

**SO YOU WANT TO IMPLEMENT UNDRIP ...**

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## I. INTRODUCTION

According to one school of thought,<sup>1</sup> the United Nations Declaration on the Rights of Indigenous Peoples<sup>2</sup> is at best a consolation prize for the world's Indigenous peoples, relegating them – unlike, for example, the beneficiaries of the UN Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)<sup>3</sup> – to a normative regime premised explicitly on preserving and protecting “the territorial integrity [and] political unity of sovereign and independent States”:<sup>4</sup> in other words, to the ongoing ministrations of the very colonial powers that govern them already.<sup>5</sup>

This view highlights an important truth. Meaningful implementation of the Declaration in Canada – implementation that renders UNDRIP rights effectively enforceable – will indeed require the active cooperation of constitutionally competent mainstream legislatures and governments. Nothing in UNDRIP purports to give Indigenous peoples access to international forums for redress where states have breached UNDRIP rights.<sup>6</sup> (Such access might well have been pointless; UNDRIP,

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<sup>1</sup> See, for example, Ward Churchill, “A Travesty of a Mockery of a Sham: Colonialism as ‘Self Determination’ in the UN Declaration on the rights of Indigenous Peoples” (2011), 20 Griffin L Rev 526.

<sup>2</sup> GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 [2007] (“UNDRIP” or “the Declaration”).

<sup>3</sup> UNGA Res 1514 (XV), 15 UN GAOR, Supp (No 16) 66, UN Doc A/4684 (1961).

<sup>4</sup> UNDRIP, note 2 above, §46¶2.

<sup>5</sup> But see Mauro Barelli, “Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?” (2011), 13 Int’l Comm L Rev 413 (Barelli, “Shaping”) at 423-426 (arguing that UNDRIP may leave room, in extraordinary circumstances, for a right of remedial secession).

<sup>6</sup> UNDRIP, note 2 above, does impose obligations on certain international bodies to “contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance” (§41) and to “promote respect for and full application of the provisions of this Declaration and follow up on [its] effectiveness” (§42), but these obligations do not include arrangements for enforcement and do not themselves appear to be susceptible to enforcement.

like most other UN declarations, is understood to be “soft law”: potentially persuasive, but not legally binding on any of its signatory states.)<sup>7</sup> Instead, the Declaration assigns to signatory states the task of providing for its enforcement.<sup>8</sup> And in Canada – unlike, for example, the United States, where international treaties become “the supreme Law of the Land”<sup>9</sup> when made by the President and ratified by the Senate<sup>10</sup> – international instruments, even when legally binding at international law, have no domestic legal effect except when implemented by valid domestic legislation<sup>11</sup> or, presumably,<sup>12</sup> by means of valid treaties with Indigenous

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<sup>7</sup> See, e.g., Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009), 58 ICLQ 957 (Barelli, “Soft Law”), at 959-960. Barelli offers three reasons why those involved in drafting UNDRIP would have preferred a non-binding declaration to a legally binding covenant or convention: (1) “a soft law document is to be preferred to no document at all, and, similarly, a soft law document represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions” (*ibid* at 964-965, comparing UNDRIP favourably with the Indigenous and Tribal Peoples Convention, 1989, International Labour Organization Convention No. 169); (2) soft law “normally allows for the more active participation of non-State actors”: a consideration particularly important in an instrument principally concerned with Indigenous peoples (*ibid* at 965-966); and (3) a soft law instrument is apt to receive broader international support more quickly than a treaty, whose efficacy depends upon a obtaining a minimum number of ratifications (*ibid* at 966).

<sup>8</sup> UNDRIP, note 2 above, §§27, 38, 40.

<sup>9</sup> US Constitution, Art VI, section 2.

<sup>10</sup> *Ibid*, Art II, section 2, para. 2.

<sup>11</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*) at paras. 69, 79; *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172-173; *Francis v The Queen*, [1956] SCR 618 at 621. (On UNDRIP specifically, see *Sackaney v The Queen*, 2013 TCC 303, *Laboucan v The Queen*, 2013 TCC 357, *Laliberte v Canada (Attorney General)*, 209 FC 766, *TA v Alberta (Children’s Services)*, 2020 ABQB 97 (UNDRIP not a source of enforceable rights or obligations without statutory ratification).) In this, international instruments differ from the principles of customary international law, which are deemed to be enforceable domestically in the absence of valid domestic legislation or binding domestic judicial determinations to the contrary: see *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (*Nevsun*) at paras 85-87.

<sup>12</sup> Does the validity of treaties between the Crown and Indigenous groups also depend on incorporating legislation? I know of no jurisprudence about that very issue. We do know, though, that courts have routinely accepted as valid, and enforced, so-called “historic treaties” – pre-Confederation treaties, numbered post-Confederation treaties, and the Williams Treaties of 1923 – without pausing to inquire about the presence or absence of statutory anchorage. See, among others, *R v Simon*, [1985] 2 SCR 387, *R v Sioui*, [1990] 1 SCR 1025 (*Sioui*), *R v Marshall*, [1999] 3 SCR 456 (*Marshall*), *R v Morris*, 2006 SCC 59 (pre-Confederation treaties), *St Catherines Milling & Lumber Co v The Queen* (1889), 14 App Cas

communities.<sup>13</sup> Courts do, where possible, construe domestic legislation in a manner consistent with recognized international norms,<sup>14</sup> but lower court decisions differ on whether to consider UNDRIP when interpreting the constitution,<sup>15</sup> and the Federal Court has declined to consider UNDRIP in determining when and to whom the Crown owes a duty to consult.<sup>16</sup> The Declaration’s usefulness to Indigenous peoples living in Canada is, beyond doubt, substantially at the mercy of domestic political will.

The good news, though, and it is good news, is that UNDRIP today is having a moment in Canadian public policy. For at least some of Canada’s elected governments, UNDRIP implementation is a signature policy priority. British Columbia recently enacted legislation<sup>17</sup> whose stated aims include “affirm[ing] the application of the Declaration to the laws of British Columbia” and “contributing to the

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46 (JCPC), *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 (*Grassy Narrows* (Treaty 3)), *R v Sundown*, [1999] 1 SCR 393 (*Treaty 6*), *R v Badger*, [1996] 1 SCR 771 (*Badger*), *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 (*Mikisew 2005*) (Treaty 8), and *R v Howard*, [1994] 2 SCR 299 (*Williams Treaties*). In none of these decisions did a treaty’s contents affect its validity. Current practice is to confirm modern treaties in legislation, but concluding today that such confirmation is an affirmative requirement would cast all that earlier jurisprudence, and the relationships built upon it, into doubt.

<sup>13</sup> The constitution – the “supreme law of Canada” – recognizes and affirms the “existing ... treaty rights of the aboriginal peoples of Canada,” including “rights that now exist by way of land claims agreements or may be so acquired”: *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK) (1982), c 11 (*Constitution Act, 1982*), ss. 35(1), (3), 52(1).

<sup>14</sup> See, for example, *R v Hape*, 2007 SCC 26, [2007] 2 SCR 292 at para 53; *114957 Canada Ltée (Spraytech, Société d’Arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241 at para 30; *Baker*, note 11 above, at paras 70-71.

<sup>15</sup> *Taku River Tlingit First Nation v. Canada (Attorney General)*, 2016 YKSC 7 (yes); *Ross River Dena Council v. Canada*, 2017 YKSC 59 (not necessarily).

<sup>16</sup> *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, 2015 FC 981 at paras 104-106 (in part because such determinations are not matters of statutory interpretation). See also *Watson v Canada*, 2020 FC 128 at para 351 (UNDRIP not relevant to interpretation of limitations statutes).

<sup>17</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 (BC Act).

implementation of the Declaration.”<sup>18</sup> It includes a(n unenforceable)<sup>19</sup> requirement that the government of that province, “in consultation with the Indigenous peoples of British Columbia, take all measures necessary to ensure that the laws of British Columbia are consistent with the Declaration.”<sup>20</sup> At least five current federal statutes proclaim in their preambles the federal government’s “commit[ment] to implementing the United Nations Declaration on the Rights of Indigenous Peoples.”<sup>21</sup> No fewer than three federal political parties, which together form a majority in the current House of Commons,<sup>22</sup> committed in their platforms for the 2019 election to full UNDRIP implementation. And the December, 2019 federal Throne Speech includes a commitment to “take action to co-develop and introduce legislation to implement [UNDRIP] in the first year of the new mandate.”<sup>23</sup> All that, of course, was

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<sup>18</sup> *Ibid*, s 2(a), (b).

<sup>19</sup> Section 8 of the BC Act, *ibid*, specifically ousts the application of s 5 of BC’s *Offences Act*, RSBC 1996, c 338. Section 5 makes it an offence to “contravene[] an enactment by doing what it forbids, or omitting to do an act that it requires to be done.” According to counsel for the Crown in right of BC, the BC Act “does not give the UN Declaration the force of law in BC or create new substantive rights”: Reply Factum of the Appellant, Her Majesty the Queen [in right of British Columbia] in *R v Desautel*, Supreme Court of Canada, August 5, 2020, online: [https://www.scc-csc.ca/WebDocuments/DocumentsWeb/38734/FM240\\_Appellant\\_Her-Majesty-the-Queen.pdf](https://www.scc-csc.ca/WebDocuments/DocumentsWeb/38734/FM240_Appellant_Her-Majesty-the-Queen.pdf), at para 6.

<sup>20</sup> *Ibid*, s 3. A very similar federal private member’s 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*, see esp s 4 – received House of Commons approval in 2018 but failed to achieve Senate approval before the 2019 federal election: see <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8160636>.

<sup>21</sup> See SC 2018, c 27, s 352, amending preamble to the *First Nations Land Management Act*, SC 1999, c 24 (FNLMA); *Indigenous Languages Act*, SC 2019, c 23, preamble; *An Act respecting First Nations, Inuit and Métis Children, Youth and Families* [sic], SC 2019, c 24 (Bill C-92 Act), preamble; *Canadian Energy Regulator Act*, SC 2019, c 28, s 10 (CERA), preamble; *Impact Assessment Act*, SC 2019, c 28, s 1 (IAA), preamble.

<sup>22</sup> The Liberal Party of Canada, the Green Party of Canada and the Bloc Québécois. The New Democratic Party committed to “an action plan for reconciliation, based on the Truth and Reconciliation Commission’s report and the UN Declaration on the Rights of Indigenous Peoples”: CBC News, Canada Votes 2019, “How do the main parties compare on these issues?”: <https://newsinteractives.cbc.ca/elections/federal/2019/party-platforms/>.

<sup>23</sup> “Moving Forward Together: Speech from the Throne to open the First Session of the Forty-Third Parliament of Canada,” December 5, 2019, <https://www.canada.ca/en/privy-council/campaigns/speech-throne/moving-forward-together.html>.

before the COVID-19 pandemic, but the September, 2020 federal Throne Speech recommitted the government to “mov[ing] forward to introduce legislation to implement [UNDRIP] before the end of this year.”<sup>24</sup>

There is reason to take such advantage as we can of this UNDRIP moment. Meaningful incorporation of UNDRIP into Canadian law would improve materially the circumstances, and enhance the autonomy, of Indigenous peoples dwelling here. Here are two easy examples. Other international instruments have recognized peoples’ rights of self-determination,<sup>25</sup> but international enforcement of such rights has proved elusive.<sup>26</sup> UNDRIP is said<sup>27</sup> to be the first such instrument to have acknowledged expressly that *Indigenous* peoples – sub-State collectives – have rights of self-determination.<sup>28</sup> Giving such rights enforceable legal effect in Canada would be a historic achievement. Likewise, the several mentions in UNDRIP of “free, prior

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<sup>24</sup> “A Stronger and More Resilient Canada: Speech from the Throne to open the Second Session of the Forty-Third Parliament of Canada,” September 23, 2020, <https://www.canada.ca/en/privy-council/campaigns/speech-throne/2020/stronger-resilient-canada.html>.

<sup>25</sup> Consider, among others, Article 1 of the International Covenant on Civil and Political Rights (ICCPR), UNTR No 14668, vol 999 (1976), at 171.

<sup>26</sup> The ICCPR includes an Optional Protocol. States parties to the ICCPR that adopt the Optional Protocol – Canada is one – agree thereby that individuals may seek redress against them from the UN Human Rights Committee for contraventions of ICCPR rights. In *Chief Bernard Ominayak and the Lubicon Lake Cree Band v. Canada*, CCPRC/38/D/1984 (10 May 1990) (UNHRC) (*Ominayak*), the Lubicon Lake Cree alleged that the government of Canada contravened their right of self-determination (ICCPR, §1) when it authorized the government of Alberta to expropriate Lubicon lands for oil and gas exploration (*Ominayak, ibid* at para 2.3). The Human Rights Committee declined to adjudicate the complaint as framed – and even to say whether the Lubicon qualified as a “people” to whom a self-determination right could belong – because the right of self-determination is a collective right and the Optional Protocol is available only to individuals seeking to enforce individual ICCPR rights (*ibid*, paras 13.3, 32.1). The committee found instead that Canada’s conduct had contravened a different, individual ICCPR right.

<sup>27</sup> See Barelli, “Soft Law,” note 7 above, at 961, 975.

<sup>28</sup> UNDRIP, note 2 above, §§3-4.

and informed consent”<sup>29</sup> would, if given domestic effect, almost certainly impose more stringent obligations on mainstream governments than does the current domestic law requiring Crown consultation.<sup>30</sup>

Given all this, it seems prudent to consider with some care what it would mean, and what it would take, to implement UNDRIP meaningfully in contemporary Canada: to render effective and enforceable here the rights and obligations UNDRIP sets out. This article is one such attempt. It has two principal parts. Part II identifies some of the issues that will require clarification, ideally in advance, for there to be a shared understanding of what UNDRIP means on the ground in Canada. Who is entitled to

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<sup>29</sup> UNDRIP, *ibid*, §§10, 11¶2, 19, 28¶1, 29¶2, 32¶2. In four of these provisions, a state that proceeds in certain ways without having obtained an Indigenous people’s free, prior and informed consent either contravenes an UNDRIP right (§§10, 29¶2) or owes redress to the Indigenous people (§§11¶2, 28¶1). In the other two instances (§§19 and 32¶2), the requirement is only that the state “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” before proceeding with its intended course of action. This difference in phrasing permits the inference that states can comply with §§19 and 32¶2 without always actually obtaining the consent of the relevant Indigenous peoples. At an absolute minimum, though, these latter two provisions require that the state first seek those peoples’ consent. (For discussion of this issue, see Barelli, “Shaping,” note 5 above, at 430-434. See also notes 248, 249, 256, 259-262, 265-290 below and accompanying text.)

<sup>30</sup> The Supreme Court of Canada has said repeatedly that Indigenous communities holding or asserting Aboriginal or treaty rights do not have a veto over proposed Crown conduct that might adversely affect the rights they hold or assert: that the Crown may proceed without consent as long as it has consulted sufficiently beforehand with the relevant Indigenous communities. See, for example, *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (*Haida*) at para 48 (asserted Aboriginal right); *Mikisew 2005*, note 12 above, at para 66 (established treaty right); *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 14 (established treaty right); *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41 at para 59 (asserted treaty and Aboriginal right); *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (*Ktunaxa*) at paras 79-80, 83 (McLachlin CJ & Rowe J), 119, 149-150, 154 (Moldaver J, concurring) (asserted Aboriginal right). Under Canadian law at present, the Crown need seek the consent of an Indigenous community before proceeding with a contemplated course of conduct only where the community is known to have Aboriginal title and the intrusion proposed would infringe the community’s title: *Tsilhqot’in Nation v. British Columbia*, 2014 SCC 44 (*Tsilhqot’in*) at para 90. See also *Tsilhqot’in*, *ibid* at paras 2, 76, 88, 91, 92, 97 and 124. It could be that the Crown must seek consent before infringing other established treaty or Aboriginal rights, but no Supreme Court decision yet requires that the Crown do so.

exercise and enforce the rights that UNDRIP sets out? Which lands and cultural practices do those rights protect? And, by no means least, what ongoing protection, if any, may Indigenous peoples exercising rights in the Declaration expect from the Crown if something goes wrong for them in the course of that exercise? Part III considers the mechanics of UNDRIP implementation: the relative merits of treaties and legislation as possible implementation vehicles; the relative importance of comprehensiveness, timeliness, uniformity and customization; and the challenge of giving the Declaration lasting domestic legal effect, despite the risk that subsequent elected governments will have quite different constituencies and priorities.

