Implementing the *UN Declaration on the Rights of Indigenous Peoples* in Canada through comprehensive legislation

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Background: Inuit Tapiriit Kanatami (ITK) recommended in our January 2017 position paper that the federal government develop comprehensive national legislation as part of its approach to implementing the *UN Declaration on the Rights of Indigenous Peoples*.[1] This paper builds on this recommendation by detailing the potential scope of national legislation for implementing the *UN Declaration*. Comprehensive legislation should focus on providing effective remedies to Indigenous peoples for violations of Indigenous peoples' human rights as well as filling the gap in the Indigenous human rights regime in order to promote and protect the distinct status and rights of Indigenous peoples.

Recommendations: ITK recommends that the federal government initiate a legislative approach to implementing the *UN Declaration* that includes the following components:

1. Comprehensive legislation affirming all articles within the *UN Declaration* and articulating the means for their effective implementation, including through directives [e.g. executive directives] to every federal agency to be responsive to the *UN Declaration* provisions central to the mandate of respective agencies while recognizing their interrelated nature.

2. Development of a national action plan to implement the *UN Declaration* through policy and program reforms. This plan would be developed jointly by Indigenous peoples and the Crown and would be jointly reviewed, assessed, and updated on a regular basis.

[1] Inuit Tapiriit Kanatami, *Inuit Tapiriit Kanatami Position Paper: Implementing the* UN Declaration on the Rights of Indigenous Peoples *in Canada* (2017), accessed March 26, 2017, https://www.itk.ca/wp-content/uploads/2017/01/ITK-Position-Paper-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-Peoples-English.pdf.

3. Create an independent national human rights body analogous to the Canadian Human Rights Commission (i.e. "Indigenous Peoples Human Rights Commission") responsible for monitoring compliance within areas of federal jurisdiction and promoting and assessing implementation of the *UN Declaration* nationally.

4. Indigenous Peoples Human Rights Commission would be established consistent with the U.N. Paris Principles relating to the "competence and responsibilities" as well as status of such a national institution, and whose core function would be to promote and protect Indigenous human rights and ensure the harmonization of national legislation.

1. Comprehensive legislation: Action taken by the federal government to implement the *UN Declaration on the Rights of Indigenous Peoples* must respect the interrelated, interdependent, indivisible and interconnected nature of human rights. In practice this means that the *UN Declaration* and other human rights instruments must be implemented in their entirety rather than in incremental parts.

The purpose of a comprehensive legislative base would be to provide guidance to officials, policy makers, Indigenous peoples and the Canadian public on Canada's commitment to fully adopt and implement the *UN Declaration*.[2] While many articles of the *UN Declaration* are already recognized as binding rules of customary international law, affirmation of the *UN Declaration* in domestic statute provides additional guidance and clarity to decision-makers, government officials and Indigenous peoples on the legal effect of the *UN Declaration* in the domestic legal framework.[3]

In absence of legislation, Indigenous peoples are likely to seek implementation of the *UN Declaration* in courts and in administrative tribunals. Indeed, this is already occurring, as the number of administrative law and judicial decisions citing and applying the *UN Declaration* is growing each year. This means that

[2] This can be important and useful for provincial and territorial legislatures interested in implementing the Declaration, consistent with Call to Action 43. Existence of federal legislation could serve as a template to other interested jurisdictions.

[3] See *R. v. Hape*, [2007] 2 SCR 292, 2007 SCC 26 (CanLII), http://canlii.ca/t/1rq5n at para 39. In that case, the Supreme Court clarified that prohibitive rules of customary international law are automatically part of the common law of Canada, absent express derogatory legislative action from Parliament. Yet, the Court also affirms that all rules of customary international law may serve to aid interpretation of the Charter. The UN Declaration contains a number of prohibitive and non-prohibitive articles, potentially confusing policy-makers, Indigenous peoples and the public.

in absence of a legislative framework, only those provisions which have been adjudicated by courts are likely to be implemented in the policy and program arena.

Such a piecemeal and incremental approach to implementation undermines the *UN Declaration* because proper interpretation of any Article of the Declaration can only be achieved through an examination of the instrument as a whole.

A legislative base for implementation is also necessary for establishing several elements of an implementation strategy. The key element for Inuit is the establishment of an independent Commission tasked with overseeing implementation of the *UN Declaration*. Other elements which could be included in legislation might be the development of a national action plan, joint development of directives to heads of federal agencies to fully implement the *UN Declaration* or a commitment for joint development and review of central agency policy directives (Memorandum to Cabinet requirements, Treasury Board Submission requirements, etc.) on the *UN Declaration*.

