



UNDERSTANDING UNDRIP

Choosing action on priorities
over sweeping claims about the
United Nations *Declaration on the Rights
of Indigenous Peoples*

BLAINE FAVEL AND KEN S. COATES

MAY 2016

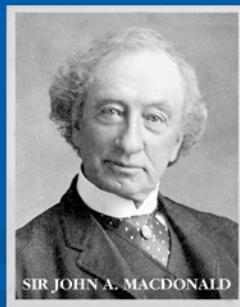


True North in
Canadian public policy

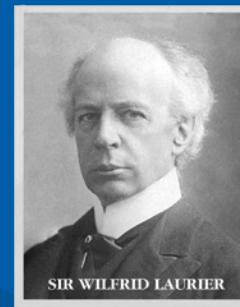
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True North in
Canadian public policy



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PREFACE

The year 2013 was the 250th anniversary of the Royal Proclamation of 1763. The Royal Proclamation is widely regarded as having been one of the cardinal steps in the relationship between Aboriginals and non-Aboriginals in British North America – what eventually became Canada.

A quarter of a millennium later it is our judgment that that relationship has often not been carried out in the hopeful and respectful spirit envisaged by the Royal Proclamation. The result has been that the status of many Aboriginal people in Canada remains a stain on the national conscience. But it is also the case that we face a new set of circumstances in Aboriginal/non-Aboriginal relations. Indigenous peoples in Canada have, as a result of decades of political, legal, and constitutional activism, acquired unprecedented power and authority. Nowhere is this truer than in the area of natural resources.

This emerging authority coincides with the rise of the demand for Canadian natural resources, a demand driven by the increasing integration of the developing world with the global economy, including the massive urbanisation of many developing countries. Their demand for natural resources to fuel their rise is creating unprecedented economic opportunities for countries like Canada that enjoy a significant natural resource endowment.

The Aboriginal Canada and the Natural Resource Economy project seeks to attract the attention of policy makers, Aboriginal Canadians, community leaders, opinion leaders, and others to some of the policy challenges that must be overcome if Canadians, Aboriginal and non-Aboriginal alike, are to realise the full value of the potential of the natural resource economy. This project originated in a meeting called by then CEO of the Assembly of First Nations, Richard Jock, with the Macdonald-Laurier Institute. Mr. Jock threw out a challenge to MLI to help the Aboriginal community, as well as other Canadians, to think through how to make the natural resource economy work in the interests of all. We welcome and acknowledge the tremendous support that has been forthcoming from the AFN, other Aboriginal organisations and leaders, charitable foundations, natural resource companies, and others in support of this project.

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EXECUTIVE SUMMARY

On May 9, 2016, the Government of Canada changed its position on the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP). Speaking to the United Nations Permanent Forum on Indigenous Issues, CBC News reports, Indigenous and Northern Affairs Minister Carolyn Bennett stepped away from the Harper government's more limited view of the *Declaration*, saying "We are fully adopting this and working to implement it within the laws of Canada, which is our *Charter*".

The Trudeau government's commitment to UNDRIP has attracted considerable support from Indigenous leaders, their communities, and non-Aboriginal supporters. It is a top priority for organizations such as the Assembly of First Nations. Expectations are high.

Negotiating, drafting, and securing international support for UNDRIP was itself a major achievement. It showed an unprecedented degree of worldwide Indigenous solidarity and demonstrated a significant shift in thinking with respect to the internationalization of Indigenous rights and claims, and global recognition of Indigenous cultures and communities.

But there has been significant confusion and uncertainty about what it means to implement the *Declaration*. There is particular concern about the compatibility of certain elements of UNDRIP with Canada's legal, political, and constitutional architecture. This poses a major challenge for the government as it seeks to meet such heightened expectations.

It is important to recall that Canada – along with a few other countries with large Indigenous populations and well-developed human rights records – for years resisted formally endorsing UNDRIP due to these concerns, and only did so once it was acknowledged that UNDRIP is merely "aspirational", and not formally binding. Under present circumstances, the process of implementing the *Declaration* could produce discord and negativity rather than providing the basis for further reconciliation and improving conditions for Canada's Indigenous peoples.¹

Canadian governments have searched for the policy masterstroke to transform Indigenous lives and provide a better quality of life for Indigenous peoples for the last 150 years. Some of these efforts have been disastrous. UNDRIP provides Canada with an occasion and an opportunity to do better; but prioritizing which aspects of UNDRIP can form the basis for genuine improvement to the lives of Canada's indigenous peoples, and which are cost-prohibitive or even counterproductive, is vital.

Consider Article 3, and the question of "the right to self-determination" on matters of "political status." Establishing full self-determination outside of the Canadian legal and constitutional framework would mean nothing less than a fundamental change to our system of governance.

Article 14 requires states to work to provide Indigenous peoples with "education in their own culture and provided in their own language". This issue is compelling, and more must be done to reverse the tragic decline of Aboriginal languages and culture. Nevertheless, providing high-quality education in Indigenous languages – there are 75 separate language groups across the country, many with populations of under 1000 people, and large numbers dispersed in cities – would be a monumental undertaking with little guarantee that it could be done effectively.

"We are fully adopting [UNDRIP] and working to implement it within the laws of Canada".

-Indigenous and Northern Affairs Minister Carolyn Bennett

Article 19 would technically require Indigenous participation on all federal, provincial, territorial, and even municipal regulations, potentially resulting in legislative gridlock. At present there is no representative body or entity that the government can engage as the national voice of Indigenous peoples.

Government cannot simply ignore expectations for greater consultation and engagement. But real thinking must occur – including among Indigenous leaders – about how to fulfill the article’s objectives in practical terms.

***UNDRIP is
much more than
“free, prior, and
informed consent”.***

Article 21 requires that Indigenous peoples have the same level of community services, and the same economic and social opportunities as other Canadians. Indeed, making this a national goal would be far better than the current approach of government programs and short-term funding agreements. The goal should be to find a compromise that does not limit the potential for Indigenous leadership and local autonomy.

There is a major distinction between a literal acceptance of the *Declaration* by codifying the UNDRIP articles and clauses in a single statute or a series of laws, which would be impractical and could undermine real progress, and a political interpretation that uses UNDRIP as a guideline for addressing Indigenous needs and aspirations. This paper recommends the latter approach.

Governments should keep the following in mind when approaching UNDRIP:

- It is not sufficient for Canadian governments to address the concept of “free, prior, and informed consent”, which presents its own challenges, and claim to have satisfied their commitments to UNDRIP. UNDRIP is much more than that.
- Policy-makers and Indigenous leaders must discuss and clarify the interaction of specific UNDRIP articles with existing Canadian laws and policies.
- UNDRIP provides no direction as to the amount of funding required to address the articulated rights. A starting point – and it is a major one – would be for the Government of Canada to commit to providing equality for Indigenous peoples in the provision of services and infrastructure.
- It would help substantially if Indigenous leaders would indicate those areas in UNDRIP where they believe current Canadian practices are, in terms of international minimum standards, at or above the expectations articulated in the *Declaration*.
- The government must ensure that it properly communicates UNDRIP and its purpose to non-Indigenous Canadians. It is certainly time for a bigger vision and agenda, like that articulated in UNDRIP, to create the conditions for greater economic and social opportunities for Indigenous peoples.

SOMMAIRE

Le 9 mai 2016, le gouvernement du Canada a modifié sa position à l'égard de la *Déclaration des Nations Unies sur les droits des peuples autochtones* (DNUDPA). Lors d'une intervention devant l'Instance permanente sur les questions autochtones des Nations Unies, la ministre des Affaires autochtones et du Nord, Carolyn Bennett, a pris une distance par rapport à la vision plus étroite de la Déclaration proposée par le gouvernement Harper, en affirmant que le gouvernement canadien l'« adoptera pleinement et travaillera pour assurer sa mise en œuvre, conformément aux lois canadiennes »¹.

L'engagement du gouvernement Trudeau à mettre en œuvre la *Déclaration sur les droits des peuples autochtones* a reçu un vaste appui de la part des chefs autochtones, de leurs communautés et des groupes partisans non autochtones. Il s'agit d'une priorité importante pour les organisations comme l'Assemblée des Premières Nations. Les attentes sont élevées.

La négociation, le travail de rédaction et la mobilisation internationale relativement à la DNUDPA sont en eux-mêmes des accomplissements majeurs. Ils rendent compte du degré sans précédent de solidarité autochtone à l'échelle mondiale et témoignent de l'important virage vers l'internationalisation des droits et des revendications autochtones, de concert avec la reconnaissance de leurs cultures et de leurs communautés.

Cependant, ce qu'on entend par mise en œuvre n'est ni clair ni définitif. La question de la conciliation entre certaines dispositions de la DNUDPA et les cadres juridiques, politiques et constitutionnels du Canada est particulièrement préoccupante. Cette situation pose un grand défi pour le gouvernement dans ses efforts pour répondre à des attentes aussi élevées.

Il est important de rappeler que – tout comme certains autres pays à forte population autochtone avec un bon bilan en matière de droits humains – le Canada a longtemps refusé son appui à la DNUDPA en raison de ces préoccupations. Il a approuvé formellement la Déclaration uniquement après qu'elle ait été reconnue à titre de document « d'aspirations » juridiquement non contraignant. Dans les circonstances actuelles, plutôt que de fournir la base d'une nouvelle réconciliation et d'améliorer les conditions de vie des peuples autochtones du Canada, la mise en œuvre risque d'entraîner des conflits et des effets nocifs².

Cette situation pose un grand défi pour le gouvernement.

Depuis 150 ans, les gouvernements canadiens s'efforcent d'identifier la politique d'exception qui arrivera à transformer la vie des Autochtones et à leur offrir une meilleure qualité de vie. Certains de ces efforts se sont soldés par des échecs désastreux. La DNUDPA offre au Canada une occasion et la possibilité de faire mieux; cependant, il est vital de privilégier les éléments de la Déclaration qui peuvent mener à de véritables améliorations dans la vie des peuples autochtones du Canada et de cerner les voies exagérément coûteuses ou même contre-productives.

Examinons l'article 3 sur la question du « droit à l'autodétermination » en matière de « statut politique ». L'établissement de la pleine autodétermination en dehors du cadre juridique et constitutionnel canadien ne signifierait rien de moins qu'un changement fondamental de notre système de gouvernance.

