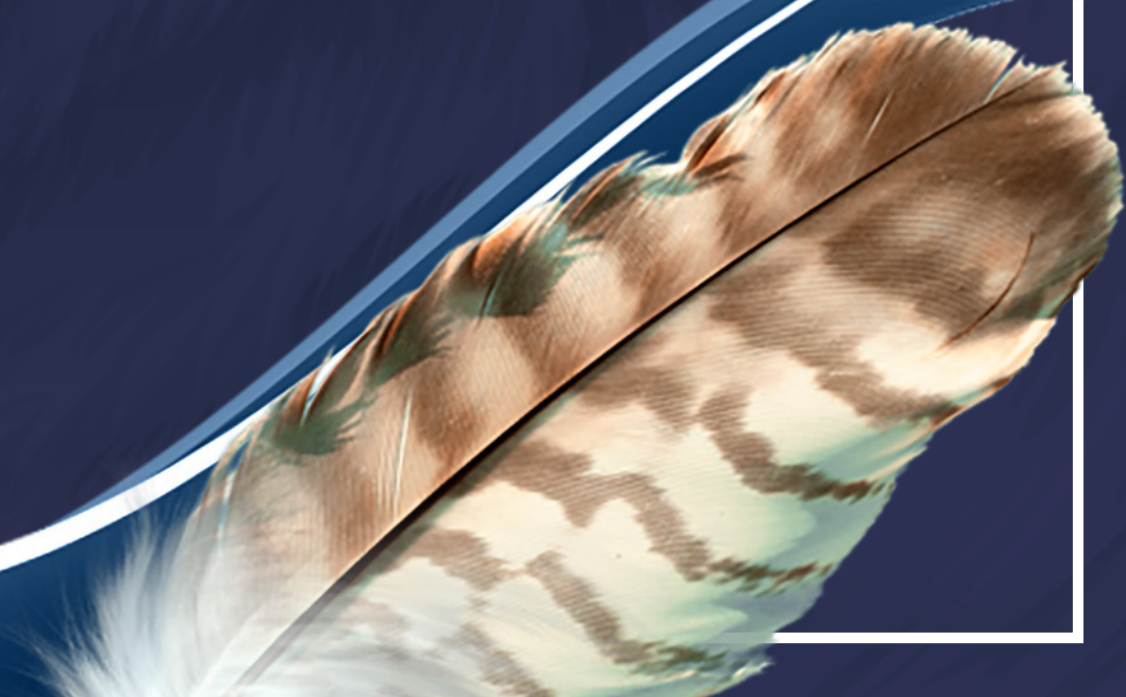


IMPLEMENTING UNDRIP IN BC: A DISCUSSION PAPER SERIES  
BY THE RESIDENTIAL SCHOOL HISTORY AND DIALOGUE CENTRE

Taking “All Measures Necessary” to  
Ensure Laws are Consistent with the  
*United Nations Declaration on the Rights  
of Indigenous Peoples*





## Introduction

In November, 2019 the British Columbia government enacted the *Declaration on the Rights of Indigenous Peoples Act* (Declaration Act) after a process of co-development with Indigenous Peoples.

Section 3 of the Declaration Act states:

In consultation and cooperation with the Indigenous Peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

Section 5 of the federal government’s Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act* which was still moving through Parliament at the time of publication of this analysis, contains a similar obligation for consistency between laws and the UN Declaration:

The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.

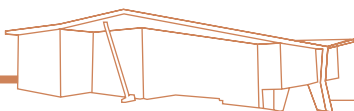
These legislative developments have emerged for many reasons, including as a response to the Calls to Action of the *Truth and Reconciliation Commission* which called on governments to implement the UN Declaration as “the framework for reconciliation.”

To date, in British Columbia, little visible progress can be seen on the implementation of the consistency of laws requirement in section 3. There are no clear, transparent, or public “measures” that have been implemented to ensure consistency between the laws of British Columbia and the UN Declaration. The only public proposal for addressing this issue is a commitment made by the government during the Fall 2020 election campaign to establish a “secretariat” that would assist with the work of alignment of laws. The secretariat has not yet been created, and there is no publicly available information regarding the when, what, and how of the secretariat.

