# UNDRIP

In this resource guide we discuss the UN Declaration on the Rights of Indigenous People and the UN Declaration Action Plan.

On June 21, 2023, National Indigenous People's Day, the United Nations Declaration Act's Action Plan ("**Action Plan**") was tabled in the House of Commons and Senate. The Action Plan builds upon the Canadian government's commitment to adopt and implement the United Nations Declaration on the Rights of Indigenous Peoples ("**UN Declaration**"). The Action is a culmination of the consultation and cooperation regarding the Action Plan between First Nations, Inuit, and Métis peoples and Justice Canada over the past two years. The Action Plan tabled in Parliament touches upon five main chapters including:

- Shared priorities
- First Nation priorities
- Inuit priorities
- Métis priorities
- Indigenous Modern Treaty Partner priorities

UN Declaration Action Plan

In 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act* ("**UNDRIPA**"). UNDRIPA gives the UN Declaration greater force in Canadian law. Many are critical of the application of the UN Declaration in Canadian law. For many years, Canada, as a nation-state, formally objected to the UN Declaration at the United Nations General Assembly. It was not until 2016, that Canada formally removed its objector status.

The federal government is legislatively obligated to complete the Action Plan on June 21, 2023. Canada is not legislatively obligated to table it in Parliament until "as soon as practicable". The federal government is obligated under UNDRIPA to develop an Action Plan within two years of Royal Assent and implement it.

Canada must include the following measures as part of the Action Plan:

- address injustices, combat prejudice and eliminate all forms of violence, racism, and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons;

- promote mutual respect and understanding as well as good relations, including through human rights education;

- measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration;

- monitoring the implementation of the plan and reviewing and amending the plan.

The implementation of the Action Plan is part of the next step of ensuring the consistency of the UN Declaration with Canadian laws. Canada must ensure that Canadian laws are consistent with the UN Declaration. The measures of consistency of laws and achieving the objectives of the UN Declaration must be done in consultation and cooperation with Indigenous Peoples.

In December 2021, the Canadian government launched a two phased distinctions-based approach to consultation and cooperation with 'Indigenous partners'. Phase one began in December 2021 and ended in February 2023. As part of phase one, Canada identified priorities and potential measures for the Draft Action Plan. Phase two was from March to June 2023. Phase two included working with Indigenous partners on validating proposed measures in the Action Plan, including modifying them as necessary and identifying and filling in any gaps or adding measures.

Many Indigenous Peoples have expressed disappointment towards the process of consultation and cooperation of the Action Plan. Some of the frustrations that Indigenous Peoples

have is directed towards the insufficient amount of time in phase two to validate the proposed measures of the Action Plan. A major point of contention is the process of the phased distinctions-based approach to consultation and cooperation with Indigenous Partners.

## PART 1

## A Critical Plan with its share of Criticisms: Canada's UNDRIP Implementation Action Plan

June 21, 2023, Indigenous Peoples' Day, Canada tabled its United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan. The Action Plan is intended to provide a framework for implementing the United Nations Declaration on the Rights of Indigenous Peoples (the "UN Declaration") and was developed in "consultation and cooperation" with Indigenous peoples.

### What's in the Action Plan?

The Action Plan sets out "measures" to address injustices, promote respect, and provide accountability for implementing the UN Declaration. This is what the United Nations Declaration on the Rights of Indigenous Peoples Act (the "Act") requires the Action Plan to do. Despite its name, the Action Plan contains few specific and measurable commitments. Much of the text commits the government to do things it is already doing. There are also skewed imbalances: for example, the Action Plan contains a chapter dedicated to modern treaty priorities, however, only contains two measures relevant to upholding historic treaty priorities. We highlight a few measures here, acknowledging that there are 181 total measures reflecting different Indigenous partners' priorities and submissions.