L'article 14 exige des États qu'ils prennent des mesures efficaces pour que les peuples autochtones « puissent accéder à un enseignement dispensé selon leur propre culture et dans leur propre

langue ». Cette question nous interpelle, et nous devons faire davantage pour inverser le déclin tragique de la culture et des langues autochtones. Néanmoins, dispenser un enseignement de grande qualité dans les langues autochtones serait une entreprise monumentale risquant de ne pas être très efficace : en effet, il y a 75 groupes linguistiques distincts au pays, de nombreux comptant moins de 1 000 locuteurs dispersés en bonne partie dans les villes.

L'article 19 exige techniquement des États qu'ils coopèrent avec les peuples autochtones avant d'adopter et d'appliquer les réglementations fédérales, provinciales, territoriales et même municipales, ce qui est susceptible de mener à des impasses législatives. À l'heure actuelle, aucune instance ou entité nationale représentative des peuples autochtones n'existe pour assurer le dialogue avec le gouvernement. Le gouvernement ne peut pas simplement ignorer les attentes concernant l'élargissement de la consultation et de la participation. Il faut qu'une véritable réflexion soit menée sur la manière de répondre aux objectifs de l'article en termes pratiques, et que les chefs autochtones y participent.

L'article 21 énonce que les peuples autochtones ont le droit de bénéficier du même niveau de service dans leurs communautés et des mêmes possibilités économiques et sociales que les autres Canadiens. Il serait effectivement beaucoup plus avisé de faire de cette exigence un objectif national que de poursuivre l'approche actuelle du gouvernement en matière de programmes et d'ententes de financement à court terme. L'objectif est de trouver un compromis qui ne limite pas le potentiel du leadership autochtone et de l'autonomie locale.

Il y a une distinction importante à faire entre une stricte adhésion à la Déclaration en codifiant les articles et les dispositions de la DNUDPA au moyen d'un statut unique ou d'une série de lois – ce qui serait difficilement réalisable et pourrait empêcher un progrès réel – et une interprétation qui considère la DNUDPA comme un texte d'orientation politique en vue de répondre aux besoins et aux aspirations des Autochtones. La présente étude recommande l'approche qui suit.

Les gouvernements devraient tenir compte de ce qui suit dans leur approche concernant la question de la DNUDPA :

- Le gouvernement du Canada ne doit pas se limiter à traiter du principe du « consentement préalable, donné librement et en connaissance de cause », qui présente ses propres difficultés, et prétendre satisfaire ainsi à ses engagements à l'égard de la DNUDPA. La DNUDPA est beaucoup plus que cela.
- Les décideurs et les chefs autochtones doivent discuter de l'interaction des articles précis de la DNUDPA avec les lois et les politiques canadiennes et clarifier cette question.
- La DNUDPA n'offre aucune orientation quant à l'importance du financement nécessaire pour répondre aux droits mentionnés. Comme point de départ – et il est crucial –, le gouvernement du Canada doit s'engager à traiter également les peuples autochtones dans l'offre de services et d'infrastructures.
- Il serait d'un grand secours si les chefs autochtones pouvaient identifier les divers aspects de la DNUDPA par rapport auxquels, selon eux, les pratiques canadiennes actuelles atteignent et n'atteignent pas les normes internationales minimales telles que formulées dans la Déclaration.
- Le gouvernement doit veiller à bien communiquer les principes et les objectifs de la DNUDPA aux Canadiens non autochtones. Le temps est certainement venu d'adopter une vision élargie et un plan d'action plus vaste, à l'exemple de ce qui est formulé dans la DNUDPA, afin de créer un climat propice à la multiplication des possibilités économiques et sociales au bénéfice des peuples autochtones.

INTRODUCTION

The Liberal government of Prime Minister Justin Trudeau has placed reconciliation with Canada's Indigenous population at the top of its governing agenda. As the Speech from the Throne in December 2015 states:

[T]he Government will undertake to renew, nation-to-nation, the relationship between Canada and Indigenous peoples, one based on recognition of rights, respect, co-operation and partnership. (Johnston 2015)

This powerful expression of the government's commitment to Indigenous issues has generated considerable goodwill with Indigenous leaders and produced widespread optimism for a more productive relationship between the federal government and Aboriginal communities.

The federal government moved quickly to demonstrate its commitment. The ministers of Justice, Indigenous and Northern Affairs, and Status of Women have held broad consultations on the mandate and process for a public inquiry into missing and murdered Indigenous women. The Prime Minister has met with Indigenous leaders on climate change and resource development and continues to meet with Indigenous peoples across the country (Prime Minister of Canada's Office 2016). And the federal budget dedicated additional billions in new spending on Aboriginal education and infrastructure. This was called "historic" and a "break against the status quo" by Assembly of First Nations national chief Perry Bellegarde (Fontaine 2016).

There is a belief in many Indigenous quarters that the next major step for the government is to show progress on its promise to implement the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP). The Liberal Party election platform described implementing UNDRIP as a starting point for its reconciliation agenda; the same language is set out in the minister of Indigenous Affairs' mandate letter. And on May 9, 2016, the government reiterated its commitment before the United Nations Permanent Forum on Indigenous Issues.

Expectations for the government to move ahead with UNDRIP are high – accompanied by uncertainty with regards to implementation.

Expectations for the government to move ahead with UNDRIP are high – accompanied by uncertainty with regards to how UNDRIP will be implemented and the potential consequences for Canadian policy, and budgets, to say nothing of the government's relationship with Indigenous peoples.

As with all major international declarations, there are no clear international standards as to what the specific articles and elements mean; furthermore, there is no clear international standard as to the timing, nature, and extent of implementation.² The federal government has not clarified what it means when it says that it will implement the *Declaration*. It could mean the Liberals intend to enshrine UNDRIP, in its entirety, in Canadian law. It might indicate that the government intends to govern according to the spirit of the *Declaration*. These options – or some middle ground between them – present major challenges to policy-makers and Indigenous leaders.

This report seeks to foster a greater understanding of UNDRIP's origins and evolution and to demonstrate how its key articles might interact with Canadian laws and policies. We will offer recommendations on how the government might use UNDRIP as the basis for positive, forward-looking strategies that bring greater economic and social opportunities for Indigenous peoples in Canada and that strengthen the partnership between governments and these communities.

Drawing from the experience of UNDRIP's development and an assessment of key provisions, we argue that implementing UNDRIP in full – that is, enshrining the entire document in Canadian law and policy – would run into legal, political, and constitutional barriers in Canada. It is important, instead, that government respond in a constructive and creative manner to a document that Canada has endorsed and that now embodies Indigenous expectations about their place in the Canadian polity.

The report will not address, in full, the UNDRIP provisions related to “free, prior, and informed consent” (FPIC). These clauses have received more public and media attention than all of the others combined. We have studied FPIC, which presents its own challenges to implementation, more comprehensively in a separate paper recently published by the Macdonald-Laurier Institute (Favel and Coates 2016).

THE ORIGINS OF UNDRIP

The United Nations *Declaration on the Rights of Indigenous Peoples* was passed by the UN General Assembly in 2007. It was endorsed by the Government of Canada in November 2010. The then-Harper government, criticized for failing to announce its support for UNDRIP sooner, belatedly declared its support for an “aspirational document” (Indigenous and Northern Affairs Canada 2010a). It did subsequently embrace the words or, indeed, the spirit of UNDRIP in the years that followed.

The new Trudeau government commemorated the five-year anniversary of Canada’s endorsement of UNDRIP in November 2015 by way of a ministerial statement. Indigenous and Northern Affairs Minister Carolyn Bennett said:

We will redouble our efforts across all Government departments, provinces and territories, municipalities and with all Canadians to *fully understand* and implement the United Nations Declaration on the Rights of Indigenous Peoples (italics added for emphasis; Indigenous and Northern Affairs Canada 2015b).

Aboriginal peoples had limited international legal standing until roughly 50 years ago.

The minister is right to focus on the need for Canadians to understand fully UNDRIP, the scope and relevance of its clauses, and the *Declaration’s* potential interactions with existing Canadian laws and policies.

The UN General Assembly approved UNDRIP in 2007 but the developments that led to this historic vote need to be understood to appreciate its far-reaching significance to Indigenous peoples. Aboriginal peoples had limited international legal standing until roughly 50 years ago. Aboriginal issues were considered to be appropriately confronted and addressed at the national level rather than in the international arena.

Indigenous organizations, particularly from the United States, Australia, Norway, and New Zealand, sought international recognition and attention to rights and claims during the social ferment of the 1960s (Ornelas 2014). There had been limited efforts to recognize Indigenous rights claims such as the International Labour Organization’s Convention C107 (Indigenous and Tribal Populations Convention, 1957) and an expanded statement in C169 (Indigenous and Tribal Peoples Convention, 1989) but these steps were, in practical terms,

relatively minor. They attracted little public attention and generated little direct action from national governments.

Canadian Indigenous leaders such as George Manuel (a member of the National Indian Brotherhood, which was a precursor to the Assembly of First Nations) were involved in Indigenous efforts to establish greater international recognition for Indigenous rights and claims, including overtures to the United Nations (Coates 2013). Mostly, though, Indigenous advocacy for cultural and political rights focused on national and regional policy-makers.

The preliminary work on UNDRIP dates back more than a quarter century. The idea for a universal statement of worldwide Indigenous rights originated in 1982 following a study by the UN on the problem of discrimination and poor economic and social outcomes faced by Indigenous peoples around the globe. A UN working group comprised of government representatives, Indigenous peoples, and UN personnel began drafting a *Declaration on the Rights of Indigenous People* in 1992. A draft was completed in 1994 and then followed a painstaking process for review and compromise (Hanson).

It was far from easy. Key countries expressed significant concerns about specific parts of the *Declaration*, particularly with respect to the rights of self-determination and the development of natural resources on traditional Indigenous territories. The discussion was complicated by the difficulties of brokering consensus among hundreds of disparate Indigenous groups from dozens of countries but there was a general agreement that endured throughout most of the process.

Defying the expectations of many observers, the draft *Declaration on the Rights of Indigenous Peoples* secured the support of the UN Human Rights Council in 2006 and the approval of the UN General Assembly the following year. In the final vote, on September 13, 2007, 144 nations supported the UN *Declaration on the Rights of Indigenous Peoples*. Four countries with large Indigenous populations and generally strong human rights records – Australia, Canada, New Zealand, and the United States – voted against the *Declaration*. Eleven others, including Russia, Bangladesh, and Colombia, abstained.

