN General Assembly, 2011), paragraph 63, [https://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35\\_en.pdf](https://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35_en.pdf).

<sup>7</sup> Anaya, *Report of the Special Rapporteur*, paragraphs 87 and 88.

<sup>8</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: National Centre for Truth and Reconciliation, University of Manitoba, 2015): 211, [http://www.trc.ca/assets/pdf/Honouring\\_the\\_Truth\\_Reconciling\\_for\\_the\\_Future\\_July\\_23\\_2015.pdf](http://www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf).

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Implementing the declaration therefore requires a broad effort to align all aspects of a government's interactions with Indigenous people through the lens of decolonization. This points away from the Crown/Indigenous relationship embedded in historic colonial periods toward one of equal partners. The move toward consensual decision-making is not simply a difference of terminology, but a fundamental reframing of the relationship between Canada and Indigenous nations.

The challenges inherent in that shift can be significant. While the declaration is a comprehensive statement of inherent human rights, one element merits particular attention: the need for free, prior and informed consent. This element was one of the main reasons why Canada originally did not endorse the declaration. Even the subsequent endorsements by both the Conservative and Liberal governments included caveats about the need to interpret this provision in a manner consistent with Canadian domestic law.

There is a broad range of views on how it should be implemented. Some, including the UN, see free, prior and informed consent as an inherent human right nested within a decolonized relationship between the state and Indigenous peoples. This means that governments must collaborate with Indigenous people to adapt existing decision-making processes or create new ones to reflect that inherent right, as defined by the rights-holders.

Others see the declaration as a set of aspirational goals that governments and Indigenous leaders should work toward. Those who hold this view argue that governments can satisfy this provision by taking Indigenous views into account, with no impediments to reaching a decision other than those imposed by domestic law. Varied views exist along the entire spectrum between these two positions.

These are more than academic debates. Different visions of free, prior and informed consent and its implementation can generate on-the-ground conflict. Many factors led to the recent dispute between the BC government, which had authorized the Coastal GasLink pipeline on Crown lands, and some Wet'suwet'en hereditary governance bodies, which insisted that only they could authorize activities on their traditional territories that had not been ceded under a treaty. The dispute brought to the public's attention differing views about Indigenous control over traditional territories, the extent to which Indigenous consent is required for government action and the mechanisms by which that consent should be given.

Although less dramatic in terms of direct action, similar issues arose during the federal government's consultations with First Nations about the Trans Mountain Expansion Project (TMX). Although considerable effort was invested by federal officials to understand and transmit Indigenous concerns to the federal cabinet as decision-makers and to accommodate those concerns, some First Nations remain opposed to the project. Their efforts to use the courts and Canada's domestic laws



to stop the pipeline expansion have failed to date.<sup>9</sup> Many of the issues underlying the Wet'suwet'en protests remain at play with projects like TMX. Indigenous concern with both projects highlights the gap between Indigenous hopes for UNDRIP, especially the provision on free, prior and informed consent, and Canada's domestic laws on the duty to consult.

## GOVERNMENT PROMISES OF IMPLEMENTATION THROUGH LEGISLATION

To assess how the BC and federal governments have approached the implementation of the declaration through legislation, I look at the degree to which governments have taken on board the vision of transformative change embedded in the declaration. While free, prior and informed consent is not always explicitly at play, the debates about its meaning and implementation are rarely far from the surface.

The declaration gives wide latitude to states on how they implement its principles, subject to the need to work in consultation and cooperation with Indigenous peoples. During the lengthy drafting process, many Indigenous advocates recognized that a declaration would have no immediate impact on Canadian law or policy. They viewed collaboration between governments and Indigenous peoples on concrete measures as critical for implementation.

Many supporters hoped that a declaration by the UN General Assembly would weigh heavily on how courts interpreted Canada's domestic laws. They also recognized it could take decades before the courts drew on UNDRIP as a source for Canadian law on Indigenous questions. These realities gave rise to the idea of using legislation to incorporate the declaration into Canadian law.

### Federal government

After UNDRIP was adopted by the UN General Assembly in September 2007, Liberal MP Tina Keeper introduced a private member's Bill requiring the federal government to "take all measures necessary to ensure that the laws of Canada are consistent" with UNDRIP.<sup>10</sup> Thereafter, the idea that UNDRIP should be implemented within a federal legislative framework was advanced by the federal New Democratic Party, mainly by Roméo Saganash, reflecting hopes that UNDRIP would lead to a fundamental shift in how governments relate to Indigenous peoples. Starting in 2009, New Democrat MPs introduced a series of similar

<sup>9</sup> *Coldwater et al. v. Canada (Attorney General)* [2020] 2020 FCA 34 <https://www.fca-cf.gc.ca/fca-caf/pdf/Coldwater-v-Canada-2020-FCA-34-summary-FINAL.pdf>. The Squamish Nation, the Tsleil-Waututh Nation, the Ts'elxwéyeqw Tribes and the Coldwater Indian Band announced they are seeking leave for appeal to the Supreme Court of Canada. Tsleil-Waututh Sacred Trust, "First Nations launch fight of TMX project approval to Supreme Court of Canada" (Vancouver: Tsleil-Waututh Sacred Trust, April 7, 2020), <https://twnsacredtrust.ca/press-release-and-legal-backgrounder-first-nations-launch-fight-of-tmx-project-approval-to-supreme-court-of-canada>.

