Myths & Misrepresentations

The *UN Declaration on the Rights of Indigenous Peoples* & Bill C-262

The federal government and a number of provinces and territories have made significant commitments to uphold the *United Nations Declaration on the Rights of Indigenous Peoples* ("*UN Declaration*" or "*Declaration*"). A private members bill before Parliament, Bill C-262, would create a legislative framework requiring the federal government to work collaboratively with Indigenous peoples to fulfil its promise to fully implement the *Declaration*.

With these important developments, the *Declaration* has become the subject of a welcome focus of public policy discussion. Unfortunately, opposition by the previous governing party left a legacy of confusion and misinformation about the *Declaration* and these misrepresentations continue to be repeated.

The Coalition for the Human Rights of Indigenous Peoples is made up of Indigenous Nations, Indigenous peoples' organizations, human rights groups and individual experts that have been deeply involved with the development of the *Declaration* or the subsequent ongoing work of its interpretation and application both in Canada and internationally. The Coalition has prepared this document to address some of the myths and misrepresentations that have clouded the debate around the *Declaration* and Bill C-262.

1. *'The* UN Declaration *is merely aspirational and there is no current obligation for governments in Canada to actually implement it'*

This is simply false.

The UN General Assembly adopted the *UN Declaration on the Rights of Indigenous Peoples* in 2007 as "minimum standards" for all States. The intent that all States should live up to

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these standards has been repeatedly reaffirmed through subsequent UN General Assembly resolutions.

The *Declaration* was developed for over two decades in a process in which Canada was an active participant. For the government to participate in this process, support resolutions calling for its implementation, and then ignore the *Declaration* in policies and decisions would be exactly the kind of bad faith conduct that the Supreme Court has said is incompatible with the constitutional duty to act honourably in respect to the rights of First Nations, Inuit and Métis peoples.

The *Declaration* has legal effect in Canada. Canadian courts have established that declarations and other sources of international human rights law are "relevant and persuasive" sources for interpretation of human rights in Canada's Constitution. What's more, Canadian courts generally favour interpretations of domestic law that are consistent with Canada's international obligations. Canadian courts and tribunals have already used the *Declaration* to help interpret Canadian laws and ensure that their interpretation complies with Canada's international obligations.

The *Declaration* is a particularly powerful source of interpretation of Canada's legal obligations with regard to Indigenous peoples. The lengthy deliberations leading to its adoption, and the direct role that Canada and Indigenous peoples played in its creation make the *Declaration* especially authoritative. Furthermore, all the provisions in the *Declaration* were developed on the basis of existing standards in international law. Many were already legally binding on Canada, either due to their acceptance as matters of customary international law, or because they are necessary to fulfil obligations under the human rights Treaties that Canada has ratified.

For example, the right of self-determination of all peoples was already established in the UN Charter and in two core, legally-binding human rights treaties, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. The Inter-American Commission on Human Rights has concluded that the duty to protect the land rights of Indigenous peoples is a matter of customary international law. And the *Declaration's* provisions on free, prior and informed consent mirror how these and other international human rights instruments, such as the *International Convention on the Elimination of All Forms of Racial Discrimination*, have been interpreted by the very bodies set up by the UN to oversee their implementation.

2. *'The* UN Declaration *leads to Indigenous peoples having rights that other people don't.'*

The *Declaration* is based on universal principles such as the right of self-determination and the right to live free from discrimination – rights guaranteed to all peoples and all individuals respectively. However, like other international human rights instruments, the *UN Declaration* interprets and applies these rights to a specific context – in this case, the distinct needs of Indigenous peoples resulting from the long history of colonialism, dispossession, marginalization and impoverishment. The *Declaration* also requires States to uphold the commitments that they have made to Indigenous peoples through treaties and other processes.

The *Declaration* also includes numerous balancing provisions to ensure that when the

Declaration is interpreted and applied in diverse national contexts, the "human rights … of all shall be respected."

3. 'The UN Declaration *undermines the careful balancing of rights that has characterized Canadian constitutional tradition.'*

Nothing could be farther from the truth.