The vote itself was quite revealing. According to Thomas Isaac of Osler, Hoskin and Harcourt, LLP, many of the nations that voted in favour emphasized the non-binding nature of the *Declaration* and other significant restrictions on its legal authority. Over 30 nations did not show up for the vote. Isaac identified another important element, namely that of the 88 members of the United Nations that have recognized Indigenous populations, 42 voted for the *Declaration*, the four noted above voted against it, 11 abstained from the voting, and 31 nations did not attend the general assembly vote. Put differently, of the 144 nations that voted for UNDRIP, 101 do not have Indigenous populations, as defined by a database on countries with minorities and Indigenous peoples maintained by the UN Human Rights Commission.³ As Isaac pointed out, all of those who voted against UNDRIP had Indigenous peoples, all of the nations that abstained had Indigenous peoples, and almost all (91 percent) of those who were absent had Indigenous peoples.⁴

The lengthy process that led to UNDRIP's approval by the UN General Assembly is rather extraordinary. The process of negotiating, drafting, and securing international support for UNDRIP was itself a major achievement. It showed an unprecedented degree of worldwide Indigenous solidarity and demonstrated a significant shift in thinking with respect to the internationalization of Indigenous rights and claims and global recognition of Indigenous cultures and communities.⁵

In 2007, 144 nations supported the UN Declaration on the Rights of Indigenous Peoples.

WHAT IS UNDRIP?

The United Nations *Declaration on the Rights of Indigenous Peoples* sets out the individual and collective rights of Indigenous peoples, including their rights to culture, identity, language, employment, health, and education. It emphasizes self-determination, highlighting the “rights of indigenous peoples to maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations” (United Nations Forum on Indigenous Issues) and prohibiting all forms of discrimination against Indigenous peoples.

UNDRIP is best understood as an expression of both positive and negative rights. That is, the *Declaration* sets out the right of Indigenous peoples to be subjected to actions by the government or other entities (positive rights) and the right of Indigenous peoples *not* to be subjected to actions by the government and other entities (negative rights).

UNDRIP sets out the individual and collective rights of Indigenous peoples.

UNDRIP is structured as a UN resolution with a 23-clause preamble and 46 articles (see annex for the full *Declaration*). Articles 1–40 concern particular individual and collective rights of Indigenous peoples. Many of them outline state obligations to protect or fulfil those rights. Article 31 concerns the right to protect Indigenous heritage as well as other manifestations of culture, including human genetic materials. Articles 41 and 42 concern the role of the United Nations with regards to Indigenous peoples. Articles 43–45 indicate that the rights in the *Declaration* apply without distinction to Indigenous men and women, and that these rights are “the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world” and do not in any way limit greater domestic-based rights. Article 46 discusses

the *Declaration’s* consistency with other international goals, and the framework for interpreting the rights declared within it.⁶

Most of the focus on UNDRIP in Canada has been on the concept of “free, prior, and informed consent” which appears in several of its articles, and the implications for resource development. The relevant articles include:

Article 19. 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 23: Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

Article 32: 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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 or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

A review of Canadian commentary about UNDRIP suggests that “free, prior, and informed consent” is the only significant element of UNDRIP. Yet the focus on this element has concealed UNDRIP’s comprehensiveness and the *Declaration*’s broader possible implications for Canadian law and policies. The *Declaration* is much more substantial than the consent provisions. It was purposefully drafted with the understanding that not all articles applied equally in all countries and for all Indigenous peoples, simply because the challenges facing Indigenous peoples and the state of national government policy varies dramatically from country to country. But even with this caveat, there is little question that UNDRIP, if implemented in full and as written, could have broad implications for the federal, provincial, and territorial governments in Canada.

It is useful to consider a selection of the 46 articles in order to appreciate the full sweep and potential impact of UNDRIP in the Canadian context. Importantly, most Canadians would likely agree with the value and nature of the specific articles, each of which speaks to areas of substantial need in Indigenous governments. Disagreement, and it could be considerable, would focus on how, when, and to what extent Canadian governments should implement these provisions. And, as a logical extension of these concerns, many wonder about the degree to which existing Canadian policies and commitments already address the spirit and intent of the *Declaration*.

Each of the articles reviewed herein would, if implemented in full, require major policy changes and in several cases very substantial amounts of money. They could contribute to the transformation of the role of Indigenous peoples within this country. Some of these articles speak more to attitudinal and process changes than to specific policy requirements. A selection of key articles and a brief commentary on each follows.

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.

This is a standard expectation and demand of colonized peoples and is consistent with long-standing United Nations declarations and expectations. Indigenous peoples in Canada have been requesting recognition of their right to self-determination for generations. Indigenous independence and autonomy is incorporated into modern treaties and self-government agreements, such as the Nunavut Land Claims Agreement, the Nisga'a Treaty, and the *Cree-Naskapi (of Quebec) Act* (Indigenous and Northern Affairs Canada 2015a).

Yet current Canadian policies may fall far short of the demands and aspirations of Indigenous sovereigntists, who strongly support Aboriginal separation from Canadian governance institutions. This is because there are limitations to full self-determination for Indigenous communities within Canada’s legal and constitutional framework. It cannot lead to community decision-making that contravenes the principle of state sovereignty or the role of the federal, provincial, and territorial governments in their respective jurisdictional areas. An Indigenous community, for instance, could not enact a decision that contravened the *Canadian Charter of Rights and Freedoms* or was inconsistent with the broader legal framework established by Canadian governments. These conditions were set out by the previous Liberal government in its 1995 statement on the inherent right of self-government (Indigenous and Northern Affairs Canada 2010b). Establishing full self-determination outside of the

Each of the articles reviewed would require major policy changes and in several cases very substantial amounts of money.

Canadian legal and constitutional framework would mean nothing less than a fundamental change to our system of governance and the recognition of Indigenous governments as a distinct and separate level of authority within the Canadian federal state.

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.

Indigenous peoples have sought greater control over governance matters. Some have achieved a measure of autonomy, including being removed from the historical controls of the *Indian Act*. (Fully 100 First Nations have stepped out from under the *Act* and a similar number are now considering it.)¹¹ Progress in the direction of greater control of land management, taxation, accountability, and government borrowing, all areas of policy innovation in recent years, represent positive steps toward greater administrative autonomy (Coates and Speer 2016).

Modern treaties, in particular, provide clear pathways to self-government (or, as some critics observe, self-administration of government programs), with Indigenous groups allowed to set the timing and scope of the evolving arrangements.

Modern treaties provide clear pathways to self-government, with Indigenous groups controlling the timing and scope.

Many are concerned about the slow process of finalizing modern treaties, particularly in British Columbia. The average negotiating timeline for a comprehensive lands claim agreement has been 15 years and there is no doubt room for improvement. The Comprehensive Land Claims Policy has not been renewed in more than 20 years in spite of a series of relevant court decisions. It would be useful, then, to update the policy to both reflect new jurisprudence and the principles enunciated in UNDRIP.

An April 2015 report by Douglas Eyford, a federal appointee with the mandate to review federal policy, sets out some practical ideas to improve the process. Some of these recommendations, such as establishing a roster of retired judges and dispute resolution specialists to address disputes about territorial boundaries, would expedite the process and better meet the expectations envisioned in UNDRIP (Eyford 2015).

Movement on comprehensive claims and other negotiations would resolve some, but not all, of the issues envisaged in this article. Progress on treaty-making in the Maritimes has been slow. First Nations in the prairie west have been pressing for greater attention to the “spirit” of the numbered treaties, and the 19th century agreements in central Canada do not address contemporary legal and political realities. Put simply, considerably more work is required in this area.

Article 12:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access to and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Canadians often need to be reminded that, starting in the 19th century, successive governments made deliberate efforts to undermine Indigenous cultural activities. The results were devastating.

Communities were prevented, at the threat of arrest and imprisonment in the case of such practices as potlatches, from continuing traditional practice. Thousands of Indigenous ceremonial and cultural objects were removed from Indigenous communities, sometimes by purchase, other times through theft, and at times through egregious acts of grave robbery.

There have been gradual steps to try to reverse these injustices. Efforts have been made, for instance, to repatriate artefacts and cultural icons that were removed from Indigenous communities by museums and galleries. Some private artefact owners have made efforts to engage with Indigenous communities. But much more work remains to be done. It is worth noting that the need to protect sacred sites and traditional cultural territories plays a major role in shaping Indigenous responses to development projects. At the other extreme, Canadian cultural institutions have made systematic efforts to promote Indigenous art and culture through gallery showings and cultural presentations. Administrative and legal steps have been taken – most strongly in the territorial North – to protect Indigenous cultural objects and sacred materials.⁷ The current arrangements may meet the UNDRIP expectations (particularly in areas covered by modern treaties), although there is no national review and recognition process.

Article 13:

- 1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.*
- 2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.*

The loss of Indigenous language and attendant cultural knowledge is a tragedy perpetuated by deliberate government policy over more than 150 years. As a result, several Indigenous languages have disappeared; many more are threatened. Only 20 percent of Indigenous Canadians report speaking an Aboriginal language with significant fluency (Norris 2014). A systematic effort was undertaken at day and residential schools and through other government interventions to undermine Indigenous languages and traditions that were thousands of years old (Truth and Reconciliation Commission 2015a). Some Aboriginal groups, typically those protected by isolation from the Canadian mainstream, have maintained their languages and some of their traditions, but the decline has been pronounced and in many instances deeply culturally destructive.

Canadian efforts, including pre- and elementary school initiatives, high-school classes, and college and university programs, are small compared to Indigenous needs. Outside the three territories, Canada has few sustained and comprehensive language revitalization programs. The significant number of languages adds to the complexity and cost of language preservation and retention initiatives. In far too many places, the weight of English and French language use has suppressed Indigenous language use and added to the challenge of strengthening Indigenous cultures.

For some Aboriginal communities, efforts are focused on elder-based rescue linguistics, to record vocabulary and grammar before the number of language users collapses. To fulfill this single article –

Only 20 percent of Indigenous Canadians report speaking an Aboriginal language with significant fluency.

an example of an area requiring urgent attention and action and one that few people would seriously contest – will require a major national commitment, large sums of sustained funding, comprehensive community participation and a revamping of many K-12 educational programs. This element of UNDRIP is a classic example of the imperative need for intense and systematic action by Canadians at all levels. It is, sadly, also an illustration of the severe challenges facing nations and Indigenous peoples that wish, even with complete sincerity, to address widely shared values and UNDRIP principles.