<sup>10</sup> Canada, Parliament, Bill C-569, *An Act to Ensure that the Laws of Canada Are Consistent with the United Nations Declaration on the Rights of Indigenous Peoples*, First Reading, July 18, 2008.

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private members' bills to this effect. Saganash introduced the last of these, Bill C-262, in 2016.<sup>11</sup>

The Trudeau government initially opposed C-262. It preferred an incremental approach, with a cabinet-level review of federal laws and policies together with negotiated agreements with Indigenous groups. However, it did an about-face in November 2017 and supported the Bill. Soon after, the Prime Minister announced in Parliament his goal of a framework for the recognition and implementation of Indigenous rights, to be developed in "full partnership" with Indigenous peoples. Although fulfilling section 35 was a major theme of his statement, he noted that his government had "endorsed the United Nations Declaration on the Rights of Indigenous Peoples without qualification, and committed to its full implementation, including government support for Bill C-262." He added that a "comprehensive and far-reaching approach" was needed to reshape Canada's relationship with Indigenous peoples. Therefore, the framework should include "new legislation and policy that would make the recognition and implementation of rights the basis for all relations between Indigenous Peoples and the federal government."<sup>12</sup>

In fall 2018, the federal government released its Overview of a Recognition and Implementation of Indigenous Rights Framework.<sup>13</sup> The document referenced UNDRIP several times. The government said the framework supported the rights of Indigenous peoples, as recognized and affirmed by the Constitution, "while also aligning with [UNDRIP] articles." The promise of legislation on rights was also framed as UNDRIP implementation through a "focus on recognition of rights, self-determination and keeping the Government accountable."

In parallel, the government worked with Indigenous and environmental groups on major changes to Canada's environmental assessment legislation through Bills C-68 and C-69 (discussed below).<sup>14</sup> Other new legislation was developed with Indigenous partners to protect and promote Indigenous languages and to increase Indigenous control over child and family services. In all this work, the government said that it was inspired by the declaration, together with its interpretation of section 35.

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<sup>11</sup> The NDP private members' Bills that were introduced in each parliament since 2009 as *An Act to Ensure that the Laws of Canada Are Consistent with the United Nations Declaration on the Rights of Indigenous Peoples*, were C-328, introduced in the 2nd and 3rd sessions, 40th Parliament, by D. Savoie; C-469, introduced in the 1st session, 41st Parliament, by R. Saganash; C-641, introduced in the 2nd session, 41st Parliament, by R. Saganash; C-469, introduced in the 2nd session, 41st Parliament, by R. Saganash; and C-262, introduced in the 1st session, 42nd Parliament, by R. Saganash.

<sup>12</sup> J. Trudeau, "Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework" (Ottawa: Government of Canada, Office of the Prime Minister, 2018), <https://pm.gc.ca/en/news/speeches/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights>.

<sup>13</sup> Canada, Crown-Indigenous Relations and Northern Affairs Canada, "Overview of a Recognition and Implementation of Indigenous Rights Framework," Ottawa: Crown-Indigenous Relations and Northern Affairs Canada, 2018), <https://www.rcaanc-cirnac.gc.ca/eng/1536350959665/1539959903708>.

<sup>14</sup> Bill C-68, *An Act to amend the Fisheries Act and other Acts in consequence*, 1st session, 42nd Parliament, 2019, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-68/royal-assent> Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st session, 42nd Parliament, 2019, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/royal-assent>.

## BC government

The May 2017 BC election brought in a minority NDP government that needed the support of the Green Party to govern. Echoing their federal counterparts, the NDP promised during the election campaign to implement UNDRIP, including through legislation.

The NDP government continued many policies of the previous Liberal government, including its promise “to achieve a government-to-government relationship based on respect, recognition and accommodation of Aboriginal title and rights, and to the reconciliation of Aboriginal and Crown titles and jurisdictions.”<sup>15</sup>

The government began work on a provincial counterpart to C-262. Like the federal government, the BC government undertook major changes to its environmental assessment regime. It also began an important shift by negotiating agreements that started to move beyond domestic legal consultation duties toward what Anaya called consensual decision-making.

Looking at the legislative measures put forward by the federal and BC governments, a picture emerges of how each views the call to take “appropriate measures” to implement UNDRIP. The main federal impetus for change appears to be a broad and generous vision of section 35, with a nod toward UNDRIP implementation. In reframing relations with Indigenous peoples, BC has continued its long standing, pragmatic approach based on section 35, but with growing emphasis on UNDRIP.

## GOVERNMENT IMPLEMENTATION

### Federal government

Since its election in 2015, the federal Liberal government has promised to transform its relationship with Indigenous peoples. In its first term in office, it had an ambitious agenda that combined a review of federal laws and policies with new spending, policy renewal, a broad legislative program and new tools to guide federal officials in their interactions with Indigenous people.