The *UN Declaration* is, in many ways, a unique instrument. It was the first international human rights instrument negotiated jointly by the beneficiaries of the instrument (Indigenous peoples) and states. Compared to other declarations, such as the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, the *UN Declaration on the Rights of Indigenous Peoples* is both long and complex. Moreover, the tendency for counsel, policy makers and others to read the Articles of the *UN Declaration* in isolation can lead to confusion and misinterpretation of the scope and content of the *UN Declaration* itself. As a consequence, interpreting and applying the *UN Declaration* requires considerable expertise in the content of the *UN Declaration*, in international human rights law and in the rights, aspirations and laws of Indigenous peoples themselves.

2. Development of a national action plan: Legislation should expressly contemplate the development of a national action plan for implementing the *UN Declaration*. Operative Paragraph 8 of the World Conference on Indigenous Peoples Outcome Document states:

> 8. We commit to cooperate with indigenous peoples, through their own representative institutions, to develop and implement national action plans,

strategies, or other measures, where relevant, to achieve the ends of the *United Nations Declaration on the Rights of Indigenous Peoples*.[4]

Legislation should serve to further articulate what cooperation is needed with Inuit representative institutions in the context of *UN Declaration* implementation. This articulation would be useful in terms of implementing the legislation and, more broadly, in terms of providing guidance to policy makers on how to cooperate with Inuit representative institutions in other areas of federal policy development.

3. Creating an Indigenous Peoples Human Rights Commission: An body independent of government is required to monitor progress on implementing the *UN Declaration*. The reason for this is that government departments have powerful incentives to assess their own conduct as adequate even where it is not. Moreover, the value of self-assessment by the government depends heavily on the government's general desire to implement the *UN Declaration*, rather than on whether it is making any tangible progress.[5]

An independent body would have implementation of the *UN Declaration* as its core mission. This is important because a reporting requirement which is simply tied to legislation and a Ministerial reporting requirement can be quickly repealed by Parliament.[6] By contrast, closing organizations tasked with specific issues generally attracts considerable controversy because a future government would not only preclude further action on a policy agenda, but would be altering then-existing machinery of government in the process.[7]

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[4] *Outcome document of the High-level Meeting of the General Assembly: The World Conference on indigenous peoples*, GA Res. 69/2, UN GAOR, 69th Sess., UN Doc. A/62/2 (2014).

[5] Consider reporting under the *Canada-Colombia Free Trade Agreement*. Section 15.1 of the *Canada–Colombia Free Trade Agreement Implementation Act*, S.C. 2010, c. 4 requires the preparation of a human rights report, related to implementation of the Agreement. Yet, several civil society organizations heavily criticized the government for failing to table meaningful reports under the Act.

[6] See *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 (repealed in 2012). This Act required the government to create an action plan to address climate change, empowered the Governor-in-Council to promulgate regulations and even established a scheme for creating offences under the Act. The government never implemented this Act, and repealed the Act as a prelude to withdrawing from the *Kyoto Protocol*.

[7] Consider the controversy attracted by the closure of the National Roundtable on Environment and Economy and Rights and Democracy Canada. These were both high-profile acts by the government, mainly because the government was shutting down organizations in addition to winding down work in several policy areas.

Because the *UN Declaration on the Rights of Indigenous Peoples* is predominantly a human rights instrument, an independent body should be a human rights institution. Human rights institutions routinely engage in promotional activities, assessment and monitoring, as well as providing redress.

4. Duties and powers of Indigenous Peoples Human Rights Commission: An Indigenous Peoples Human Rights Commission should be vested with the same duties and powers as a Paris Principle Institution in order to meet international standards which frame and guide the work of National Human Rights Institutions.

Empowering an indigenous peoples' human rights commission with a promotional mandate should allow the Commission to engage in promotional activities with provinces and territories. The *United Nations Declaration on the Rights of Indigenous Peoples* is an international commitment, requiring compliance from all sub-national jurisdictions. A promotional mandate would allow the Commission to provide advice, assistance and support to subnational jurisdictions that may lack expertise on the *UN Declaration*.

Consistent with Canada's commitment to develop a national action plan to implement the *UN Declaration*, a Commission could also be vested with monitoring federal, provincial and territorial actions. This monitoring could be used for the National Action Plan, as well as for contributions to Canada's periodic reports to international human rights treaty bodies. In terms of the latter, the Indigenous Peoples Human Rights Commission could work with Heritage Canada and the federal/provincial/territorial Coordinating Committee on Human Rights (CCOHR), providing expertise and guidance to jurisdictions on Indigenous peoples' human rights and the *UN Declaration*.