Article 14:

- 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.*
- 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.*
- 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.*

It is widely understood that Indigenous children immersed in their traditional culture succeed better in school.

The terms of this article are compelling. Poor education standards and a lack of educational resources have contributed to poor outcomes for Indigenous children in Canada (St. Germain and Dyck 2011). It is also widely understood that Indigenous children immersed in their traditional culture succeed better in school. This article, like many others in UNDRIP, covers themes that would enjoy widespread support, at least in principle. The need for reform is broadly accepted among Indigenous leaders, policy commentators, and political parties. There is less consensus on the right balance between greater resources and stronger educational standards and the role of Indigenous communities in setting such standards. The commitment tends to shrivel when the talk turns to money. There is no question that providing high-quality education in Indigenous languages – there are 75 separate language groups across the country, many with populations of under 1000 people – would

require a large-scale and sustained public investment with no assurances it will lead to a successful revitalization of Indigenous languages (Cook and Flynn 2008).

Consider the contentious debate that ensued following the release of the Harper government's *First Nations Control of First Nations Education Act*, which set out a combination of incremental funding and new national standards with respect to curriculum and basic student competencies. The legislation was the result of a lengthy process of consultation with the Assembly of First Nations and other Indigenous groups (Indigenous and Northern Affairs Canada 2014). It ultimately fell victim to Indigenous concerns about process, consultation, and the perceived imposition of Ottawa-based mandates on Indigenous leaders and their communities (Canadian Press 2014). The Trudeau government has made significant financial commitments to Aboriginal education, but even the most elementary accounting of the cost of providing the required educational reforms indicates that the new allocations fall far short of actual need. Remember, as well, that Aboriginal languages are in severe decline in much of the country; each year of delay weakens Indigenous language and culture.

The last clause – incorporating Indigenous peoples living outside their communities – has particular relevance in Canada, where more than half of all status First Nations currently live off reserve or in predominantly non-Indigenous communities, often in distant towns and cities (Turner, Crompton,

and Langlois 2011). Large cities have Indigenous peoples from dozens of communities, which makes it challenging to develop a targeted and effective education strategy. Again, it is entirely logical to agree that Indigenous people living off reserve should, in an ideal world, have access to language and cultural programming. Shifting from principles to practicalities, particularly given the linguistic and cultural complexity of the Indigenous peoples and the geographic distribution of off-reserve populations, however, raises the cost to an exceptionally high level. Given that the decision-points come in the details, attending to this article in a timely and effective manner will be extremely difficult.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The “free, prior and informed consent” concept is not restricted in UNDRIP to natural resource rights. Indeed, the *Declaration* makes it clear that consultation and agreement on all matters affecting Indigenous communities ought to be pursued. Furthermore, the phrase “may affect them” is extremely open-ended. As citizens of Canada, Indigenous peoples are affected by all laws and regulation, so technically this provision would require Indigenous participation on all federal, provincial, territorial, and even municipal regulations. Obviously, Indigenous peoples should be consulted on issues of particular impact on their lives. This is now widely accepted (if not as widely practised) as a decent political principle.

Past experiences show the devastating effects that the top-down imposition of government policy can produce. Government policy has, since the 19th century, been among the most destructive forces in Indigenous culture and socio-economic well-being. Few would argue that the old model wasn’t a failure. Indigenous people now want a greater role in the development of laws and policies that affect them. Greater engagement, consultation, and participation is needed.

But operationalizing this expectation is far from easy. An advocacy organization like the Assembly of First Nations is not mandated to serve as a conduit to such consultation on behalf of Indigenous peoples. It does not, for instance, represent the Inuit, Métis, or non-status Aboriginal people. Its mandate and job is to lobby national and sub-national governments and to hold them accountable for their actions. At present there is no representative body or entity that the government can engage as the national voice of Indigenous peoples. The experience of the *First Nations Control of First Nations Education Act* highlights the limitations of current Indigenous organizations or bodies for the purposes of consultation and engagement with the national government.

There are, conversely, a wide range of regional bodies, from the Government of Nunavut to organizations based around modern treaties (the Grand Council of the Crees is an effective example, and the Nisga'a have effective Nisga'a-wide governance systems) and tribal councils (such as the Gwich'in Tribal Council), which represent smaller groupings of Indigenous peoples. While these regional arrangements have worked reasonably well on group-specific issues, it is not yet clear how the federal government, provinces, and the territories could consult these groups extensively and effectively on all legal and policy issues affecting Indigenous peoples, which, as described in UNDRIP, would mean virtually all government matters.

Yet, taken as written, this article could require comprehensive engagement on *all* matters of federal, provincial, and territorial legislative and administrative activities that could affect Indigenous peoples conceivably with every Indigenous group in the country. Managing this type of engagement at a

Government policy has, since the 19th century, been among the most destructive forces in Indigenous culture.

practical level, given the diversity of Indigenous cultures and viewpoints, could produce policy and administrative gridlock.

Still it is a priority for Indigenous peoples that their input be sought on topics as diverse as resource development, climate change, and police matters. Government cannot simply ignore these expectations for greater consultation and engagement. But real thinking must occur – including among Indigenous leaders – about how to fulfill the article’s objectives in practical terms. There are international models such as the Saami Parliament in Norway, which consults with the national government on legislation affecting the Saami people (although not, it must be said, to their complete satisfaction) that ought to be examined for its possible application in the Canadian constitutional, legal, and political context (Josefsen 2010).

Article 21:

- 1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.*
- 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.*

This article broadly captures the greatest and most immediate challenges facing Indigenous peoples. It can be summarized, simply, by saying that Indigenous peoples ought to have the same level of community services as non-Indigenous communities and the same economic and social opportunities as other Canadians. Indeed, making this a national goal (applicable to all levels of government) would be a far better approach than the current and long-term strategy of offering new government programs, short-term funding, and large-scale but imprecise budgetary announcements. It speaks to the critical need for reversing decades of poor economic and social outcomes and ensuring that Indigenous youth and future generations can pursue their personal goals and realize their individual and collective potential.

It is indefensible that a country as wealthy as Canada still has dozens and dozens of communities with boil-water advisories, inadequate housing, and weak basic social services.

By most standards, Indigenous communities experience poor quality services with respect to education, local infrastructure, and basic services such as housing, water, and energy. It is indefensible that a country as wealthy as Canada still has dozens and dozens of communities with boil-water advisories, inadequate housing, and weak basic social services (Coates and Speer 2016). Setting this right will require a major, long-term financial commitment. The Harper government made some progress in these areas. The Trudeau government has committed itself to do even more.

Yet direct government financing is not the only solution. This clause is also about enabling greater local control over revenues (including supporting the ongoing shift to greater own-source revenue for Indigenous governments) and granting more responsibility to communities for providing their own services and support, where financial resources permit (even through locally-imposed taxes). This would not only satisfy UNDRIP’s provisions with respect to self-determination and the ability to set directions for Indigenous communities without outside interference. Greater local autonomy and responsibility is also the best chance for real and sustained progress.

In the post-Second World War era, the desire to bring Indigenous peoples “up to the standard” of other Canadians unleashed a vast program of social and economic interference in the lives of Indigenous

Canadians. This process included the construction of many of the isolated reserve villages that are the source of much contemporary contention. It would be wrong – and ineffective – if the Government of Canada took this article to justify massive state-led intervention, on the scale of interventions during the 1950s and 1960s. Instead, and respecting the broader spirit of UNDRIP, a new approach would leave much of the priority setting and decision-making to Indigenous groups at the community or regional level.

At issue, then, is the extent to which Article 21 imposes legal obligations on the direct financial provision from the federal government and minimizes the potential for the type of bottom-up, community-based progress witnessed in recent years. The recent Canadian Human Rights Tribunal judgment on the case of insufficient social service support for Aboriginal youth is an example of the legalization of Indigenous expectations and demands (CBC News 2016a). The goal should be to find a compromise that achieves the objectives spelled out in Article 21 without limiting the potential for Indigenous leadership and local autonomy.

Article 27: States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Indigenous people in Canada have full access to the Canadian legal system and there are many instances, such as the *Tsilhqot'in* case, in which Aboriginal groups received an advance cost to fund litigation (Canadian Press 2013). There is plenty of evidence of Indigenous groups using the legal system to bring greater expression and clarity to their rights in Canada's business and political environment (Newman 2014; Coates and Newman 2014; Newman 2015).

But the Canadian legal system is not based on Indigenous traditions and customs. Establishing an appropriate tribunal (consider, for instance, the Waitangi Tribunal in New Zealand which, by all accounts, serves the country reasonably well) would be a difficult process, particularly because of the cultural complexity and geographic diversity of the country. But some alternate arrangement to the expensive, time-consuming, and complicated task of relying on the Canadian courts should be considered, as we recommend in our companion report on "free, prior, and informed consent." (Favel and Coates 2016)

It is not clear that marginal or even substantial reform to existing structures would be "implementation", or, be seen by Indigenous peoples to meet the test.

An alternative would be to attempt to modify existing legal and tribunal bodies to better reflect the spirit of Article 27. Herein lies the key question about the meaning of "implement" UNDRIP. In the absence of clear direction from UNDRIP, which is a principled document and not an administrative or political roadmap, it is not clear that marginal or even substantial reform to existing structures would meet the test and, importantly, be seen by Indigenous peoples to meet the test.

Article 39: Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

All the parties involved in the UNDRIP process recognized that it would take a great deal of money to reverse historic depredations and fulfill the objectives set out in the *Declaration* – with no assurances that spending more money will necessarily produce the desired outcomes. Article 39 brings full expression to this expectation.

But it is difficult to estimate the incremental public funding required in each of the jurisdictions affected by UNDRIP. The economic and financial circumstances of Indigenous peoples differ greatly and the progress toward full economic and social participation is uneven. There are also competing visions among Indigenous peoples about the relative role of direct financial contributions from government and different visions of the best way to achieve greater financial self-sufficiency for Indigenous communities.

Notwithstanding these caveats, it is obvious that implementing UNDRIP in any meaningful way will involve significant and sustained public investment. The Trudeau government has made major and medium-term commitments to fund Aboriginal programs. It is widely acknowledged that the funds will not meet even the most urgent and pressing needs. Even more elusive is the great unknown number: the amount needed to address, systematically and with sustained positive outcomes, both the requirements of Indigenous communities and the appropriate commitments under UNDRIP.