Implicit in almost all that follows is the special challenge of implementing UNDRIP within a legal order that is not well designed to welcome it. Complicating the task is the fact that the cumulative impact on Indigenous peoples of the Canadian and, before that, the Imperial legal regime has been to fragment and disaggregate their ancestral communities, destabilize their relationships in and with their traditional territories, and suppress and marginalize such elements of their cultures as had proved, or seemed, distasteful or inconvenient. How, exactly, does one unscramble an egg or put Humpty Dumpty back together? It would be unwise, and could be tragic, to underestimate the magnitude of this undertaking: the care it will take to get there from here. Yet these same considerations, taken together, also make the task of implementation morally imperative. Postponing the project further will not make it any easier.



## II. PREPARING FOR IMPLEMENTATION

Anyone reading UNDRIP with a view to enforcing it here must face and seek to answer some questions of surpassing difficulty, conceptually and operationally. It is, I think, not difficult to imagine UNDRIP operating somewhat successfully in Canada once we have satisfactory answers to many of these questions, but much – quite possibly everything – depends on the background assumptions that inform the very beginning of that enterprise: the shared default understandings from which implementation would proceed.

In considering each of these questions – and to be clear, I propose to offer only a partial list<sup>31</sup> – we need to wonder not only what its right, or best, answer is but who will, or should, get to decide on the answer when the time comes for decision.

In the absence of sufficient forethought at the outset of implementation – sufficient specificity in the implementing instrument about substance, process, or both – the answer to the second question is going to be, as usual, “the ordinary courts,” comprising almost certainly, for at least the discernible future, predominantly non-Indigenous judges approaching these issues, *faute de mieux*, from first principles anchored in a non-Indigenous mindset in mainstream law. This need not mean, of

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<sup>31</sup> By way of example, I do not discuss here the task of ascertaining the scope and content of Indigenous peoples’ right of self-determination (UNDRIP, note 2 above, §3), or determining priority, in case of any conflict, between Indigenous laws whose force is acknowledged pursuant to such a right and federal or provincial legislation. But it would be unwise to implement UNDRIP without at least some antecedent clarity about these critical issues.

course, that non-Indigenous litigants would always succeed in limiting or blocking enforcement of UNDRIP rights. It might well mean, though, that in the long run, UNDRIP rights would be read down as necessary, sized to fit more or less unobtrusively within the mainstream Canadian legal framework. Unless the only real purpose of UNDRIP implementation is cosmetic, such an outcome ought to give the enacting government, and the rest of us, pause. No less troubling is the prospect that answers to any of the threshold questions whose resolution UNDRIP presupposes will have to await potentially highly contentious litigation: litigation likely to strain the resources of many Indigenous collectives worthy of consideration as bearers of UNDRIP rights.

There is wisdom, therefore, in acknowledging and addressing these threshold questions at the outset of any meaningful process of UNDRIP implementation. But there are some significant risks, as well. Unilateral federal (or, *a fortiori*, provincial or territorial) answers, especially if prescribed near the outset of an implementation process, will, with reason, lack credibility with Indigenous constituencies precisely for not having taken account of Indigenous interests or expectations. But engagement with Indigenous voices, with a view to reaching working consensus about the matters that will define the proper starting point for UNDRIP implementation, seems almost certain to take considerable time and expense because, if we're honest, the non-Indigenous participants in that dialogue are going to need some education in Indigenous realities and because there is no good reason just to assume that all the

relevant Indigenous perspectives or interests will converge conveniently. And in the meantime, no Indigenous peoples will be deriving practical benefit from any of UNDRIP's rights or obligations.

There is, in my judgment, no clear winner in the contest between getting UNDRIP implementation right and getting it done. It might very well turn out – I'm not sure – that UNDRIP should work differently, even within Canadian law, for different Indigenous constituencies, whether because their own priorities differ, because they have organized themselves in importantly different ways, or because they understand themselves to be at different stages of readiness to use the rights in the UNDRIP menu effectively. But such differentiation always runs some risk of invidious comparison and, in the worst case, of suspicions of favouritism. It doesn't seem self-evident, either, whether universal implementation, postponed till everyone is ready, or a more incremental approach deserves preference.

With this as background, we turn to some threshold issues.

#### **A. IDENTITY**

In nearly every one of its articles,<sup>32</sup> UNDRIP identifies rights ascribed, or states' obligations owing, to "indigenous peoples." "Indigenous peoples," therefore, will be

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<sup>32</sup> There are a few exceptions. §§6, 7¶1, 17¶3, 22 and 44 of UNDRIP, note 2 above, set out rights particular to Indigenous individuals; the rights in §§9 and 17¶1 belong alike to Indigenous peoples and individuals. And §§41, 42 and 46 are institutional or procedural.

the entities – other things equal, the only entities – empowered to enforce almost all of the rights set out in UNDRIP once UNDRIP acquires enforceable legal effect. What UNDRIP does not do, alas, is identify for us these candidate constituencies. According to the Declaration, “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions”<sup>33</sup> and “the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned.”<sup>34</sup> This would be helpful instruction if we knew already how to individuate an Indigenous people, but nothing in the text of UNDRIP tells us what collectives partake of these rights: what makes “indigenous peoples” Indigenous, or what makes them peoples. The decision to leave this term undefined may well have been deliberate.<sup>35</sup> Its effect, though, is to leave to those responsible for UNDRIP implementation in Canada the task of postulating an initial array of “indigenous peoples.” These, after all, will be the collectives empowered to exercise the UNDRIP rights of self-determination<sup>36</sup> and the ones whose “free, prior and informed consent” mainstream governments must begin seeking or obtaining as a precondition to going about much of their work.<sup>37</sup> Not much else can happen to give effect to the Declaration until this initial configuration emerges.

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<sup>33</sup> *Ibid*, §33, ¶1.

<sup>34</sup> *Ibid*, §9.

<sup>35</sup> The 23rd and final recital at the beginning of UNDRIP, *ibid*, “recogniz[es] that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration” (italics in original omitted).

<sup>36</sup> UNDRIP, *ibid*, §§3-5, 33 ¶2.

<sup>37</sup> See note 29 above.

It is fortunate that this exercise need not begin from scratch. To qualify under the Declaration to exercise UNDRIP rights, an entity must, at a minimum, be the kind of collective capable of exercising the rights that UNDRIP lists: the kind of collective, in other words, to which it is reasonable to ascribe rights such as these. For UNDRIP purposes, Indigenous peoples must, for example, be capable, as such, of entering into treaties and agreements with states<sup>38</sup> and of having their own: cultural values and ethnic identities;<sup>39</sup> lands, territories<sup>40</sup> and land tenure systems;<sup>41</sup> customs and traditions;<sup>42</sup> cultural, religious and spiritual property;<sup>43</sup> languages and oral traditions;<sup>44</sup> and traditional knowledge.<sup>45</sup> For all this to be true of a candidate group, the group will need, at an absolute minimum, a shared history of significant duration.

From this collection of key attributes, it seems to follow that being a “band” under the *Indian Act*<sup>46</sup> is neither necessary nor sufficient for a group to qualify under UNDRIP as an “Indigenous people.” Not sufficient, because nothing in the *Indian Act* requires the federal government to take account of any of these attributes in deciding whether to take the steps that make a “body of Indians” a “band.” Any “body of Indians” – a term left undefined – is a band if the federal Crown holds land

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<sup>38</sup> UNDRIP, note 2 above, §37.

<sup>39</sup> *Ibid*, §§8 ¶2(a), 31.

<sup>40</sup> *Ibid*, §§8 ¶2(b), 10, 25-28, 30, 32.

<sup>41</sup> *Ibid*, §27.

<sup>42</sup> *Ibid*, §§11 ¶1, 12 33.

<sup>43</sup> *Ibid*, §§11 ¶2, 12.

<sup>44</sup> *Ibid*, §§13-14.

<sup>45</sup> *Ibid*, §31 ¶1,

<sup>46</sup> RSC 1985, c I-5 (*Indian Act*), s 2(1) “band.”

or money for its benefit in common, or if the Governor in Council, after April 17, 1985, declares it to be a band.<sup>47</sup> Not necessary, because there is no obligation under the *Indian Act* for the federal Crown to do any of this for any given “body of Indians,” yet the group may have, independently, all the attributes required to exercise UNDRIP rights fully. (Some Métis collectives come readily to mind here.) This doesn’t mean, of course, that no *Indian Act* band could have UNDRIP rights; it does mean, though, that its status as a band doesn’t help us determine what standing, if any, it warrants for UNDRIP purposes.<sup>48</sup>

Somewhat more promising, but differently unhelpful in the end, is the definition of “Indigenous governing body” one finds in several recent federal statutes. Four such statutes define that term to mean “a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.”<sup>49</sup> (The definition of “Indigenous governing body” in the BC Act is essentially the same.)<sup>50</sup> It would indeed be reasonable to ascribe the rights set out in UNDRIP to Indigenous peoples whose governing bodies satisfy this description, but the definition fails to

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<sup>47</sup> *Ibid.* The Minister of Indigenous Services may combine or divide existing bands essentially at will upon receipt of a sufficient request from members of the existing band(s): *ibid.*, ss. 2(1) “Minister” [amended SC 2019, c 29, s 375(1)(a)], 17(1) [enacted RSC 1985, c 32 (1st Supp), s 7].

<sup>48</sup> But if *Indian Act* bands are not to be the bearers of UNDRIP rights, what ought to become of the statutory authority such bands and their councils currently have under the *Indian Act* and several other, more recent federal statutes?

<sup>49</sup> See *Indigenous Languages Act*, note 21 above, s 2 “Indigenous governing body”; Bill C-92 Act, note 21 above, s 1 “Indigenous governing body”; CERA, note 21 above, s 2 “Indigenous governing body”; IAA, note 21 above, s 2 “Indigenous governing body.”

<sup>50</sup> BC Act, note 17 above, s 1(1) “Indigenous governing body.”

satisfy here for at least two reasons. First, its use would disqualify from UNDRIP's benefits any Indigenous collective that had not yet tried, or had tried and failed, to establish in judicial proceedings that it has existing Aboriginal or treaty rights (the "rights recognized and affirmed by section 35 of the *Constitution Act, 1982*"), or whose treaty or Aboriginal rights were all surrendered or extinguished before April 17, 1982. This will not be a problem for collectives known and accepted as signatories or adherents to treaties or land claims agreements with the Crown, but significant numbers of First Nation communities, especially in British Columbia, have yet to take part in such treaties, and Métis involvement in treaty-making has been, to the best of my knowledge, rare.<sup>51</sup> Why should access to the rights in UNDRIP be conditional on proof that a given Indigenous collective already has certain constitutional rights?<sup>52</sup> Especially when the law now used in appraising claims to such rights developed without any reference to, or regard for, UNDRIP implementation.

But the other problem with this definition is that it leaves unaddressed a question essential to the identification enterprise: the level of generality at which to denominate "Indigenous peoples." Does, should, the UNDRIP right of self-determination,<sup>53</sup> for example, belong to the Haudenosaunee Confederacy Chiefs Council, the Oneida Nation (one of the six nations comprising the confederacy) or the

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<sup>51</sup> The only clear example I know of is the Adhesion to Treaty 3, the Northwest Angle Treaty (1873) by "Halfbreeds of Rainy River and Lake": <https://www.rcaanc-cimac.gc.ca/eng/1100100028675/1581294028469>.

<sup>52</sup> Implementing UNDRIP by treaty would be one way of solving this problem. But doing so would obviate any need for such a definition as the one under discussion.

<sup>53</sup> See note 36 above and accompanying text.

community at the Oneidas of the Thames? Is it the Anishinaabe, the Grand Council of Treaty 3, or each of the constituent Anishinaabe communities that took part in Treaty 3 whose free, prior and informed consent mainstream governments ought to (have to) seek or obtain before making or implementing decisions that might affect them? This statutory definition of “Indigenous governing body” could, in proper circumstances, accommodate any or all of these responses. But the consequences of grouping “Indigenous peoples” at any one of these levels of generality, as opposed to the others, are obvious and significant. Will the chosen configuration honour, or further compromise, the distribution of authority – the locus of political legitimacy – under Indigenous legal systems?<sup>54</sup> And how many discrete, self-determining Indigenous polities can Canadian federalism accommodate operationally?<sup>55</sup> Who should get to decide how we answer these questions?<sup>56</sup>

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<sup>54</sup> By way of example, the Royal Commission on Aboriginal Peoples recommended recognizing rights of self-determination in 50-80 Indigenous nations – collectives each displaying a shared sense of collective identity, having sufficient critical mass to assume the powers and responsibilities of self-determination, and comprising the predominant population somewhere in Canada – and creating “a neutral and transparent process for identifying Aboriginal groups entitled to exercise the right of self-determination as nations”: *Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship* (Ottawa: Supply and Services Canada, 1996) at 177-184.

<sup>55</sup> There are, for example, over 600 nominate First Nations (Indian bands) in Canada today, not counting operative Métis and Inuit collectives. Reflecting years ago on the logistics of Indigenous self-government, Roger Gibbins thought it essential that there be “[a]t the very least ... a province-wide Indian government, one that would have the power to enforce its decisions with respect to its constituent bands or communities”: “Citizenship, Political and Intergovernmental Problems with Indian Self-Government” in J. Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 369 at 372.

<sup>56</sup> Issues about the locus of authority to represent a given Indigenous collective are sometimes matters of rancorous dispute within such collectives themselves. Examples in mainstream jurisprudence include *Logan v Styres* (1959), 20 DLR (2d) 416 (Ont HCJ) and, much more recently, *Coastal GasLink Pipeline Ltd v Huson*, 2019 BCSC 2264.



And there is, finally, the vexing question of Indigeneity. Having section 35 rights may well suffice to qualify an Indigenous collective as an “indigenous people” entitled to UNDRIP rights, but who else might also deserve to count as Indigenous for UNDRIP purposes? Canadian constitutional law almost certainly places this inquiry beyond the reach of provincial legislative authority; the Supreme Court has said consistently that “Indianness” – that which makes Indians what they are – is a matter within exclusive federal legislative competence<sup>57</sup> and, more recently, that “all Aboriginal people” are “Indians” for this purpose.<sup>58</sup> And federal attempts to determine unilaterally who qualifies as Indigenous have not fared well, to say the least, in recent times. Twice since 2009 lower courts have struck down eligibility rules about federal Indian status for unjustified discrimination based on sex.<sup>59</sup> More recently, Canada, to its credit, has undertaken extensive consultations with Indigenous groups about matters relating to Indigenous identity and community membership.<sup>60</sup> Prominent among the messages from participating Indigenous interlocutors was the need for more time,

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<sup>57</sup> *Natural Parents v Superintendent of Child Welfare* (1975), [1976] 2 SCR 751 (*Natural Parents*) at 761 (“Indianness”), 763 (“Indian character ... Indian identify and relationship”), Laskin CJC; *Four B Manufacturing Ltd v United Garment Workers* (1979), [1980] 1 SCR 1031 (*Four B*) at 1047-1048 (“Indianness,” “nothing inherently Indian”); *Dick v The Queen*, [1985] 2 SCR 309 at 315 (“Indianness”), 320 (“Indians qua Indians”); *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at 835-836 (quoting with approval *Natural Parents*, *ibid* per Laskin CJC); *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 61 (“Indianness”); *NIL/TU,O Child and Family Services Society v BC Government & Service Employees’ Union*, 2010 SCC 45 (*NIL/TU,O*) at para 70 (“matters that go to the status and rights of Indians”), McLachlin CJC and Fish J (concurring).

<sup>58</sup> *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (*Daniels*) at paras. 19, 25 (in both, emphasis in original deleted), 46.

<sup>59</sup> *Mclvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153; *Descheneaux c Canada (Procureur général)*, 2015 QCCS 3555.