***Commitments to continue actions Canada is already doing***

As mentioned, the Action Plan contains numerous measures committing Canada to actions the government is already taking, including:

- Co-develop a comprehensive approach to combat anti-Indigenous racism in support of Canada's new Anti-Racism Strategy (Chapter 1, Measure 4). This is an improvement upon earlier drafts that simply said "continuing to implement the anti-racism strategy" without any new perspective.
- Continue to implement the Act respecting First Nations, Inuit and Métis children, youth and families which affirms the inherent right of self-government, including jurisdiction in relation to child and family services, and sets minimum standards in relation to the delivery of culturally appropriate and Indigenous led services with the aim to reduce the number of Indigenous children in care and ensure they remain connected to their families, communities and culture. (Chapter 1, measure 29). This references federal law in place since 2019.
- Continue to address issues related to the overrepresentation of Indigenous peoples in the criminal justice system (Chapter 1, Measure 60 and 61). These measures feature multiple bullet points about things that the government will continue to do.
- Continue work underway with First Nations partners on a new fiscal relationship to provide sufficient, predictable, and flexible funding (Chapter 2, Measure 1). This references a process that began in 2016.
- Continue to reform the specific claims tribunal program (Chapter 2, Measure 3)
- Continue to support lifting of short and long-term drinking water advisories in First Nation communities (Chapter 2, Measure 16). This is of course a campaign promise that remains unfulfilled. The Trudeau government has been talking about lifting drinking water advisories since 2015, yet 28 remain in place as of the date this was published.

These are hardly transformative, precedent-setting moves.

***Non-measurable measures***

The government also makes many laudable, but general and vague commitments, which will be difficult to gauge progress on in the coming months and years without further specifics attached, including the following excerpts:

- Pursue amendments and reforms to fisheries legislation, regulation and policies to support self-determination (Chapter 1, Measure 36)
- Modernize the Canada Water Act to reflect Canada's freshwater reality, including climate change and Indigenous rights (Chapter 2, Measure 49)
- Fully implement Joyce's principle (Chapter 1, Measure 6)

How will the government achieve these goals? By when? What reforms would they implement and by what mechanisms? What specifically do they mean by Joyce's Principle, there is no defining document or plan, and are they committing to eliminate Indigenous-specific healthcare discrimination? How and with whom?

***Where is the accountability?***

The government commits to establishing an independent Indigenous rights monitoring, oversight, recourse or remedy mechanism or mechanisms. This measure has the potential to be quite transformative, however, lacks the detail required to address the urgent need for justice respecting historic and ongoing Crown breaches of Indigenous and treaty rights. However, no measures in the Action Plan expressly engage treaty breaches or other disputes with respect to Indigenous rights, which would be required to actually implement articles 27 and 37 of the UN Declaration.

Land back, restitution, and other title and rights priorities may have been discussed in a process appropriately convened by Canada over the last two years, but Indigenous governments did not have a willing partner to create an action plan measure that would have been as central to the future relationship of Indigenous Peoples and Canadians.

**<u>Developing this Action Plan</u>**

Canada released a draft action plan on March 20, 2023, and made several changes to the final version, including:

- Adding a fifth chapter, "Modern Treaty Partner Priorities", that changes the existing structure of the document, which had been based on the legal distinction of Canada's three groups of Indigenous peoples: First Nations, Métis, and Inuit.

- Adding more language linking this Action Plan to the Truth and Reconciliation Commission Calls to Action and existing plans to end violence against Indigenous women, girls, and 2SLGBTQIA+ people.
- At some measures, improving language supporting implementation. For example, adding a measure forming an Action Plan Advisory Committee for implementation (Chapter 1, Measure 22).
- At some measures, reducing accountability and removing timelines to have things done. For example, removing "by June 2024" as a timeline to provide educational materials at Chapter 1, Measure #18.

**Reception from Indigenous Peoples**

With the final version of the Action Plan just released, we await the perspectives of Indigenous peoples from sea to sea to sea. We will work to amplify their voices as they share their opinions and provide their feedback, including in this resource.

So far, there is widespread criticism of the consultation with Indigenous Peoples. As earlier drafts were released and the timeline crystalized, the Assembly of First Nations called for more time to consult on the draft Action Plan before it was tabled. A week before the Action Plan was tabled, the Congress of Aboriginal Peoples said that it had been excluded from the consultation process. On June 21, 2023, Alberta Treaty First Nations Chiefs held a joint press conference to say they were not consulted.