These UNDRIP articles show the potential gap between principle and practice. Few would contest the general tenor of the *Declaration* or argue about the need to strengthen the rights and opportunities for Indigenous peoples around the world. But there are legitimate questions about the practical implications of some of the Articles that the Trudeau government will need to address as it seeks to fulfill its promise to implement UNDRIP.

WHY DID CANADA OPPOSE IT?

The current federal commitment to UNDRIP raises the question of why Canada opposed UNDRIP during the 2007 vote and took an additional three years before endorsing the *Declaration*. Concerns about the practical and legal consequences of UNDRIP caused Canada, the United States, Australia, and New Zealand to vote against the *Declaration* in 2007. The comprehensiveness and non-specific nature of the document and perceived overlaps with existing laws, policies, agreements, and treaties raised the potential for legal challenges and political conflict. It is also worth noting that notwithstanding historic injustices in all four nations, these four countries were among a small number of nations whose Indigenous policies and funding actually exceeded international standards in such areas as funding for Indigenous communities and organizations, financial contributions to Indigenous social and economic needs, access to the legal system, and, more unevenly among the four, recognition of Indigenous rights and self-determination (Lightfoot 2008).

Canada argued that the level of autonomy recognized for Indigenous peoples in UNDRIP was problematic and would undermine the sovereignty of its own state.

It is worth examining the arguments that these countries made against endorsing and thus implementing UNDRIP in order to better understand the evolution of Canada's position and the current state of play. There are considerable similarities in the lines of argumentation and expressions of concern by representatives from these four countries.

Each nation argued that the level of autonomy recognized for Indigenous peoples in UNDRIP was problematic and would undermine the sovereignty of their own states, particularly in the context of land disputes and natural resource development. This section will largely refrain from addressing the natural resource development question and the possible implications of the “free, prior, and

informed consent” clause because, as noted above, it is covered in the accompanying MLI report. Instead it will focus more generally on the application of UNDRIP in Canada, the United States, Australia, and New Zealand, and the concerns that these countries expressed about the *Declaration*.

The four countries have extensive legal and political accords with Indigenous peoples, ranging from historic and modern treaties to extensive government programs and spending to environmental processes involving Indigenous communities. These arrangements may be imperfect but they are deeply entrenched in Canada’s political, legal, and constitutional architecture. This concern cannot be dismissed. The evolving conception of Aboriginal and treaty rights under Section 35 of the *Constitution Act, 1982*, for example, and the protections that apply to these rights can only be changed through constitutional amendment.

The concern, then, was the potential for incompatibility between UNDRIP and domestic laws and rights. As then-minister of Indian affairs and northern development Jim Prentice stated in the House of Commons in 2006:

The proposed wording is incompatible with our Constitution, the *Canadian Charter of Rights and Freedoms*, various Supreme Court of Canada decisions, the *National Defence Act* and federal policies on aboriginal land claims and self-government. We must work with other countries and the Standing Committee on Aboriginal Affairs and Northern Development to improve the drafting of such a declaration. (Parliament of Canada 2006)

If UNDRIP was accepted as the foundation for new Indigenous law and policy, there was (and indeed remains) a concern that the *Declaration* would also disrupt the slow yet steady evolution of legal and political progress and undo the intricate web that underpinned the current system. Practical issues such as the interaction between existing Canadian law such as the *Indian Act* and UNDRIP articles (see Article 3) and the scope of military exercises in traditional territories in Canada’s North (see Article 30) further complicates its implementation. This is to say nothing of the massive financial implications that would follow from the proper and comprehensive implementation of certain articles (see, for instance, Article 28 and the discussion above).

These governments struggled with the competing laws and practices enshrined in their own constitutions and political arrangements and the spirit and letter of UNDRIP. A 2007 statement by John McNee, Canada’s ambassador to the UN, illustrates this complicated tension:

Canada’s position has remained consistent and principled. We have stated publicly that we have significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, member States and third parties. . . .

Canada will continue to take effective action, at home and abroad, to promote and protect the rights of indigenous peoples based on our existing human rights obligations and commitments. Such effective action, we must be clear, would not be undertaken on the basis of the provisions of this Declaration.

By voting against the adoption of this text, Canada puts on record its disappointment with both the substance and process. For clarity, we also underline our understanding that this

Current arrangements may be imperfect but they are deeply entrenched in Canada’s political, legal, and constitutional architecture.

Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law.

Rosemary Banks, New Zealand's permanent representative to the UN, struck a similar tone in her 2007 statement on UNDRIP, saying:

New Zealand fully supports the principles and aspirations of the Declaration on the Rights of Indigenous Peoples . . .

It is therefore a matter of deep regret that we find ourselves unable to support the text before us today. Unfortunately, we have difficulties with a number of provisions in the text. In particular, four provisions in the Declaration are fundamentally incompatible with New Zealand's constitutional and legal arrangements, the Treaty of Waitangi, and the principle of governing for the good of all our citizens . . .

This Declaration is explained by its supporters as being an aspirational document, intended to inspire rather than to have legal effect. New Zealand does not, however, accept that a State can responsibly take such a stance towards a document that purports to declare the contents of the rights of indigenous people. We take the statements in the Declaration very seriously. For that reason have felt compelled to take the position that we do. (Banks 2007)

New Zealand's deputy prime minister, Michael Cullen, was blunt in his assessment of the UN vote in favour of UNDRIP:

I think the votes on that issue in the UN largely came down to three categories: those countries that did not have what we call indigenous people – that is, people separate from the main population – and that did not care; those countries that did but said they would not enforce the declaration even though they voted for it; and those countries that thought if they voted for it they would be bound to enforce it, so voted against it. (New Zealand Parliament 2007)

The four holdout nations were clearly in Cullen's final category.

The subsequent debate unfolded in much the same way in all four countries. Indigenous leaders and their supporters advocated for these governments to endorse UNDRIP. Much of this debate focused on the extent to which the *Declaration* is non-binding. It lacked the force of the law; it was an expression of moral priorities rather than legal doctrine. This interpretation of UNDRIP became the basis of the decision for the four holdout countries to endorse UNDRIP, beginning with Australia in 2009. The national governments may have been prepared to endorse the *Declaration* but each was clear that it would effectively have no legal standing.

Australia's indigenous affairs minister, Jenny Macklin, was unequivocal that endorsing the *Declaration* extended no new rights to Indigenous peoples:

We want indigenous Australians to be partners in efforts to close the gap. For this to happen, we must recognize the unique place of indigenous peoples in Australia. The declaration is not legally binding and will not affect Australian laws. (Drape 2009)

New Zealand's prime minister, John Key, echoed these sentiments when his government opted to endorse UNDRIP roughly a year later:

I think it is important to understand that the *Declaration on the Rights of Indigenous Peoples* is just that – it is a declaration. It is not a treaty, it is not a covenant, and one does

The holdout nations made it clear UNDRIP has no legal standing.

not actually sign up to it. It is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework. What is more, the advice we had from Crown Law was that whether or not New Zealand affirmed it, in areas where we do not have law or constitutional arrangements, the declaration could be imported already, and that people have already tried to do so, so affirming it would have no effect whatsoever. (New Zealand Parliament 2010)

Canada joined Australia and New Zealand in endorsing UNDRIP in 2010 and adopted a similar line of reasoning with respect to the *Declaration's* non-binding status and the primacy of domestic constitutional and legal rights. The Government of Canada's statement reads:

The Declaration is an aspirational document which speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances.

Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada. . . .

In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States and third parties. These concerns are well known and remain. However, we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.

Aboriginal and treaty rights are protected in Canada through a unique framework. These rights are enshrined in our Constitution, including our *Charter of Rights and Freedoms*, and are complemented by practical policies that adapt to our evolving reality. This framework will continue to be the cornerstone of our efforts to promote and protect the rights of Aboriginal Canadians. (Indigenous and Northern Affairs Canada 2010a)

The United States was the last to endorse UNDRIP. President Obama announced the shift in his administration's position at a summit with Indigenous leaders in 2010. But the US decision came with the now-usual caveats. As a US Department of State (2010) spokesperson says:

Obviously, as with any international declaration, we have certain reservations that we will voice reflecting our own domestic and constitutional interests.

It is important to note that while Canada, the United States, Australia, and New Zealand ultimately endorsed UNDRIP, none of the four countries was prepared to fully enact its provisions in their national constitutions or domestic laws. The four national governments ratified UNDRIP as an "aspirational document." The key implication was that the UN *Declaration on the Rights of Indigenous Peoples* was a target and a long-term road map that laid out national and Indigenous ambitions. But the terms were not binding on governments, and did not have the force of law.

*Canada, the US,
Australia, and
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an "aspirational
document."*

NEW DEVELOPMENTS IN CANADA

Recent developments in Canada have created renewed interest in UNDRIP and new ambition for its implementation. These developments reflect a growing shift in interpretation of UNDRIP as an “aspirational” document to the idea that it serves as a blueprint for the governance and administration of Indigenous affairs.

The Truth and Reconciliation Commission’s (2015b) final report, issued in December 2015, calls on the “federal, provincial, territorial, and municipal governments to fully adopt and implement the United Nations *Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.” It also recommends that the federal government “develop a national action plan, strategies, and other concrete measures to achieve the goals of the United Nations *Declaration on the Rights of Indigenous Peoples*.” It was a high-profile endorsement for UNDRIP and conveyed the belief that the *Declaration* provides a framework for reconciliation.

Prime Minister Justin Trudeau’s statement upon the release of the commission’s final recommendations reaffirmed his support for UNDRIP and prioritized its implementation. He says:

[W]e will, in partnership with Indigenous communities, the provinces, territories, and other vital partners, fully implement the Calls to Action of the Truth and Reconciliation Commission, starting with the implementation of the United Nations *Declaration on the Rights of Indigenous Peoples*. (Prime Minister of Canada’s Office 2015)

The prime minister’s comments, consistent with his party’s election platform and his minister’s mandate letter, represent a significant shift in tone from his predecessor’s position. Apprehensions about the legal, political, and constitutional consequences of UNDRIP have been minimized and, to date, largely undebated. NDP MP Romeo Saganash, the critic for Intergovernmental Relations, introduced (not for the first time), on April 21, 2016, a private member’s bill that called for the implementation of UNDRIP. As Saganash comments:

I think there is a lot of talk of reconciliation, a new nation-to-nation relationship in this country. I have heard all the words that have been spoken from the other side of the House in this Parliament, what I am proposing today is concrete action to back up those words. (Barrera 2016)

The Truth and Reconciliation Commission recommends adoption of UNDRIP as the “framework for reconciliation”.