Again, the *Declaration* includes some of the most comprehensive balancing provisions in any international human rights instrument. The language of Article 46 of the *Declaration*, which calls for the *Declaration* to be interpreted "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith" is wholly consistent with Canadian constitutional traditions. In a May 2008 open letter, 100 Canadian legal scholars and other experts stated that the *Declaration* is consistent with the Canadian Constitution and Charter of Rights and Freedoms and "profoundly important for fulfilling their promise."

4. '*The* UN Declaration's *provisions on free, prior and informed consent would create an absolute veto over resource development projects.'*

The *UN Declaration* clearly and repeatedly affirms the right of Indigenous peoples to make their own decisions. The *Declaration* also provides rigorous protections against State decision-making processes that ignore the consequences for the health, well-being and cultural integrity of Indigenous nations, communities, families and individuals. The necessity for such provisions should not be controversial in Canada, given the public acknowledgement of the tragic harms that have been repeatedly inflicted on Indigenous peoples through decisions imposed against their wishes.

The rights protections set out in the *Declaration* are not absolute, except in the case of genocide. The *Declaration*'s provisions on free, prior and informed consent (FPIC) are subject to the same balancing provisions as all other articles in the *Declaration* and would be interpreted and applied in this light. In any given situation, the facts and the law must be fully considered.

Consistent with the need for rigorous protection of the rights of Indigenous peoples, any limitations on these rights should be rare and never arbitrary. Article 46 affirms that the exercise of rights set out in the *Declaration* should be "subject to only such limitations as are determined by law and in accordance with international human rights standards". Furthermore, such limitations must 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."

FPIC is an essential safeguard. Respect for FPIC puts Indigenous peoples in a more equitable position when their representatives come to the table with government or industry. A commitment to move forward on the basis of mutual respect and agreement promotes reconciliation rather than conflict. FPIC also provides government, business and Indigenous peoples with the certainty that they seek for long-term planning.

5. *'The* UN Declaration *only requires States to "seek consent" of Indigenous peoples which means States can freely ignore Indigenous peoples who refuse to grant such consent.'*

During the discussions and negotiations on the *UN Declaration*, Indigenous peoples expressly rejected any reference to "seek" consent. The phrase "seek consent" does not appear in the *Declaration*.

As noted above, the free, prior and informed consent provisions of the *Declaration* are clearly intended to provide a meaningful standard of rights protection and fulfillment. Even a good faith consultation process requires States to take the views and decisions of Indigenous peoples seriously. Free, prior and informed consent requires much more than that.

Articles 19 and 32.2 set out a requirement for States to "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** [emphasis added]" a) "before adopting and implementing legislative measures that may affect them (Article 19)" and b) "prior to the approval of any project affecting their lands or territories or other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Article 32.2)."

Clearly, there is nothing in these articles to imply that States are entitled to simply ignore the decisions made by Indigenous peoples. That would not be consistent with the requirement of good faith consultation and cooperation.

Critically, no article of the *Declaration* should be read in isolation. Articles 19 and 32.2 need to be interpreted and applied consistent with other provisions in the *Declaration* and in the larger body of international law. These include the *Declaration*'s affirmation of Indigenous peoples' right of self-determination (Article 3) and the "right to determine and develop priorities and strategies for exercising their right to development (Article 23)", as well as numerous other articles affirming the right of Indigenous peoples to determine and control their own lives and futures. For example, Article 32.1 of the *UN Declaration* affirms "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."

The *Declaration* must also be interpreted alongside the findings of the UN Committee on the Elimination of Racial Discrimination which – along with other independent, expert bodies charged with interpreting legally-binding international and regional human rights conventions and covenants – has explicitly called on States to ensure that, in regard to Indigenous peoples, "no decisions directly relating to their rights and interests are taken without their informed consent [CERD General Recommendation 23, 1997]."

It's also worth noting that there are instances where Canadian courts have already explicitly affirmed the right of Indigenous peoples to grant or withhold consent, including in respect to title lands (*Tsilhqot'in Nation*, 2014) and as part of the spectrum of the duty to consult and accommodate where there is potential for "very serious" impacts (*Delgamuukw*, 1997) and *Haida Nation*, 2004). There are also numerous contexts in which a requirement of consent is already accepted in Canadian government practice, including treaty-making.