In July 2017, the government released one of the clearest articulations of its vision, Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples.<sup>16</sup> The principles and their explanatory text weave concepts from the UN declaration with what the government considered a generous interpretation of Canadian domestic law on Indigenous and treaty rights.

<sup>15</sup> British Columbia – First Nations Leadership Council, “Proposed Commitment Document,” October 1, 2015, [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/bc\\_-\\_fn\\_commitment\\_document\\_\\_oct\\_1\\_2015.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/bc_-_fn_commitment_document__oct_1_2015.pdf)

<sup>16</sup> Canada, Department of Justice, “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples” (Ottawa: Department of Justice, July 14, 2017), government document, <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

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The principles were subsequently supplemented with the Attorney General of Canada's directive on the conduct of civil litigation involving Indigenous people.<sup>17</sup> The directive underscores that "Indigenous self-determination and self-government are affirmed in the UN Declaration and are central to addressing the history of colonization and forming new relationships based on recognition, respect, partnership, and co-operation."

### Bill C-262

Bill C-262 was essentially declaratory, although it included commitments to prepare a national action plan on implementation and to report annually to Parliament on its progress. Section 3 of the Bill affirmed that the UN declaration is "a universal international human rights instrument with application in Canadian law." In section 4, the government committed "in consultation and cooperation with Indigenous peoples [to] take all measures necessary to ensure that the laws of Canada are consistent" with the declaration.

The Bill passed easily through the House of Commons where the Liberals held a majority of the seats. Conservative opposition in the Senate reflected the concerns of several provincial governments and industrial sectors about lack of clarity around free, prior and informed consent. This prevented passage of the Bill through the Senate prior to the 2019 election. Re-elected with a minority, the Liberal government promised to "take action to co-develop and introduce legislation to implement [UNDRIP] in the first year of the new mandate." The Minister of Justice, responsible for leading the codevelopment process, promised legislation would be tabled by the end of 2020. The Minister of Crown-Indigenous Relations said Bill C-262 would serve as a "floor" for a new law to implement UNDRIP law. However, the questions and concerns raised about C-262, especially about free, prior and informed consent, have not gone away. Arguably, the Wet'suwet'en dispute and continued opposition to the Trans Mountain Expansion Project will put those concerns front and centre in any subsequent Bill.

### Bills C-68 and C-69

The Liberals delivered on their 2015 election promise to change how environmental assessments of major projects were done with Bills C-68 and C-69. The bills significantly changed the federal process, including increasing the weight given to Indigenous rights in assessments. They also recognized that holders of Indigenous rights have a voice in federal decision-making processes on resource management and environmental assessments of major projects.

Bill C-69's preamble stated that "the Government of Canada is committed to implementing" the UN declaration. In materials provided to the House of Commons, the government said that the new *Impact Assessment Act* (IAA)<sup>18</sup> and amendments to other statutes would achieve three goals:

<sup>17</sup> Canada, Department of Justice, "The Attorney General of Canada's Directive on Civil Litigation Involving Indigenous Peoples" (Ottawa: Department of Justice, January 11, 2019), <https://www.justice.gc.ca/eng/csjsjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>.

<sup>18</sup> C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to Amend the Navigation Protection Act and to Make Consequential Amendments to Other Acts*, 1st session, 42nd Parliament, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-69/royal-assent>.

*More clearly reflect the Government's commitment to the [Declaration]. Clarify that the Government, the Minister, the proposed Impact Assessment Agency and federal authorities would need to exercise their powers under the Impact Assessment Act in a way that respects the Government's commitments with respect to the rights of Indigenous peoples. Clarify that the mandate of the proposed Canadian Energy Regulator would include exercising its powers and performing its duties and functions in a way that respects the Government's commitments with respect to the rights of Indigenous peoples.<sup>19</sup>*

The new Act significantly changes the role of Indigenous groups in the federal environmental assessment process. Compared to the previous regime, the Act brings new opportunities for Indigenous participation, cooperation and partnership with government in impact assessment processes and decision-making. It increases the weight given to Indigenous rights and interests. It also fosters greater Indigenous consultation and engagement. Federal decision-makers are now expressly required to consider any impacts on Indigenous peoples and their asserted and established Indigenous or treaty rights. This is broader than the current requirements of Canada's common law.

Although the Act refers to UNDRIP in its preamble, its substantive provisions focus more narrowly on the "rights of the Indigenous peoples of Canada recognized and affirmed by section 35" and their "interests." The interests are not defined. These provisions are more constrained than the declaration's expansive language about Indigenous rights to use and control their "traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources."

The Act also prescribes the roles offered to Indigenous peoples during planning and assessment phases. While their views must be considered, there is little room for a group to unilaterally modify or even stop a major project, even when they regard it as an unacceptable infringement on their rights. There is scope for the responsible minister to agree that an Indigenous governing body can exercise some of its statutory powers, or that the body can carry out its own parallel assessment. However, the minister, and by extension the cabinet, retains the ultimate decision-making power. In this sense, the new regime tracks existing Canadian domestic law, albeit in a more detailed fashion, on how the Indigenous voice factors into federal decision-making.

