Bill C-15 Passed: Federal Government to Align Federal Laws with the United Nations Declaration on the Rights of Indigenous Peoples

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It is expected that Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act*[1] ("Bill C-15") will receive Royal Assent today on National Indigenous Peoples Day.

Bill C-15 affirms the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") as a universal international human rights instrument with application in Canadian law and requires the Government of Canada to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP and to prepare and implement an action plan to achieve the objectives of UNDRIP.

UNDRIP is a statement of principles adopted by the United Nations General Assembly in 2007.[2] It is a human rights declaration that elaborates on existing human rights standards and fundamental freedoms as they apply to the specific situation of Indigenous peoples. UNDRIP addresses a broad range of individual and collective Indigenous rights, such as the rights to education, identity, health, employment, culture, language, self-determination, and social and cultural development.[3] For more information on UNDRIP and the introduction of Bill C-15, see our article here.

This article provides an overview of Bill C-15 as passed by the federal government and what it means for Canada.

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1 Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2020-2021 (as passed by the Senate 16 June 2021) ["Bill C-15"].
2 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, A/RES/61/295 [UNDRIP].
3 *Ibid*.

ACTION PLAN AND REPORTING

Bill C-15 requires the federal government, in consultation and cooperation with Indigenous peoples, to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP.[4] As a result, the Minister must, in consultation and cooperation with Indigenous peoples and other federal ministers, prepare and implement an Action Plan to achieve the objectives of UNDRIP.[5] The Action Plan must include:

1 measures to:

   a) address injustices, combat prejudice, and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples, and

   b) promote mutual respect, understanding, and good relations, including through human rights education

2 measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to implementation of UNDRIP, and

3 measures related to monitoring the implementation of the action plan and reviewing and amending the action plan.[6]

The Action Plan must be prepared within two years of Bill C-15 coming into force.[7] At the end of each fiscal year, the Minister, in consultation and cooperation with Indigenous peoples, must prepare and table a report on the measures taken to ensure the laws of Canada are consistent with UNDRIP and the measures taken to prepare and implement the Action Plan.[8] The report and the Action Plan must be made public.[9]

FREE, PRIOR AND INFORMED CONSENT

Much of the discussion about Bill C-15 has focused on the concept of free, prior and informed consent ("FPIC") and whether it gives Indigenous peoples a veto over resource

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4 Bill C-15, *supra* note 1, cl 5.
5 *Ibid*, cl 6(1).
6 *Ibid*, cl 6(2), (3).
7 *Ibid*, cl 6(4).
8 *Ibid*, cl 7.
9 *Ibid*, cls 6(6), 7(4).

development projects. The concept of FPIC appears in several provisions of UNDRIP. For example, Article 32(2) states:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[10]

The federal government has taken the position that reference to FPIC in Article 32 is not a veto. In committee hearings for Bill C-15, Justice Minister David Lametti stated that "FPIC is a process" and that it "will be contextual, so there is no way to precisely define it at the outset."[11]

FPIC as a context-specific process is supported by the text of UNDRIP itself. Various articles in UNDRIP refer to FPIC in different ways. For example, Article 10 provides that "no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned…"[12] Whereas Article 32(2) speaks of consultation and cooperation with Indigenous peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories, Article 10 mandates that no relocation shall take place without FPIC.

The different treatment of FPIC in UNDRIP indicates the contextual nature of FPIC. In the context of Article 32, FPIC speaks to a process of cooperation and consultation. This interpretation is consistent with existing Canadian jurisprudence on s. 35 of the *Constitution Act, 1982* and the duty to consult.

Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal rights, title and treaty rights of Indigenous peoples. The federal and provincial governments' (the "Crown") duty to "act honourably in defining the rights guaranteed by

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10 UNDRIP, *supra* note 2, art 32(2).

11 Globe and Mail, "The Liberals Give UNDRIP a Blank Cheque" (25 May 2021), online: https://globe2go.pressreader.com/@nickname11051113/csb_z5Rvr6B5Q1rgV7PAHuXG7rTjoP-zU4latdQKfTeKeVhAKEp76lZg7yuwZNbvF8Yq.

12 UNDRIP, *supra* note 2, art 10.

s. 35 and in reconciling them with other societal rights and interests" gives rise to a duty to consult.[13] The duty to consult arises where the Crown has:

1 actual or constructive knowledge of an existing or asserted Aboriginal right, title or treaty right, and

2 contemplates conduct that may potentially affect that right.[14]

The extent of consultation and accommodation required to satisfy the duty to consult depends on the strength of the case supporting the existence of the right or title, and on the seriousness of the potentially adverse effect upon the right or title claimed.[15] In some cases, the duty to consult may require providing notice of a project and an opportunity to comment, while in other cases it may entail formal participation in the decision-making process and funding to do so.

