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BARRISTERS AND SOLICITORS

Artwork by Robert

# Because it's 2019: UNDRIP Implementation

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# United Nations Declaration on the Rights of Indigenous Peoples

## The Declaration:

- broadly describes the individual and collective rights held by Indigenous peoples, including the right to self-determination;
- identifies rights to education, health, employment, language, identity, and a wide range of economic and social rights, including rights to lands and resources and traditional livelihoods;
- rejects all forms of discrimination against Indigenous people, including gender discrimination;
- ensures the right of Indigenous peoples to remain distinct and to pursue their own priorities in economic, social and cultural development; and
- encourages harmonious and cooperative relations between States and Indigenous peoples through their own representative institutions.

# United Nations Declaration on the Rights of Indigenous Peoples

## What it is.

- International resolution adopted by the UN General Assembly in 2007 by 144 nations.
- There were some notable exceptions: Canada, Australia, New Zealand and the USA, voted against adoption.
- In 2009 and 2010, Australia and New Zealand adopted the Declaration.

## What it does.

- Not a convention or treaty.
- Declarations express international political commitments to matters of global significance.
- Declarations form part of customary international law.
- Declarations inform domestic law, including Canadian common law.

# Canada's Positions on the Declaration



# So why the holdup?

Hint...consent!

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.

Article 32

The story so  
far...

*For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada. The establishment and operation of residential schools were a central element of this policy, which can best be described as cultural genocide.*

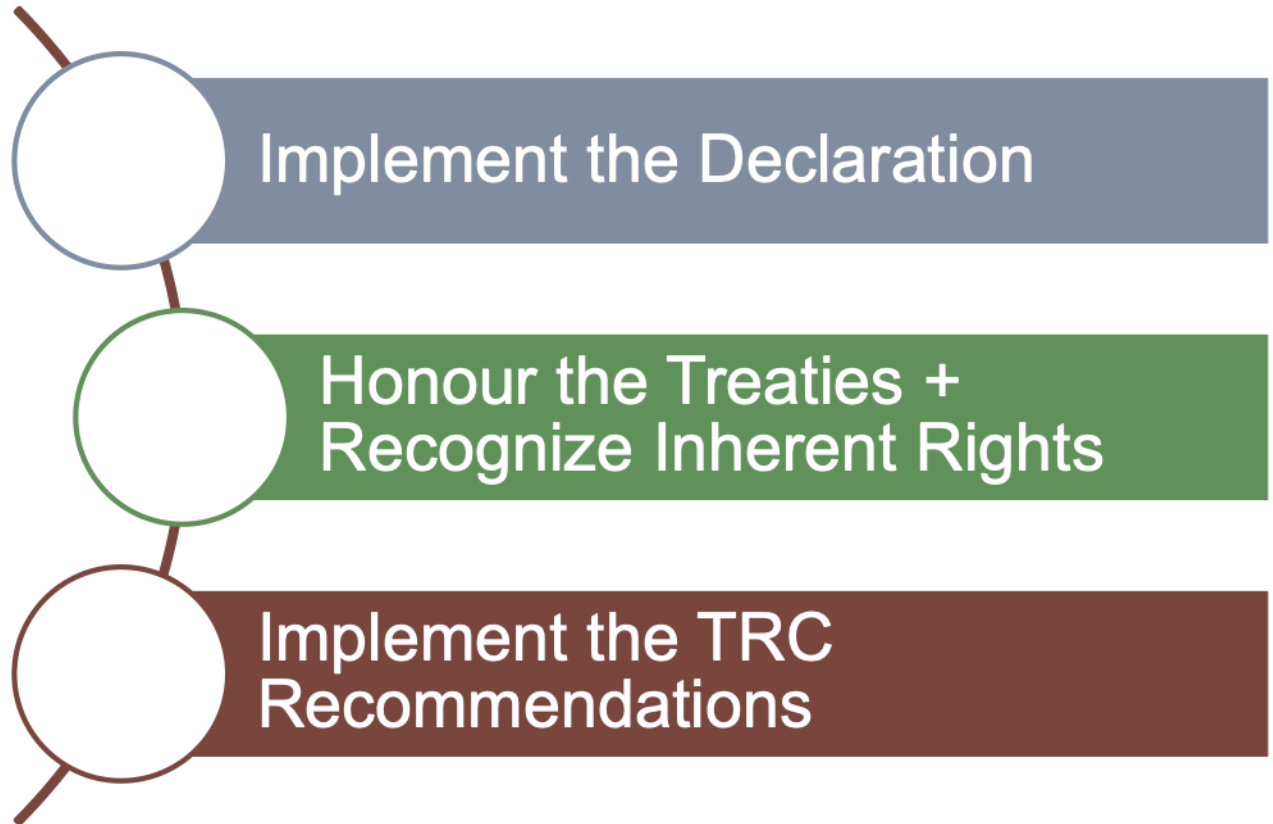
**Final Report, Truth and Reconciliation  
Commission (2015)**

## TRC Recommendations

- Adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.
- Renew or establish Treaty relationships based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.
- Reconcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements.

Three Pathways  
to Reconciliation  
and Self-  
Determination

Grand Chief Dr.  
Wilton Littlechild





2008: Legislative Assembly of the NWT “recognizes and supports” the Declaration, “strongly urges the Government of Canada to respect and honor the decision of the international community in adopting the Declaration.”