Another significant difference between the declaration and the *Impact Assessment Act* is the scope for Indigenous governance. The declaration speaks broadly about the right to self-determination of Indigenous peoples and the powers over traditional lands and resources that spring from that right. It also reinforces the idea that an Indigenous group decides how to govern itself and what form of governance entity will speak on its behalf.

<sup>19</sup> Canada, "Key Amendments to Bill C-69" (Ottawa: Canada, July 31, 2018), infographic, <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/infographic-amendments-indigenous-en.png>.

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In contrast to the declaration, the Act refers to “Indigenous governing bodies,” which are defined as “a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35.” The Act is silent, however, on who “authorizes” the entity, the criteria by which that is determined, the process for recognition or what occurs in the event of disputes about recognition. The question remains, therefore, whether the Act was intended to leave the matter solely to the discretion of an Indigenous group, as does the declaration, or whether the federal government will choose whom it recognizes.

In supporting C-262, the federal government agreed that UNDRIP has application in Canadian law as a minimum standard of universal human rights. However, it is not readily evident that the new federal environmental regime fully satisfies a number of UNDRIP’s provisions. There is a major gap between the declaration’s description of inherent Indigenous human rights and state duties and Canada’s domestic law on section 35 rights, government duties to consult and accommodate, and the test for justifiable infringement of such rights. A consensus between the federal government and Indigenous groups on how free, prior and informed consent is reflected in future decisions may prove to be challenging.

### Protection and promotion of Indigenous languages

In the preamble to the new *Indigenous Languages Act* (ILA), adopted in 2019, the federal government commits “to implementing the [Declaration] which affirms rights related to Indigenous languages.”<sup>20</sup> Article 13 of the declaration recognizes that Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures. It also obliges states to take effective measures to ensure that these rights are protected.

In contrast, the federal government recognizes in the Act that Indigenous rights under section 35 include language rights, without specifying what they entail. In doing so, it essentially reiterates the policy on Indigenous self-government it released in 1995, when four First Nation self-government agreements were brought into force by legislation. The policy document refers to “a range of matters that the federal government would see as subjects for negotiation” when implementing the Indigenous right to self-government, including “Aboriginal language, culture and religion.”<sup>21</sup> Aside from new sources of funding to support language preservation, it is not evident that the Act changes the federal government’s view of language rights or its legal obligations.

Like the *Impact Assessment Act*, the *Indigenous Languages Act* foresees agreements with an “Indigenous governing body...authorized to act on behalf of an Indigenous rights-holder,” but the minister retains the power to decide who will be selected for such agreements. Again, this seems much more constrained than the full right to self-determination envisaged by many Indigenous leaders.

<sup>20</sup> C-91, *An Act respecting Indigenous Languages*, 1st session, 42nd Parliament, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-91/royal-assent>.

<sup>21</sup> Canada, Crown and Indigenous Relations and Northern Affairs, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government,” <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

### Indigenous child and family services

The *Act respecting First Nations, Inuit and Métis children, youth and families*, adopted in 2019, affirms the rights and jurisdiction of Indigenous peoples in relation to child and family services and sets out principles for the provision of child and family services in relation to Indigenous children.<sup>22</sup> The Act's preamble refers to the government's commitment to implement UNDRIP.<sup>23</sup> The Act also affirms the right to self-determination of Indigenous peoples and that their inherent right to self-government includes jurisdiction for child and family services.

However, the Act frames Indigenous jurisdiction through the lens of section 35, which is narrower than the vision of self-determination contained in the declaration. Further, the Act specifies that the exercise of Indigenous jurisdiction is governed by the Canadian Charter of Rights and Freedoms. In both regards, the scope of the right and limits on its exercise, the Act is not a significant change from the federal 1995 policy on Indigenous self-government.

The new Act is nevertheless a step beyond previous policy in two important respects. It envisages the Indigenous exercise of jurisdiction without the 1995 policy's precondition of negotiated agreements with both the federal and provincial governments. It also clarifies that Indigenous laws on child and family services will have precedence over conflicting federal and provincial laws on the same matter.

However, the Act strongly encourages what are called coordinating agreements prior to an Indigenous governing body using its powers. If no agreement is negotiated, then the Act provides a dispute resolution mechanism for that purpose. Although not explicitly stated in the Act, there is a strong implication that federal funding for Indigenous child and family services is dependent on such an agreement. The result is a broad recognition of Indigenous jurisdiction, but practically speaking the federal and provincial governments retain financial and other forms of power to limit its exercise.

The references to the provinces led Quebec to threaten a court challenge to its constitutionality for treading on provincial jurisdiction.<sup>24</sup> This may prove to be limited to a dispute over child welfare authorities. Yet it speaks to an underlying tension in several provinces about federal efforts to broker a national agenda on Indigenous issues.

In summary, the Liberal government characterized several legislative measures passed or considered by Parliament during its first term as implementing UNDRIP. In large part, the legislative measures reflected Canada's current domestic law on Indigenous and treaty rights, rather than fully satisfying Indigenous views of their right to self-determination under the declaration.