**What we know about the "Implementation Phase"**

Canada has committed to publicly reporting on progress implementing the Action Plan in an annual report to Parliament (Chapter 1, Measure 20). Canada has stated that all submissions it receives from Indigenous partners will "inform the next phase of our implementation work together". Canada describes its Action Plan as an "evergreen roadmap" which can be renewed and updated throughout the implementation process. Canada has stated it will "co-develop and implement a process to review and update the plan every five years, and a process for making amendments to the action plan" (Chapter 1, Measure 21). As such, the Action Plan is expected to be reviewed and amended from time to time, although Canada has

not committed to any particular way in which this review will occur, or how it will involve Indigenous partners.

**PART 2**
**UN Declaration Action Plan and Treaties**

*Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

*Article 3*

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In this section we provide an overview of the United Nations Action Plan's ("UNDA") distinction-based approach regarding historic and modern treaties. Canada has said that historic and modern treaties inform Canada's relationships and approaches with respect to the implementation of the Action Plan.[1] But many are left questioning how historic and modern treaties will help form its relationships and approaches regarding the implementation of the Action Plan.

***Highlights About Treaties in The Action Plan***

Here are some highlights about treaties in the Action Plan:

- 18 measures related to treaties (in total);
- An entire chapter related to Modern Treaty Priorities;
- Two measures related to historic treaties, but only one measure on historic treaties specifically; and
- Engages Articles 3, 4, and 37 of the United Nations Declaration on the Rights of Indigenous Peoples regarding the recognition, observance, and enforcement of treaties[2].

***Measures Commit Canada to Honourably Implement Modern And Historic Treaties***

Measure 25 requires Canada to implement both historic and modern treaties. Measure 25 states:

*Consistent with article 37 of the UN Declaration, honourably implement historic and modern treaties, self-government arrangements, agreements and constructive arrangements – see specific measures found in subsequent chapters. (All departments)[3]*

This measure broadly codifies the existing state of the law on treaty rights in Canada. Canada is already required to implement historic and modern treaties honourably and diligently in Canada.

**Article 37**

1. 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.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

For example, in a case appealed to the Supreme Court of Canada, Restoule v Canada, the Ontario Court of Appeal confirmed that the honour of the Crown demands a purposive interpretation of treaties.[4] Further that the Crown must act diligently in its pursuit of its solemn obligations and honourable reconciliation of Crown and Aboriginal interests.[5] Measure 25 does not change the legal landscape, nor articulate how Canada will implement this measure in accordance with Article 37 of the UN Declaration.

**Action Plan Falls Short for First Nations With Historic Treaties**

Measure 2 is the only measure specific to historic treaties in the Action Plan. Measure 2 states:

> *Re-affirm pre-1975 treaty relationships based on the principles of mutual respect, self-determination and the nation-to-nation relationship. Engage Treaty Nations in co-developing approaches, including reconvening of Treaty Councils if Nations wish to do so, for the renewal and honourable implementation of pre-1975 treaties and treaty relationships, including a shared vision to guide actions and a common understanding of the spirit and intent of pre-1975 treaties. (Crown-Indigenous Relations and Northern Affairs Canada)[6]*

Measure 2 commits Crown-Indigenous Relations and Northern Affairs Canada to "engage Treaty Nations in co-developing approaches" to the implementation of historic treaties. The commitment to co-develop approaches creates a wedge for First Nations with Historic Treaties to negotiate bilateral mechanisms. Bilateral mechanisms could serve as a forum for First Nations and Canada to come together to reach a shared understanding of the Crown's treaty obligations and how the Crown ought to fulfill those obligations.

***Modern Treaty Partner Priorities***

Modern Treaty Partners are a "distinct element within the distinctions-based approach that includes First Nations, Inuit, and Métis peoples".[7] Chapter 5 sets out an instructive blueprint on measures to co-develop legislative and policy processes, tools, and mechanisms

regarding the implementation of modern treaties.[8] There are 16 measures with several sub-measures including:

- A robust framework for the continuation of the co-development annexes to Canada's Collaborative Modern Treaty Implementation Policy (Measure 1)[9]
- Co-development of funding methodologies to ensure Modern Treaty Partners have the fiscal resources to meet their governing responsibilities (Measure 8)
- A Modern Treaty oversight mechanism (Measure 9)
- Collaboration on possible changes to federal legislation, regulation, and policies to ensure consistency between modern treaty obligations and federal laws (e.g., Measures 9, 13, and 14)