Taking no measures does not meet the standard in the Declaration Act to “take all measures necessary.” For this reason, and rightfully so, there is increasing criticism of the government from many sectors including Indigenous Peoples, opposition parties, the public, and even industry.<sup>1</sup> The Declaration Act was a promise to bring a clear, principled, vision and a coherence of approach to the work of reconciliation. To date, without visible shifts and changes, criticism and concerns are growing.

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1 See the list of witnesses called: Standing Committee on Indigenous and Northern Affairs, 43rd Parliament, 2nd Session. Subject matter of Bill C-15, *An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples*. <https://www.ourcommons.ca/Committees/en/INAN/StudyActivity?studyActivityId=11156647>



Inaction has costs and risks. In 2020 two proposed government Bills were halted because no measures had been taken to align with the UN Declaration, and the consultation and engagement with Indigenous Peoples was not guided by a clear process or pathway. In 2021, a Bill underwent an unusual process in the legislature to add a provision confirming a section regarding hunting did not derogate or abrogate from Indigenous rights. This was criticized by some as an afterthought addition, which while completely appropriate in the legislative process, reflected a shortcoming by government in discharging the obligation to ensure consistency prior to the introduction of laws.

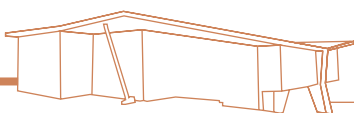
These missteps are significant. The costs and risks go far beyond the legislative agenda of the government. There is a legal risk of side-stepping the clear obligation the Government of British Columbia and Legislative Assembly confirmed in section 3, and re-igniting a new front in the seemingly endless necessity for Indigenous Peoples to fight in the courts to have basic legal imperatives implemented. More importantly, there is the social risk of escalating conflict and uncertainty as the promise of a new era of reconciliation is broken by old patterns of government inaction and intransigence. With these risks the promise of finally achieving a principled, public, and coherent approach to addressing the legacy of colonialism and creating a new era of cultural, economic, and social well-being could fall by the wayside.

For British Columbia, these costs and risks are mounting. First Nations across British Columbia are increasingly voicing concerns that the Declaration Act may amount to another episode in the long history of broken government promises — though this episode is unique as it may involve violation of its own, much-heralded, recent law. For Canada, which is close to passing Bill C-15, the risks and costs are further in the future, but will be serious if there is a similar lack of coherent “measures” taken to align laws.<sup>2</sup>

This paper identifies some preliminary observations that may inform the development of measures to achieve consistency between the laws of BC and Canada and the UN Declaration. In particular, this discussion paper sets out some examples of measures one would expect to witness with the shift to the implementation of the UN Declaration, and the priority given to this task. In outlining some of these expected steps, it is hoped that this discussion paper will contribute to the on-going dialogue and support the taking of action that reflects a greater sense of urgency to meet the imperative of implementing the UN Declaration.

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2 Wright, T. (2021, April 13). Indigenous leaders, experts urge Ottawa to quickly pass UNDRIP bill before election. *Toronto Star*. <https://www.thestar.com/politics/2021/04/13/indigenous-leaders-experts-urge-ottawa-to-quickly-pass-undrip-bill-before-election.html>.



## Understanding the Consistency Obligation

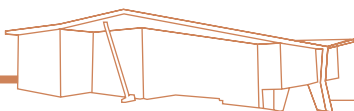
It is important to examine why the Declaration Act and Bill C-15 include a legal obligation to take measures to align laws with the UN Declaration. There are three perspectives that help explain why such a requirement has been included in these legislative developments.

First, is the reality of how legislation has been used in relation to Indigenous Peoples in Canadian history. Throughout this history, legislation has been used by both federal and provincial governments to actively oppress Indigenous Peoples. Legislation has been a primary, and for governments, an indispensable tool of colonization. Examples of this are vast, including most notoriously, the *Indian Act* that overtly sought to dispossess, destroy family and kinship systems, establish control and impose forms of government, criminalize aspects of culture and identity, and use systems like the residential school system to carry out a systemic plan to break the chain of transmission of Indigenous identity, culture, language and social organization. In 2021, the *Indian Act* remains the primary law in Canada with respect to First Nations.