2018: Bill C-262 introduced to recognize and give effect to the Declaration in Canadian law.

Crickets from the GNWT.

## Motion

### United Nations Declaration on the Rights of Indigenous People

WHEREAS the *United Nations Declaration on the Rights of Indigenous People* establishes a universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous people;

AND WHEREAS the *United Nations Declaration on the Rights of Indigenous People*

- addresses individual and collective rights;
- identifies rights to education, health, employment and language;
- outlaws discrimination against indigenous people;
- ensures their right to remain distinct and to pursue their own priorities in economic, social and cultural development; and
- encourages harmonious and cooperative relations between States and indigenous peoples;

AND WHEREAS Canada as a member of the United Nations Human Rights Council took a leadership role within the Commission on Human Rights that drafted the Declaration over the past 20 years;

AND WHEREAS on September 13, 2007 the United Nations adopted the *Declaration on the Rights of Indigenous People* by a vast majority vote of 143;

AND WHEREAS Canada was one of only four countries that voted against the *United Nations Declaration on the Rights of Indigenous People*;

AND WHEREAS the Declaration is now an aspirational document; ~~78627~~

NOW THEREFORE I move, seconded by the honourable Member for Mackenzie Delta, that this Legislative Assembly recognizes and supports the *United Nations Declaration on the Rights of Indigenous People* as an international legal instrument;

AND FURTHER that this Legislative Assembly strongly urges the Government of Canada to respect and honor the decision of the international community in adopting the Declaration.



Date of Notice:

Date of Introduction:

Disposition:

Carried:

February 15, 2008

February 19, 2008

Carried as Amended R.V.

February 19, 2008

Moved by:

Seconded by:

Ruled Out of Order;

Mr. Menicoche

Mr. Krutko

# Where are We Now?

## Private Member's Bill C-262: the UNDRIP Act

- Adopted in the House on May 30, 2018
  - “An act to ensure that the laws of Canada are **in harmony** with UNDRIP”
- Foundational Language
  - “the Parliament of Canada recognizes that **the principles** set out in UNDRIP **should be enshrined** in the laws of Canada”
  - “Canada is committed to **taking appropriate measures** – including legislative, policy and administrative measures – at the national and international level, in consultation and cooperation with indigenous peoples, to achieve **the ends** of UNDRIP and to follow up on its effectiveness”

# Where are We Now?

## Section 1 – Short Title

- The UNDRIP Act

## Section 2 - Interpretation

### Aboriginal and treaty rights

- (1) “...nothing in this Act is to be construed so as to diminish or extinguish existing aboriginal or treaty rights of the Aboriginal peoples of Canada that are recognized and affirmed in section 35 of the *Constitution Act, 1982*”

### Declaration

- (2) “Nothing in this Act is to **be construed as delaying the application** of UNDRIP in Canadian law”

# Where are We Now?

## Section 3 – UNDRIP

- UNDRIP is “affirmed as a universal international human rights instrument **with application in Canadian law**”

## Section 4 – Consistency

- Government, in consultation with indigenous peoples, must take all measures to **ensure Canadian laws are consistent** with UNDRIP

## Section 5 – National Action Plan

- Government, in consultation with indigenous peoples, must develop and implement **a national plan to achieve UNDRIP’s objectives**

## Section 6 – Report to Parliament

- The Minister must submit a report every year between 2017 and 2037 on the implementation of measures, per sections 4 and 5

# Where Do We Go From Here?

- UNDRIP has been referred to in **over 50 Canadian court decisions**
  - These cases have dealt with a wide variety of issues including, discrimination adoption, self-government, and the duty to consult
- UNDRIP has been referenced in **over a half-dozen statutes** at federal and provincial levels
  - *Path to Reconciliation Act*, 2016 (Manitoba)
  - *Child, Youth and Family Services Act*, 2017 (Ontario)
  - Bill 51 – *Environmental Assessment Act*, 2018 (BC)

# Where Do We Go From Here?

- The Bill continues the incremental approach to UNDRIP adoption that is moving forward, not only internationally, but federally and provincially
  - *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, 10 Principles, 2018
  - Recognition and Implementation of Indigenous Rights Framework (ongoing)
  - *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, 2018
  - BC UNDRIP Implementation Legislation (ongoing)

“It will be more than symbolic; we need to address reconciliation in British Columbia” – John Horgan

# The Promise of UNDRIP

- UNDRIP marks an overdue shift from a consultation and accommodation framework to a nation-to-nation relationship
  - This begins a process that will involve building approaches in support of co-operative federalism and legal pluralism
  - The space for creative and innovative mechanisms that respect the needs and circumstances of Indigenous groups will be required
    - Approaches that directly solicit consent
  - This shift will demand more than a single piece of legislation, but a whole-of-government approach and genuine and enduring commitment to changing the nature of Crown-Indigenous relations

QUESTIONS?

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# The FPIC “Problem”

## UNDRIP Article 32(2):

- “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 and territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”

## Multi-stakeholder support for FPIC adoption exists:

- World Bank, 2015 Safeguards make FPIC from impacted communities a condition precedent to project funding
- The Boreal Leadership Council (BLC) FPIC Report urged government and industry to implement FPIC when working with Indigenous peoples
  - BLC is an industry-led consortium, including majors such as Suncor and Tembec

# Free, Prior and Informed Consent

