



8 May 2024

Submission to the Senate Standing Committee on Indigenous Peoples

Study to examine the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples Act, 2021* by Canada and First Nations, Inuit and Métis peoples

Submission on behalf of:

Amnistie internationale Canada
francophone

First Nations Summit

Association Tinhinan

Union of British Columbia Indian Chiefs

British Columbia Assembly of First Nations

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Adoption of the *United Nations Declaration on the Rights of Indigenous Peoples Act* was a momentous achievement. Through the *Declaration Act*, Canada affirmed its intent to uphold the standards set out in the *UN Declaration* and put in place clear legislative requirements for their full and effective implementation. Adoption of the *Declaration Act* was the culmination of years of advocacy by Indigenous Peoples' organizations and advocates. It was also an important act of reconciliation by the Parliament of Canada, as recognized by the Truth and Reconciliation Commission of Canada which called the *Declaration* "the framework for reconciliation at all levels and across all sectors of Canadian society." In addition, adoption of this legislation has



provided an important model for how other states around the world can fulfill their own obligations to uphold the *UN Declaration*.¹

This being said, our Coalition is deeply concerned by the slow and uneven progress toward fulfilling the commitments set out in the *Declaration Act*. Compliance with the *UN Declaration* requires a fundamental transformation in Canada's relationship with Indigenous Peoples. The three years that have passed since the adoption of the Act is a short period of time in relation to the enormity of this task. At this point, however, we would expect to see greater clarity and transparency about the path forward. Unfortunately, the vagueness of Canada's 2023 Action Plan on critical matters such as resources for participation, the process of law reform, structures for oversight and accountability, and the training of civil servants only feeds into doubts about the sincerity of Canada's commitments to the *UN Declaration*.

As the *Declaration Act* states, and the Supreme Court of Canada has confirmed,² the *UN Declaration* is part of the law of the land: compliance with the law is not discretionary. Furthermore, the *Declaration Act*, collaboratively developed with Indigenous Peoples' organizations, and actively promoted by the Government of Canada as an act of reconciliation, must be understood as a solemn commitment to Indigenous Peoples.

We welcome this timely and important Study by the Senate Committee. In this submission we have set out a number of areas where we have ongoing concerns that the necessary foundations for successful implementation of the *Declaration* have not been put in place and where, in our experience, the government has not provided a clear account of its actions or intent.

We hope that the Committee's study will help provide the clarity and transparency that is so urgently needed.

Coalition for the Human Rights of Indigenous Peoples

The Coalition has been actively engaged with the *UN Declaration* for more than a quarter century, first in working toward adoption of the *Declaration* at the United Nations, and then in mobilizing support for implementation in Canada. The Coalition engages with a wide range of Indigenous partners and works both domestically and at the United Nations.

¹ Coalition for the Human Rights of Indigenous Peoples, Joint Statement to the UN Expert Mechanism on the Rights of Indigenous Peoples, Item 9: Report Establishing Effective Monitoring Mechanisms for the Implementation of the United Nations Declaration on the Rights of Indigenous Peoples, 20 July 2023. <https://quakerservice.ca/news/joint-statements-delivered-at-the-un-in-geneva-expert-mechanism-on-the-rights-of-indigenous-peoples/#:~:text=After%20years%20of%20opposition%20to,of%20this%20cannot%20be%20understated.>

² *Attorney General (Quebec) v Attorney General (Canada)*, 2024 SCC 5.



1. Meeting the standard of “consultation and cooperation”

The *UN Declaration Act* explicitly states that measures to implement the *UN Declaration* “must” be taken “in consultation and cooperation” with Indigenous Peoples. The phrase “consultation and cooperation” directly mirrors the *UN Declaration* itself where the phrase “consultation and cooperation with Indigenous Peoples” appears five times in defining state obligations. The UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), the principal UN body tasked with interpreting the *UN Declaration*, has noted that the deliberate use of this “combined term” clearly implies that Indigenous Peoples must have a significantly higher degree of participation, and greater decision-making authority, than afforded through mere consultation.³

The standard of consultation and cooperation cannot be met simply by inviting Indigenous Peoples to the table. The decision-making process must be capable of accommodating effective and meaningful participation of Indigenous Peoples, consistent with their inherent right to self-determination, their jurisdiction, and their own modes of decision-making. This includes mutually agreed timelines, effective information sharing, and transparency about how the views of Indigenous Peoples will be incorporated into the final decision, including a mutually agreed upon understanding of how free, prior and informed consent will be operationalized.