The co-development of the suite of legislative, policy, and other mechanisms through the implementation of the Action Plan is vitally important as more Nations negotiate self-government agreements. To date there are 25 self-government agreements signed between First Nations, Canada, and the provinces with many more being negotiated. As more self-government agreements are signed, it will become imperative that First Nations be able to fully implement their rights with respect to self-government. The depth of the co-development including measures to determine the actual implementation of those modern treaty rights will be equally determinative. While this is important, it amounts to a continuation for Canada to continue to work cooperatively with First Nations and does not create concrete commitments for Canada.

***Conclusion***

The Action Plan's distinction between historic and modern treaty rights and rights-holders has left some First Nations questioning Canada's willingness to meet their obligations to implement treaties and accommodate treaty rights in legislation. First Nations have entered solemn treaties and they are largely uninterested in any tables set to renegotiate their treaties as "modern" treaties. Therefore, historic treaty parties do not have similar access to the

many commitments on treaty implementation provided to Modern Treaty Partners.

We leave you with this question to consider – will historic treaties become engulfed by Canada's modern treaty framework? In the coming weeks and months as conversations regarding implementation progress, the issue may become more clearly defined. But at this time, we are left with more questions than answers regarding the Action Plan's measures on modern and historic treaties.

References

1 United Nations Action Plan, at page 23

2 United Nations Declaration on the Rights of Indigenous Peoples

3 Measure 25 in Chapter 1 on Shared Priorities of First Nation, Metis, and Inuit peoples.

4 *Restoule v. Canada (Attorney General)*, 2021 ONCA 779, at 240 and 249 [*Restoule*]; originally citing: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, at para 76 [*MMF*].

5 *Restoule,* at para 240; originally citing *MMF,* at para 78.

6 Chapter 2 in First Nation Priorities.

7 Modern Treaty Partners are Indigenous peoples who entered into Modern Treaties, at p 67.

8 Ibid, at p 59.

9 Canada's Collaborative Modern Treaty Implementation Policy (rcaanc-cirnac.gc.ca)

## PART 3

## Continuing Improvement of Economic and Social Conditions?

## Commentary on Canada's Action Plan to Implement UNDRIP and How it Fails to Address the Need for Improved Living Conditions On-Reserve

This section focuses on how the Action Plan seeks to implement UNDRIP articles relating to the improvement of the economic and social conditions of Indigenous peoples. The section also highlights how the plan falls far short in creating a viable route to closing the standard of living gap for Indigenous peoples living on-reserve in Canada.

### What's the issue?

The systemic nature of the standard of living gap between First Nations people living on-reserve and other people living in Canada has long roots in Canadian colonial history, starting with the creation of the reserve system. While the official federal position was that reserves were designed to protect Indigenous people and preserve their ways, in reality, they isolated and impoverished Indigenous peoples. Reserves prevented Indigenous peoples both from participating in their own economies that they had built for thousands of years and from accessing the broader settler economy by imposing barriers like restrictions on movement and challenges raising capital. Participation in First Nations culture was banned and sometimes criminalized. Children were removed from their homes and sent to residential schools. And on reserve, basic services like health, infrastructure and housing were knowingly provided at grossly subpar standards.

While oppressive practices like potlatch bans and residential schools have been consigned to history, these historic roots are still visible in the entrenched poverty and inequities present in the reserve system today. There is severe underfunding for such fundamental requirements as governance and infrastructure. Access to clean drinking water and adequate wastewater treatment is a major challenge for many communities. Overcrowding and unsafe living conditions are endemic. As the Government of Canada has recognized, the current fiscal relationship is not working for anyone.

The impact of these inequities cannot be overstated. First Nations people who live on-reserve have the lowest income and lifetime earnings in Canada.[1] Life expectancy for First Nations people is almost 10 years lower than for non-Indigenous people.[2] Low socioeconomic status continues to drive structural inequity, such as when low income means household food insecurity, which impacts the lifelong health of children. Inadequate housing, which is extremely common on-reserve, impacts lifelong physical and mental health. Social and health inequities persist across generations because policies of systemic discrimination and stigmatization reinforce existing inequities.