<sup>22</sup> C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*, 1st session, 42nd Parliament, <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-92/royal-assent>.

<sup>23</sup> C-92, *An Act respecting First Nations, Inuit and Métis children, youth and families*.

<sup>24</sup> B. Shingler and J. Deer, "Quebec Wants Out of New Federal Indigenous Child Welfare Law, Citing Threat to Provincial Jurisdiction," CBC News, December 19, 2019, <https://www.cbc.ca/news/canada/montreal/quebec-bill-c92-indigenous-child-welfare-1.5402968>.

### BC implementation

An important legacy of the previous BC Liberal government was the commitment to a new relationship based on respect, recognition and accommodation of Indigenous rights and title. The NDP government has continued that work and developed a joint agenda with the province's leading Indigenous organizations.<sup>25</sup> UNDRIP figures prominently as the first of a series of guiding principles for their collaboration outlined in a joint commitment document:

*The rights recognized in the [Declaration] constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world, including in British Columbia. These include foundational standards related to the right of self-determination, self-government, and land and resource rights...*

At the same time, the NDP government has continued many of the previous government's Indigenous policies. For decades, BC has negotiated agreements to frame the Crown's domestic legal duty to consult and build Indigenous voices into land use planning.<sup>26</sup> BC offered two elements in generic agreements available to all First Nations and in more specific ones tailored to a few nations:

- The province's legal duty under Canadian law to consult and accommodate was translated into relatively predictable terms for provincial ministries and agencies. A variety of mechanisms were used, sometimes tailored to the priorities of a given Indigenous nation. But their essence was the same – to fulfill, as efficiently as possible, the province's legal duties concerning economically valuable public lands and resources in order to convince a court of the merits of the final decision.
- The province gave broad, open-ended political commitments to improve relations, foster collaboration and deepen cooperation on issues of shared interest, such as land and resource management. Sometimes topics, for example revenue sharing, were identified for future negotiation. But the main obligations in most agreements were to share information and work together.

Although there is continuity, the NDP government has taken important steps in new directions. Examples include sharing gaming revenues and increasing direct spending on Indigenous services, such as housing on reserves. It also adopted, with relatively minor changes, the federal government's 10 principles for relations with Indigenous peoples.<sup>27</sup>

<sup>25</sup> British Columbia, "Joint Agenda: Implementing the Commitment Document" (Victoria: Government of British Columbia, November 26, 2018), [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/concrete\\_actions\\_final\\_26nov2018.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/concrete_actions_final_26nov2018.pdf).

<sup>26</sup> For more details on BC's use of negotiated, nontreaty agreements to manage relations, see M. Hudson, *British Columbia-Indigenous Nation Agreements – Lessons for Reconciliation?* IRRP Insight No.20 (Montreal: Institute for Research on Public Policy, 2018), <https://irpp.org/wp-content/uploads/2018/03/British-Columbia-Indigenous-Nation-Agreements-Lessons-for-Reconciliation.pdf>.

<sup>27</sup> British Columbia, "Draft Principles That Guide the Province of British Columbia's Relationship with Indigenous Peoples" (Victoria: Government of British Columbia, 2018), [https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft\\_principles.pdf](https://www2.gov.bc.ca/assets/gov/careers/about-the-bc-public-service/diversity-inclusion-respect/draft_principles.pdf).



Perhaps its most noteworthy change is how it seeks Indigenous consent. The government's new approach is less about the domestic legal duty to consult and more about an effort to implement the declaration, including free, prior and informed consent, in ways that align with Indigenous views.

The shift away from the domestic duty to consult toward what Anaya called consensual decision-making is more than a change in emphasis. It involves a fundamental change in how the BC government approaches relations with Indigenous nations. The Indigenous right to self-determination is recognized from the outset, unlike the existing model of negotiating self-government arrangements. This means the province recognizes a nation's choice of governance bodies and respects their laws and legal traditions. It also drives the codevelopment of mechanisms and processes for an Indigenous nation to provide its consent prior to a proposed government action or decision.

Agreements with Indigenous nations signed over the past three years have, accordingly, moved incrementally toward much greater shared decision-making.<sup>28</sup> In a few agreements, BC has opened the door to a limited Indigenous veto over certain issues within particular geographic areas.<sup>29</sup> A recent example is the 2019 Pathway Forward 2.0 Agreement with the Carrier Sekani Tribal Council and seven First Nation bands.<sup>30</sup> In that agreement, BC recognizes that the Carrier Sekani peoples are self-governing, their governance integrates traditional and elected forms, their Indigenous title and rights will be implemented in a manner that enhances harmonious and cooperative relations, and Carrier Sekani governance and stewardship of their traditional territories will be implemented by agreement.

Under the agreement, the parties agree to work in a collaborative, "stepwise" manner toward a long-term and comprehensive reconciliation of Carrier Sekani and Crown titles, rights and interests in the traditional territories. In the interim, BC provides significant financial benefits to the Carrier Sekani and agrees to "collaborative decision-making." On major projects in the territories, the parties agree to seek consensus through new structures and processes, including dispute resolution mechanisms.