Critically, in order for Indigenous Peoples to participate meaningfully in such a process, they must have access to resources needed to independently research the issues at hand; obtain guidance and advice from Elders, Knowledge Keepers and other experts of their choosing; support their chosen representatives’ effective participation in any meetings; and consult with their citizens and communities as appropriate. Such participation is always resource intensive and this can present a significant challenge for Indigenous Peoples, given the wide range of implementation activities that they may wish to engage with, and the difficulties created by the federal government’s chronic under-funding of Indigenous governance structures, institutions, and processes.

During these Senate hearings, Department of Justice officials stated that a participation fund of “about \$26 million was made available to over 150 Indigenous partners across the country” during the development of the federal Action Plan. It is not clear what – if any – funds are now available to support Indigenous Peoples’ participation in implementation of that plan, and other ongoing activities related to the *UN Declaration*, such as the required review and reform of Canada’s laws and policies to ensure consistency with the *Declaration*.

³ UN Human Rights Council, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination – Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 4 August 2021. UNDOC A/HRC/48/75



This gives rise to the following potential scenarios:

- Federal departments and agencies may be carrying out implementation measures without meaningful participation of Indigenous Peoples, contrary to the requirements of the *Declaration* and the *Declaration Act*.
- Potential implementation measures, including measures named in the Action Plan, may be stalled because federal departments are unable to meet the standard of consultation and cooperation.
- Indigenous Peoples' organizations may be put in a position of having to negotiate funding for participation on an initiative-by-initiative basis.
- Indigenous Peoples' organizations may have to divert resources from other priorities in order to be at the table when *Declaration* implementation initiatives are being advanced.

Conversations with partners suggest that variations of all these scenarios are, in fact, currently playing out across various departments.

2. Structures required to support *UN Declaration* implementation

The *UN Declaration Act* states that Canada's Action Plan to implement the *Declaration* "must" include "measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration [6 (2) (b)]". The *Declaration Act* further states that the Action Plan "must" include "measures related to monitoring the implementation of the plan and reviewing and amending the plan [6 (3)]."

The Action Plan tabled in June 2023 failed to meet these requirements.

The Plan includes a commitment to eventually establish an independent Indigenous rights mechanism or mechanisms. The plan also includes a commitment to create an advisory body which the government may call on – or not – at its own discretion.

In testimony before this Committee, Justice officials noted the complexity of creating oversight and remedy mechanisms responsive to the diverse needs and values of Indigenous Peoples. In a written response requested by this Committee, the Department states, "We anticipate that a multi-stage process will be needed in order to adequately explore the various options and identify which will best meet the objectives of this action plan measure over the longer term."



We fully appreciate the complexity of this challenge. It is clear that a one-size fits all approach would not be appropriate or helpful. Above all else, it is necessary that all mechanisms and processes be developed in consultation and cooperation with Indigenous Peoples.

However, the complexity of the task does not explain or excuse the failure to develop an interim mechanism. It has been three years since the Act was adopted by Parliament. Given the response from the Department of Justice it seems likely that an equal or greater number of years may pass before any permanent mechanism is established. In the meantime, there is no mechanism for oversight, evaluation and accountability that is either independent of government or properly positioned to work on a whole of government basis, rather than working within the confines of a specific department.

In January 2023, the federal government announced the appointment of a Ministerial Special Representative to examine options for the creation of national human rights mechanisms for Indigenous Peoples in fulfillment of Call to Justice 1.7 of the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls.

In these hearings, government officials have rightly emphasized that the work of the Ministerial Special Representative is highly relevant to the development of the accountability mechanisms called for in the *UN Declaration Act*. At the same time, while these interconnections are indisputable, it is also the case that there are requirements of the *UN Declaration Act*, such as the requirement for monitoring of the Action Plan, and the requirement of review and reform of Canada's laws [discussed below], that would benefit from a similar high-level attention at arm's length from any department. It is not clear whether or not the government has contemplated creating a high level or independent representative to help lead this work, pending future development of permanent oversight and remedy mechanisms.