**What is the relationship between on-reserve living conditions and UNDRIP?**

The socio-economic inequalities faced by Indigenous people in Canada are connected to UNDRIP in two main ways:

- First, Articles 20-24 of UNDRIP affirms Indigenous peoples' rights to equitable and acceptable living conditions. These articles provide for the right to engage in and improve economic and social systems, with just and fair support by Canada, including in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. Notably, these UNDRIP articles are also connected more broadly to the broad suite of United Nations Declarations, which fundamentally uphold human dignity[3] and require states to use resources to progressively achieve economic and social rights without discrimination.[4]

- Second, implementation of UNDRIP as a whole requires the improvement of economic and social living conditions on-reserve. To implement UNDRIP, Canada will need to commit to supporting First Nations as strong, healthy, self-determining communities. Full implementation is not possible in a reserve system of poverty, isolation, intentional deprivation, and a structural lack of opportunity that undermines equity. For example:
  - The right to cultural expressions (Article 31) is impacted by poor living conditions because people suffering from health conditions may not be able to express their culture, and the reduced life expectancy of Elders prevents knowledge transmission.
  - The right to self-determination and self-government in Article 4 cannot be realized without adequate, sustainable, predictable, and flexible funding for First Nation governments – funding not currently provided.
  - Free, prior and informed consent cannot be meaningfully obtained without effective self-government, such that implementation of Article 11 is tied to robust implementation of Article 4 (especially because Canada does not provide consultation funding, so Nations have to choose between meeting basic needs and protecting their lands).

**What is Canada doing already?**

Prior to the UNDA Action Plan, Canada had begun to both recognize and take steps to address the social and economic inequities faced by Indigenous peoples living on-reserve.

In terms of recognition of the issue, these inequities have been public knowledge since at least 1996, when the Royal Commission on Aboriginal Peoples published its findings on the major gaps faced by Indigenous peoples (both on- and off-reserve) in areas such as health, well-being, and social conditions. Since then, the reports and studies describing service gaps on-reserve are too numerous to describe here, and include reports identifying issues with fiscal management, wastewater and water treatment, education, housing, infrastructure and more.[5]

In terms of taking steps to address these issues, Canada has begun to act in response to Indigenous advocacy taking place through collaborative relationships and, in some cases, legal challenges alleging discrimination in on-reserve service delivery in areas such as child welfare, clean drinking water, and policing. However, much work remains, and progress is slow. For example, after recognizing that the current system was failing First Nations Canada and Assembly of First Nations signed a Memorandum of Understanding to develop a "new fiscal relationship" in July 2016, but that new relationship has yet to be implemented. [6]

**What does the Action Plan commit to?**

In this area, as in others (as we described in previous sections), the Action Plan commits to "continuing" to do a lot of things, without making new, discrete commitments. For example, the first measure in the First Nations' priorities section commits to continuing "work underway with First Nation partners on a new fiscal relationship to provide sufficient, predictable and flexible funding in support of closing socioeconomic gaps and advancing self-determination." However, no specific funding is promised. The Action Plan does not comment on specific policies like the 10-year grant, block funding, core and proposal-based funding, and so on. Given that this process of a "new fiscal relationship" began in July 2016, when is the work no longer "new"?

The "continues" continue with First Nations priorities measures 11, 14, 15, 16, and 17. These address continuing to explore options for jurisdiction over housing and funding for on-reserve housing, improving the Income Assistance program particularly for on-reserve families, closing infrastructure gaps on-reserve, lifting drinking water advisories in First Nations communities, and advancing water and wastewater service transfer. Even without the word "continue," the intent is the same. This is true for First Nations priorities measures 12 and 13, which address First Nations control over health service delivery: a project that has been ongoing for decades.

The weak language of the measures is intensified by the absence of set, measurable commitments in the entire economic, health and social rights section of the First Nations priorities Chapter. This means that there will not be accountability in implementation. Without concrete action on such critical issues as housing and safe water and given the fundamental lack of information on sufficient and predictable funding, it is hard to imagine that the Action Plan will result in full implementation of UNDRIP.