### ***BC Declaration on the Rights of Indigenous Peoples Act***

The *BC Declaration on the Rights of Indigenous Peoples Act* (DRIPA) states that UNDRIP has "application" to the laws of BC. It includes requirements for an action

<sup>28</sup> See, for example, the Broughton Archipelago letter of understanding. Government of British Columbia, "Letter of Understanding Regarding a Government-to-Government Process to Address Finfish Aquaculture in the Broughton Area, Including Recommendations on Provincial Tenure Replacement Decisions" (Victoria: Government of British Columbia, June 27, 2018), [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/broughton\\_nations\\_and\\_bc\\_letter\\_of\\_understanding\\_june\\_2018\\_final\\_signed.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/broughton_nations_and_bc_letter_of_understanding_june_2018_final_signed.pdf).

<sup>29</sup> Government of British Columbia, "Forestry Shared Decision Making Pilot Agreement" (Victoria: Government of British Columbia, 2017), [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shshlh\\_forestry\\_shared\\_decision\\_making\\_pilot\\_agreement\\_signed\\_20171016.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shshlh_forestry_shared_decision_making_pilot_agreement_signed_20171016.pdf); Government of British Columbia, "shishálh Nation / British Columbia Foundation Agreement" (Victoria: Government of British Columbia, October, 4, 2018), [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh\\_nation\\_foundation\\_agreement\\_-\\_final\\_-\\_redacted\\_signed.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted_signed.pdf).

<sup>30</sup> Government of British Columbia, "Pathway Forward 2.0 Agreement" (Victoria: Government of British Columbia, January 2020), [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/cstc\\_pathways\\_20\\_agreement\\_signed\\_-\\_jan\\_2020.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/cstc_pathways_20_agreement_signed_-_jan_2020.pdf).

## New Tools for Reconciliation: Legislation to Implement UNDRIP

plan to be developed in consultation and cooperation with Indigenous peoples and annual reporting on how the BC declaration is being implemented through the province's laws and policies.<sup>31</sup>

In contrast to C-262, DRIPA has substantive provisions that empower ministers (with cabinet approval) to enter into agreements with Indigenous groups for shared decision-making or that require Indigenous approval prior to decisions by public authorities. These are noteworthy new authorities given BC's history of using bilateral agreements to foster cooperative working arrangements with Indigenous groups.

### Environmental assessment processes

Through legislation adopted early in 2019, BC put the declaration at the heart of its environmental assessment process. The government's website describes changes to the environmental assessment regime as a way to "ensure the legal rights of First Nations are respected, and the public's expectation of a strong transparent process is met."<sup>32</sup>

The changes to the environmental regime stem, in large part, from an external advisory group with significant Indigenous representation. Its recommendations included increasing the power of Indigenous nations to decide on projects on their traditional territories.

In response, the government promised to implement UNDRIP through "revitalizing the Environmental Assessment process [which] presents an opportunity to develop a new legal framework and to make organizational shifts based on recognition of Indigenous title, rights and jurisdictions, treaty rights, and the legal pluralism that exists in Canada."<sup>33</sup>

A discussion paper that set out the revitalization plan reflected Indigenous views on UNDRIP implementation, particularly the power to control decisions on traditional territories. The paper said that reconciliation requires recognizing Indigenous peoples "as decision-makers in their territories based on their inherent rights of self-government, self-determination, and to sustain and benefit from the wealth of their territories." BC's new *Environmental Assessment Act* closely followed those recommendations. The Act contains important changes that bolster the role of Indigenous nations in decisions concerning their traditional lands.<sup>34</sup>

<sup>31</sup> Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th session, 41st Parliament, <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/third-reading/gov41-3>.

<sup>32</sup> Government of British Columbia, "Environmental Assessment Revitalization" (Victoria: Government of British Columbia, n.d.), <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization>.

<sup>33</sup> Government of British Columbia, *Environmental Assessment Revitalization Discussion Paper* (Victoria: Government of British Columbia, June 2018), [https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea\\_revitalization\\_discussion\\_paper\\_final.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/environmental-assessment-revitalization/documents/ea_revitalization_discussion_paper_final.pdf).

<sup>34</sup> Bill 51, *Environmental Assessment Act*, 3rd session, 41st Parliament, <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/3rd-session/bills/third-reading/gov51-3>.

The influence of First Nations in the new environmental assessment process is a sea change to a degree not seen in other provincial or federal processes. The Act fundamentally changes the objectives of the assessment process to include implementation of UNDRIP and gives First Nations a major role in decision-making on matters affecting their rights and interests.<sup>35</sup> It also equips the government with new or improved tools for those purposes, thereby increasing the Indigenous role in decision-making on their traditional territories.