Specifically, Saganash’s bill called for UNDRIP to be affirmed “as a universal international human rights instrument with application in Canadian law.” The bill called on Indigenous peoples and the Government of Canada to “ensure that the laws of Canada are consistent with the United Nations *Declaration on the Rights of Indigenous Peoples*” and asked for a “national action plan to achieve the objectives” of UNDRIP. The Bill would also require an annual report to Parliament on progress towards implementing UNDRIP.⁸

Grand Chief Dr. Matthew Coon Come of the Grand Council of the Crees (2016) endorsed the approach, arguing:

The way forward to achieve a new relationship between Canada and Indigenous peoples and to put our communities on a path of healing and inclusion is not a mystery. The United Nations *Declaration on the Rights of Indigenous Peoples* lays out a framework and a path for redressing the historic injustices suffered by Indigenous peoples, and if implemented

properly, can lay the foundation for the elimination of poverty, dispossession and the kinds of intolerable living conditions that produce epidemic suicides among our youth. This bill provides the opportunity to do this and it should be supported wholeheartedly.

The Liberal goal, according to Natural Resources Minister Jim Carr, was a “Canadian definition” solution to UNDRIP (APTN National News 2016).

It is not the first time that the Liberal representatives emphasized the importance of implementing UNDRIP. Even prior to the 2015 election, Mr. Trudeau invoked UNDRIP as a key part of his policy vision at a July 2015 meeting of the Assembly of First Nations, saying:

When I say that we must complete the unfinished work of Confederation, I mean that Canada needs a renewed, nation-to-nation relationship with Aboriginal communities.

A relationship based on recognition, rights, respect, co-operation and partnership. One that is rooted in the principles of the United Nations *Declaration on the Rights of Indigenous Peoples*. One that is guided by the spirit and intent of the original Treaty relationship, and one that respects the decisions of our courts. One that takes us beyond our formal agreements and speaks to how we ought to treat each other – person to person and spirit to spirit. One that remembers that when we conduct ourselves with dignity, we manifest our respect for the Creator, and for Creation.

Then, during the 2015 election campaign, the Liberal Party leader recommitted to placing UNDRIP at the centre of his policy agenda related to Indigenous people, stating:

We know we are going to have to go through the books entirely and repeal and reform many pieces of legislation that do not respect the rights of Indigenous peoples in this country. The Liberal party is fully committed to doing a complete review to ensure this relationship we need to renew is done properly and of course the United Nations declaration is at the heart of that. (Barrera 2015)

The Liberal government suggests that it views UNDRIP as much more than an aspirational document.

The government’s message certainly suggests that it views UNDRIP as much more than an aspirational document and intends to reflect it in federal laws and policy. The Liberal government has not, as of spring 2016, clarified its plans to implement UNDRIP. This is a critical issue. There is a major distinction between a literal acceptance of the *Declaration* by codifying the UNDRIP articles and clauses in a single statute or a series of laws and a political interpretation that seeks to reflect the *Declaration* in government decision-making on an ongoing basis and that uses UNDRIP as a guideline for addressing Indigenous needs and aspirations.

Prime Minister Trudeau is not alone in announcing high level political support for UNDRIP. Alberta premier Rachel Notley has also indicated her government’s commitment to the *Declaration*, particularly as it relates to land use and resource development. In July 2015, she announced a comprehensive assessment of Alberta’s policies and regulations to ensure that they are aligned with UNDRIP. She specifically directs the Cabinet to:

engage directly with Indigenous people to find a common and practical understanding of how the principles of the UN Declaration can be implemented in a way that is consistent with our [Canadian] Constitution and with Alberta law. (Jamieson, Olynyk, and Rodzinyak 2015)

This review is ongoing and its implications remain unclear especially since the government is also committed to resource development, new pipeline construction, and other activities requiring

extensive engagement with Indigenous peoples. It will thus be interesting to see how the Alberta government reconciles these potentially competing interests. To the extent that it can show progress on both fronts, reconciling provincial priorities and commitments to Indigenous peoples, its approach may become a model for other governments in Canada.

The consequences of these recent political developments are still unclear. There remain real questions about what it means to implement UNDRIP. It is not yet evident how it can be done in a way that is consistent with existing legal, political, and constitutional architecture. Clearly, as well, all stakeholders want to ensure that Canada under UNDRIP produces greater economic and social opportunity for Indigenous peoples in Canada. These are the key issues that the Trudeau and Notley governments will need to consider as they seek to fulfill their respective commitments to UNDRIP.

INTERPRETING UNDRIP

At the core of these questions are competing interpretations of UNDRIP. There is not a universal consensus about the meaning and authority of the *Declaration*.

The preponderance of legal analysis and opinion tilts in favour of the view that UNDRIP has no real legal standing in Canada in and of itself. It is a general statement of comprehensive, long-term objectives and a recognition of widely-held historical experiences of Indigenous peoples around the world.

But without action by national governments to codify UNDRIP in their legal, political, and constitutional arrangements, it is widely viewed as an aspirational rather than practical document. UNDRIP is not a treaty or a convention (both of which would be legally binding) that would be signed or ratified by states. Instead, it is a statement endorsed by most UN members (Indigenous and Northern Affairs Canada 2016).

The practical implications of this interpretation is that UNDRIP calls on member nations to update domestic laws and policies to reflect its spirit and letter in order for UNDRIP to have substantial practical effect.⁹ Without specific government action, its influence is generally limited to moral or political authority. Indigenous groups, for their part, can use the international consensus embodied in UNDRIP to advocate for legal or policy change. Yet some Indigenous leaders and communities disagree with this narrow interpretation and have argued that it has or ought to have full legal effect (Davis 2012).

As the foreword to an international handbook on UNDRIP puts it:

The UN Declaration defines the minimum standards necessary for the survival, dignity and well-being of Indigenous peoples of the world. The international community has already taken the important and positive step towards the recognition of indigenous peoples' rights through the adoption of the UN Declaration. It is now time to move towards the implementation of the UN Declaration's provisions. (Inter-Parliamentary Union 2014)

British legal scholar Marco Odello belongs to the intellectual camp that takes a limited or narrow view of UNDRIP and places primary legal authority with the nation state. He argues:

international law usually provides a general and abstract set of rules, the fruit of lengthy and complex negotiations and compromises. In addition, it would be a serious lack of

pragmatism to forget that individuals and communities, both domestic and foreign, are today under the jurisdiction of states. Therefore, the responsible entities for ensuring their protection are the states' authorities at their different levels, from national to local governments. This protection is given through national legal norms, the system of courts and other mechanisms for the protection of human rights, such as ombudsmen and national human rights commissions. (2011, 106)

British human rights expert Jessie Hohmann takes a broader view and sees UNDRIP as a crucial initiative designed to recognize the importance of cultural survival to Indigenous peoples:

indigenous peoples and advocates of indigenous rights have in some respects succeeded, in others failed, to make connections between individual survival, non-assimilation or group survival, and cultural survival, and to link these concepts with rights to land and territory. These emerging linkages in international law point to an understanding of indigenous place in the world which rejects compartmentalised visions of human rights, and which seeks to overcome long-standing conceptual and practical divisions over what constitute individual versus group rights, and collective culture versus individual identity and survival.

Robert McCreery (2012), an Australian-based editor of an Indigenous law journal, sees UNDRIP in more expansive terms than either Odello or Hohmann. He writes:

The UNDRIP is a global endorsement of the fact that Indigenous peoples have more than just the right to be beneficiaries of externally controlled economic systems, but that Indigenous peoples have the right to determine and control their own economic futures. Although in many ways it only reflects the rights of Indigenous peoples to the extent that they are already recognized in international law, its great utility is that it collectively recognizes these rights as they specifically apply to Indigenous peoples. In doing this, it provides clarity as to the nature of Indigenous economic and development related rights and explains how Indigenous led economic development can advance without impeding states' economic sovereignty.

"UNDRIP is a global endorsement of the fact that Indigenous peoples have more than just the right to be beneficiaries of externally controlled economic systems".

-Robert McCreery

As for the potential influence of UNDRIP, there are also competing views. Some have argued that UNDRIP is already influencing legislation and policy-making in liberal democracies in the direction of greater recognition of Indigenous rights (John 2013; Mitchell 2013). Others such as Duane Champagne (2013), a senior American Indigenous scholar, are more skeptical. He writes:

The UNDRIP plan may work within nation-states that seek to recognize indigenous nations and their rights to self-government, cultural autonomy, and territory within nation-state legal and political institutions. Most nation-states, however, do not recognize indigenous rights, and UNDRIP gives them no incentives to do so. Most modernizing and mestizo-based nation-states reject the continuity and rights of indigenous peoples and their forms of social and cultural organization.

Others have even accused UNDRIP of serving as "colonisation by other names" by imposing on Indigenous peoples a Eurocentric conception of international law (Pulitano 2012, 4). It speaks to the wide range of competing views about UNDRIP, its meaning and legal authority, and its relevance as a driver of new cultural and legal rights for the world's Indigenous peoples.

The academic and legal debate on UNDRIP is complex and nuanced, far more so than the contemporary

political exchanges in Canada about the *Declaration*. Notwithstanding this ongoing legal debate, UNDRIP has become a baseline for the evaluation of government policies – in effect, a testable international standard for the development of new initiatives and programs related to Indigenous peoples.¹⁰

LIMITATIONS TO IMPLEMENTING UNDRIP IN CANADA

UNDRIP is a call to action to redress the historic wrongs and establish the conditions for self-determination, cultural resurgence, and new economic and social opportunities for Indigenous peoples. The Trudeau government is right to focus on the *Declaration* as a basis for reconciliation and progress.

Yet there are limitations on the government's ability to implement UNDRIP that depend in part on the government's meaning of "implement." A literal interpretation that involves codifying every

UNDRIP article and clause in a single statute or a series of laws will face significant constitutional, legal, political, and financial challenges. A political interpretation that instead seeks to reflect UNDRIP in government decision-making on an ongoing basis risks disappointing high expectations.