<sup>60</sup> See *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, SC 2017, c 25, ss 11-13; Crown-Indigenous Relations and Northern Affairs Canada, *Collaborative Process on Indian Registration, Band Membership and First Nation Citizenship: Report to Parliament June 2019*: <https://www.aadnc-aandc.gc.ca/eng/1560878580290/1568917202322> (2019 Report).

information, federal funding and support so First Nations could think carefully through, and explain to their members, the implications and consequences of certain suggested further changes to the current rules for Indian status and band membership:<sup>61</sup> evidence of the magnitude and the complexity of these issues. And that exercise does not even pretend to address comprehensively the larger generic issue of Indigeneity.

Two other problems lie beneath the surface of the Indigeneity issue. Should the inquiry begin with Indigenous individuals, working outward to identify the collectives, or with Indigenous collectives, working inward to identify the individuals? UNDRIP itself, once in force, would follow the latter approach; it accords Indigenous peoples “the right to determine their own identity or membership in accordance with their customs and traditions”<sup>62</sup> but gives Indigenous individuals only a qualified right to belong to Indigenous nations or collectives, subject to those same traditions and customs.<sup>63</sup> Intuitively, Indigenous collectives (once we succeed in denominating them) seem better placed than anyone else to determine who their own members are. The Supreme Court of Canada, however, thought otherwise, declaring in 2016 that someone could be Métis (and therefore “Aboriginal,” and therefore subject to “Parliament’s protective authority”) even though no Métis community would accept them as a member. Unfortunately, it offered no guidance at all on how else to

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<sup>61</sup> 2019 Report, *ibid*, “Summary of consultation input.”

<sup>62</sup> UNDRIP, note 2 above, §33 ¶1.

<sup>63</sup> *Ibid*, §9. Article 9 does appear to proscribe “discrimination of any kind ... aris[ing] from the exercise of such a right.”

approach the “fact-driven question to be decided on a case-by-case basis in the future” about whether a given individual might qualify as Métis.<sup>64</sup>

Finally, mainstream legislatures and governments, still populated predominantly by people that do not purport to be Indigenous, have no credible claim to expertise in deciding independently who is Indigenous. How, then, are they to decide which voices from the Indigenous side should receive priority in the conversation about Indigeneity? Individuals and collectives that identify as Indigenous will want, with good reason, an understanding of the term “Indigenous” in UNDRIP that is broad enough to include them but not so broad that it dissipates the term’s significance. There is no assurance that all of them can have both, or that they will agree among themselves about which should be in and which should be out. Even structuring, let alone funding, these preparatory conversations, especially on a national scale, will require some initial assumptions, a willingness to correct them, and considerable tact.

Given all this uncertainty, it would be prudent, I think, to include in the measures adopted for giving UNDRIP enforceable legal effect some means by which collectives of Indigenous peoples might reconfigure themselves, combining or dividing as their

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<sup>64</sup> *Daniels*, note 58 above, at paras 47-49. There is serious ongoing dispute about what must be true for someone to be Métis, especially as regards groups in Quebec and Atlantic Canada that choose to self-identify as Métis. For one view on this controversy, see Adam Gaudry and Darryl Leroux, “White Settler Revisionism and Making Métis Everywhere: The Evocation of Métissage in Quebec and Nova Scotia” (2017) 3:1 *Critical Ethnic Studies* 116. See also “Metis leader warns that Ontario is the gateway to ‘eastern invasion,’ APTN, February 25, 2020, online: <https://aptnnews.ca/2020/02/25/metis-leader-warns-that-ontario-is-the-gateway-to-eastern-invasion/>. Thanks to Kent McNeil and Bobbi-Jo Virtue, respectively, for these references.

post-UNDRIP experience and good sense dictates. Given the duration and the extent of Canadian and, before that, colonial interference with traditional Indigenous structures of governance and internal authority, it would be surprising, if not downright miraculous, if those responsible managed, all at once on the first try, to identify for UNDRIP purposes the optimal set of collectives of “indigenous peoples” in present-day Canada.

## B. PLACE

Giving UNDRIP enforceable legal effect almost certainly will increase dramatically both the protection available to Indigenous peoples’ lands and the complement of lands that are subject to such protection. Among other relevant provisions,<sup>65</sup> the Declaration affirms Indigenous peoples’ “right to,” and “right to own, use, develop and control” “the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,”<sup>66</sup> and imposes an affirmative obligation on states to “give legal recognition and protection to these lands, territories and resources.”<sup>67</sup> It entitles Indigenous peoples to redress, *in specie* unless that is “not possible,”<sup>68</sup> when such lands “have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent”<sup>69</sup> and requires states to “establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process ... to

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<sup>65</sup> See, e.g., UNDRIP, note 2 above, §§25, 29-30.

<sup>66</sup> *Ibid*, §26 ¶¶1-2.

<sup>67</sup> *Ibid*, §26 ¶3.

<sup>68</sup> *Ibid*, §28 ¶¶1-2.

<sup>69</sup> *Ibid*, §28 ¶1.

recognize and adjudicate the rights of indigenous peoples pertaining to” these lands, territories and resources.<sup>70</sup> It prohibits any subsequent non-consensual relocation of Indigenous peoples from their lands or territories, and any relocation at all without “agreement on just and fair compensation,”<sup>71</sup> and it requires states to “provide effective mechanisms for prevention of, and redress for ... [a]ny action which has the effect of dispossessing them of their lands, territories or resources.”<sup>72</sup> Finally, states must “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, ...”<sup>73</sup>

Implementation of any of this can begin only after the nominate Indigenous peoples (again, once we know who they are) have identified the lands, territories and resources that are, or were traditionally, theirs. It is possible, but far from certain, that this exercise in identification will proceed without irreconcilable differences among Indigenous peoples whose territories overlap. Where differences emerge among them, someone is going to have to decide how best to address those differences: whether these are issues best left to the Indigenous groups themselves, or whether mainstream institutions have some role to play in resolving them. More vexing, almost certainly, will be the task of weighing the UNDRIP rights of Indigenous

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<sup>70</sup> *Ibid*, §27.

<sup>71</sup> *Ibid*, §10.

<sup>72</sup> *Ibid*, §8 ¶2(b).

<sup>73</sup> *Ibid*, §32 ¶2.

peoples to the lands they have identified against the interests of non-Indigenous others who claim entitlement under mainstream law to some of those same lands. Because these UNDRIP rights extend to “the lands, territories and resources which [Indigenous peoples] *have traditionally* owned, occupied or otherwise used or acquired,”<sup>74</sup> we can’t just assume that the only lands at issue for UNDRIP purposes are public lands.<sup>75</sup> It may be necessary, for instance, to consider whether the land surrender provisions in the English versions of the post-Confederation numbered treaties accurately reflect the “free, prior and informed consent”<sup>76</sup> of their Indigenous signatories<sup>77</sup> or, for that matter, whether those provisions are consistent with the federal Crown’s fiduciary obligation to prevent exploitative bargains<sup>78</sup> and avoid conflicts of interest<sup>79</sup> when Indigenous interests in land are being proposed for surrender.

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<sup>74</sup> *Ibid*, §26; emphasis added.

<sup>75</sup> By way of example, the Supreme Court of Canada has held that provincial patents do not extinguish pre-existing Indigenous interests in the lands to which they pertain: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 (*Delgamuukw*) at paras 174-176.

<sup>76</sup> UNDRIP, note 2 above, §28¶1.

<sup>77</sup> Some recent scholarship suggests that the Indigenous parties to at least some of those treaties agreed to do nothing more than share the subject lands with the settlers (see, for example, Brittany Luby, “The Department Is Going Back on These Promises: An Examination of Anishnaabe and Crown Understandings of Treaty” (2010) 30:2 *Can J Native Stud* 203; Michael Asch, “On the Land Cession Provisions in Treaty 11” (2013) 60:3 *Ethnohistory* 451; Kate Gunn, “Agreeing to Share: Treaty 3, History and the Courts” (2018) 51 *UBC L Rev* 75), and that the Indigenous representatives in those treaty negotiations may well have lacked authority under their own legal systems to surrender to the Crown jurisdiction over their peoples or stewardship of their lands (see, for example, James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 *Sask L Rev* 241 at 253-254, 257).

<sup>78</sup> See, for example, *Guerin v The Queen*, [1984] 2 SCR 335 (*Guerin*) at 383, Dickson J; *Blueberry River First Nation v Canada (Department of Indian Affairs and Northern Development)*, [1995] 3 SCR 344 (*Blueberry River*) at paras 33, 35, McLachlin J (concurring).

<sup>79</sup> *Blueberry River*, *ibid* at paras 53-56, McLachlin J (concurring).

There is, in addition, the task of authenticating the interests Indigenous peoples have in the lands, territories and resources they have identified as theirs. One option is to accept as definitive Indigenous peoples' own identification of their lands and their interests, especially if that identification reflects consensus among the several different Indigenous peoples having traditional territories. But one doubts somehow that mainstream Canada would countenance that approach, not least because non-Indigenous settlers claim interests (derived from the Crown) in many of those same lands (and quite often vote in significant numbers in elections). Any other solution to the authentication problem is going to require some sort of test to distinguish the sound identifications from the bogus ones.

If this task is left to the mainstream courts in the absence of further direction, they will be strongly tempted to invoke the law they know already: the tests in use to adjudicate claims of Aboriginal title.<sup>80</sup> There are two obvious problems with having them do so. First, it will postpone for years for most Indigenous peoples any meaningful enforcement of UNDRIP land rights, because of the evidentiary complications involved in appraising claims of Aboriginal title. The trial alone in

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<sup>80</sup> In brief, a community has Aboriginal title if it can prove "(1) 'sufficient occupation' of the land claimed to establish title at the time of assertion of European sovereignty; (2) continuity of occupation where present occupation is relied on to establish ancestral occupation; and (3) exclusive historic occupation": *Tsilhqot'in*, note 30 above, at para 50. Occupation is "sufficient" when there is "evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group": *ibid* at para 38; it is "exclusive" when the claimant group demonstrates "the intention and capacity to retain exclusive control over the lands" at the time of sovereignty: *ibid* at paras 47-48, quoting *Delgamuukw*, note 75 above, at para 156, quoting, in turn, Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 204 (emphasis added in *Tsilhqot'in* deleted). See generally *Delgamuukw*, *ibid* at paras 143-156, *Tsilhqot'in*, *ibid* at paras 24-50.

*Delgamuukw* required 374 sitting days;<sup>81</sup> the trial in *Tsilhqot'in* consumed “339 days over a span of five years.”<sup>82</sup> There is no obvious reason to expect a more streamlined process for addressing such claims in the future. But second, and probably more important, implementation of UNDRIP’s land rights would make little meaningful difference in the lives of Indigenous peoples if it did no more than codify rights available already to communities having the patience, the evidence and the resources to prove that they have, or at least that they once had, Aboriginal title. But if Aboriginal title is not to be the measure of UNDRIP land rights, what measure should we use for that purpose instead?

UNDRIP’s land rights regime poses at least two other issues worthy of mention. The first concerns the redress provisions for Indigenous peoples deprived without their consent of their traditional lands, resources or territories because of dispossession, relocation, confiscation or damage.<sup>83</sup> It seems reasonable to suppose that these provisions appear in UNDRIP because Indigenous peoples *already* have suffered such deprivations in respect of their traditional lands.<sup>84</sup> Will those provisions apply prospectively only, to Crown or settler misbehavior subsequent to their implementation, or will they entitle Indigenous peoples to recourse in respect of

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<sup>81</sup> *Delgamuukw*, note 75 above, at para 5.

<sup>82</sup> *Tsilhqot'in*, note 30 above, at para 7.

<sup>83</sup> UNDRIP, note 2 above, §§8¶2(b) (dispossession), 10 (relocation), 28 (confiscation, occupation or damage).

<sup>84</sup> The sixth recital to UNDRIP, *ibid* explicitly notes the General Assembly’s “[c]oncern[] that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests” (emphasis in original).



historical grievances that relate to land: incidents of deprivation that have occurred already? It is difficult to overstate the importance of this question. And if the decision is to give these remedies retroactive scope, it will be essential to clarify the relationship between them and the limitation periods that ordinarily govern civil proceedings under provincial and federal law.

Second, UNDRIP itself requires that any process established to adjudicate and enforce the land rights in the Declaration “giv[e] due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, ...”<sup>85</sup> What form should such recognition take? How should mainstream law take account of Indigenous legal orders: as foreign law, or as domestic law?<sup>86</sup> Foreign law requires proof as fact by means of expert evidence, failing which adjudicators assume it to be identical with the law they would apply ordinarily.<sup>87</sup> And courts may “decline to enforce foreign laws where such laws are contrary to public policy, ...”<sup>88</sup> Domestic law, on the other hand, is law that need not be specially proved; it is law of which adjudicators may

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<sup>85</sup> *Ibid*, §27. See also §40 (decisions in Indigenous peoples’ “disputes with States or other parties ... shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights”).

<sup>86</sup> In *Beaver v Hill*, 2018 ONCA 816, a decision in part about whether Ontario law or Haudenosaunee law should govern a dispute about custody, spousal and child support, the Ontario Court of Appeal held (at para 17) that “Aboriginal rights or Indigenous law do not constitute ‘foreign law’, even conceptually” for purposes of section 35 of the *Constitution Act, 1982*, note 13 above. It is unfortunate that the court did not offer reasons for that determination or indicate whether this is true more generally of Indigenous law. For discussion of what it might mean for Canadian courts to treat Indigenous law as foreign law and Indigenous oral traditions as evidence of that law, see Karen Drake, “Indigenous Oral Traditions in Court: Hearsay or Foreign Law?” in Karen Drake and Brenda L Gunn, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 2019), 281. Thanks to Kent McNeil for this latter reference.

<sup>87</sup> “Where a defendant relies upon some difference between the law of the locality and the law of the forum the onus is upon him to prove it”: *Canada National Steamships Ltd v Watson*, [1939] SCR 11 at 14. See also *Nevsun*, note 11 above, at para 97.

<sup>88</sup> *Nevsun*, *ibid*, at para 45.

take judicial notice. But reliable judicial notice is possible only for those with some antecedent familiarity with the relevant body of domestic law. Such familiarity with the multiple bodies of Indigenous law subsisting today in Canada is unusual. If we accept that Indigenous laws, traditions, customs and land tenure systems form part of domestic Canadian law, “due recognition” of them while adjudicating UNDRIP land rights is possible only for adjudicators conversant already with the relevant laws of the relevant Indigenous peoples.

Be this as it may, it seems almost certain that federally appointed judges will have some role in the adjudication of UNDRIP land rights. Even if the scheme assigns original jurisdiction elsewhere in respect of such matters and affords no right of appeal to the regular courts, some supervisory jurisdiction over such proceedings will remain with either the provincial superior courts<sup>89</sup> or the federal courts.<sup>90</sup>

### C. CULTURE

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<sup>89</sup> See *Crevier v Quebec (Attorney General)*, [1981] 2 SCR 220 at 236 (“a provincially-constituted statutory tribunal cannot constitutionally be immunized from review of decisions on questions of jurisdiction”), 238 (“[i]t cannot be left to a provincial statutory tribunal, in the face of s. 96 [of the *Constitution Act, 1867*, 30 & 31 Vict, c 3 (UK) (*Constitution Act, 1867*)], to determine the limits of its own jurisdiction without appeal or review”); *McEvoy v New Brunswick (Attorney General)*, [1983] 1 SCR 704 at 720 (“Section 96 bars Parliament from altering the constitutional scheme envisaged by the judicature sections of the *Constitution Act, 1867* just as it does the provinces from doing so”).

<sup>90</sup> In all likelihood, any tribunal established under federal legislation to adjudicate UNDRIP land rights issues would qualify as a “federal board, commission or other tribunal” under s 2(1) of the *Federal Courts Act*, RSC 1985, c F-7, as amended and would be subject to the statutory judicial review jurisdiction either of the Federal Court of Appeal (if added to the list in s 28(1) of that Act) or of the Federal Court (otherwise: see s 18).