BC's new environmental assessment regime is significant in two regards: UNDRIP is essentially incorporated as a standard for the conduct of reviews; and the onus has shifted from the strength of Indigenous claims to rights under domestic law toward how First Nations themselves view their inherent rights and interests. How far these two elements shift the balance of power in assessments remains to be seen. It will be reflected in how BC officials and ministers apply them to projects. The minister has considerable room to make political choices in how he or she exercises their powers. But, overall, the new *Environmental Assessment Act* is a powerful signal about the Indigenous role in public decision-making.

The BC government has used a variety of tools to implement the UN declaration, including new legislation, revised policies and new forms of negotiated agreements to create or adapt processes and mechanisms. It has accommodated a strong Indigenous voice in government decision-making. In essence, it has aligned many aspects of its relations with Indigenous peoples with the shared goal of decolonization. In doing so, BC has begun to move toward the UN declaration's vision of a fundamentally different role for Indigenous nations in the governance of the province.

## IMPLICATIONS OF UNDRIP IMPLEMENTATION

Both the federal and BC governments are committed to transforming their relations with Indigenous peoples. Both jurisdictions are pursuing a suite of measures, including legislation described as implementing UNDRIP. Although the measures taken to date are relatively new, their implications are starting to emerge.

### Federal government

The changes to the federal environmental assessment process create new opportunities for engagement with Indigenous groups potentially affected by government decisions. They have kept pace of Canada's evolving law on the duty to consult. To some extent, the changes have gone further by detailing processes and mechanisms not specifically directed by the courts. They have not, however, gone as far as the vision of free, prior and informed consent held by many Indigenous leaders and advocates whereby a project cannot proceed without their consent.

<sup>35</sup> S. Lee-Anderson, "A Closer Look: BC Government Releases Draft Legislation for Revitalized Provincial Environmental Assessment Process" (Vancouver: McCarthy Tétrault, December 18, 2018), <https://www.mccarthy.ca/en/insights/blogs/canadian-era-perspectives/closer-look-bc-government-releases-draft-legislation-revitalized-provincial-environmental-assessment-process>.

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The new federal *Impact Assessment Act* attracted support from some Indigenous groups, but also criticism from others who felt it did not go far enough.<sup>36</sup> New points of dispute may emerge about how much power the federal government must share in recognizing Indigenous governance rights.

Both the federal Act and C-262 generated active opposition, notably from the oil and gas industry and the Alberta and Saskatchewan governments. This opposition may become more muted as the government implements the environmental assessment changes from its first mandate. Recent disagreements with Indigenous peoples about the Trans Mountain Expansion Project and the Coastal GasLink may make it harder to find common ground. Future decisions and agreements negotiated under the new Act should therefore be followed closely.

The Trudeau government faces a more complicated political environment than during its first term. The minority Liberal government requires the support of the Conservatives or a combination of the NDP, Greens and Bloc Québécois to pass legislation. The Conservatives raised a number of concerns about Bill C-262 and may have similar difficulties with an eventual government bill to implement UNDRIP.

Since the 2019 federal election, the Quebec government has publicly expressed concern that the federal legislation on Indigenous family and children services treads on traditionally provincial jurisdiction. Alberta, under its United Conservative Party government, has been increasingly vocal about its opposition to the changes to the federal environmental assessment process. The Premier of Manitoba has raised concerns about legislation to implement UNDRIP.<sup>37</sup> Recent high-profile disputes with Indigenous groups over oil- and gas-related projects will only exacerbate those concerns. This interplay between federal politics and intergovernmental relations will be challenging to manage.

### BC government

The changes brought by BC's environmental assessment law and its legislation to align the province's laws with the UN declaration are starting to generate public attention. For the introduction of legislation to enshrine the declaration, the BC government marshalled an impressive media campaign involving Indigenous leaders in support of its approach. This is perhaps not surprising, given statements by the Premier and ministers that the way forward will be greater shared decision-making and even consent requirements. Even so, some Indigenous commentators are already raising questions about the government's promises of transformational change and are waiting to see how they translate into concrete action.

<sup>36</sup> J. Barrera, "Indigenous Rights Question Remains in Ottawa's Planned Environmental Assessment Overhaul" (Ottawa: CBC, February 8, 2018), <https://www.cbc.ca/news/indigenous/indigenous-rights-consultation-environment-assessment-1.4527355>.

<sup>37</sup> B. Pallister, "UNDRIP Legislation Would Be Chaotic in This Country - and the Blockades Prove it" (*Globe and Mail*, March 9, 2020), <https://www.theglobeandmail.com/opinion/article-undrip-legislation-would-be-chaotic-in-this-country-and-the/>.

The business community in BC expressed cautious optimism that BC's approach to implementing the UN declaration might generate broad agreement on the way forward. Like some Indigenous commentators, the business community appears to be awaiting further clarification from the government on a range of practical questions. But already a debate has begun in the media about whether the government has, in fact, accepted that Indigenous groups have a veto in decisions on land and resource planning.