The option of fully codifying UNDRIP's articles and clauses in a single piece of legislation or multiple bills would pose challenges. Consider Article 3 and the question of "the right to self-determination" on matters of "political status." The full expression of this vision of self-determination with respect to so-called "political status" would conflict with the *Canadian Charter of Rights and Freedoms* and existing federal, provincial, and territorial laws. The 1995 self-government policy of the previous Liberal government specifically addressed this issue. It states:

As a right which is exercised within the framework of the Canadian Constitution, the inherent right [to self-government] will not lead to the automatic exclusion of federal and provincial laws, many of which will continue to apply to Aboriginal peoples or will co-exist alongside validly enacted Aboriginal laws.

To minimize the possibility of conflicts between Aboriginal laws and federal or provincial laws, the Government believes that all agreements, including treaties, should establish rules of priority by which such conflicts can be resolved. The Government takes the position that negotiated rules of priority may provide for the paramountcy of Aboriginal laws, but may not deviate from the basic principle that those federal and provincial laws of overriding national or provincial importance will prevail over conflicting Aboriginal laws. Prior to the conclusion of self-government agreements, federal and provincial laws would continue to apply to the extent that they do currently. (Indigenous and Northern Affairs Canada 2010b)

The point is not to dismiss or minimize the importance of self-determination but rather to highlight that its implementation will require proper design for the Canadian legal context.

A similar challenge applies with respect to the interaction between UNDRIP articles and clauses and existing laws related to Indigenous communities. Consider Article 4 on the “right to self-determination” for Indigenous communities on matters “relating to their internal and local affairs” and the potential interaction with the *Indian Act*. The much reviled *Indian Act* is clearly in need of an overhaul or replacement, but key elements of Indigenous governance are still influenced by the *Act* and cannot be easily dropped without a careful analysis of how any changes fit within the Canadian legal context. Simply passing a law that enshrines the *Declaration*’s articles, as Member of Parliament Saganash proposes, could create instances of legal tensions with existing laws and policies.

Another limitation relates to fiscal resources. The government’s recent budget has made important steps in increasing financial support for key social services, such as housing, energy, and education. But a literal interpretation of UNDRIP could require the expenditure of billions of dollars in incremental funding in the short-term to meet even the minimal standards expressed in UNDRIP.

These are just some of the limitations to implementing UNDRIP in Canada. The key takeaway, then, is that the Trudeau government will need an UNDRIP strategy that reflects Canada’s legal, political, and constitutional architecture and yet still meets expectations from Indigenous communities and their leaders. It is not an impossible task per se but it will require effective consultation and engagement with Indigenous peoples to identify priority areas and a plan to pursue reconciliation and to produce real and constructive change.

Implementation will require consultation and engagement with Indigenous peoples to identify priority areas and a plan to pursue reconciliation and to produce real change.

RECOMMENDATIONS FOR “IMPLEMENTING” UNDRIP

Navigating the legal, political, and constitutional implications of UNDRIP is possible but far from easy. It is clear that policy-makers and the general public understand the significance of UNDRIP and appreciate the challenges that lie ahead in implementing such a comprehensive and important *Declaration*.

Here are a series of concrete recommendations to help the government and Indigenous leaders achieve progress on UNDRIP without undermining the important recent developments that are creating new economic and social opportunities for Indigenous communities:

- Much of the public debate about UNDRIP has focused on the clauses related to “free, prior, and informed consent” and the implications for resource development. These are important questions. Establishing the concept of “free, prior, and informed” consent in the project approval process is a contentious issue with numerous challenges. But it does not represent the full scope of UNDRIP. There is a risk that the focus on this clause will obscure the other equally important UNDRIP imperatives. Simply put, it is not sufficient for Canadian governments to address the concept of “free, prior, and informed consent”, difficult as that may be, and claim to have satisfied their commitments to UNDRIP.

- Policy-makers and Indigenous leaders must discuss and clarify the interaction of specific UNDRIP articles with existing Canadian laws and policies. One way to think about this question is through the lens of positive and negative rights. Articles that set out negative rights such as “Indigenous peoples shall not be forcibly removed from their lands or territories” (Article 10) can be examined vis-à-vis the *Canadian Charter of Rights and Freedoms* to better understand what, if any, changes would be needed to grant Indigenous peoples stronger protection from the imposition of illiberal state action as evidenced in the past. In this case, the *Charter* provides adequate protection that likely goes beyond the requirements of Article 10. Articles that set out positive rights such as “Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration” (Article 39) must be considered in the broad context of government programs and spending. Again, Canada and provinces provide substantial resources to Indigenous groups.

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- It is clear that the funding currently available is not sufficient to meet the myriad challenges facing the Aboriginal communities across the country. UNDRIP provides no direction as to the amount of funding required to address the articulated rights. UNDRIP could be the tool needed to force the government’s hand on this major financial issue. A starting point – and it is a major one – would be for the Government of Canada to commit to providing equality for Indigenous peoples in the provision of services and infrastructure.

- It would help substantially if Indigenous leaders would indicate those areas in UNDRIP where they believe current Canadian practices are, in terms of international minimum standards, at or above the expectations articulated in the *Declaration*. Successive Canadian governments have made substantial financial, legal, and political commitments to Indigenous people, and new economic partnerships with Canadian companies are creating real opportunities for Indigenous communities.

- The status quo has flaws. There are plenty of areas that require improvement. Canadian governments have not done enough, for instance, on language retention or strengthening Indigenous culture. But this is precisely the reason that prioritization is critical. It was always understood that UNDRIP would apply differently in the signatory countries depending on the size of their Indigenous populations and pre-existing circumstances. It only stands to reason that we focus energy and resources on the UNDRIP articles where Canada is deficient and publicly recognize those areas where Canada is ahead of the international curve.
- The final recommendation is that the government must ensure that it properly communicates UNDRIP and its purpose to non-Indigenous Canadians. Broadly speaking, the *Declaration* is about protecting Indigenous rights from illiberal state action and bringing the socio-economic and cultural conditions of Indigenous peoples up to basic national standards. It is not about handouts or unjustifiable cases of asymmetrical treatment. Canadian governments have long acknowledged the deficiencies of Indigenous policies in the country. Yet reform has typically been too narrowly focused. It is time for a bigger vision and agenda, like that articulated in UNDRIP, to create the conditions for greater economic and social opportunities for Indigenous peoples.

CONCLUSION

Canadian governments have searched for the policy masterstroke to transform Indigenous lives and provide a better quality of life for Indigenous peoples for the last 150 years. Some of these efforts have been disastrous. The *Indian Act*, the reserve system, residential schools, and efforts to erase Indigenous cultures produced tragic consequences and created a barrier to trust and cooperation between Indigenous peoples and Canadian governments.

Yet Canadians have witnessed significant transformations in the modern age due to Indigenous protests, political action, and legal challenges. Resource rights, modern treaties, Aboriginal self-government, and royalty revenue-sharing are establishing new economic partnerships between government, businesses, and Indigenous communities, and creating real opportunities for Indigenous peoples. These developments have positioned Canada as a world leader with respect to selected aspects of Indigenous cooperation and partnership, moving the country along the path for reconciliation.

The Trudeau government has shown a real determination to continue down this path and made implementing UNDRIP a key part of its plan to achieve reconciliation with Indigenous Canadians.

Expectations for the government to move ahead with UNDRIP are high – accompanied by uncertainty with regards to how UNDRIP will be implemented and the consequences for Canadian policy and the government's relationship with Indigenous peoples. The Trudeau government will need to answer some key questions as it seeks to fulfil its promise to convert UNDRIP from an aspirational document into an effective strategy for improving relationships with Indigenous peoples in Canada.

Implementing UNDRIP in full – that is, enshrining every provision in Canadian law and policy – would not only be impractical, it could undermine recent progress towards greater economic opportunity and self-sufficiency for Canada's Indigenous peoples. Instead the government should focus on the parts of UNDRIP where Canada requires further improvements to meet its obligations to Indigenous peoples and to create the conditions for their economic and cultural empowerment.

*For 150 years,
Canadian
governments
searched for the
policy master
stroke to improve
Indigenous lives.*

ANNEX

ARTICLES OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

ARTICLE 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

ARTICLE 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

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.

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 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

ARTICLE 6

Every indigenous individual has the right to a nationality.

ARTICLE 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

ARTICLE 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of forced assimilation or integration;
- (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

ARTICLE 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

ARTICLE 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

ARTICLE 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

ARTICLE 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

ARTICLE 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

ARTICLE 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

ARTICLE 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

ARTICLE 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

ARTICLE 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.
3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

ARTICLE 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

ARTICLE 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

ARTICLE 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

ARTICLE 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

ARTICLE 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

ARTICLE 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

ARTICLE 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

ARTICLE 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

ARTICLE 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

ARTICLE 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous

peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

ARTICLE 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

ARTICLE 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

ARTICLE 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

ARTICLE 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

ARTICLE 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

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 or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

ARTICLE 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

ARTICLE 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

ARTICLE 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

ARTICLE 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

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.

ARTICLE 38

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

ARTICLE 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

ARTICLE 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give

due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

ARTICLE 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, *inter alia*, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

ARTICLE 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

ARTICLE 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

ARTICLE 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

ARTICLE 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

ARTICLE 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

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Blaine Christopher Favel

Blaine Favel is the 14th chancellor of the University of Saskatchewan, having taken up his duties on July 1 of 2013. Mr. Favel is an influential Plains Cree leader who has made significant contributions to scholarship, education, public service and the Canadian public good.

During his tenure as Chief of the Poundmaker Cree Nation in Cutknife, SK, Chief Favel established the first community-based justice program for First Nations with the introduction of sentencing circles on reserves. A former Grand Chief of the Federation of Saskatchewan Indian Nations, Mr. Favel pioneered two national firsts; the establishment of the First Nations Bank of Canada, Canada's only Aboriginal controlled bank, and

the Saskatchewan Indian Gaming Authority, Canada's first Indian gaming organization. He implemented the 1996 Treaty Implementation Process under the supervision of the Office of the Treaty Commissioner with the governments of Canada and Saskatchewan.

Mr. Favel was appointed to an ambassadorial level posting by Prime Minister Chrétien as Canadian Counsellor on International Indigenous Issues. This office advised Cabinet and the Foreign Affairs and International Trade Minister on human rights and trade issues affecting indigenous peoples globally. Mr. Favel has also worked as legal counsel with the law firm of Bennett Jones and as an investment banker with RBC Capital Markets energy group. He was a senior personal adviser to two Assembly of First Nations National Chiefs, Ovide Mercredi and Phil Fontaine.