UNDRIP acknowledges Indigenous peoples’ “right not to be subjected to forced assimilation or destruction of their culture,”<sup>91</sup> their “right to practise and revitalize their cultural traditions and customs[, including] the right to maintain, protect and develop the past, present and future manifestations of their cultures,”<sup>92</sup> their “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,” and their intellectual property in these manifestations.<sup>93</sup> It requires that states provide effective redress mechanisms for any deprivation of their cultural values,<sup>94</sup> and for “cultural, intellectual, religious and spiritual property taken [from them] without their free, prior and informed consent or in violation of their laws, traditions and customs.”<sup>95</sup>

Effective implementation of the Declaration’s culture provisions raises issues of identification, authentication and temporal scope identical to those discussed in respect of Indigenous peoples’ UNDRIP land rights.<sup>96</sup> It seems probable that we will need some way of distinguishing Indigenous peoples’ “cultural traditions and customs” from the other kinds of pursuits in which Indigenous peoples, like the rest

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<sup>91</sup> UNDRIP, note 2 above, §8¶1.

<sup>92</sup> *Ibid*, §11¶1.

<sup>93</sup> *Ibid*, §31¶1. See also §§12 (right to manifest and teach their spiritual and religious traditions; obligation to facilitate access to or repatriation of ceremonial objects and human remains) and 15 (“right to the dignity and diversity of their cultures, traditions, histories and aspirations”).

<sup>94</sup> *Ibid*, §8¶2(a).

<sup>95</sup> *Ibid*, §11¶2. See also §31¶2 (states must “take effective measures to recognize and protect the exercise of” Indigenous peoples rights to their cultural heritage, traditional knowledge and intellectual property).

<sup>96</sup> See notes 74-83 above and accompanying text.

of us, happen to take part from time to time. It may seem tempting, for the sake of convenience, to use for this purpose the test already adopted for identifying Aboriginal rights: contemporary versions of customs, traditions or practices found to be “integral to the distinctive culture”<sup>97</sup> of the ancestral Indigenous community as of a particular historical reference date.<sup>98</sup> But doing so, again, would render these UNDRIP provisions redundant, mere duplicates of rights already available to Indigenous peoples that have sufficient resources and sufficient ethnohistorical evidence to establish them. And an approach that required candidate Indigenous cultural customs to have such deep historical anchorage would seem, on its face, inconsistent with the explicit UNDRIP right “to maintain, protect and develop the past, present *and future* manifestations of their cultures, ...”<sup>99</sup> Again, we are going to need some different test to use for this purpose.<sup>100</sup> It would be helpful if there were agreement about that test by the time these UNDRIP rights took effect. And it will, as before, be essential to clarify whether the related redress provisions,<sup>101</sup> whose inclusion in UNDRIP probably responds to past dispossessions of Indigenous peoples’

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<sup>97</sup> *R v Van der Peet*, [1996] 2 SCR 507 (*Van der Peet*) at para 46.

<sup>98</sup> For most kinds of Indigenous communities, the relevant historical reference date is the date of the ancestral community’s first contact with Europeans: *ibid* at paras 60-61. For Métis, the relevant date is the date of effective European control of the area the ancestral Métis community inhabited: *R v Powley*, 2003 SCC 43 at para 18.

<sup>99</sup> UNDRIP, note 2 above, §11¶1. Emphasis added. The Supreme Court’s approach to Aboriginal rights identification has incurred a good deal of criticism in its own right. See, for example, John Borrows “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997) 22 *Am Indian L Rev* 37; Russel Lawrence Barsh & James Youngblood Henderson “The Supreme Court’s *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42 *McGill LJ* 993; and the dissenting judgments of L’Heureux-Dubé and McLachlin JJ in *Van der Peet*, note 97 above.

<sup>100</sup> A reviewer has suggested including and protecting, at a minimum, characteristics integral to any culture. This suggestion deserves further thought, but may we assume that Indigenous and non-Indigenous commentators would routinely agree in identifying such characteristics? And if not, who should get to make those determinations?

<sup>101</sup> *Ibid*, §§8¶2(a), 11¶2, 12¶2 and 31¶2.

cultural and spiritual property,<sup>102</sup> are to apply prospectively only or to permit recovery for previous forms of cultural interference or of properties already taken without consent. In the latter event, it will, again, be necessary to clarify how these rights of recovery relate to existing limitation periods and to previous statutory prohibitions of certain Indigenous cultural practices.<sup>103</sup>

#### D. BACKSTOP

The Declaration is replete with affirmative obligations<sup>104</sup> that states owe to Indigenous peoples. By giving UNDRIP enforceable effect in Canadian law, the federal order of government will be undertaking these obligations. Several other UNDRIP provisions adjure signatory states to get out of the way to leave room for the exercise of rights identified in the Declaration.<sup>105</sup> What isn't clear and needs attention is what further role, if any, mainstream governments in Canada ought to

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<sup>102</sup> See note 84 above and accompanying text.

<sup>103</sup> See, for example, SC 1884, c 27, s 4 (prohibiting potlatch and sundance festivals), RSC 1927, c 98, s 140 (continuing and extending the prohibition), repealed SC 1951, c 29, s 123(2).

<sup>104</sup> See, for example, UNDRIP, note 2 above, §§8¶1, 11¶2, 12¶2, 27, 32¶3 (provide effective redress mechanisms), 13¶2 (effective measures to protect Indigenous languages and oral traditions), 14¶3 (provide Indigenous children with access to education in their own cultures and languages), 15¶2 (combat prejudice and eliminate discrimination), 16¶2 (reflect Indigenous cultural diversity in state media and encourage it in private media), 17¶2 (protect Indigenous children from economic exploitation and from hazardous or otherwise deleterious work), 18-19, 23, 29¶2, 30¶2, 32¶2 (consult with Indigenous peoples and involve them in decision-making about matters that affect them or their rights), 22¶2 (protect Indigenous women and children against all forms of violence and discrimination), 24¶2 (take steps necessary to provide Indigenous individuals with highest standards of physical and mental health), 26¶3 (recognize and protect Indigenous peoples' lands, territories and resources), 29¶¶1, 3 (implement programs to assist Indigenous peoples with conservation and protection of their lands, territories and resources, and to monitor and restore health of Indigenous peoples affected by hazardous materials), 31¶2 (take effective measures to recognize and protect Indigenous peoples' cultural rights), 36¶2 (facilitate exercise and ensure implementation of right to develop contacts and relations with Indigenous peoples across international borders), and 38 (take appropriate measures to implement the ends of the Declaration).

<sup>105</sup> See *ibid*, §§3-5, 7¶2, 9-10, 20, 24¶1, 25, 33-35.

have, beyond the several enumerated affirmative obligations, when and if something goes wrong within a community of Indigenous peoples going about the business of exercising its UNDRIP autonomy rights.<sup>106</sup> Two examples illustrate the point.

### 1. Significant Economic Setback

Imagine first that a such a community, exercising its UNDRIP right “to own, use, develop and control the ...resources” it possesses,<sup>107</sup> suffers a catastrophic financial reverse, as a result of improvidence, inexperience, inferior bargaining power or perhaps just simple bad luck.<sup>108</sup> Whose problem is that? What responsibility, if any, should the Crown have to protect or indemnify a community of Indigenous peoples that suffered economic misfortune as a result of choices the community itself had made (without, let’s assume, advice from the Crown)<sup>109</sup> in exercising its UNDRIP rights?

Three UNDRIP provisions arguably impose on states affirmative economic obligations to Indigenous peoples. Article 4 give Indigenous peoples a right to “ways and means

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<sup>106</sup> See, for example, *ibid*, §§3-5, 9, 14 ¶1, 16 ¶1, 20, 23, 25-26, 33-35.

<sup>107</sup> *Ibid*, §26 ¶2.

<sup>108</sup> Section 89(1) of the *Indian Act* may seem to provide some protection in such a case. It exempts from the usual creditors’ remedies the on-reserve property of bands (First Nations) and status Indians. But several provincial courts of appeal have held that Indians and First Nations may waive this statutory exemption: see *Tribal Wi-Chi-Way-Win Capital Corporation v Stevenson*, 2009 MBCA 72; *L. Martin (1984) Inc v Shubenacadie Band* (1995), 144 NSR (2d) 241 (CA); *Kingsclear Indian Band v JE Brooks & Associates Ltd* (1991), [1992] 2 CLNR 46 (NBCA); but see *Benedict v Ohwistha Capital Corporation*, 2014 ONCA 80. And there is, again, no assurance that *Indian Act* bands will be the nominate collectives of Indigenous peoples entitled to exercise the rights in UNDRIP: see notes 46-48 above and accompanying text.

<sup>109</sup> If loss resulted because the community had relied on advice it received from the Crown, the usual rules about professional negligence liability would govern, other things equal, the Crown’s exposure.

for financing their autonomous functions.” Article 21 confers on them “the right, without discrimination, to the improvement of their economic and social conditions, ...”<sup>110</sup> and requires that states “take effective measures, and where appropriate, special measures to ensure continuing improvement of their economic and social conditions.”<sup>111</sup> And Article 39 sets out Indigenous peoples’ “right to have access to financial and technical assistance from states and through international cooperation, for the enjoyment of rights contained in this Declaration.” None of these provisions seems on its face to authorize states to intercede to prevent or reverse improvident or exploitative transactions involving communities of Indigenous peoples exercising UNDRIP rights to self-determination<sup>112</sup> or rights to own and use their own resources.<sup>113</sup> But would their enactment require the Crown to save such communities harmless from the unfavorable consequences of transactions in which the Crown played no part? Do they render the Crown an insurer against such losses?

The short answer, given the phrasing of these three provisions, is, I think, “not necessarily.” The Crown, of course, could choose to undertake such a role and to assume the consequent obligations. But these UNDRIP provisions do not seem to require it. For one thing, it is a principle of Commonwealth constitutional law that expenditures of public funds require parliamentary authorization.<sup>114</sup> None of these UNDRIP provisions is specific about the circumstances in which states are to provide

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<sup>110</sup> UNDRIP, note 2 above, §21 ¶1.

<sup>111</sup> *Ibid*, §21 ¶2.

<sup>112</sup> *Ibid*, §§3-5.

<sup>113</sup> *Ibid*, especially §26 ¶2.

<sup>114</sup> *Auckland Harbour Board v The King*, [1924] AC 318 (JCPC).

financial resources to their Indigenous peoples or about how to ascertain the amounts sufficient in those circumstances. None, therefore, if given domestic effect as is, would suffice on its own as parliamentary authorization for any given expenditure, and none appears to prescribe any particular state response to this specific situation. And courts, left to their own devices, would probably be disposed to construe these UNDRIP articles in a manner consistent with the existing general law about the Crown as protector of Indigenous interests.

The Crown, the Supreme Court has said, is in a fiduciary relationship with Indigenous peoples.<sup>115</sup> It has enforceable fiduciary obligations to them when it has discretionary control over any “independent legal interest”<sup>116</sup> that a community of Indigenous peoples holds communally.<sup>117</sup> Among them are obligations “to act on behalf of the Indians [sic] so as to protect their interests in transactions with third parties” – to “prevent the Indians from being exploited”<sup>118</sup> – and to exercise its control over the relevant interests as would “a man [sic] of ordinary prudence in managing his own affairs.”<sup>119</sup> But the Crown’s enforceable obligations as a fiduciary do not extend at present past the outer limits of its discretionary control over a candidate Indigenous interest. When a self-determining community of Indigenous peoples is free, without

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<sup>115</sup> See, for example, *Guerin*, note 78 above, at 376, Dickson J.

<sup>116</sup> *Ibid* at 385. An Indigenous interest is an independent legal interest when “[i]t is not a creation of either the legislative or executive branches of government”: *ibid*.

<sup>117</sup> *Manitoba Metis Federation v Canada (Attorney General)*, 2013 SCC 14 (*MMF*) at para 53.

<sup>118</sup> *Guerin*, note 78 above, at 383. See also *Blueberry River*, note 78 above, at paras 33-35, McLachlin J (concurring).

<sup>119</sup> *Fales v Canada Permanent Trust Co*, [1977] 2 SCR 302 at 315, quoted with approval in *Blueberry River*, note 118 above, at para 104, McLachlin J (concurring) and in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 9 (*Ermineskin*) at paras 57, 131.



any Crown supervision, to do what it will with that interest, the Crown no longer has (if it ever had) capacity to protect that interest.<sup>120</sup> And without capacity, the Crown no longer has (if it ever had) an enforceable obligation to do so.<sup>121</sup> When such a community wants the Crown to relinquish such control as it has over such an interest, the Crown, as fiduciary, “must be satisfied that any transfer is in the best interest” of that community<sup>122</sup> and is accountable for its judgment on that issue.<sup>123</sup>

One relevant question, then, is whether, and if so to what extent, UNDRIP, once in force, would strip the Crown of discretionary control the Crown now exercises over Indigenous collectives’ “independent legal interests.”<sup>124</sup> Any such reduction will yield, as a matter of general law, a concomitant reduction in the enforceable obligations of the Crown as fiduciary in respect of those interests.<sup>125</sup> A related question is how much

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<sup>120</sup> In “The Crown’s Fiduciary Obligations in the Era of Aboriginal Self-Government” (2009), 88 Can Bar Rev 1, Kent McNeil said (at 14), “I do not think the Canadian government can avoid responsibility for the dependency its own policies have created, especially when this dependency has arisen from the Crown’s exercise of discretionary statutory power, specifically the imposition of a governmental system that has interfered with the inherent right of self-government of First Nations.” But the remedies McNeil contemplates (see *ibid* at 17-18) do not include ongoing federal supervision, or ongoing federal responsibility for the consequences, of the exercise of such a right.

<sup>121</sup> See, for example *Ermineskin*, note 119 above, at para 152: “Once a transfer [of funds the Crown held and managed on the First Nation’s behalf] is effected, the Crown’s fiduciary obligations with regard to the funds in question must cease, as it no longer has control over the funds and is not responsible for their management.” See also *ibid* at paras 180-181.

<sup>122</sup> *Ibid* at para 152.

<sup>123</sup> See *ibid* at paras 169-170. But Parliament has authority to legislate outcomes inconsistent with the Crown’s fiduciary obligations: *Authorson v Canada (Attorney General)*, 2003 SCC 39 at para 15.

<sup>124</sup> Complicating this determination is the fact that almost all of the federal Crown’s documented fiduciary obligations to Indigenous peoples are owed to First Nations – *Indian Act* bands – but First Nations, again, may very well not be the most appropriate collectives when identifying nominate Indigenous peoples for UNDRIP purposes. See notes 46-48 above and accompanying text.

<sup>125</sup> By way of example, each of the federal statutes that equips First Nations to assume control of moneys the federal Crown has managed on their behalf also absolves the federal Crown explicitly of liability for what happens thereafter to any moneys transferred. See FNLMA, note 21 above, s 19 [re-en SC 2018, c 27, s 369], *First Nations Fiscal Management Act* SC 2005, c 9, s 93 [re-en SC 2019, c 27, s 408], *First Nations Oil and Gas and Moneys Management Act*, SC 2005, c 48, s 32.

of its remaining discretionary control the Crown should be prepared to relinquish in getting out of the way of the Declaration's autonomy rights.<sup>126</sup> Canada's current public position on this second issue is clear:

In circumstances where Aboriginal groups wish the Crown to have certain ongoing obligations, self-government jurisdiction or authority will, correspondingly, be limited. In such cases, continuing Crown obligations should be clearly defined. There is no justifiable basis for the Government to retain fiduciary obligations in relation to subject matters over which it has relinquished its control and over which an Aboriginal government or institution, has, correspondingly, assumed control.<sup>127</sup>

Different communities of Indigenous peoples might well prefer different outcomes (and have differing capacities to show that discontinuation of Crown discretion over their "independent legal interests" is in their best interest as communities).<sup>128</sup>

Left unaddressed, these difficult issues create potential for real disappointment or real surprise when UNDRIP takes effect as Canadian law. It is reasonable to suppose that UNDRIP Articles 4, 21 and 39, once in effect, will impose at least some enforceable financial obligations on the Crown to Indigenous peoples. It would be prudent, if possible, to reach agreement in advance about the specifics of those obligations: about their extent and duration, and about what shapes and triggers them. And it seems extremely important that there be shared understandings about

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<sup>126</sup> If, as seems probable, the rights set out in UNDRIP would have legal force in Canada exclusively by reason of statute or treaty (or perhaps both), they very probably would not themselves qualify as "independent legal interests" capable of attracting Crown fiduciary obligations. See note 116 above and MMF, note 117 above, at para 58.