6. *'The inclusion of the principle of territorial integrity in Article 46 undermines the right of self-determination and other rights in the* Declaration.'

Article 46.1 includes the statement that nothing in the *Declaration* may be "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." This one phrase should not be interpreted in isolation. It is also detrimental to the advancement of the rights of Indigenous peoples to exaggerate its significance.

The principle of territorial integrity already existed in international law when the Declaration was adopted; it was not created in the *Declaration*. Application of the principle of territorial integrity in the context of Indigenous peoples' right to self-determination and other rights must be consistent with the other provisions of the *Declaration* and with the wider body of international law.

The *Declaration* is clear that Indigenous peoples have the same right to self-determination as all other peoples. The first Preambular paragraph affirms that, in adopting the *Declaration*, the General Assembly is: "*Guided* by the purposes and principles of the Charter of the United Nations". The Charter's purposes and principles include the principle of "equal rights and self-determination of peoples". In addition, preambular paragraph 17 affirms that "nothing in this Declaration may be used to deny any peoples their right to self-determination, **exercised in conformity with international law** [emphasis added]."

As a principle of international law, the rights of Indigenous peoples cannot be interpreted in a discriminatory way that would create a lesser standard than that enjoyed by others peoples. This point of interpretation is explicit in the *Declaration* itself. Article 1 of the *Declaration* affirms: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of **all human rights** … as recognized in the Charter of the United Nations … and international human rights law [emphasis added]." Article 2 affirms: "Indigenous peoples … are free and equal to all other peoples … and have the right to be free from any kind of discrimination." Article 45 stipulates: "Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future."

Any effort to invoke the principle of territorial integrity to limit or diminish the rights of Indigenous peoples would also be subject to the important interpretative provisions found in the rest of Article 46. Article 46.2 expressly states that any limitations on the rights contained in the *Declaration* must not only be consistent with international law, but must also 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 democracy society." Furthermore, Article 46.3 says that all provisions in the *Declaration* are to be interpreted "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."

7. *'Implementation of the* UN Declaration *would undermine existing rights of Indigenous peoples in Canada, including Treaty rights.'*

International human rights standards are created to raise the bar for human rights, not lower it. States should always uphold the highest applicable standards.

The *Declaration* explicitly states that "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 (Article 37.1)." Furthermore, as noted above, Article 37.2 reiterates: "Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of Indigenous peoples contained in treaties, agreements and other constructive arrangements."

8. *'Bill C-262 would create confusion and chaos by immediately making all of the* UN Declaration *Canadian law overnight.'*

This is untrue.

Bill C-262 expresses a strong, legal commitment to implement and comply with the *UN Declaration*. It does so in three ways.

First, Bill C-262 affirms what is already the case, that the *Declaration* has "application" in Canadian law. This is consistent with the fact (see #1) that the *UN Declaration* already has legal effect in Canada and is already being used by Canadian courts and tribunals to interpret Canadian laws.

Second, Bill C-262 creates a legislative framework for the federal government to collaborate with Indigenous peoples to establish a national action plan for implementation of the Declaration.

Third, the Bill will require the government to work with Indigenous peoples to review existing laws and bring forward reforms to ensure their consistency with the *Declaration*.

In other words, rather than creating 'chaos and confusion', Bill C-262 allows for an orderly, principled and cooperative framework for meeting the existing requirement of implementing the Declaration and living up to its requirements.

This will be an ongoing process. Bill C-262 also requires regular reporting to Parliament on the progress being made.

9. *The implications of Bill C-262 need further study.*

Canada's obligation to implement the *Declaration* began when the UN General Assembly adopted it more than a decade ago (see #1). It is a universal human rights instrument. It is also a consensus instrument. No State in the world formally objects to it. Bill C-262 provides a much-needed framework to ensure that Canada works in cooperation with Indigenous peoples to see it fully and effectively implemented.