Also pernicious and destructive, however, is the almost complete erasure of Indigenous Peoples and their constitutional and human rights from almost all legislative regimes. For example, throughout history, British Columbia has enacted countless pieces of legislation to govern lands and resources based on the assumption that the rights of Indigenous Peoples could be fully subordinated to provincial authority and the informed consent of Indigenous Peoples was unnecessary. Legislation has been a tool for reinforcing doctrines of moral superiority including the doctrine of discovery *terra nullius* (that the land was empty before the arrival of Europeans). This legislation assumes there are no existing Indigenous title and rights. In this land and resource regime, British Columbia asserts its interest in lands and resources as unencumbered and complete. This legislative practice largely continues to this day, despite decades of Supreme Court of Canada decisions that explicitly confirm the opposite — including *Tsilhqot'in Nation* which affirms that Indigenous title and rights exist, are real, and that British Columbia cannot assert or maintain unilateral ownership or control over the land base.

This erasure through legislation is an attempt to give a neutral, benign, veneer, to the enduring ugly, racist, colonial reality that remains with us. The lack of political will over decades to change or confront this legislative practice is perhaps one of the clearest examples of how entrenched systemic racism is within government structures and cultures.

The Declaration Act and Bill C-15, and the requirement for consistency, are a very preliminary response to this enduring reality. It is important to have a legislation that affirms Indigenous rights. This is a break with the tradition of legislative oppression, and should be applauded. However, such legislation is only one small step forward. A single piece of legislation cannot undo an entrenched



legislative regime that is the product of more than 150 years of colonial denial and racist practices. This is why a requirement for consistency, such as in section 3 of the Declaration Act is essential — to require systematic, coherent, and on-going efforts at legislative change. But this is also why the continued inaction by the British Columbia government, and the lack of any clear measures to align legislation, is hard to view as anything other than a continuation of the long enduring racist status quo.

Second, the UN Declaration has many articles which speak to the necessity of consistency between laws and the UN Declaration. Given this, if governments are serious about implementing the UN Declaration and upholding the human rights of Indigenous Peoples, then principled legislative change is an imperative.

For example, Article 19 speaks to the need for consultation and cooperation to obtain consent before implementing legislative measures that may affect Indigenous Peoples:

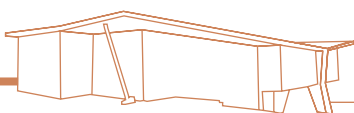
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

More broadly, Article 38 speaks to the need for legislative measures to implement the UN Declaration:

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

Third, the obligation to achieve consistency is intended to provide a mechanism for the UN Declaration to operate in a distinct, but also analogous manner to the way constitutional rights instruments do in Canada. In so doing, there is an intent to help facilitate the work of reconciliation and fulfil the promise of the recognition and affirmation of Aboriginal and treaty rights in section 35(1) of the *Constitution of Canada*.

Given its constitutional status, the rights protected by section 35(1) (like those in the *Charter of Rights and Freedoms*) are enshrined in the highest law of Canada. As such, both legislative and executive action must be consistent with these constitutionally-protected rights. The human rights in the UN Declaration are not part of the *Constitution*, and as such do not operate in a similar way to the *Charter* and section 35(1) as standards that must be met in legislative action. The obligation in section 3 seeks to address this reality by creating a statutory obligation on government to take



“all measures necessary” to ensure consistency between the laws of British Columbia and the UN Declaration.<sup>3</sup>

## Issues and Considerations in Achieving Consistency

There are number of issues and considerations that must inform the development of measures for achieving consistency between laws and the UN Declaration.

### *Distinction between new and existing laws*

The obligation for achieving consistency applies to the development of new, as well as to existing laws. Achieving consistency with respect to new and existing laws raise some distinct issues, and will require different types of measures.

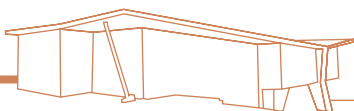
In relation to existing laws, there is a necessity for a process of prioritization and review. Undertaking such a process is not new. There are many examples of law reform commissions and legislative review processes that have looked at areas of legislation and identified changes that should be made. Indeed, such processes took place in various ways when the *Charter* was adopted in 1982. One can foresee many possible structures and mechanisms for involving Indigenous Peoples in such a review, setting priorities, and identifying steps and stages in the process.