An independent Indigenous rights mechanism is required to monitor implementation of the *UN Declaration Act* and the Action Plan, and to provide recourses and remedies to Indigenous Peoples when their individual and collective rights are violated. This mechanism must reflect the rights of all Indigenous Peoples to self-determination and be co-developed with Indigenous Peoples, including organizations directly representing Indigenous rights holders as well as national-level advocacy organizations. Its membership must be representative and diverse, and established through a fair and transparent process, to ensure the mechanism is seen as legitimately representing the rights and interests of Indigenous Peoples. It must also have sufficient and secured funding, and full independence, so it can hold governments accountable without fear of reprisal.

Furthermore, this mechanism must have authority and power in law to order binding recourses and remedies, so that its decisions have more "teeth" than recommendations, which are too often merely taken under consideration, and never implemented.



To be legitimate and effective this mechanism must also be permanent. As the circumstances facing Indigenous Peoples and related Canadian and international law change over time, the mechanism must always be in place to ensure that Canada’s legislative, administrative, policy, and regulatory practices remain consistent with the *UN Declaration*, and the progressive development of Canadian and international law.

3. Legal guidance on implementation of the *UN Declaration*

The first stated purpose of the *UN Declaration Act* is to “affirm the Declaration as a universal international human rights instrument with application in Canadian law [4(a)].” In a recent reference decision – after considering the *Declaration* itself, the *Declaration Act*, and the incorporation of Canada’s commitments to the Declaration in the 2019 *Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24) – the Supreme Court of Canada unanimously concluded that the *Declaration* is part of “the country’s positive law”.⁴

Despite this, in recent meetings with government officials we have been informed that the Department of Justice continues to hold the position that the *Declaration* is not legally binding. While we have no doubt that there are many officials in the Department of Justice who are committed to advancing the *Declaration*, we have serious concerns about the overall capacity of the Department to fulfill Parliament’s intent that the *Declaration* be fully implemented and upheld in Canada. These are critical concerns given that the Department continues to play a key role in implementing the Act, provides legal advice to other departments, and may act as a “gatekeeper” in defining what the government, as a whole, may say about the *Declaration* and Canada’s obligations.

International law in general, and international human rights law in particular, are highly specialized fields of practice. Most lawyers in Canada have not studied international law and have little or no experience in its application. It seems likely that this is also true of the majority of lawyers at the Department of Justice. Furthermore, the role played by the Department of Justice during the years in which Canada actively opposed the Declaration in international fora and domestic courts raises reasonable apprehensions about the Department’s credibility and impartiality on the subject of the *Declaration*.

We are aware that when Canada was actively opposing the *Declaration* at the United Nations, the government of the day sought independent legal advice to help bolster its arguments. We are not aware whether the government has since sought updated advice consistent with its formal commitments to fully implement the *Declaration*.

⁴ *Attorney General (Quebec) v Attorney General (Canada)*, 2024 SCC 5.



In 2018, the Attorney General of Canada adopted – and made public – new guidelines for how the department would engage in civil litigation involving Indigenous Peoples.⁵ These guidelines, while marking a significant break with the regressive approaches of the past, were adopted prior to the *UN Declaration Act* and indeed prior to other legislation such as the *Indigenous Languages Act* (SC 2019, c. 23) and the *Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24), which also affirmed Parliament’s intent to implement the *Declaration*. Apart from noting the importance of “guidance” from the *Declaration*, the Directive offers no commentary on the *Declaration’s* legal status in Canada or Canada’s obligation to work in consultation and cooperation with Indigenous Peoples to achieve its full realization. It is not clear whether there is any intent to update these guidelines.

4. Training of civil servants

The June 2023 Action Plan includes a commitment for the Department of Justice and other departments to:

Develop and implement foundational training co-created by Indigenous subject matter experts, including with the Canada School of Public Service, for federal public servants that will build fundamental understanding and competence about the history, rights and title of Indigenous peoples, treaties, the UN Declaration, the UN Declaration Act, the dynamics of respectful relations, Indigenous-specific systemic racism, and meaningful reconciliation.

In testimony before this Committee, Department of Justice officials stated:

Justice Canada, in collaboration with the Canada School of Public Service and Indigenous experts, has held UN Declaration Act training sessions in 2022 and 2023, engaging over 4,000 officials. These efforts are key to equip officials to think about whether and how their work intersects with the declaration and to identify where and when consultation and co-operation with Indigenous peoples are needed as part of ensuring that federal laws are consistent with the declaration.