**What are Nations saying about this aspect of the plan?**

Many Nations have identified this area of existing weakness as particularly pivotal for successful implementation of the Action Plan. As identified above, without healthy and vibrant First Nations institutions and communities, the plan cannot succeed. Today, for many First Nations people, even if they can secure housing on-reserve (which is often unavailable), choosing between living on- and off-reserve is a choice between "starvation and assimilation" – a choice that is fundamentally incompatible with the rights of Indigenous peoples protected by UNDRIP.

Nations have echoed the concerns identified above regarding weak measures and lack of measurable commitments. Indigenous people question whether the Action Plan will change anything for them and their communities.

**Our Action Plan Series**

We will continue to discuss the United Nations Declaration Act Action Plan in this ongoing blog series. Our next posts will consider the legal landscape of UNDRIP implementation and the key issue of free, prior, and informed consent.

References

1 Pendakur, Krishna, and Ravi Pendakur. "Aboriginal income disparity in Canada." *Canadian Public Policy* 37.1 (2011): 61-83.

2 Tjepkema, Michael, Tracey Bushnik, and Evelyne Bougie. "Life expectancy of First Nations, Métis and Inuit household populations in Canada." *Health Reports* 30.12 (2019): 3-10.

3 See Article 1 of the United Nations Declaration of Human Rights.

4 See the International Covenant on Economic, Social and Cultural Rights.

5 See e.g. Auditor General of Canada, *2011 Status Report*, "Chapter 4, Programs for First Nations on Reserves" (Ottawa, 2011), preface; Report 3—Access to Safe Drinking Water in First Nations Communities—Indigenous Services Canada (oag-bvg.gc.ca); The Effects of the Housing Shortage on Indigenous Peoples in Canada (ourcommons.ca).

6 A new approach: Co-development of a new fiscal relationship between Canada and First Nations (sac-isc.gc.ca)

**PART 4**

**Judicial Interpretation of UNDRIP in Canada**

On June 21, 2023, the federal government released the UN Declaration Act Action Plan (Action Plan) which attempts to lay out the framework for following through on the commitments of the *United Nations Declaration on the Rights of Indigenous Peoples Act (UNDRIPA*). The case law following the passage of *UNDRIPA* has been slow to develop, but there are signs it is headed in the right direction. The creation of the Action Plan by the federal government provides a useful foil with which to evaluate the developments in the courts.

In this section, we provide an overview of how Canadian courts have interpreted *UNDRIPA* and contrast it with the promises of the Action Plan. What we see is a judiciary that is still working to reconcile years of jurisprudence with this new legislative framework and an Action Plan that has more ambition than substance.

**United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in the Courts**

*Courts Optimistic Yet Cautious in Initial Decision about UNDRIP's Potential in Canadian Law*

In *Saik'uz First Nation v Rio Tinto Alcan*, 2022 BCSC 15, the Saik'uz First Nation claimed damages for harm to its Aboriginal fishing rights caused by a dam on the Nechako River.

British Columbia Supreme Court addressed the recently passed *UNDRIPA* in speculative terms, while noting that it can potentially provide a framework to expand and acknowledge Indigenous rights:

> It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. [1]

Since *Saik'uz*, the courts have found *UNDRIPA* to be more than "vacuous political bromide," but its impact has been slow to take hold. We see courts reference UNDRIP in three main ways:

1. The courts make a decision based on the merits of the case, but then mention UNDRIP and note that their decision is consistent with UNDRIP;
2. The courts suggest that UNDRIP creates substantive rights, but do not (yet) make this clear and definitive; and
3. The courts circumvent UNDRIP and decline to apply it.

At best, UNDRIP is persuasive authority to be relied upon. At worst, an argument framed solely around UNDRIP will fail.

**UNDRIP supports Indigenous peoples' right to regulate child and family services**

In the "*Bill C-92 reference*",[2] the Quebec Court of Appeal used UNDRIP to bolster its analysis that s. 35 of the Constitution Act, 1982 included the right of self-government over child and family services. The court, in a first, articulated a clear harmony between UNDRIP and the s. 35 right to self-government, noting UNDRIP confirms this Indigenous autonomy. The UNDRIP analysis provided a basis for the court to expand its jurisprudence from basing Indigenous rights on a case by case and group-specific basis to applying the right to all

Indigenous people.