The issue of new laws raises some distinct consideration. As it is more explicitly about how the legislative process unfolds in real time, it raises the issue of how Indigenous Peoples will be involved in a process that has historically operated to exclude them. More generally, it is about inclusion in a process that has primarily been designed and thought of as an internal government process. As well, it is not accurate to presume there is a singular process through which legislation is developed. Ministries across government develop legislation. Sometimes this is through policy development over many years. Other times it is done rapidly in response to emerging realities and contexts. Priorities for legislative development are also developed by Cabinet through consideration of a host of dynamic and changing factors.

As such, while there will be certain steps that are always taken in legislative development – the setting of government priorities, the development of policy, the creation of instructions for drafting legislation, the drafting of legislation itself, and the introduction of the Bill into the parliamentary

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<sup>3</sup> There has been substantial dialogue and debate about the legal effect and meaning of the requirement to achieve consistency between laws and the UN Declaration. As an example of discussion of some of the legal ambiguities and issues with this language in the context Bill C-262, the previous federal Bill to enact the UN Declaration, see the commentary: Gib van Ert, *The impression of harmony: Bill C-262 and the implementation of the UNDRIP in Canadian law*, CanLII Authors Program, 2018 CanLII Docs 252, <https://canlii.ca/t/2cvt>, retrieved on 2021-04-12.





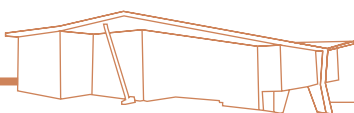
process - how these unfold and on what timelines can vary greatly.

Of course, the development of new laws is also a constant, on-going activity. For both British Columbia and Canada there are on-going legislative proposals, long in development, with many new ones arising continuously. Typically, with few exceptions, there is no Indigenous involvement in the development of these proposals. This creates a very challenging scenario, where to meet the obligation in section 3 (or section 5 if Bill C-15 is passed), government needs to implement measures immediately to "catch up" on the requirement for consistency, and not risk immediately violating their own statute and putting aspects of their own legislative agenda in peril.

To date, British Columbia has effectively failed this test by having no clear, public, and transparent measures for consistency. Moreover, by having no measures British Columbia has failed to "catch up." One can only catch up if one tries to. Canada will find itself in a similar predicament in short order after the passage of Bill C-15 if it has no measures ready for meeting its obligation in section 5. Furthermore, it would appear much of the skepticism over Bill C-15 is not the proposed Bill itself but whether the Crown will act honourably to implement the Bill given the shortfall of action that has occurred when years ago it already committed to fully implement the Declaration without qualification.

In considering measures that may be used for current, new, and existing laws, it should also be remembered that not all laws are necessarily the same. There are areas of legislation that will be of, at best, remote relevance to Indigenous Peoples and their rights. There will be others that will be central and vital, such as legislation to protect Indigenous Peoples' languages, cultural heritage and property, and protect Indigenous Peoples from racism and discrimination. As such, the focus should not be on developing a singular "measure" that must apply the same process to all legislation. To do so would be overly cumbersome, impractical and inefficient for all involved.

A kaleidoscopic approach to the development of measures, with different mechanisms and processes that can be adapted and utilized in different circumstances, is what is needed. In developing such approaches, consideration should also be given to legislation that may be driven by Indigenous Peoples as part of creating mechanisms to ensure the principled recognition and enabling of their inherent right of self-government both generally, and in relation to specific spheres of jurisdiction. As well, as part of the evolution of legislation that is consistent with the UN Declaration, it can be expected that within legislation there will necessarily be ways of recognizing the autonomy, responsibility and authority of Indigenous legal orders, and the existence of true legal pluralism including Indigenous laws.





## *Indigenous self-determination and the inherent right of self-government*

The rights, standards and principles in the UN Declaration that relate to Indigenous Peoples being involved in legislative matters are expressions of Indigenous self-determination and the inherent right of self-government.

