

Federal UNDRIP Bill becomes law

JUN 22, 2021 5 MIN READ

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On June 16, Canada's Senate voted to pass Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the UNDRIP Act or the Act), into law. The UNDRIP Act received Royal Assent on June 21, marking a historic milestone in Canada's implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration).

The UNDRIP Act is Canada's first substantive step towards ensuring federal laws reflect the standards set out in UNDRIP. Accordingly, the Act has several potentially significant implications for Indigenous groups, government authorities and resource project proponents, particularly in relation to UNDRIP's provisions requiring states to obtain "free, prior and informed consent" (FPIC) in their consultations with Indigenous peoples.

In this Update, we provide an overview of the UNDRIP Act's key provisions, outstanding questions about the Act's implementation and impacts, and our comments on how Canada's UNDRIP implementation is already shaping, and will continue to shape, the landscape of Canadian business and natural resource development.

Key provisions of the UNDRIP Act

UNDRIP is a non-binding international instrument that enunciates "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world." A majority of the UN General Assembly voted to adopt UNDRIP in 2007, and Canada officially endorsed UNDRIP in 2016.

The UNDRIP Act's 22 paragraph preamble presents a lofty introduction to the Act. Among other things, it recognizes the inherent right to self-determination and affirms UNDRIP as a source for the interpretation of Canadian law. While the preamble is only an introduction to the Act, it will likely be relied upon as a tool for interpreting the intent and purpose of the legislation.

The Act itself presents two key goals:

- affirm UNDRIP as a universal international human rights instrument with application in Canadian law; and
- provide a framework for the government of Canada (the GoC) to implement the Declaration.

The Act's substantive provisions establish how these two goals are to be pursued by making Canada's laws consistent with UNDRIP and by preparing and implementing an action plan to

achieve UNDRIP's objectives.

Ensuring the laws of Canada are consistent with UNDRIP

Section 5 of the UNDRIP Act requires the GoC to take all measures necessary to ensure that Canada's federal laws are consistent with the Declaration, and to do so in consultation and cooperation with Indigenous peoples. To achieve this purpose, section 6 requires the Minister designated by the federal Cabinet (the Minister) to prepare and implement an action plan to achieve the objectives of UNDRIP in consultation and cooperation with Indigenous peoples and other federal ministers.

The action plan, which will be made public, must be completed "as soon as practicable" and no later than two years after section 6 comes into force.^[1] To provide for accountability and transparency in implementing the Act, the Minister must also prepare a publicly available annual report on the GoC's progress in ensuring that Canada's laws are consistent with UNDRIP, as well as the Minister's progress in completing the action plan.

UNDRIP's application in Canadian law

As early as 2012, Canadian courts have recognized that UNDRIP can be used to inform statutory interpretation in three ways:

- to prefer an interpretation of a statute that is more consistent with Canada's international obligations;
- to inform the court's contextual approach to statutory interpretation; and
- to identify values and principles that should inform legislative interpretation.^[2]

However, in addition to the preamble of the UNDRIP Act affirming UNDRIP as a source for the *interpretation* of Canadian law, section 4 of the Act affirms UNDRIP as "a universal international human rights instrument with *application* in Canadian law" [emphasis added]. The legal implications of this provision are unclear. Canada's Minister of Justice, the Honourable David Lametti, has said that the Act does not mean that UNDRIP can override Canadian laws, but instead confirms that "we can look to the Declaration to inform the process of developing or amending laws and as part of interpreting and applying them." The objective, as stated by Minister Lametti, is to recognize existing legal principles, rather than to give the Declaration itself direct legal effect in Canada.^[3] In other words, while the Declaration has "application" in Canadian law, it is not intended to establish new legal principles in Canadian law (such as FPIC, to the extent FPIC is inconsistent with existing Canadian law). The meaning of section 4 will undoubtedly be the subject of future litigation.

UNDRIP's implementation in the natural resource sector

With the UNDRIP Act coming into force, UNDRIP's articles themselves will not take on the force of law, but federal law-makers will be required to consider consistency with UNDRIP when adopting new statutes and amendments, and courts will look to UNDRIP as a tool to interpret law in Canada. As the federal government develops its action plan to implement UNDRIP, new legislative and policy developments are likely.

Although the stated intention is not for FPIC to be considered a "veto" power for Indigenous groups,^[4] the concept may influence changes to current consultation approaches and

practical expectations of all parties involved in such processes. At minimum, FPIC is likely to trigger a more robust and proactive consultation process with potentially affected Indigenous groups where a proposed project triggers the application of any federal laws. While partnership with Indigenous communities has long been a consideration for project developers, the UNDRIP Act's implementation will strengthen incentives for proponents to partner with Indigenous groups in project development and may increase incentives for Indigenous equity ownership.

[1] UNDRIP Act, s 6(4).

[2] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 at paras 350 – 354, *aff'd* 2013 FCA 75.

[3] House of Commons Debates, 43-2, No. 60 (17 February 2021) 1810 (Hon David Lametti).

[4] House of Commons Debates, 43-2, No. 60 (17 February 2021) 1815 (Hon David Lametti).