<sup>127</sup> *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, online: <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136#fido>.

<sup>128</sup> See notes 122-123 above and accompanying text.

the Crown's ongoing role, if any, in protecting particular self-determining Indigenous communities from their own potential future financial misfortunes.

## **2. Discord Within the Community**

According to the Declaration, Indigenous peoples and individuals have “the right to full enjoyment ...of all human rights and fundamental freedoms as recognized in ...international human rights law”<sup>129</sup> and “the right to be free from any kind of discrimination, in the exercise of their rights.”<sup>130</sup> “Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.”<sup>131</sup> And “[a]ll the rights and freedoms recognized [in UNDRIP] are equally guaranteed to male and female indigenous individuals.”<sup>132</sup> To the extent that these rights supplement, and do not duplicate, somewhat similar protections already available in Canadian law, it seems clear that Indigenous peoples will be able to enforce them against mainstream governments once UNDRIP has the force of law in Canada. But suppose that contraventions of these rights are said to be occurring within self-determining communities of Indigenous peoples. Suppose, for example, that Indigenous women living in some such community experience exclusion from some important aspect of community life or community decision-making. At least one UNDRIP provision requires that Indigenous peoples maintain and develop their forms

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<sup>129</sup> UNDRIP, note 2 above, §1.

<sup>130</sup> *Ibid*, §2. See also §§9, 14 ¶2, 17 ¶3, 21 ¶1 and 24 ¶1.

<sup>131</sup> *Ibid*, §7 ¶1.

<sup>132</sup> *Ibid*, §44.

of governance “in accordance with international human rights standards.”<sup>133</sup> But what recourse would – what recourse should – those women have to mainstream governments or institutions to address their concerns about discrimination, or about safety? What business is it of the rest of us how a self-determining community of Indigenous peoples conducts its internal affairs?

This concern is neither imaginary nor hypothetical. In the early 1990s, when the federal, provincial and territorial governments and several national Indigenous organizations were making serious efforts to entrench in the constitution an inherent (Aboriginal) right of Indigenous self-government, the Native Women’s Association of Canada (NWAC) went to court in an unsuccessful attempt to be included in those negotiations.<sup>134</sup> NWAC’s principal concern was to ensure that the *Canadian Charter of Rights and Freedoms*,<sup>135</sup> without its “notwithstanding” clause,<sup>136</sup> would apply to any Indigenous government exercising such a right.<sup>137</sup> Several other commentators, most of them Indigenous, urged the federal government not to forsake Indigenous women to the discretion of predominantly male Indigenous leadership.<sup>138</sup>

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<sup>133</sup> *Ibid*, §34.

<sup>134</sup> *Native Women’s Association of Canada v Canada*, [1994] 3 SCR 627.

<sup>135</sup> Part I of the *Constitution Act, 1982*, note 13 above (*Charter*).

<sup>136</sup> *Ibid*, s 33.

<sup>137</sup> The Charlottetown Accord – the culmination of these constitutional negotiations -- would have made the *Charter*, *ibid*, including a version of the “notwithstanding” clause, applicable “to all legislative bodies and governments of the Aboriginal peoples of Canada”: Draft Legal Text, Charlottetown Accord, October 9, 1992, online: <http://www.efc.ca/pages/law/cons/Constitutions/Canada/English/Proposals/CharlottetownLegalDraft.html>, ss 25-27.

<sup>138</sup> See, for example, Thomas Isaac & Mary Sue Maloughney, “Dually Disadvantaged and Historically Forgotten? Aboriginal Women and the Inherent Right of Aboriginal Self-Government” (1992) 21 *Manitoba LJ* 453; Joyce Green, “Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal

As it happens, almost any realistic scenario for rendering UNDRIP enforceable in Canadian law would leave Indigenous peoples' rights of self-determination subject to the *Charter*.<sup>139</sup> It's far from clear, though, just how the *Charter* would (or, frankly, should) address issues or complaints that arose from within communities of Indigenous peoples exercising their right to self-determination or their right "to autonomy or self-government in matters relating to their internal and local affairs."<sup>140</sup> We know, for example, that at least some aspects of some traditional Indigenous

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Government" (1993) 4 *Constitutional Forum* 112; Emma LaRocque, "Re-examining Culturally Appropriate Models of Criminal Justice Applications" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 75-96.

<sup>139</sup> Under the jurisprudence to date, an entity exercising powers conferred by federal, provincial or territorial legislation will itself be subject to the *Charter* if "the entity is itself 'government' for the purposes of s. 32 [of the *Charter*]" (*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 (*Eldridge*) at para 44): if, that is, the powers conferred upon it are "inherently governmental in nature" (*McKinney v University of Guelph*, [1990] 3 SCR 229 at 270; *Eldridge*, *ibid* at para 42). It seems difficult to dispute that a statutory right of self-determination, for instance, is "inherently governmental in nature." This is so, Peter Hogg has argued, because

[a]ction taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the *Charter*, neither body can authorize action which would be in breach of the *Charter*. Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority:

*Constitutional Law of Canada*, 4<sup>th</sup> ed., abridged (Toronto: Carswell, 1997) at 668. See also *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 52. Although I know of no jurisprudence on the point, it seems reasonable to assume that the same is true when the source of delegated authority that is "inherently governmental in nature" is a treaty or agreement. See, for example, Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986) at 391-392. The situation might be different if the treaty or agreement merely confirmed the existence of a pre-existing right of self-determination; even there, however, the parties could agree to *Charter* application as a term of the treaty. See, for example, Nisga'a Final Agreement (1999), online: <https://www.nisgaanation.ca/sites/default/files/Nisga%27a%20Final%20Agreement%20-%20Effective%20Date.PDF> (*Nisga'a Treaty*), c 2, s 9.

<sup>140</sup> UNDRIP, note 2 above, §4. See also §34.

legal systems are gendered already.<sup>141</sup> How relevant is that in appraising discrimination complaints about other gender differences that emerge in communities of Indigenous peoples adhering to those traditions? And if, as it seems, a good part of the point of giving effect to rights that protect Indigenous peoples' collective autonomy (and give "due recognition" to their own laws and legal systems)<sup>142</sup> is to create sufficient space for them to do things differently, their way, how ought the law to allow for that difference in appraising possible justifications of measures it deems discriminatory taken by those collectives?<sup>143</sup> Finally, what protection would the UNDRIP autonomy rights derive from section 25 of the *Charter*?<sup>144</sup>

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<sup>141</sup> Here are two examples. (1) In Anishinaabe law, *inaakonigewin*, women are the keepers of water, with unique responsibilities as a result. See, for example, Aimée Craft, "Navigating Our Ongoing Sacred Legal Relationship with *Nibi* (Water)" in John Borrows, Larry Chartrand, Oonagh E. Fitzgerald and Risa Schwartz, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) 101-110, esp at 107. (2) According to at least one commentator on Haudenosaunee constitutional law, men are the ones who serve as chiefs on the confederacy council, but they are nominated for consideration by the women in their extended families, and those women are the ones who warn them, and eventually can have them removed, if they fail repeatedly to abide by the rules of the Great Law: see Darlene M Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44 UT Fac L Rev 1 at 8-9.

<sup>142</sup> UNDRIP, note 2 above, §§27, 40.

<sup>143</sup> I discuss this issue in a somewhat different context in "...But We Need the Eggs: The Royal Commission, the Charter of Rights, and the Inherent Right of Aboriginal Self-Government" (1999) 49 UTLJ 53 at 101-108. See also Menno Boldt & J Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985), 165-179.

<sup>144</sup> According to s 25, "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired." There are two issues here. The first is whether s 25 would even apply to UNDRIP rights. That could depend on how the federal government implements them. If implementation took place by treaty, and if the relevant treaty or treaties qualified as "land claims agreements" for purposes of ss 25 and 35(3), s 25 would apply by its own terms. If UNDRIP were implemented by statute, it would be necessary to decide whether UNDRIP rights qualified as "other rights" for purposes of s 25. In *R v Kapp*, 2008 SCC 41 (*Kapp*), the majority (at

One option, of course, is to let the *Charter* do its work with these issues and to wait and see what happens. But regardless of the results of any potential *Charter* litigation, those implementing UNDRIP in Canada will need to decide what to do about the *Canadian Human Rights Act*.<sup>145</sup> The *CHRA* identifies, and provides an arm's length complaint and redress procedure<sup>146</sup> for, practices within federal legislative authority<sup>147</sup> that discriminate in respect of goods, services, facilities or accommodations,<sup>148</sup> employment<sup>149</sup> or harassment<sup>150</sup> or that incite others to engage in such practices,<sup>151</sup> on the basis of any prohibited ground of discrimination.<sup>152</sup> One such prohibited ground is, of course, discrimination on the basis of sex.<sup>153</sup> Do the UNDRIP rights that promote collective Indigenous autonomy deserve exemption from *CHRA* protections? Should their exercise be subject, like all other relevant

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para 63) suggested (without deciding) that “only rights of a constitutional character are likely to benefit from s. 25.” Are UNDRIP’s autonomy rights “rights of a constitutional character”? Second, assuming that s 25 does apply to the relevant UNDRIP rights, what protection does it afford them? The Supreme Court of Canada has had two opportunities to consider the meaning of s 25; on both occasions, it has declined to do so: see *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203 at paras 20, 52-53; *Kapp*, *ibid* at paras 62-65. In concurring reasons in *Kapp*, *ibid*, however, Bastarache J argued (at paras 84-121) that s 25 shields the Indigenous rights to which it applies completely from the rights in the *Charter*, subject only to s 28 of the *Charter*. Bastarache J cites considerable academic commentary in support of his view, but the matter remains unresolved.

<sup>145</sup> RSC 1985, c H-6 (*CHRA*). See generally notes 232-237 below and accompanying text on the legislative options available.

<sup>146</sup> *Ibid*, ss 39-57. In brief, one complains to the Canadian Human Rights Commission (CHRC) (s 40). The CHRC may commission an investigation and report about the complaint (ss 43-44) and may refer a complaint to the Canadian Human Rights Tribunal (CHRT) for inquiry and determination if satisfied that the complaint warrants an inquiry (ss 49-50). If the CHRT finds the complaint substantiated, it may award any of several statutory remedies (s 53). CHRT orders are enforceable as orders of the Federal Court (s 57).

<sup>147</sup> *Ibid*, s 2.

<sup>148</sup> *Ibid*, ss 5-6.

<sup>149</sup> *Ibid*, ss 7-11.

<sup>150</sup> *Ibid*, s 14.

<sup>151</sup> *Ibid*, s. 12.

<sup>152</sup> *Ibid*, ss 3-4.

<sup>153</sup> *Ibid*, ss 3(1)-(2).

matters under federal legislative authority, to the full force of the CHRA? Or is some intermediate option most appropriate? If the CHRA's own legislative history is indicative,<sup>154</sup> one can expect this decision, whatever it is, to be controversial.

Whether or not the CHRA comes to govern collective UNDRIP rights, the federal Crown may well be expected (by some individuals or advocacy groups) to intervene,<sup>155</sup> and (by representatives of some self-determining collectives of Indigenous peoples) not to intervene, in situations featuring instances of sex discrimination (or violations of other UNDRIP individual rights) alleged to be occurring within such collectives. UNDRIP itself gives states the option of limiting

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<sup>154</sup> Until 2008, the CHRA itself exempted from its reach exercises of statutory powers under the *Indian Act*, note 46 above: CHRA, *ibid*, s 67. 2008 federal legislation repealed s 67 – *An Act to amend the Canadian Human Rights Act*, SC 2008, c 30 (2008 Act), s 1 – but subject to certain statutory conditions. Section 3 of the 2008 Act postponed for an additional three years application to First Nation councils of the CHRA's enforcement provisions. Section 2 of that Act required that the federal government and “any organizations identified by the Minister of Indian Affairs and Northern Development as being, in the aggregate, representative of the interests of First Nations peoples throughout Canada” jointly undertake, within five years, “a comprehensive review of the effects of the repeal of section 67” of the CHRA. Finally, s 1.2 of the 2008 Act, which is still in force, reads as follows:

[i]n relation to a complaint made under the [CHRA] against a First Nation government, including a band council, tribal council or governing authority operating or administering programs and services under the *Indian Act*, this Act shall be interpreted and applied in a manner that gives due regard to First Nations['] legal traditions and customary laws, particularly the balancing of individual rights and interests against collective rights and interests, to the extent that they are consistent with the principle of gender equality.

The *Report to Parliament on the Five-Year Review of the Repeal of Section 67 of the Canadian Human Rights Act*, Aboriginal Affairs and Northern Development Canada, September 2014, online: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-BR/STAGING/texte-text/pr-5-repeal\\_sec\\_67\\_1410457357881\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-BR/STAGING/texte-text/pr-5-repeal_sec_67_1410457357881_eng.pdf) (Five-Year Review) summarized the results of surveys conducted about the post-repeal experience by the federal department, NWAC and the Congress of Aboriginal Peoples (CAP). The report acknowledged that “challenges remain in respect of: [among other things] recognition of, and respect for First Nations legal traditions and customary laws, as well as culturally appropriate dispute resolution mechanisms as part of the human rights complaints process”: *ibid* at 39. NWAC [!] reported that “[o]nly 1.9% of participants in [its] survey felt that the CHRC, the CHRT or the court respected First Nations legal traditions and customary laws when dealing with their complaint of discrimination”: *ibid* at 32. See also *ibid* at 36 (for CAP's comments on this).

<sup>155</sup> In the Five-Year Review, *ibid*, respondents to both the NWAC and the CAP surveys commented on the unavailability of affordable legal assistance with the CHRA process: see *ibid* at 32 (NWAC), 35 (CAP).



exercise of the rights it sets forth, but only where “such limitations ... are determined by law and in accordance with international human rights obligations,” are “non-discriminatory and [are] 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.”<sup>156</sup> These exacting standards, once interpreted (but by whom?), will clarify what must be true of external constraints on UNDRIP rights for them to be UNDRIP-compliant, but nothing in UNDRIP obligates states to impose such external limits. States – in our case, Canada – must make that decision afresh each time for themselves. Each time they do so, they will be giving priority either to UNDRIP individual rights or to UNDRIP collective rights. The long-term credibility of any Canadian scheme to implement the Declaration will depend in significant part on the soundness and the transparency of the reasoning that informs such determinations. Actual experience will, of course, refine that reasoning, but it would be prudent, before UNDRIP comes into full force in Canada, to seek and achieve as much agreement as possible with Indigenous peoples about what kinds of circumstances might justify, in principle, Crown intervention to address alleged unfairness within self-determining collectives of Indigenous peoples.

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<sup>156</sup> UNDRIP, note 2 above, §46 ¶2.

Like the previous scenario, this one raises, but does not answer, difficult questions about the scope and permeability of Indigenous autonomy under UNDRIP. Such questions will arise repeatedly once UNDRIP has enforceable effect in Canadian law.

### **III. ACHIEVING IMPLEMENTATION**

The preceding discussion identified some of the threshold substantive issues on whose resolution successful UNDRIP implementation seems to me to depend. In a perfect world, Indigenous and Crown representatives would reach a shared understanding about them – or, at an absolute minimum, a shared understanding about the means and standards for use in resolving disputes about them – before UNDRIP acquired full domestic legal force. The discussion that follows assumes that the parties have reached some such shared understanding or have made fully informed decisions to defer these issues and take their chances before domestic adjudicators. The task now is to consider what it will take to give UNDRIP enduring enforceable legal effect in Canada. I trust we can agree at the outset that constitutional amendment for this purpose is simply not a serious option.

#### **A. VEHICLE AND PACE OF IMPLEMENTATION**

##### **1. The Treaty Option**

The federal government has pledged, in the first year of its mandate, to introduce legislation to implement UNDRIP.<sup>157</sup> Most of the rest of this discussion will focus on

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<sup>157</sup> See notes 23-24 above and accompanying text.

implementation issues relating to legislation. First, though, it makes sense to consider what it would mean to implement UNDRIP by treaty.