The concept of "consent" has existed in the duty to consult jurisprudence for many years. In its 1997 decision in *Delgamuukw v British Columbia*,[16] the Supreme Court of Canada stated that in some cases, the duty to consult may require obtaining the consent of affected Indigenous peoples.[17] The Supreme Court discussed the concept of consent again in 2014 in *Tsilhqot'in Nation v British Columbia*.[18] The Supreme Court stated that where a proposed activity may infringe on Aboriginal title, the Crown must obtain the consent of the interested Indigenous group.[19] These cases suggest that the duty to consult is a context-specific process, and one which may, in some cases, require obtaining the consent of Indigenous peoples. With Bill C-15's affirmation that UNDRIP has application in Canadian law, we anticipate that there will be further jurisprudence that applies UNDRIP and FPIC as an interpretive tool to Canadian statutory consultation obligations.

Interpreting FPIC as a process of consultation and collaboration that may require consent in some cases is consistent with the s. 35 jurisprudence. FPIC is unlikely to be interpreted as giving Indigenous peoples a veto over every new resource development project. The preamble of UNDRIP itself, which can be used to interpret its Articles, recognizes that Indigenous peoples are "equal to all other peoples".[20]

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13 *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 62.
14 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 35.
15 *Ibid* at para 39.
16 [1997] 3 SCR 1010, 1997 CanLII 302 (SCC).
17 *Ibid* at para 168.
18 2014 SCC 44.
19 *Ibid* at para 76.
20 UNDRIP, *supra* note 2, Preamble.

UNDRIP IN CANADA

Now that Bill C-15 has been passed, the work begins to ensure that the laws of Canada are consistent with UNDRIP and to develop and implement an Action Plan to achieve the objectives of UNDRIP.

Which environmental laws might be amended to be consistent with UNDRIP?

The *Impact Assessment Act*[21] ("IAA") currently references UNDRIP in its preamble and already has a number of provisions that could be used to provide Indigenous peoples affected by a project a meaningful role in environmental assessment. The IAA is in its early days of implementation, however, the government of Canada believes that the IAA is already UNDRIP consistent.

Bill C-28 proposes amendments to the *Canadian Environmental Protection Act, 1999*,[22] which reference UNDRIP and require the federal government to offer to consult with Aboriginal governments when amending the list of substances to be given priority in the assessment of whether they are toxic or capable of becoming toxic.[23]

Aside from legal requirements, obtaining FPIC from affected Indigenous peoples is emerging as an ESG (Environmental, Social and Corporate Governance) standard for corporate boards. For example, the 360˚Governance Guidelines provide that corporations should report activities with and without free prior and informed consent to shareholders as a matter of risk disclosure.[24] In addition, the Mining Association of Canada's Towards Sustainable Mining protocol identifies a good practice to include: "a demonstrated commitment to aim to obtain the Free, Prior and Informed Consent of directly affected Indigenous peoples for new projects and expansions where impacts to rights may occur."[25]

The new UNDRIP legislation will apply to federal laws and actions. BC is the only provincial jurisdiction that has similar UNDRIP specific legislation. In the territories, where the legal landscape is very much driven by land claim settlement agreements, Inuit

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21 SC 2019 c28 s 1.

22 SC 1999, c 33.

23 Bill C-28, *An Act to amend the Canadian Environmental Protection Act, 1999, to make related amendments to the Food and Drugs Act and to repeal the Perfluorooctane Sulfonate Virtual Elimination Act*, 2nd Sess, 43rd Parl, 2020-2021 (first reading 13 April 2021).

24 Peter Dey & Sarah Kaplan, "360˚ Governance: where are Directors in a World in Crisis?" Rotman School of Management, online: https://www.rotman.utoronto.ca/FacultyAndResearch/ResearchCentres/LeeChinInstitute/Sustainability-Research-Resources/360-Governance-Report.

25 Mining Association of Canada, "Towards Sustainable Mining", online: https://mining.ca/towards-sustainable-mining/protocols-frameworks/indigenous-and-community-relationships/.

and First Nations peoples sit on environmental assessment and land and water permitting tribunals and thus have a meaningful role in shaping project approvals. In addition, agreements with the impacted Indigenous peoples are mandated before major development projects can proceed under the land claims agreements and under the prospective Northwest Territories *Mineral Resource Act.*[26]

As the process of developing an Action Plan unfolds, we will learn more about what Bill C-15 and UNDRIP mean for federal legislation, plans and policies.

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[26] Bill 34, *Mineral Resources Act*, 3rd Sess, 18th Leg, Northwest Territories, 2019.