A number of practical issues are emerging in BC:

- How big a change is planned? The BC government under the NDP has begun to move toward a significantly different relationship with Indigenous nations. BC's approach to implementation of the declaration was hailed by the government and Indigenous commentators as a major breakthrough. The Premier called it a "real catalyst for significant change." Will it lead to full-scale, significant change to the province's governance? Targeted changes on discrete topics? Or will it incrementally build change through negotiated agreements?
- How will BC identify "an entity that is authorized to act on behalf of Indigenous peoples that hold rights under s.35"? Given the extensive powers recognized for a "participating Indigenous nation," there is no obvious mechanism for how or by whom the nation is recognized.
- What is the resolution mechanism for disputes about whether an "entity" is the appropriate voice for an Indigenous group with the necessary legal authority to enter into an agreement to exercise BC statutory authorities? The BC declaration has no dispute resolution provisions, and the references in the environmental assessment law to dispute resolution facilitators are restricted to the environmental assessment process.
- Is there a preferred model for how shared decision-making plays out on the ground? Recent agreements with expansive, shared decision-making, such as the Broughton Archipelago agreement, or those envisaging a veto over future Crown decisions, such as the Sechelt agreements, could represent a new floor, a ceiling, or become exceptional, one-off agreements. The Premier's public statements about DRIPA suggest that they are the model for the future. Time will tell.

What role will an action plan to implement the declaration play? The action plan, which is being developed, figures prominently in the Act and in public statements, but its details remain unclear (for example, will the plan be a high-level agreement with Indigenous leaders on priority topics for attention or specific commitments to reach agreement on particular matters within a time frame?).

- BC has not signalled what will happen to the myriad of operational decisions under other existing regulatory statutes while the action plan is developed. Presumably, more details will emerge from the promised review of laws and policies. It is not yet known whether changes to other laws will match Indigenous expectations on the speed and breadth of change.
- How will BC respond on other parts of UNDRIP, beyond Canada's domestic law? The declaration goes further than current Canadian law on many topics,

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such as the right for redress and compensation for the loss of traditional lands and resources through government actions or decisions. It is unclear how BC plans to respond to those elements, especially in light of the Premier's ambitious call for significant changes in BC's laws and policies.

- What will happen to existing engagement and consultation processes and the more than 500 nontreaty agreements with Indigenous groups signed over the past 20 years? Indigenous groups may view existing consultation and accommodation processes as no longer fit for purpose, but BC has not yet said how existing agreements will be handled following the BC declaration.
- What is BC's state of readiness for implementation? It is unknown how new approaches to shared decision-making and consent will apply more broadly. For example, what or who goes first and what comes next and over what time frame? It is also not known if there is a tentative list of priorities covering such things as topics, geographic locations or Indigenous communities.

BC has laid the foundations for new forms of governance through its implementation of UNDRIP to date. Measures for shared decision-making with Indigenous governments, and even a veto over some government actions appear in a growing number of agreements. These may satisfy those seeking transformative change. But, in doing so, the BC government may run up against non-Indigenous expectations about the role of governments that act on behalf of all citizens.

BC is charting a new path by moving away from imposing a framework for the domestic legal duty to consult toward negotiated, consent-based arrangements. At the moment, there is a gap between the free, prior and informed consent envisioned under the declaration and the way in which most Canadian governments fulfill the domestic legal duty to consult.

BC's approach is broadly supported by Indigenous organizations and academic commentators. It has not been widely debated among the general public to date. Polls suggest that a significant proportion of British Columbians may not be aligned with the government's approach. Polling after the Wet'suwet'en protests suggests a majority in BC recognize that Indigenous land claims are valid and want governments to prevent or resolve direct conflicts. The same survey found that 74 percent of British Columbians support the need to consult Indigenous peoples during the planning stages of large infrastructure projects to be built on land they claim to be their own. It also found that 41 percent support an Indigenous veto (defined as "the right to say no") over major projects on their traditional territories.<sup>38</sup>

In summary, BC has embarked on a more ambitious agenda for change than the federal government, particularly around land and resource decisions. Although it oper-

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<sup>38</sup> Léger Marketing, "Federal Politics - March 4, 2020" (Montreal: Léger Marketing, March 4, 2020), <https://leger360.com/voting-intentions/federal-politics-march-4th-2020>.

ates in a less complicated political environment, it will need to resolve a number of practical questions. It also needs to bring a significant portion of British Columbians along with its ambitious vision of transformative change.

## CONCLUSION

Implementation of the UN declaration is an important testing ground for governments' commitment to a new relationship with Indigenous Canadians. It may give rise to new, practical tools for sustainable reconciliation, such as innovative forms of governance. Indeed, the way UNDRIP is implemented, especially around free, prior and informed consent, could be a pivot point for Canada's economy and society – in essence, disruptive innovation.

All Canadians should pay attention to what is at stake. To encourage broader understanding, governments should be transparent about the nature and the degree of change needed to strengthen the relationship with Indigenous peoples. Otherwise, new misunderstandings may arise and governments will risk losing public support for their efforts, particularly on contentious issues such as free, prior and informed consent.

Everyone – Indigenous and public governments, business and civil society – should heed the potential for unintended consequences and remain open to creative approaches. Governments should implement the declaration in ways that foster a broad, national understanding of the place of Indigenous peoples in Canada's economic development and governance. Only then will implementation of UNDRIP prove to be a pivot point for Canada.



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