Treaties are, of course, negotiated agreements involving two or more distinct parties. “[W]hat characterizes a treaty” between the Crown and Indigenous peoples, the Supreme Court said in *Sioui*, “is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity.”<sup>158</sup> There is room for dispute about what obligations, if any, UNDRIP would impose on Indigenous peoples to the Crown, but the court has been generous in its application of these criteria. Later in *Sioui*, for instance, it observed that “solemnities are not crucial to the existence of a treaty,”<sup>159</sup> and in the treaty at issue there, all that was expected of the Indigenous party (the Hurons) was “alliance [with the British] or at least neutrality” during the war then underway with the French.<sup>160</sup> In any event, the parties to a treaty giving effect to UNDRIP could include, if necessary, explicit provisions meant to satisfy a “mutually binding obligations” requirement. And we now know that the obligations the Crown undertakes in a treaty bind both orders of government, federal and provincial, even when no provincial government took part in negotiation of the treaty.<sup>161</sup>

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<sup>158</sup> *Sioui*, note 12 above, at para 43.

<sup>159</sup> *Ibid* at para 87.

<sup>160</sup> *Ibid* at para 83. The treaty’s text appears *ibid* at para 5.

<sup>161</sup> See *Grassy Narrows*, note 12 above, at paras 32 (“It is true that Treaty 3 was negotiated with the Crown in right of Canada. But that does not mean that the Crown in right of Ontario is not bound by and empowered to act with respect to the treaty”), 35 (“The promises made in Treaty 3 were promises of the Crown, not those of Canada. Both orders of government are responsible for fulfilling these promises when acting within the division of powers under the *Constitution Act, 1867*”), 50 (“These

Section 35 of the *Constitution Act, 1982*<sup>162</sup> protects “[t]he existing ... treaty rights of the aboriginal peoples of Canada” – “the Indian, Inuit and Métis peoples of Canada”<sup>163</sup> – from unjustified infringement<sup>164</sup> by federal<sup>165</sup> and provincial<sup>166</sup> legislation or government action. “Existing” rights, for this purpose, are rights that “were in existence when the *Constitution Act, 1982* came into effect.”<sup>167</sup> A treaty made today to implement UNDRIP wouldn’t satisfy this requirement. But according to section 35(3), the term “treaty rights” in section 35(1) “includes rights that now exist by way of land claims agreements or may be so acquired” (emphasis added). On at least three occasions,<sup>168</sup> the Supreme Court has acknowledged that rights in post-1982 treaties attract section 35’s protection. Strictly speaking, any post-1982 treaty seeking protection under section 35 needs to qualify as a “land claims agreement” for purposes of section 35(3). We don’t yet have criteria for identifying land claims agreements, but it seems reasonable to suppose that identifying in the treaty instrument the lands of each Indigenous people for purposes of the UNDRIP land rights provisions<sup>169</sup> could qualify an UNDRIP treaty as a land claims agreement.

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duties bind the Crown. When a government – be it a federal or a provincial government – exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question” (emphasis in original)).

<sup>162</sup> Note 13 above.

<sup>163</sup> *Ibid*, ss 35(1)-(2).

<sup>164</sup> *R v Sparrow*, [1990] 1 SCR 1075 (*Sparrow*) at 1108-1119; *Badger*, note 12 above, at paras 74-85.

<sup>165</sup> *Marshall*, note 12 above, at paras 4, 66.

<sup>166</sup> *Grassy Narrows*, note 12 above, at para 53.

<sup>167</sup> *Sparrow*, note 164 above, at 1091.

<sup>168</sup> *Beckman*, note 30 above, at para 2; *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40, at paras 2, 19, 22; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at paras 1, 8.

<sup>169</sup> See notes 65-90 above and accompanying text.

Incorporating UNDRIP into a treaty would give the rights it sets out constitutional protection<sup>170</sup> and almost certainly protect them from subsequent unilateral extinguishment.<sup>171</sup> It would also ensure – and require – that the parties to the treaty reach agreement, before implementation, about the essential threshold issues identified above (and any others).<sup>172</sup> Assuming that any UNDRIP treaty captured that consensus with sufficient clarity and specificity, the result would maximize the chance that UNDRIP implementation proceeded as all involved intended.

The disadvantage, as mentioned above, is, of course, that negotiated agreements can take considerable time to achieve, especially where, as here, the interests of the parties participating have diverged and conflicted so often and so significantly and where there is so little antecedent mutual trust. Duration is a problem for two obvious reasons. First, there can be no assurance that negotiations will reach

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<sup>170</sup> Implementing such a treaty by means of legislation could introduce into the legislative process an enforceable requirement at least to consult and cooperate with Indigenous peoples before enacting certain kinds of legislation: *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 (*Mikisew 2018*) at para 51, Karakatsanis J. Such provisions already exist in some post-1982 land claims agreements: see Nisga'a Treaty, note 139 above, c 11, ss 30-31; Factum of the Intervener BC/Yukon Modern Treaty Coalition (in the appeal to the Supreme Court of Canada in *Mikisew 2018*), online: [https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37441/FM090\\_Intervenors\\_Champagne-and-Aishihik-First-Nations-et-al.pdf](https://www.scc-csc.ca/WebDocuments-DocumentsWeb/37441/FM090_Intervenors_Champagne-and-Aishihik-First-Nations-et-al.pdf). But the terms of a treaty can't bind Parliament to enact implementing legislation because the executive branch of government (the one concluding the treaty) can't bind the legislative: *Reference re Canada Assistance Plan*, [1991] 2 SCR 225 (CAP) at 548; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (*Pan-Canadian Securities*) at paras 53-67. Any provision in a treaty purporting to require introduction and passage of legislation would be unenforceable: *Pan-Canadian Securities*, *ibid* at paras 61-62, 67.

<sup>171</sup> The Supreme Court has said quite clearly that section 35 of the *Constitution Act, 1982*, note 13 above, precludes subsequent unilateral extinguishment of Aboriginal rights: *Van der Peet*, note 97 above, at para 28; *Mitchell v Canada (Minister of National Revenue)*, 2001 SCC 33 at para 11. I know of no similar jurisprudence about unilateral extinguishment of treaty rights after 1982, but it would be astonishing if s 35 protected Aboriginal rights, but not treaty rights, from extinguishment. (Consider the resulting disincentive to engage in any subsequent treaty-making.)

<sup>172</sup> One of those issues, of course, concerns the individuation of collectives of “Indigenous peoples.” That would likely have to happen at the outset.

agreement within the mandate of any particular federal government (or, come to that, within the mandate of an Indigenous people's leadership at any given time), and it is foolish to assume that all potential subsequent federal governments will share the current one's public commitment to UNDRIP implementation. (Recall that only three – at most four – of the five major federal political parties announced support in the last election for UNDRIP implementation.)<sup>173</sup> Second, in the absence of any interim alternative measure, no Indigenous peoples will benefit from the rights in UNDRIP unless and until the treaty negotiations reach fruition. Each of these considerations generates particular incentives and disincentives for the parties to negotiate and affects in fairly obvious ways their relative bargaining power in any UNDRIP treaty negotiations.

If the idea of an UNDRIP treaty seems appealing, therefore, it might well be good public policy to implement on an interim basis some statutory UNDRIP scheme to serve while the treaty negotiations take their course.<sup>174</sup>

## 2. Phasing Implementation

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<sup>173</sup> See note 22 above and accompanying text.

<sup>174</sup> There are statutory precedents for this kind of arrangement. In the *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20, as amended, provisional federal rules (ss 13-52) govern the disposition of family property on a First Nation's reserve during or after the end of a conjugal relationship unless and until that First Nation has enacted and brought into force laws of its own governing some or all such matters (ss 7-12). UNDRIP implementation legislation could provide that it would give way, or cease to apply, when superseded by a treaty (or "land claims agreement") dealing with similar or identical subject matter. Even without any such provision, the treaty, once in force, would supersede contrary legislation except where limits imposed in the legislation could be justified: see note 164 above and accompanying text.

All other things being equal, the ideal for UNDRIP implementation would be for it to take effect nationwide at about the same time. Simultaneous nationwide implementation would ensure a measure of uniformity, avoid “creat[ing] an awkward patchwork of ... protection”<sup>175</sup> for UNDRIP rights, and – again, all other things equal – reduce any risk of invidious comparison as among regions or different Indigenous peoples. But time, as just discussed, is a concern in negotiating consensual UNDRIP implementation by treaty, and there is reason to believe that the duration of the negotiation process could vary upward with the number of participants. In addition, and quite apart from this, it is possible that different collectives of Indigenous peoples will perceive themselves to be in different states of readiness for the responsibilities that accompany the rights that UNDRIP offers, perhaps because some of them are just resolving a new collective identity as an Indigenous people or restoring a traditional one that was long suppressed or dormant. Finally, it is conceivable, at least, that some Indigenous peoples will prefer to use their UNDRIP right to self-determination to remain with some version of the status quo. Such considerations as these make it prudent to entertain, as appropriate, scenarios for phased, consensual UNDRIP implementation.

Such models exist, for both treaties and legislation. It was fairly common, for example, for post-Confederation numbered treaties in Canada to include adhesions: arrangements with nearby communities that had not taken part originally to agree

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<sup>175</sup> *R v Côté*, [1996] 3 SCR 139 at para 53.

subsequently to the terms of a treaty previously negotiated.<sup>176</sup> The circumstances surrounding those adhesions varied from treaty to treaty; reasonable people differ about the efficacy and the equity of some of them. But their existence suggests that there are ways of negotiating a treaty arrangement with an initial cohort of Indigenous peoples and expanding it subsequently to include additional Indigenous peoples that make informed choices to join that treaty relationship. In a perfect world, a treaty today that was meant to leave room for adhesions would include a protocol setting out the procedures and the consents required to expand the cohort of treaty participants. Any such protocol would have to include a way of addressing and resolving any disputes among the relevant Indigenous peoples about whose lands are traditionally whose.<sup>177</sup>

An attractive alternative model is the one adopted in modern treaty negotiations with the Yukon First Nations. It featured an umbrella final agreement among the Council of Yukon Indians and the governments of Canada and Yukon,<sup>178</sup> which had no enforceable legal effect of its own<sup>179</sup> but created a template for the conclusion of subsequent individual “settlement agreements” with each of the several Yukon First

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<sup>176</sup> By way of example, for each of post-Confederation Treaties 3-11 there were subsequent adhesions involving Indigenous communities that had not taken part in the initial treaty negotiations: online <https://www.rcaanc-cirnac.gc.ca/eng/1370373165583/1581292088522>.

<sup>177</sup> See notes 65-79 above and accompanying text.

<sup>178</sup> *Umbrella Final Agreement between The Government of Canada, the Council for Yukon Indians and The Government of the Yukon* (1993) (Umbrella Final Agreement), online: [https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al\\_ldc\\_ccl\\_fagr\\_ykn\\_umb\\_1318604279080\\_eng.pdf](https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_fagr_ykn_umb_1318604279080_eng.pdf).

<sup>179</sup> *Ibid*, §2.1.2.



Nations.<sup>180</sup> The settlement agreements, which were to be land claims agreements for purposes of the *Constitution Act, 1982*,<sup>181</sup> would each include key provisions of the umbrella final agreement but would also include specific provisions applicable only to their signatories.<sup>182</sup> This model left some room for tailoring to meet the specific circumstances of the different Indigenous signatories.

Similar flexibility is available in legislative design. The *First Nations Land Management Act*<sup>183</sup> offers interested First Nations expanded authority over reserve lands<sup>184</sup> and exemption for their reserves and themselves from several of the more restrictive provisions in the *Indian Act*.<sup>185</sup> To participate, an interested First Nation must sign a Framework Agreement<sup>186</sup> with the federal Crown, be enrolled under the Act by the Minister of Crown-Indigenous Relations,<sup>187</sup> enter into an “individual agreement” with the minister<sup>188</sup> and prepare and obtain its members’ approval of a land code for its reserve.<sup>189</sup> The *First Nations Fiscal Management Act* and the *First Nations Oil and Gas and Moneys Management Act*<sup>190</sup> offer interested First Nations, on an opt-in basis, enhanced powers of taxation, financial management and management and regulation of on-reserve oil and gas exploration and exploitation, among others,

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<sup>180</sup> *Ibid*, §2.1.1. See also §2.1.3.

<sup>181</sup> *Ibid*, §2.2.1; *Constitution Act, 1982*, note 13 above, ss 35(1), (3). See notes 162-169 above and accompanying text.

<sup>182</sup> Umbrella Final Agreement, note 178 above, §2.1.3.

<sup>183</sup> Note 21 above.

<sup>184</sup> See *ibid*, ss 18-33.

<sup>185</sup> *Ibid*, s 38(1).

<sup>186</sup> Online: <https://labrc.com/framework-agreement/>.

<sup>187</sup> *FNLMA*, note 21 above, ss 2(1) “First Nation,” 45(1)

<sup>188</sup> *Ibid*, s 6(3).

<sup>189</sup> *Ibid*, ss 6-14.

<sup>190</sup> Both note 125 above.

subject to some preliminary and subsequent procedural requirements. Federal legislation enacted to give the Declaration enforceable legal effect in Canada could, if thought appropriate, take a somewhat similar form, giving Indigenous peoples (again, once identified authoritatively as such) the option of undertaking when they are ready the rights and responsibilities that would result from UNDRIP's implementation.

## **B. THE LEGISLATIVE OPTION**

Using legislation to render the rights in UNDRIP enforceable in Canada has certain clear advantages. In principle, a government may proceed unilaterally,<sup>191</sup> and it may decide when to give effect to UNDRIP. Realistically speaking, legislation may be the only way of giving any of UNDRIP's benefits to Indigenous peoples in a timely way. And as mentioned above, the federal government has said publicly that it intends to introduce UNDRIP implementation legislation in 2020.<sup>192</sup> This option, therefore, deserves a closer look.

But there are potential disadvantages to relying on ordinary legislation to implement UNDRIP rights. Legislation has no legal effect unless it is enacted by the right, not by the wrong, order of government. It is susceptible to frustration, and indeed to outright repeal, by a different government with a different policy agenda and

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<sup>191</sup> But see UNDRIP, note 2 above, §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." It would be a bit incongruous to seek to implement UNDRIP in a manner inconsistent with this salient UNDRIP principle.

<sup>192</sup> See notes 23-24 above and accompanying text.

political base. It is at risk of gradual cumulative erosion as a result of subsequent, more specific, coordinate legislation. And it will take forethought to integrate Indigenous peoples' consent into administrative decision-making in a way that works. Each of these issues deserves independent attention.

### 1. Federal, Provincial or Both?

The *Constitution Act, 1867*<sup>193</sup> gives the federal order of government exclusive authority to make laws in relation to “Indians, and Lands reserved for the Indians.”<sup>194</sup> As mentioned above, we know now that the term “Indians,” as it appears in that Act, is broad enough to include both Inuit<sup>195</sup> and Métis:<sup>196</sup> indeed, “all Aboriginal people.”<sup>197</sup> The rights set out in the Declaration pertain, by their terms, exclusively to “indigenous peoples.” “Indigenous peoples,” therefore, are going to be the primary subject matter of any federal legislation aimed at bringing UNDRIP into effect in Canada. Accordingly, any such measure is almost certain to be valid, enforceable federal legislation, despite any incidental effects it may have on matters within exclusive provincial legislative authority.<sup>198</sup> Federal legislation found to be really

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<sup>193</sup> Note 89 above.

<sup>194</sup> *Ibid*, s. 91¶24.

<sup>195</sup> *Reference re British North America Act, 1867 (UK) (Re Eskimos)*, [1939] SCR 104.

<sup>196</sup> *Daniels*, note 58 above.

<sup>197</sup> See note 58 above and accompanying text.