The Bill C-92 Reference is on appeal to the Supreme Court of Canada.

The Action Plan states that Canada will "continue" to implement an *Act respecting First Nations, Inuit and Métis children, youth, and families*, which affirms the inherent right of self-government. In this case, the courts are much stronger than the Action Plan. By referencing UNDRIP itself, the courts are looking at the big picture of self-determination while the Action Plan is focused on continuing to implement a law that has been on the books for years.

**UNDRIP could create substantive rights**

In *Servatius v. Alberni School District No. 70*, *2022 BCCA 421*, the British Columbia Court of Appeal (BC Court of Appeal) considered arguments by an evangelical Protestant mother that her children's freedom of religion was unjustifiably infringed by their school hosting two demonstrations of Indigenous cultural practices: the smudging of a classroom, and a school assembly featuring a hoop dancer who said a prayer.

The BC Court of Appeal rejected the mother's claim, but declined to rule on whether the UNDRIP creates "substantive rights under s. 25 of the Charter". This leaves the door open to future courts finding that UNDRIP creates substantive rights within the existing constitutional framework. The Court did find that by seeking "to incorporate Indigenous culture and perspectives into the public school curriculum," the provincial government's conduct was consistent with the UNDRIP.

The Action Plan does not set out freedom of religion and freedom of expression of cultural beliefs. At Chapter 1, measure #101, there is general reference to traditional cultural expressions in relation to Canada's intellectual property laws. There is no protection for cultural expression in schools. Neither the courts nor the Action Plan create substantive rights in this area, but the court's commitment in *Servatius* is more concrete than the Action Plan's because it supports schools honouring Indigenous cultural expression.

**Labor law disregards UNDRIP**

In *Newcrest Red Chris Mining Limited v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 1-1937, 2023 BCLRB 10* an employer and union had a labor dispute over work at a mine. The mine is on the traditional territory of the Tahltan Nation (TN).

TN sought standing in the labor dispute, as they have numerous rights that were affected by the negotiations. TN had entered into an impact benefit and co management agreement with the employer and sought to ensure that any negotiated labor settlement would be consistent with the originally negotiated agreement. TN's position was that their free, prior, and informed consent was based on the negotiated agreement and the suggested resolution by the mediator did not account for TN's rights and title.

In a troubling holding, the Labor Board found TN did not have standing. Citing the labor code, the Board stated that the Tahltan Nation does not have a "direct and material interest in the outcome of the present proceeding," as the proceeding is just about the "process" by which a collective agreement can be achieved "rather than the content of the first collective agreement."

The Board then focused on the agreement itself, noting that it did not require that the Employer agree to any particular terms, but only that the Employer use "reasonable best efforts" to achieve certain terms and that, pursuant to the agreement, the Employer's obligation to use "reasonable best efforts" to achieve those terms would end if the Union were to commence a strike.

The Board concludes in contrast that an arbitrator can decide the terms of a first collective agreement and consequently incorporate the international, constitutional, and statutory rights of the Tahltan "if the arbitrator deems it relevant."

This may be an isolated case but is a concerning precedent. While the Board's decision is consistent with the enabling statute and stays within the confines of labor law, it fails to properly acknowledge the importance of TN's rights and any impact on them. Administrative

law is an area that should be monitored, as it appears to be one of the slowest to accommodate UNDRIP.

Chapter 1, measures #32-34 of the Action Plan speak to free, prior, and informed consent including in specified administrative law venues. In this area, Nations should rely on the Action Plan for persuasive authority on the importance of consultation and collaboration, particularly in the context of natural resources projects as the case law appears incongruous at this point.