The Coalition was surprised to learn that such training had already taken place. Our organizations have repeatedly sought clarification from the federal government about what, if any training, was being provided to assist members of civil service understand the *Declaration* and Canada’s obligations. Just this year, in March 2024, Crown-Indigenous Relations shared a

⁵ Minister of Justice and Attorney General of Canada, *The Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples*, 2018. <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html#:~:text=Core%20objectives-,A%20core%20theme%20of%20this%20Directive%20is%20to%20advance%20an,matters%20will%20require%20legal%20clarification.>



training package that we understand is still under development and has not yet been rolled out for use.

Training is a critical concern. As noted above, international human rights law is a highly specialized field. Unfortunately, the period of Canada's opposition to the *Declaration* has led to considerable misunderstandings and misrepresentations about how this instrument should be understood and applied.⁶ It is particularly important therefore that civil servants receive accurate information about the *Declaration* and that there be full transparency about who is being trained, how and what they are being trained in, and who is doing the training.

5. Consistency of the laws of Canada

The *UN Declaration Act* states that "the Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration [5]." This provision is arguably the heart of the Act, establishing an immediate obligation applicable to the interpretation and application of all laws of Canada. Unfortunately, this provision has to a large degree been overshadowed by the requirement to develop an Action Plan.⁷ And indeed the Action Plan itself devotes only three action items to implementing this critical provision.

The Action Plan states that Canada will:

- "Develop and implement a process and further direction for federal government departments and agencies to ensure bills and proposed regulations are consistent with the UN Declaration."
- "Identify and prioritize existing federal statutes for review and possible amendment."
- Where statutes include mandatory review processes, ensure that such reviews are conducted "in a manner that ensures consistency with the UN Declaration and meets applicable consultation and cooperation requirements in the UN Declaration Act."

The Act is thin on details about how these commitments will be realized or the role that will be played by Indigenous Peoples.

⁶ Coalition for the Human Rights of Indigenous Peoples, *Implementing the UN Declaration on the Rights of Indigenous Peoples: Myths and Misrepresentations*, October 2020. https://www.declarationcoalition.com/wp-content/uploads/2022/03/UNDRIP_Implementation_ENG-1.pdf

⁷ Coalition for the Human Rights of Indigenous Peoples, *Joint Statement on the Release of Canada's UN Declaration on the Rights of Indigenous Peoples Act National Action Plan: Effective oversight and accountability mechanisms critical to implementation of the UN Declaration on the Rights of Indigenous Peoples*,



We are concerned that the government is pursuing a very narrow interpretation of what is in fact a significant and far-reaching legal requirement. The Action Plan refers to new bills and proposed regulations, existing legislation that already require review, and other existing legislation where it has been prioritized. We would argue that, in fact, the Act requires careful review of *all* legislation and regulations and how such legislation and regulations are being interpreted and applied. We would further questions whether it is reasonable, appropriate or consistent with the requirements of the *Declaration Act* for this work to be carried out through internal departmental processes or whether what is required an arm's length, independent mechanism or process that is able to work with Indigenous Peoples on a whole of government basis.

6. Engagement with provinces and territories

It is an established principle of international law that in federal states such as Canada, the federal government has primary responsibility for ensuring compliance with the state's international commitments, notwithstanding the fact that some of those commitments may involve areas of sub-national (ie., provincial or territorial) jurisdiction. In its recent reference decision about the *Act respecting First Nations, Inuit and Métis children, youth and families* (S.C. 2019, c. 24), the Supreme Court found that the federal government might legitimately intrude into areas generally recognized as provincial or territorial jurisdiction for objectives related to reconciliation and implementation of the *UN Declaration*.⁸

The stated purposes of the *UN Declaration Act* – ensuring that “the laws of Canada are consistent with the Declaration” and “achiev[ing] the objectives of the Declaration” – require, at the very least, active engagement and collaboration with provincial and territorial governments. However, the federal Action Plan does not include a coherent approach for doing so. References to the provinces and territories are almost exclusively confined to specific projects and initiatives within individual departments, although there is one reference, under “Next Steps for implementing the Action Plan,” to possible “federal-provincial-territorial-Indigenous fora.”

Conclusion

The Coalition is grateful for the opportunity to share these observations with the Committee. For further information on how we view the *Declaration*, and our concerns about the progress toward implementation, we would encourage Committee members to consider the factsheets,

⁸ *Attorney General (Quebec) v Attorney General (Canada)*, 2024 SCC 5.



briefing papers and other resources found on the website of the Coalition for the Human Rights of Indigenous Peoples: www.declarationcoalition.ca

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