<sup>198</sup> Matters relating to education (UNDRIP, note 2 above, §14) and labour and employment law (*ibid*, §17), for example, are ordinarily within exclusive provincial legislative authority: *Constitution Act, 1867*, note 89 above, ss 93 and 92¶13, respectively. As to the latter, see, for example, *Construction Montcalm Inc v Minimum Wage Commission*, [1979] 1 SCR 754 at 768; *Four B*, note 57 above; *NIL/TU,O*, note 57 above, at para 11.

about something within federal legislative authority does not cease to be valid merely because of incidental effects on provincial legislative authority.<sup>199</sup>

As for the provinces, they probably do have capacity to implement some UNDRIP provisions themselves. Otherwise valid provincial legislation – legislation really about something within exclusive provincial legislative authority<sup>200</sup> – does not cease to be valid “because it affects something which is subject to Federal legislation”<sup>201</sup> or federal legislative authority. Provincial legislation may not “single out” “Indians” for special treatment,<sup>202</sup> but “singling out’ should not be confused with disproportionate effect”;<sup>203</sup> “[t]he mere mention of the word ‘aboriginal’ in a statutory provision does not render it ultra vires the province.”<sup>204</sup> Provinces, therefore, probably could give effect, in otherwise valid provincial laws, to the UNDRIP rights that relate to education,<sup>205</sup> employment and labour relations,<sup>206</sup> health<sup>207</sup> and perhaps cultural objects and practices,<sup>208</sup> and could bind themselves prospectively (if they did it properly)<sup>209</sup> to seek Indigenous peoples’ free, prior and

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<sup>199</sup> See, for example, *Gold Seal Ltd v Dominion Express Co* (1921), 62 SCR 424 at 460; *Munro v National Capital Commission*, [1996] SCR 663 at 671.

<sup>200</sup> *Constitution Act, 1867*, note 89 above, ss 92, 92A, 93.

<sup>201</sup> *Cardinal v Alberta (Attorney General)*, [1974] SCR 695 (*Cardinal*) at 702-703.

<sup>202</sup> *Four B*, note 57 above, at 1048; *The Queen v Sutherland*, [1980] 2 SCR 451 at 455-456; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 (*Kitkatla*) at para 67.

<sup>203</sup> *Kitkatla*, note 202 above, at para 68.

<sup>204</sup> *Ibid*, at para 66.

<sup>205</sup> UNDRIP, note 2 above, §14. See note 198 above.

<sup>206</sup> *Ibid*, §17. See note 198 above.

<sup>207</sup> *Ibid*, §24.

<sup>208</sup> *Ibid*, §§11-12. See *Kitkatla*, note 202 above, at para 51.

<sup>209</sup> See notes 264-291 below and accompanying text.

informed consent before taking administrative measures or approving development projects that affect them or their lands, territories or resources.<sup>210</sup>

But because the power to make laws in relation to “Indians, and Lands reserved for the Indians” is exclusive to the federal order of government, provincial legislation deemed to be really about Indians – now, Indigenous peoples<sup>211</sup> – or their lands will be invalid.<sup>212</sup> And at least some of the provisions in UNDRIP do seem to come exclusively within federal legislative authority. As mentioned above,<sup>213</sup> provincial legislation couldn’t validly purport to specify independently which individuals count as, or which collectives count among, “indigenous peoples” for UNDRIP purposes. Neither could it validly give effect to the provisions that deal specifically with issues of membership in particular collectives of Indigenous peoples;<sup>214</sup> those provisions are, on their face, of the essence of “Indianness.”<sup>215</sup> The same is true, very probably, of the rights in UNDRIP that provide for Indigenous self-determination and governance,<sup>216</sup> and the rights that require ascertainment and protection of

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<sup>210</sup> UNDRIP, *ibid.*, §32¶2.

<sup>211</sup> See notes 195-197 above and accompanying text.

<sup>212</sup> See, for example, *Cardinal*, note 201 above, at 703. Some have argued that provinces have greater latitude to make laws that favour Indigenous peoples than to make laws restricting them; see, for example, Alan Pratt, “Federalism in an Era of Aboriginal Self-Government” in David C Hawkes, ed, *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1989) 19 at 41; David C Hawkes & Allan M Maslove, “Fiscal Arrangements for Aboriginal Self-Government” in Hawkes, *ibid.* 93 at 98-99. *Gift Lake Métis Settlement v Alberta (Aboriginal Relations)*, 2019 ABCA 134 is a recent instance where a court worked hard to preserve the validity of provincial legislation deemed highly beneficial to Métis.

<sup>213</sup> See note 57 above and accompanying text.

<sup>214</sup> See, for example UNDRIP, note 2 above, §§8¶2, 9, 13, 33-36.

<sup>215</sup> See, again, note 57 above and accompanying text.

<sup>216</sup> UNDRIP, note 2 above, §§3-5, 9, 33-34. See, for example, *Whitebear Band Council v Carpenters Provincial Council of Saskatchewan* (1982), 135 DLR (3d) 128 (SKCA) at para 28: “in enacting bylaws

Indigenous peoples' traditional use and ownership of lands.<sup>217</sup> Finally, UNDRIP in its entirety contains little except rights specific, and state obligations owed specifically to, Indigenous peoples as such. Implementation of UNDRIP as a comprehensive whole, therefore, is almost certainly beyond provincial legislative authority. Achievement of that objective will require a federal initiative.

## 2. Vulnerabilities

One advantage of federal legislation as a means of incorporating UNDRIP into Canadian law is that it – and that which it incorporates into Canadian law – will always prevail, in case of conflict, over relevant provincial legislation.<sup>218</sup> But if UNDRIP's enforceability within Canadian law depends entirely on ordinary federal legislation, it is vulnerable to all the same limitations that beset such legislation. Other things being equal, it will not bind the Crown, either federal or provincial.<sup>219</sup> It will give way, in case of conflict, to any other federal legislation that is more specific or more recent.<sup>220</sup> And, not least, it is subject to repeal at the hands of any subsequent federal government to whose political base or policy agenda UNDRIP is not congenial.<sup>221</sup> If UNDRIP is to

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pursuant to their power to do so, and in performing generally their local government functions, an Indian band council is doing that which parliament is exclusively empowered to do pursuant to s. 92.24 [sic] of the *British North America Act ...*”

<sup>217</sup> UNDRIP, note 2 above, §§25-28. According to the Supreme Court of Canada, the Indigenous interest in reserve lands – which clearly comes within exclusive federal legislative authority (see, for example, *Derrickson v Derrickson*, [1986] 1 SCR 285 at 296) – is “the same” as (*Guerin*, note 78 above, at 379; *Delgamuukw*, note 75 above, at para 120), or “fundamentally similar” to (*Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85 at para 41), the Indigenous interest in unrecognized Aboriginal title.

<sup>218</sup> See most recently *Alberta (Attorney General) v Moloney*, 2015 SCC 51.

<sup>219</sup> *Interpretation Act*, RSC 1985, c I-21 (*Interpretation Act*), s 17.

<sup>220</sup> See, for example, *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 (*Lévis*) at paras 58-60.

<sup>221</sup> *Interpretation Act*, note 219 above, s 42(1).

have lasting effect within Canadian law, one must consider at the outset what to do about each of these default vulnerabilities.

**a. Crown Immunity**

According to section 17 of the federal *Interpretation Act*,<sup>222</sup> “[n]o enactment is binding on Her Majesty or affects Her Majesty or Her Majesty’s rights or prerogatives in any manner, except as mentioned or referred to in the enactment.” This presumptive immunity extends to provincial Crowns, not just to the federal Crown.<sup>223</sup> The point is not that Parliament lacks capacity to subject the Crown in right of a province to federal legislation; it can.<sup>224</sup> The point is that courts need a very good reason to conclude that Parliament meant any given legislation to govern (“bind”) any provincial Crown (or the federal Crown). This means that a federal statute giving legal effect to UNDRIP will not necessarily render UNDRIP’s rights and obligations enforceable against provincial Crowns. And this, in turn, means – to take perhaps the most obvious example – that provinces might very well not be required, even after implementation, to fulfill the more exacting obligations UNDRIP imposes as to consultation, cooperation and consent,<sup>225</sup> but only to continue fulfilling the consultation obligations to which they are already subject under Canadian law.<sup>226</sup>

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<sup>222</sup> *Ibid*

<sup>223</sup> *Alberta Government Telephones v Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 2 SCR 225 (*Alberta Government Telephones*) at 272-274.

<sup>224</sup> *Ibid* at 275; *Her Majesty in right of Alberta v Canadian Transport Commission* (1977), [1978] 1 SCR 61 at 72.

<sup>225</sup> See, in particular, UNDRIP, note 2 above, §§19, 32 ¶2.

<sup>226</sup> See note 30 above.

What must be true for a given federal statute to bind the Crown?<sup>227</sup> In *Alberta Government Telephones*, the court summarized the situation in this way:

It seems to me that the words ‘mentioned or referred to’ in s. 16 [now s. 17] are capable of encompassing: (1) expressly binding words (‘Her Majesty is bound’); (2) a clear intention to bind which, in *Bombay*<sup>[228]</sup> terminology, ‘is manifest from the very terms of the statute’, in other words, an intention revealed when provisions are read in the context of other textual provisions, ...; and, (3) an intention to bind where the purpose of the statute would be ‘wholly frustrated’ if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced.<sup>229</sup>

In my view, it would be reasonable to infer from a federal statute giving legal effect to UNDRIP a legislative intention that the statute bind the *federal* Crown; UNDRIP is all about the obligations of “states” and the rights Indigenous peoples have as against them. It is, however, much less obvious that such a statute need, and therefore would, bind the Crown in right of the provinces. It would, no doubt, be undesirable for the rights in UNDRIP to be enforceable exclusively against the federal order of government, but it wouldn’t be absurd; at a minimum, even that result would be a marked improvement for Indigenous peoples over the status quo. And the fact that the language in UNDRIP speaks exclusively of “states,” taking no account of subnational governance units in states that are federated, makes it

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<sup>227</sup> In *Quebec (Attorney General) v Canada (Human Resources and Social Development)*, 2011 SCC 60, the Supreme Court expressed (at paras 12-15) some discomfort with the very idea of Crown immunity from legislation. “Although the courts cannot change the Crown immunity rule given that it is set out in s. 17 of the [federal] *Interpretation Act*,” the court said (at para 16), “this does not mean that they are required to apply it systematically. Where a case can be decided without recourse to Crown immunity, the court should generally give preference to the other grounds raised by the parties.” In that case, the court was able to decide the issue on the basis of the paramountcy doctrine. In a subsequent case involving provincial compliance with UNDRIP, however, most probably it could not. It is true that the federal UNDRIP legislation would prevail, in case of conflict, over any provincial law. But in the range of situations under discussion here, there would be no conflict if the federal UNDRIP statute did not apply to the Crown in right of the relevant province.

<sup>228</sup> The reference here is to *Province of Bombay v City of Bombay*, [1947] AC 58 (PC) (*Bombay*) at 61, 63.

<sup>229</sup> *Alberta Government Telephones*, note 223 above, at 281.



difficult to infer, without more, “a clear intention to bind ... ‘manifest from the very terms of the statute.’”<sup>230</sup>

The prudent course, therefore, in designing federal UNDRIP implementation legislation would be to include a provision binding the Crown, provincial and federal, explicitly,<sup>231</sup> if the intention is that UNDRIP’s rights and obligations be enforceable comprehensively in Canada.

#### **b. Implied Repeal**

If UNDRIP takes effect by way of federal legislation, it, and the legislation giving it effect, will find its place among the rest of the federal legislation. Suppose there is a conflict between something in UNDRIP and provisions in some other federal statute. What happens then?

The Supreme Court set out the relevant law concisely in *Lévis*:

When a conflict [between coordinate statutes] does exist and it cannot be resolved by adopting an interpretation which would remove the inconsistency, the question that must be answered is which provision should prevail. The objective is to determine the legislature’s intent. Where there is no express indication of which law should prevail, two presumptions have developed in the jurisprudence to aid this task. These are that the more recent law prevails over the earlier law and that the special law prevails over the general ... The first presumes that the legislature was fully cognizant of the existing laws when a new law was enacted. If a new law conflicts with an existing law, it can only be presumed that the new one is to take precedence. The second presumes that the legislature intended a special law to apply over a general

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<sup>230</sup> *Ibid*, quoting from *Bombay*, note 228 above, at 61.

<sup>231</sup> For a recent example of just such a provision, see Bill C-92 Act, note 21 above, s 7.

one since to hold otherwise would in effect render the special law obsolete. Neither presumption is, however, absolute. Both are only indices of legislative intent and may be rebutted if other considerations show a different legislative intent ...<sup>232</sup>

In brief, and other things equal, provisions in other federal legislation would supersede the rights and obligations given effect in federal UNDRIP legislation if the other legislation were the later of the two or if, regardless of the time they took effect, they dealt more specifically with the relevant subject matter. The latter presumption is of particular interest here because of the (understandably) high generality of the Declaration's language. The risk is that UNDRIP, though still in force, would gradually recede in importance as a result of subordination to the terms of these other federal statutory arrangements.

But as the court in *Lévis* makes clear, these statutory presumptions are rebuttable “if other considerations show a different legislative intent”: if, for example, there is an “express indication of which law should prevail.”<sup>233</sup> It is open to Parliament, then, in giving UNDRIP effect in legislation to give it explicit priority over all, or all but certain specified, other federal legislation. Section 2 of the *Canadian Bill of Rights*,<sup>234</sup> for example, requires that all other federal legislation, regardless of its date of enactment,<sup>235</sup> be construed and applied in a manner consistent with the CBR unless

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<sup>232</sup> *Lévis*, note 220 above, at para 58.

<sup>233</sup> *Ibid.*

<sup>234</sup> SC 1960, c 44 (CBR).

<sup>235</sup> *Ibid*, s 5(2).

that other legislation says expressly that it is to operate despite the CBR.<sup>236</sup> A similar, somewhat stronger provision appears in Ontario's *Human Rights Code*.<sup>237</sup> Inclusion of such a provision in federal UNDRIP legislation would reduce significantly the risk of unintended erosion or dilution within Canadian law of UNDRIP's rights or obligations.

### c. Amendment or Outright Repeal

But for our purposes, the principal vulnerability of ordinary legislation is its susceptibility to amendment or repeal.<sup>238</sup> Parliament, being supreme within its envelope of legislative authority, is free, within very broad limits, to change its mind.<sup>239</sup> Section 42(1) of the federal *Interpretation Act*<sup>240</sup> makes this quite clear: "Every Act shall be so construed as to reserve to Parliament the power of repealing or amending it, and of revoking, restricting or modifying any power, privilege or

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<sup>236</sup> This means, of course, that Parliament, in deliberating about an UNDRIP implementation statute, will have to decide whether UNDRIP is to supersede or be subordinate to the CBR.

<sup>237</sup> RSO 1990, c H.19, s 47(2): "Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I [the part of the Act listing prohibited grounds and prohibited acts of discrimination], this Act applies and prevails unless the Act or regulation provides that it is to apply despite this Act." No similar provision appears in the *CHRA*, note 145 above.

<sup>238</sup> In this respect, again, implementation by treaty would be more reliably durable: see notes 170-171 above and accompanying text.

<sup>239</sup> In the words of Peter Hogg,

Not only may the Parliament [or] a Legislature, acting within its allotted sphere of competence, make any law it chooses, it may repeal any of its earlier laws. Even if the Parliament or Legislature purported to provide that a particular law was not to be repealed or altered, this provision would not be effective to prevent a future Parliament or Legislature from repealing or amending the 'protected' law. ... If a legislative body could bind itself not to do something in the future, then a government could use its parliamentary majority to protect its policies from alteration or repeal. This would lay a dead hand on a government subsequently elected to power in a new election with new issues. In other words, a government while in office could frustrate in advance the policies urged by the opposition:

*Constitutional Law of Canada*, 5<sup>th</sup> ed (Toronto: Carswell, 2007) at pp 12-8 – 12-9, quoted with approval in *Greater Vancouver Regional District v British Columbia (Attorney General)*, 2011 BCCA 345 (GVRD) at para 33.

<sup>240</sup> Note 219 above.

advantage thereby vested in or granted to any person.” The advantage of such flexibility, when it comes to UNDRIP, is that it permits refinements to the implementation arrangement (or even, for the purposes of domestic Canadian law, to the substance of UNDRIP itself) that better reflect Indigenous peoples’ wishes, needs and intentions. The disadvantage, of course, is any subsequent revisions to the legislation need not redound to Indigenous peoples’ benefit. In the worst case, a subsequent government with a different political orientation, frustrated by the inconvenience of respecting all of UNDRIP’s rights and adhering to all its obligations, could repeal the legislation outright and leave UNDRIP, as it is at present, unenforceable in Canadian law.<sup>241</sup> What options might there be to limit this risk?