Kenneth S. Coates

Kenneth S. Coates is MLI's Senior Fellow in Aboriginal and Northern Canadian Issues. He is the Canada Research Chair in Regional Innovation in the Johnson-Shoyama Graduate School of Public Policy at the University of Saskatchewan. He has served at universities across Canada and at the University of Waikato (New Zealand), an institution known internationally for its work on Indigenous affairs. He has also worked as a consultant for Indigenous groups and governments in Canada, New Zealand, and Australia as well as for the United Nations, companies, and think tanks.

He has previously published on such topics as Arctic sovereignty, Aboriginal rights in the Maritimes, northern treaty and landclaims processes, regional economic development, and government strategies for working with Indigenous peoples in Canada. His book, *A Global History of Indigenous Peoples: Struggle and Survival*, offered a world history perspective on the issues facing Indigenous communities and governments. He was co-author of the Donner Prize winner for the best book on public policy in Canada, *Arctic Front: Defending Canada in the Far North*, and was short-listed for the same award for his earlier work, *The Marshall Decision and Aboriginal Rights in the Maritimes*.

Ken contributes regularly, through newspaper pieces and radio and television interviews, to contemporary discussions on northern, Indigenous, and technology-related issues.

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ENDNOTES

- 1 For a useful commentary on this topic, see Roxanne T. Ornelas, 2014, “Implementing the Policy of the U.N. Declaration on the Rights of Indigenous Peoples.”
- 2 There are a series of handbooks and guides available related to UNDRIP. See, for example, Asia Pacific Forum and United Nations Human Rights Office of the High Commissioner, 2013, *United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, and Brenda Gunn, 2011, *Understanding and Implementing the United Nations Declaration on the Rights of Indigenous Peoples: An Introductory Handbook*.
- 1 « Le Canada va retirer son statut d'objecteur permanent à la Déclaration des Nations Unies sur les droits des peuples autochtones », 9 mai 2016, <http://ici.radio-canada.ca/regions/manitoba/2016/05/09/010-canada-objection-onu-declaration-droits-autochtones-nations-unies.shtml>.
- 2 Pour un commentaire utile sur ce sujet, voir R.T. Ornelas (2014). Implementing the Policy of the U.N. Declaration on the Rights of Indigenous Peoples. *International Indigenous Policy Journal*, 5(1). Tiré de : <http://ir.lib.uwo.ca/iipj/vol5/iss1/4> DOI: 10.18584/iipj.2014.5.1.4.
- 3 See the World Directory of Minority and Indigenous Peoples, available through Minority Rights Group International and accessible at <http://minorityrights.org/directory/>.
- 4 The information was provided during a Conference Board of Canada webinar on UNDRIP. The detail is available in Thomas Isaac, 2016, “Understanding the Implications of the United Nations Declaration on the Rights of Indigenous Peoples in Canada,” PowerPoint presentation, Conference Board of Canada, May 4.
- 5 It has implications for an estimated 370 million Indigenous people around the world. See Scott Simon, 2011, “Canada and UNDRIP: Moving forward on Indigenous Diplomacy..”
- 6 It should be noted that Article 46, which preserves and protects state sovereignty and territorial integrity, was added late by the states (in 2007) and never negotiated and/or agreed to by Indigenous delegates.
- 7 For an introduction to this issue, see Michael Ames, 1992, *Cannibal Tours and Glass Boxes: The Anthropology of Museums*. There is an interesting commentary on this topic by Meagan Gough, 2008, “The Changing Relationship Between First Nations People and Museums.” See also Michael Ross, 2005, *First Nations Sacred Sites in Canada’s Courts*.
- 8 The bill, *Bill C-262: An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 2016, can be found at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=8210051&Col=1>.
- 9 Countries such as Ecuador and Bolivia have rewritten their constitutions to strengthen the concepts of Indigenous rights along the lines envisioned in the declaration.
- 10 The excellent study by Anna Cowan (2013) of Australia’s Northern Territory policies is a good illustration.
- 11 First Nations communities can get out from under the *Indian Act*, or some of its major provisions, in a variety of ways. The signing of a modern treaty or the negotiation of a modern self-government agreement, for example, can empower the community through the drafting of a new constitution and the creation of new governance systems. The *First Nations Land Management Act*, implemented only following community opt-in, transfers decision-making authority over land to the First Nation. Similarly, the *Mi’kmaq Education Act* gave First Nations in the Maritimes control over the education requirements as spelled out in the *Indian Act* and provided a model for other First Nations wishing to replace Indigenous Affairs control with local authority. The *First Nations Election Act* (2015) similarly allowed First Nations to replace the Band and Council electoral procedures spelled out in the *Indian Act* with a more contemporary electoral system.



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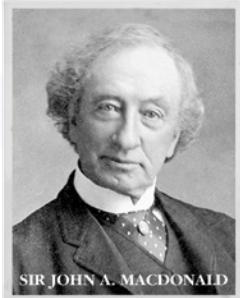
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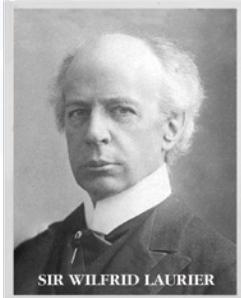
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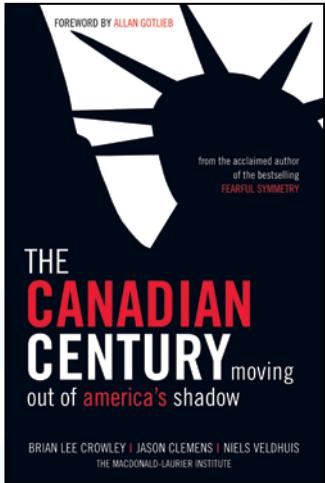
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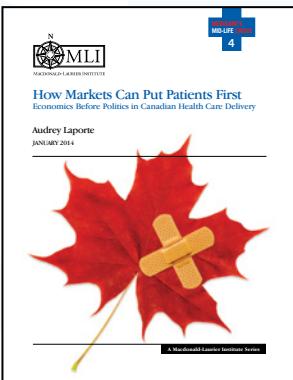
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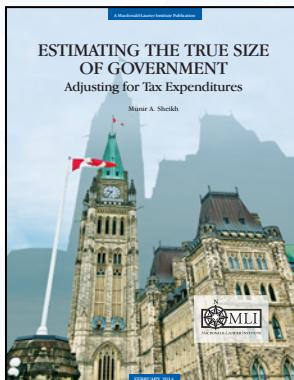
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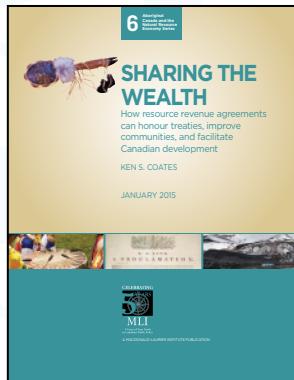
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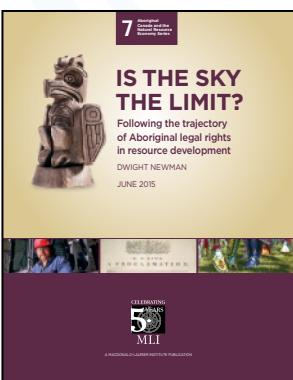
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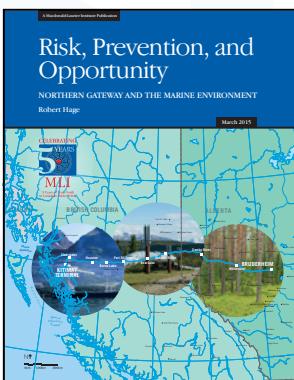
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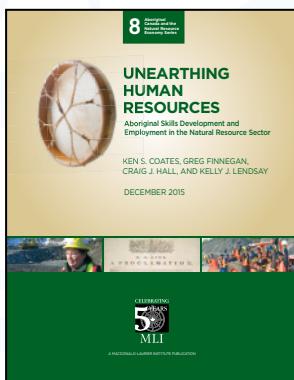
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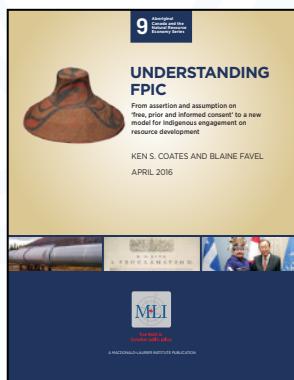
Is the Sky the Limit
Dwight Newman



**Risk, Prevention and
Opportunity**
Robert Hage



**Unearthing Human
Resources**
Ken S. Coates,
Greg Finnegan, Craig J. Hall,
and Kelly J. Lendsay



Understanding FPIC
Ken S. Coates and
Blaine Favel



True North in
Canadian public policy

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What people are saying about the Macdonald- Laurier Institute

In five short years, the institute has established itself as a steady source of high-quality research and thoughtful policy analysis here in our nation's capital. Inspired by Canada's deep-rooted intellectual tradition of ordered liberty – as exemplified by Macdonald and Laurier – the institute is making unique contributions to federal public policy and discourse. Please accept my best wishes for a memorable anniversary celebration and continued success.

THE RIGHT HONOURABLE STEPHEN HARPER

The Macdonald-Laurier Institute is an important source of fact and opinion for so many, including me. Everything they tackle is accomplished in great depth and furthers the public policy debate in Canada. Happy Anniversary, this is but the beginning.

THE RIGHT HONOURABLE PAUL MARTIN

In its mere five years of existence, the Macdonald-Laurier Institute, under the erudite Brian Lee Crowley's vibrant leadership, has, through its various publications and public events, forged a reputation for brilliance and originality in areas of vital concern to Canadians: from all aspects of the economy to health care reform, aboriginal affairs, justice, and national security.

BARBARA KAY, NATIONAL POST COLUMNIST

Intelligent and informed debate contributes to a stronger, healthier and more competitive Canadian society. In five short years the Macdonald-Laurier Institute has emerged as a significant and respected voice in the shaping of public policy. On a wide range of issues important to our country's future, Brian Lee Crowley and his team are making a difference.

JOHN MANLEY, CEO COUNCIL