Article 3 and 4 affirm the right to self-determination, which includes the right to autonomy or self-government in matters relating to their internal and local affairs. This includes the right of Indigenous Peoples “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.”

In affirming Indigenous self-determination and self-government, the UN Declaration is also affirming the need to establish and maintain proper relations between States and Indigenous governments. The UN Declaration speaks of how the recognition of the rights it affirms “will enhance harmonious and cooperative relations between the State and Indigenous Peoples” and of the need for a “strengthened partnership” between Indigenous Peoples and States, including as facilitated by treaties, agreements, and other constructive arrangements. Such treaties, agreements, and other constructive arrangements will need to be developed through new processes of negotiation and agreement-making that are themselves reflective of the rights and standards of the UN Declaration.

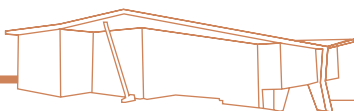
In this recognition of self-determination and self-government is also the complete repudiation of racist doctrines of moral superiority such as the doctrine of discovery and terra nullius. While the Supreme Court of Canada went some way to affecting this repudiation in *Tsilhqot’in Nation*, the international human rights regime, of which the UN Declaration is a vital part, fully rejects such ideas. The International Convention on the Elimination of All Forms of Racial Discrimination<sup>4</sup>, which Canada ratified decades ago, states that “any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere.”

This focus on proper relations between States and Indigenous governments is also a focus of the law of Canada, and core to the promise of the recognition and affirmation of Indigenous rights in section 35(1).

Structuring proper relations has been the fundamental historic and contemporary imperative between the Crown and Indigenous Peoples. The history of the founding of Canada should have

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4 United Nations Human Rights Office of the High Commissioner. *International Convention on the Elimination of All Forms of Racial Discrimination*. <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>



been rooted in the recognition of Indigenous sovereignty and the formation and honouring of proper treaty relationships between sovereigns. This was, and remains, a requirement of the common law, and has been re-iterated time and again by the Supreme Court of Canada. For example, in discussing the role of treaty-making the Court emphasizes the focus on reconciling sovereignties:

Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" (*Badger, supra*, at para. 41). This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. (Haida, paragraph 20)<sup>5</sup>

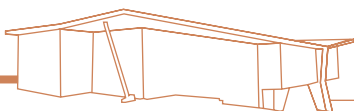
While treaties were formed (though not over much of British Columbia) neither those entered into before or after Confederation have been honoured. Rather, colonization and oppression, including through the *Indian Act*, became the prime focus. It is that legacy that remains with us today, both unaddressed and urgent.

While some important strides have been made through the advocacy and effort of Indigenous Peoples, and many changes have taken place, the fundamental issue of proper Indigenous government-State relationships, remains largely unfinished work. The predominant pattern in Canada has been for governments to fight about every aspect of rights recognition, and choose to use the Courts for the purpose of delaying doing the real work. This strategy of delay has been reinforced by structuring processes of negotiations and adopting limited mandates that make negotiations to establish proper relations interminable. Reflecting these goals of delay, supporting true self-determination and self-government have been largely ignored by Crown governments, while Indigenous Peoples have had to focus much of their limited time and resources towards endless fights against Crown intransigence and away from the vital Nation and government-building work they must do.

The focus the UN Declaration provides on self-determination and self-government as fundamental human rights of Indigenous Peoples is thus a vitally important accelerant of the real work of establishing proper relations between governments, and investing in self-determination and self-

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5 *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2189/index.do>, retrieved on 2021-04-19.



government.<sup>6</sup>

This focus also elucidates aspects of how the UN Declaration brings a different lens to the limited ways in which judicial discussion of Indigenous participation in legislative processes have emerged to date. In *Mikisew Cree* (2018)<sup>7</sup>, the Supreme Court of Canada was asked whether there was a duty to consult and accommodate Indigenous Peoples in the law-making process. While the majority of the Court ruled that the duty to consult was not triggered, three separate sets of reasons were issued, with a majority of the Court also ruling that the honour of the Crown could attach to the law-making process.