**Nations must carefully consider how they make their resolutions**

In *George v. Heiltsuk First Nation, 2022 FC 1786*, the court was asked to review a decision made by Heiltsuk Tribal Council via Band Council Resolution (BCR). Heiltsuk Tribal Council (HTC) had barred someone from their land via BCR, and the individual challenged the decision in the courts. HTC brought a motion to dismiss the application to review on the basis that the action was taken "consistent with its inherent right of self – determination and self-government, as recognized by Articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)." [3]

In what appears to be a cautionary tale for Indigenous governments, rather than evaluating the substance of the decision, the court reviewed the actual verbiage of the BCR. Because the standardized text opened with: "WHEREAS sections 81(1)(p.1) and (p.2) of the Indian Act empower the Council…" the court found that "the impugned actions were undertaken by HTC pursuant to power granted under federal legislation," and found they did have authority to review. The seeming innocuous language at the top of the BCR was the difference between HTC having its own power rather than simply being a "federally empowered decision maker." The court concluded with a statement noting the nuanced and complicated relationship between indigenous and Canadian governments,

"As this Court is increasingly called upon to create space for Indigenous law within our jurisdiction, the Court will endeavor to delineate its jurisdictional boundary in a manner that is respectful of Indigenous peoples and their legal traditions, while taking into account their

assertion of self-government and the Government of Canada's endorsement of the UNDRIP through the federal UNDRIPA."[4]

**Case to watch – *Gitxaala v British Columbia (Chief Gold Commissioner)***

In *Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 29*, Gitxaala Nation is challenging parts of the mineral tenure regime in British Columbia. Under the current system ("free-entry"), there is no duty on any miner to consult with any First Nation prior to staking a claim for mineral rights on a parcel of land.

Gitxaała's position is that the free-entry system does not respect the Crown's "duty to consult," breaches the test set out in *Haida Nation v. British Columbia (Minster of Forests), 2004 SCC 73* and has had an adverse effect on their rights or title. Gitxaała asserts that UNDRIP provides legal standards the court can use to invalidate legislation that violates the duty to consult and is otherwise inconsistent with UNDRIP.

The Action Plan binds the Canadian federal government, so it is not as relevant here, but in general, the Action Plan supports the requirement of free, prior, and informed consent (FPIC). It however commits only to "developing guidance" and making "recommendations" rather than shifting policy to immediately implement FPIC in a constructive way. While British Columbia has its own legislation incorporating UNDRIP, Gitxaała's analysis will be broadly relevant nationally on the interplay between UNDRIP and consent.

**Bill S-13 Amending the Interpretation Act**

On June 8, 2023, the federal government introduced Bill S-13[5] that would amend the federal Interpretation Act to include a non-derogation clause to uphold section 35 Aboriginal and treaty rights. The bill states that the law should be interpreted to uphold, and not diminish, the rights of First Nations, Inuit and Métis recognized and affirmed by section 35 of the Constitution Act, 1982. Ideally this will further bolster the recognition of the rights of Indigenous peoples in the courts, but this remains to be seen.

**Conclusion**

The journey towards integrating UNDRIP into Canadian law is like any new recipe, it includes a mixture of optimism and caution. While initial court decisions acknowledge UNDRIP's significance and potential, progress has been gradual and varies in different areas of the law.

Canadian courts have started to take judicial notice of UNDRIP in their judgments, demonstrating a willingness to explore its impact on Indigenous rights. But the process remains evolving and complex, requiring the reconciliation of long-established jurisprudence with this new legislative framework. Courts have taken different approaches, sometimes making decisions consistent with UNDRIP or hinting at its substantive rights, while in other instances, they have avoided its direct application.

The Action Plan is a crucial step towards implementing UNDRIP, but it is not without criticism. Although it affirms a commitment to Indigenous rights, the Action Plan is criticized for lacking substantive measures and concrete changes. While courts are beginning to embrace UNDRIP in their interpretations, the Action Plan should strive to match this commitment and substance to ensure the effective protection of Indigenous rights.

Moving forward, a harmonious and constructive approach between courts, government, and Indigenous communities will be vital to realizing the true potential of UNDRIP in Canadian law. The commitment to respecting Indigenous autonomy and self-determination, as enshrined in UNDRIP, should continue to guide these efforts, leading to a more equitable and just society for all.

References

1 Saik'uz First Nation v Rio Tinto Alcan, 2022 BCSC 15

2 *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis* 2022 QCCA 185

3 Para 66

4 Para 76

5 https://www.parl.ca/DocumentViewer/en/44-1/bill/S-13/first-reading

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