But what is important in *Mikisew Cree* is that all of the decisions spoke of the value and importance of Indigenous Peoples being engaged prior to enacting legislation that may affect them. In effect this is a re-iteration of how the work of reconciliation and decolonization will necessitate Indigenous roles in legislative development. The challenge is how to do this practically and effectively. The duty to consult was not designed for this purpose, and what is needed is proper mechanisms and measures that can do this in a coherent way that also is consistent with the norms of our parliamentary system of democracy. The UN Declaration is a vehicle for assisting with this through its emphasis on self-determination and self-government and the structuring of proper relations between Indigenous governments and States that can uphold Indigenous human rights.

### ***Parliamentary sovereignty (supremacy), privilege, and the operation of government***

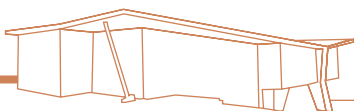
A point of discussion of *Mikisew Cree*, and one which has been raised in discussion about the implementation of the obligation to achieve consistency is how Indigenous Peoples may be involved in the legislative process, including meeting the consent standard in article 19, in ways that respect the principles of parliamentary sovereignty (supremacy) and privilege.

Parliamentary sovereignty is intimately connected to Canada’s model of responsible and representative government. In its original definition, saying Parliament is supreme means that Parliament has absolute power to make or abolish any law. This meaning has evolved. Since 1982,

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6 For more discussion about how the UN Declaration and the Declaration Act are advancing discussion of proper relations between Indigenous and Crown governments, it is important to examine the understanding of “Indigenous governing bodies” as referenced in the Declaration Act. An analysis is provided in the paper published by the IRSHDC at [https://irshdc.ubc.ca/files/2020/03/UNDRIP\\_Article2\\_GoverningBodies.pdf](https://irshdc.ubc.ca/files/2020/03/UNDRIP_Article2_GoverningBodies.pdf). It is also important to note that the BC government has made statements to Indigenous Nations in BC that reinforce and reflect a principled understanding that Indigenous people determining who is their governing entity is a matter of self-determination and not to be dictated or influenced by the Crown. This is an important shift and development in approach by the government.

7 *Mikisew Cree First Nation v. Canada* (Governor General in Council), 2018 SCC 40 (CanLII), [2018] 2 SCR 765, <https://canlii.ca/t/hvhcj>, retrieved on 2021-04-16.



the *Constitution*, not Parliament, has been supreme – as made explicit in section 52(1) of the Constitution Act, 1982 and explained in numerous places by the Supreme Court of Canada.

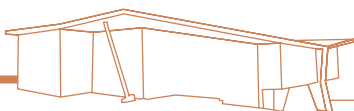
Parliamentary privilege refers to the “rights and immunities that are deemed necessary for the House of Commons [or a legislature], as an institution, and its members, as representatives of the electorate, to fulfill their functions.” It also refers to the powers possessed by the House to protect itself, its members and its procedures from undue interference so that they can carry out effectively their principal functions, which are to legislate, deliberate and hold the government to account.

In *Mikisew Cree*, parliamentary sovereignty and privilege were identified as central to the challenge of determining how a duty to consult Indigenous Peoples could be imposed as part of the legislative process. As one of the majority judgments reasoned:

Parliamentary sovereignty mandates that the legislature can make or unmake any law it wishes, within the confines of its constitutional authority. While the adoption of the Canadian Charter of Rights and Freedoms transformed the Canadian system of government “to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy” (Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at para. 72), democracy remains one of the unwritten principles of the Constitution (Secession Reference, at paras. 61-69). Recognizing that the elected legislature has specific consultation obligations may constrain it in pursuing its mandate and therefore undermine its ability to act as the voice of the electorate.

Parliamentary privilege, a related constitutional principle, also demonstrates that the law-making process is largely beyond the reach of judicial interference. It is defined as “the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions” (Vaid, at para. 29(2)). Once a category of parliamentary privilege is established, “it is for Parliament, not the courts, to determine whether in a particular case the exercise of the privilege is necessary or appropriate” (Vaid, at para. 29(9) and paras. 47-48 (emphasis in original)). Canadian jurisprudence makes clear that parliamentary privilege protects control over “debates or proceedings in Parliament” (Vaid, at para. 29(10); J. P. J. Maingot, *Parliamentary Immunity in Canada* (2016), at pp. 166-71; see also *New Brunswick Broadcasting Co. v. Nova Scotia* (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, at p. 385; P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 1.7; Article 9 of the U.K. Bill of Rights of 1689). The existence of this privilege generally prevents courts from enforcing procedural constraints on the parliamentary process.

Applying the duty to consult doctrine during the law-making process would lead to significant judicial incursion into the workings of the legislature, even if such a duty were only enforced



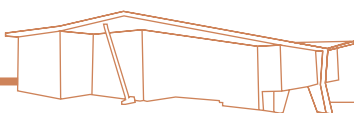
post-enactment. The duty to consult jurisprudence has developed a spectrum of consultation requirements that fit in the context of administrative decision-making processes. Directly transposing such executive requirements into the legislative context would be an inappropriate constraint on legislatures' ability to control their own processes. (paragraphs 36 - 38)

In this reasoning, there is also an understanding that the entirety of the law-making process, from development of policy ideas to tabling in Parliament to passage, is a legislative function, and not an executive function.

While implementing the UN Declaration is distinct from questions of whether a duty to consult arises under section 35(1) of the *Constitution*, the issues of parliamentary sovereignty and privilege do raise questions about whether there are measures for involving Indigenous Peoples in the law-making process. These measures may entrench on roles that Parliament must play within Canada's democratic system and demand the requirements of responsible and representative government. Inevitably in designing measures these constitutional principles will have to be respected.

In addition to parliamentary sovereignty and privilege, there are also other principles that come into play when talking about involvement of Indigenous Peoples in the legislative process. For example, Cabinet confidentiality and privilege is an important element of our system of government that enables Cabinet to make decisions and set direction for government. As we have a system of collective decision-making and shared responsibility through Cabinet, a free exchange of views needs to be able to take place, and having aspects of exchange of views immune from public disclosure supports that necessary dialogue to occur. At times, this will include matters of policy and legislative agenda setting, and be a realm of decision-making that others cannot be a party to. Similarly, like in other spheres, there are important elements of solicitor-client privilege that government relies upon like in any other solicitor-client relationship, and which will prevent certain information from being disclosed to others.

The implication of all of these principles is that they raise questions about how measures for achieving consistency may be designed and implemented. One can foresee how certain types of measures can give rise to tensions with any of these principles. This may be by forming particular structures or mechanisms that would effectively result in the law-making process being unduly controlled (including whether legislation will be pursued or stopped), practices which interfere with the frank and open discussion of matters by Cabinet (including materials which are prepared for Cabinet), changing the ability of the executive to receive confidential legal advice, or disclosing the content of proposed legislation to the public in ways that may be improper before it is tabled in Parliament.



## Potential Measures

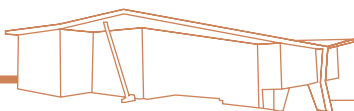
Of course, doing something new is never easy. Given that ensuring legislation upholds Indigenous rights is completely new, it is not surprising that governments struggle to take action. But the reality is that it is not that hard. As discussed above, there are vital issues that have to be considered in designing measures, and such a design must be done in consultation and cooperation with Indigenous Peoples. But with these issues in mind, there are many measures that in British Columbia could and should already have advanced with Indigenous Peoples and moved to implementation.

Some examples of such measures include the following:

1. **UN Declaration “statements:”** A requirement placed on the Attorney General to make a statement of the legislature (or House of Commons) that a proposed Bill, upon its introduction in the legislature, is consistent with the UN Declaration. Such a requirement already exists federally in relation to the *Charter* in sections 4.1 and 4.2 of the *Department of Justice Act*. Such a measure would ensure that government is behaving in a publicly responsible and transparent manner in upholding Indigenous rights, and taking accountability for meeting its obligation for achieving consistency with new legislation.
2. **Global non-derogation clause:** A legislative amendment could be made to confirm that all enactments are to be construed as upholding the rights of Indigenous Peoples in both section 35(1) and the UN Declaration, and not abrogating or derogating from them. Such a non-derogation clause has been recommended federally for years, including through a report of the Senate in 2007.<sup>8</sup> Including such a clause could be done globally through amendment to the federal *Interpretation Act* and the British Columbia *Interpretation Act*. While such an amendment would not by itself establish consistency, it would assist in the interim in how both existing laws are interpreted while other measures for consistency continue to be implemented.
3. **Expert advisory committee:** An advisory committee made up of experts in Indigenous rights, UN Declaration, and constitutional law could be established for a range of purposes. These may include providing recommendations to both Indigenous and Crown governments on the development of a process for review of existing laws for consistency, and/or reviewing proposed new laws and providing recommendations on whether they are consistent with the UN Declaration.
4. **Release of expert analysis:** An advisory committee (such as the one noted above) or a

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8 “Taking Section 35 Rights Seriously: Non-derogation Clauses relating to Aboriginal and treaty rights.” Final Report of the Standing Senate Committee on Legal and Constitutional Affairs. December 2007. <https://sencanada.ca/Content/SEN/Committee/392/lega/rep/rep05dec07-e.pdf>, retrieved on 2021-04-19.



publicly appointed individual expert, could be asked to develop, upon tabling of a Bill, a public opinion on whether a Bill is consistent with the UN Declaration, and what steps may be taken now or in the future to further advance consistency with regards to that legislation.

5. **Design and establish a review and reform process:** A law review and reform process could be jointly established with Indigenous Peoples, made up of leading experts, who would undertake to provide recommendations on legal changes to achieve consistency. Such a process would include the clear setting of priorities and stages in the review.

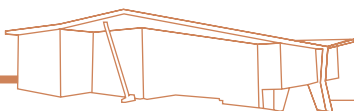
6. **Establish a policy on working in partnership with Indigenous Peoples in the legislative development process:** Co-development of a clear policy that identifies how Indigenous Peoples may be engaged consistently across government at various stages in the law-making process, including how engagement may differ between these stages. Such a policy may specify the importance of early engagement in the process, while noting how at later stages, such as legislative drafting, other practices may have to be used because of issues related to principles of parliamentary sovereignty, solicitor-client privilege, and Cabinet confidentiality.

7. **Establish new mechanisms and forms of dispute resolution, and approaches to avoid adversarial litigation:** Achieving consistency of laws with the UN Declaration also speaks to *how* we address conflicts about the understanding and application of the law. For the longest time, Crown governments have actively sought to force these matters into adversarial litigation — effectively the opposite of working co-operatively to build understandings, alignment, and consistency. Canada took one step from breaking from this long tradition in 2018 with the adoption of the Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples.<sup>9</sup> BC, on the other hand, has done nothing in this regard — resisting even taking the first step of passing a directive such as Canada’s. This apparent intransigence by BC to end conflict-oriented patterns and remain entrenched in a litigation approach that is the antithesis of reconciliation is especially shocking given BC’s passage of the Declaration Act. BC has provided no coherent or principled explanation or reason for not taking such a step, despite many requests from First Nations. Further, beyond a directive, much more is needed, including establishing processes for settlement and dispute resolution that can proactively reach understanding, rather than adversarial conflict. This could include the use of mediation rosters, the creation of dispute resolution institutions, and the establishment of new oversight and accountability mechanisms.

These are just a few examples of potential measures. There are many others that could be contemplated, and as noted earlier, multiple measures will be necessary. Further, in addition to

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9 The Attorney General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples. <https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.html>, retrieved on 2021-04-16.





consultation and co-operation on the measures, and in various ways throughout the legislative development process, there will be some legislation which affects Indigenous Peoples in ways that will require increased forms of direct and on-going participation of Indigenous Peoples.

## Conclusion

While the observations and ideas in this paper are preliminary, they are shared with urgency. In British Columbia a new era of reconciliation was promised with the passage of the Declaration Act. To date, inaction has remained the norm. If the Declaration Act fails in British Columbia because of a lack of political will, and the federal government follows a similar course in implementing Bill C-15, the negative effects will be severe. It will demonstrate that even where governments take steps to do the right thing — something which has been rare in the history of Indigenous and Crown relations — the commitment to racial justice and reconciliation in this country remains illusory, weak, and insincere. The costs and harms of this — of breaking promises in 2021 just as they were in all the decades past — would be felt for generations to come.