Although, as noted, “parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation,”<sup>242</sup> legislative bodies do have at least some capacity, if they choose, to impose additional procedural requirements – called, in the parlance, “manner and form requirements” – on their own legislative processes, either generally or in respect of particular legislation. Peter Hogg has discussed this capacity:

Would the Parliament or a Legislature be bound by *self-imposed* rules as to the ‘manner and form’ in which statutes were to be enacted? The answer, in my view, is yes. ... The Parliament or a Legislature could add other elements to the legislative process, either for all statutes or just for particular kinds of statutes. For example, the federal Parliament could provide that a law to abolish the office of the Auditor General must first be approved by a referendum of voters, or a provincial Legislature could provide that a law altering the

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<sup>241</sup> See note 239 above.

<sup>242</sup> CAP, note 170 above, at 563.

constituencies for elections must be passed by a two-thirds majority in the Legislative Assembly. These ‘manner and form’ laws, which purport to re-define the legislative body, either generally or for particular purposes, are binding for the future. A law which purported to disregard these hypothetical examples of manner and form laws ... would be held to be invalid by the courts. Thus, while the federal Parliament or a provincial Legislature cannot bind itself as to the substance of future legislation, it can bind itself as to the manner and form of future legislation.<sup>243</sup>

Manner and form requirements could give UNDRIP implementation legislation some protection from subsequent repeal or unfriendly amendment.

What must be true for a manner and form requirement to be valid and enforceable?

The Supreme Court has suggested three potential conditions and limitations:<sup>244</sup> (1) the measure must “show that Parliament intended, in the face of s. 42(1) [of the federal *Interpretation Act*,<sup>245</sup> in the case of federal legislation], to bind itself or to restrict the legislative powers of those of its members who are also members of the executive”;<sup>246</sup> (2) any measure displaying such an intention will typically have a constitutional or quasi-constitutional character;<sup>247</sup> and (3) the measure must not

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<sup>243</sup> Hogg, note 239 above, at pp. 12-11 – 12-12. Emphasis in original; citations omitted.

<sup>244</sup> For a similar summary of the three conditions in respect of provincial legislation, see *Canadian Taxpayers Federation v Ontario (Minister of Finance)* (2004), 73 OR (3d) 621 (SCJ) (*Canadian Taxpayers Federation*) at para 49.

<sup>245</sup> Note 219 above, quoted in text above at note 240.

<sup>246</sup> CAP, note 170 above, at 562.

<sup>247</sup> *Ibid*, at 563:

It is not coincidence that when this Court has found ‘manner and form’ restrictions, the instrument creating the restrictions has not been an ordinary statute. ... It may be that where a statute is of a constitutional nature and governs legislation generally, rather than dealing with a specific statute, it can impose requirements as to manner and form. But where a statute has no constitutional nature, it will be very unlikely to evidence an intention of the legislative body to bind itself in the future.

purport to require “the consent to legislation of a certain kind, of an entity not forming part of the legislative structure ...”<sup>248</sup>

Consider in this context UNDRIP,<sup>249</sup> 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.” Would this, if enacted as part of generic federal legislation giving legal effect to UNDRIP, be a valid manner and form requirement governing adoption and implementation of subsequent federal “legislative ... measures”?

The short answer, in my judgment, is “probably not.” It is arguable, on the one hand, that federal legislation giving domestic effect to a wide-ranging UN declaration would qualify as quasi-constitutional, meeting the second of the Supreme Court’s three conditions; the argument would strengthen if the implementing legislation included provisions giving it, and UNDRIP, some primacy over other coordinate federal legislation.<sup>250</sup> And this second condition may not even be imperative. The examples Hogg cites of valid manner and form provisions,<sup>251</sup> for instance, appear in statutes that would not necessarily qualify as constitutional or quasi-constitutional.

And the B.C. Court of Appeal has said that the constitutional status, or lack thereof,

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<sup>248</sup> *Ibid* at 564, quoting with approval *West Lakes Ltd v South Australia* (1980), 25 SASR 389 (SASC) (*West Lakes*) at 397-398.

<sup>249</sup> Note 2 above.

<sup>250</sup> See notes 233-237 above and accompanying text.

<sup>251</sup> See note 243 above and accompanying text.

of a particular statute “may or may not be determinative” of whether a provision within it counts as a valid manner and form requirement.<sup>252</sup> But there are at least three reasons to doubt that incorporation of Article 19, as written, by reference into federal law would suffice.

First, it probably would not meet the Supreme Court’s first condition. In the words of the B.C. Court of Appeal, “any manner and form restraint must be imperative,” “sufficiently clear to overcome the right of the legislative body” to amend or repeal its own legislation by ordinary means,<sup>253</sup> and “unmistakeably addressed to the future actions of the enacting legislative body.”<sup>254</sup> Article 19 is not “unmistakeably addressed to the future actions of the enacting legislative body”:<sup>255</sup> in this case, Parliament; it speaks, understandably but unhelpfully for the present purpose, only of the obligations of “states.” Second, there is reason to doubt that courts would enforce a requirement that certain legislation take effect only with the consent of “the indigenous peoples concerned.” Most probably they would construe it, as the courts did in *West Lakes* and in *CAP*, not as a permissible manner and form requirement but as an unenforceable “renunciation *pro tanto* of the lawmaking power.”<sup>256</sup> Finally, there is no assurance that such an approach would protect the

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<sup>252</sup> See *GVRD*, note 239 above, at para 39.

<sup>253</sup> *Ibid* at para 43.

<sup>254</sup> *Ibid* at para 45, quoting Hogg, note 239 above, at p 12-18.

<sup>255</sup> *Ibid*.

<sup>256</sup> *CAP*, note 170 above, at 564, quoting with approval *West Lakes*, note 248 above, at 398. See also *Canada (Attorney General) v Friends of the Canadian Wheat Board*, 2012 FCA 183:

[a] provision requiring that legislation be introduced into Parliament only insofar as an outside corporation or small outside group agrees does not appear to me to be merely a procedural

UNDRIP implementation legislation itself. As the Canadian Taxpayers Federation discovered to its chagrin, provincial legislation preventing future tax increases unless approved by popular referendum did not govern the process for amending (or, by implication, repealing) the legislation that had required the referenda. Simple amendments exempting a proposed new health tax from the requirement were valid.<sup>257</sup> “[T]o be fully effective in law,” Peter Hogg observed in light of that case, “a manner and form provision must apply to itself (be self-referencing or doubly entrenched). The manner and form provision must not only apply to the protected category of laws ..., it must also apply to laws amending or repealing the manner and form provision itself.”<sup>258</sup>

This said, a federal statute implementing UNDRIP could, and might prudently, include among its operative provisions a more carefully worded analogue to Article 19. It could require, for example, that consultation and cooperation with the “indigenous peoples concerned,” with a view to *seeking* their free, prior and informed consent, precede enactment in Parliament of any subsequent legislation that might affect their interests, even if it could not require that anyone *obtain* their consent.<sup>259</sup> The

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requirement. The effect of such a provision is to relinquish Parliament’s powers in the hands of a small group not forming part of Parliament. I seriously doubt such a provision could be used to impede the introduction of legislation in Parliament or could result in invalidation of any subsequent legislation adopted by Parliament ... and *Progressive Conservative Party of Manitoba v Government of Manitoba*, 2014 MBQB 155 at paras 30-37.

<sup>257</sup> See *Canadian Taxpayers Federation*, note 244 above, at paras 34-50.

<sup>258</sup> Hogg, note 239 above, at p 12-13.

<sup>259</sup> Such an approach seems consistent with Indigenous opinion that UNDRIP’s insistence on “free, prior and informed consent” “should not be regarded as according Indigenous peoples a general ‘veto power’ over decisions that may affect them, but rather as establishing consent as the objective of



B.C. Court of Appeal has left open the possibility,<sup>260</sup> and six members of the Supreme Court of Canada have said,<sup>261</sup> that requiring consultation with specified persons prior to enactment of legislation is, or can be, a valid manner and form requirement.<sup>262</sup>

Doing only this, however, could leave the UNDRIP implementation statute itself still at risk of unwelcome amendment or even repeal. It would be prudent, therefore, for a federal government committed to meaningful UNDRIP implementation to ensure that a manner and form requirement mandating consultation apply explicitly to any amendment of the implementation statute itself. Given that any such legislation might well require improvement to serve the interests of Indigenous peoples, any more stringent manner and form requirement for amendments might be unwise. Such a government might consider, however, including in any such statute a somewhat more stringent manner and form requirement – a supermajority vote, for example<sup>263</sup> – aimed specifically at any bill that was introduced to repeal it. It is not

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consultation with Indigenous peoples”: James Anaya, *Report to the Human Rights Council, A/HRC/12/34*, (14 July 2009) at 16, quoted in Sasha Boutilier, “Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples” (2017), 7:1 *UWO J Leg Stud* 4, online: <https://ojs.lib.uwo.ca/index.php/uwojls/article/view/5688/4782>, at 8. See generally Boutilier, *ibid* at 7-8. Thanks to Maura McDowell for this reference.

<sup>260</sup> *GVRD*, note 239 above, at para 42 (“I am not convinced that it is not open to Parliament or a provincial legislature to enact legislation that validly requires government or government officials to consult with a stated person or group before it may legislate in a particular way”).

<sup>261</sup> “If Parliament or a provincial legislature wishes to bind itself to a manner and form requirement incorporating the duty to consult Indigenous peoples before the passing of legislation, it is free to do so”: *Mikisew 2018*, note 170 above, at para 167, Rowe J (for himself and two other judges). (Citation omitted.) See also *ibid* at para 51, Karakatsanis J (for herself and two other judges).

<sup>262</sup> On the subject of prudence, however, a government contemplating imposing such a manner and form requirement would do well to consider the operational challenges that such a measure would pose. See *Mikisew 2018*, note 170 above, at paras 160-165, Rowe J.

<sup>263</sup> The list Peter Hogg provided of sample manner and form requirements includes one prescribing a supermajority. See note 243 above and accompanying text.

open to Parliament to make its legislation impossible to repeal,<sup>264</sup> but it does have the option, if so moved and if it does it properly, of making repeal of particular statutes somewhat more difficult.

### 3. Operationalizing Consent

As we saw just above, Parliament very probably cannot preclude itself from enacting legislation without the consent of the Indigenous peoples the legislation might affect.<sup>265</sup> But UNDRIP also requires that states take steps “in order to obtain the[] free, prior and informed consent” of affected Indigenous peoples “before adopting and implementing ... administrative measures that may affect them”<sup>266</sup> or approving “any project affecting their lands or territories and other resources.”<sup>267</sup> Does Canadian law permit compliance with these UNDRIP obligations? Why would it not?

Here, in brief, is the problem. Adoption and implementation of administrative measures and approval (or not) of resource development projects, for example, are choices made by designated authorities in the exercise of statutory discretion. In the absence of some statutory power to delegate that authority, the decision in such instances must be the decision solely of the designated person, and must be made afresh in each instance, following the prescribed procedure, if there is one, and taking into account all and only such relevant considerations as the statute or the

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<sup>264</sup> See note 239 above and accompanying text.

<sup>265</sup> See notes 248, 256 above and accompanying text.

<sup>266</sup> UNDRIP, note 2 above, §19, quoted in full in text at note 249 above.

<sup>267</sup> *Ibid*, §32¶2.

situation prescribes. In the words of Sara Blake, “[t]he tribunal retains discretion on whether and how to exercise the power right up until the power is exercised and the final decision made.”<sup>268</sup> This means that the designated authority may not make it a practice automatically to decide certain issues in a certain way or to give decisive weight in reaching decisions to some particular viewpoint or consideration not prescribed by the statute or by a regulation. A decision-maker that does so is said to have fettered its discretion.<sup>269</sup> And it means that no one other than the designated authority may be the one making the decision. “Dictation” occurs when the designated authority “fails to exercise an independent judgment, as a result of feeling compelled to exercise its statutory power in accordance with the views of another.”<sup>270</sup> Either of these circumstances justifies relief on judicial review.

Nothing, of course, precludes a statutory decision-maker from consulting and cooperating with Indigenous peoples, giving due weight to their concerns, accommodating their interests or even seeking their consent in the usual course of deliberating about a given matter, even where there is no constitutional obligation to do so,<sup>271</sup> as long as any other relevant interests or considerations also receive due

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<sup>268</sup> Sara Blake, *Administrative Law in Canada*, 6<sup>th</sup> ed (Toronto: LexisNexis, 2017) at 110.

<sup>269</sup> “Individual matters are entitled to individual attention, and the discretion of the statutory authority should not be so fettered that it prevents the possibility of individualized consideration of particular cases”: David J Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) at 116. See also Blake, note 268 at 110; Donald J M Brown, QC and the Hon John M Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Thomson Reuters, 2013, 2017), vol 3 at pp. 12-40 – 12-52.

<sup>270</sup> Brown & Evans, note 269 above, at p 12-55.

<sup>271</sup> By way of example, the Crown will have no constitutional obligation to consult a given Indigenous group when the interest the group is asserting is something other than an existing Aboriginal or treaty right (existing, or credibly claimed), or where the right asserted has been extinguished or surrendered absolutely: *Hiawatha First Nation v Ontario (Minister of the Environment)* (2007), 221 OAC 113 at paras

weight. Resolving, however, *never* to adopt any given administrative measure or to approve a resource development project without the prior consent of concerned Indigenous peoples would be a risky course for any statutory decision-maker; it would jeopardize the finality of any decisions so made.<sup>272</sup> This is the problem that needs solution if we are to implement effectively a regime that requires Indigenous peoples' consent to such decisions.

The framers of the BC Act<sup>273</sup> set out to address this problem. Section 7 of that Act equips the Lieutenant Governor in Council to authorize a minister “to negotiate and enter into an agreement with an Indigenous governing body” relating either to joint Indigenous/government exercise of a statutory power of decision or to “the consent of the Indigenous governing body before the exercise of a statutory power of decision.”<sup>274</sup> Such agreements take effect only when published in the BC Gazette.<sup>275</sup>

The good news about this provision is that it is perfectly legal. It is always open to a legislature to arrange to clothe a minister with authority to enter into contracts with Indigenous peoples (or anyone). The bad news is twofold. Any such contract would

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50-60; *Council of the Innu of Ekuanitshit v Canada (Fisheries and Oceans)*, 2015 FC 1298; *Wauzhushk Onigum Nation v Ontario (Minister of Finance)*, 2019 ONSC 3491 (Div Ct) at paras 154-158..

<sup>272</sup> In *Ktunaxa*, note 30 above, at para 154, for example, Moldaver J, in concurring reasons, noted with approval the decision-maker's conclusion that

grant[ing] the power of exclusion to the Ktunaxa ... would significantly hamper, if not prevent, him from fulfilling his statutory objectives: to administer Crown land and to dispose of it in the public interest. In the end, he found that the fulfillment of his statutory mandate prevented him from giving the Ktunaxa a veto right over the construction of permanent structures on over 50 square kilometres of public land.

<sup>273</sup> Note 17 above.

<sup>274</sup> *Ibid*, s 7(1). Section 1(1) of the Act defines “statutory power of decision.”

<sup>275</sup> *Ibid*, s 7(4).

probably be unenforceable.<sup>276</sup> And acting pursuant to it would, without more, taint any resulting decision.<sup>277</sup> Contracting in advance not to approve certain kinds of proposals or to implement certain measures without the prior consent of an Indigenous group would, *prima facie*, be fettering;<sup>278</sup> contracting to share decision-making authority with such a group would, on its face, be dictation.<sup>279</sup>

If the aim is to require decision-makers to *obtain* – not just to seek – the consent of concerned Indigenous peoples to any approvals or other decisions made pursuant to statutory discretion, the better, if not the only, way is to build the consent requirement into the legislation or regulations that confer and structure that

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<sup>276</sup> See, for example, *Pacific National Investments Ltd v Victoria (City)*, 2000 SCC 64 (municipal rezoning decision valid despite contract with developer not to rezone).

<sup>277</sup> There is some authority to the contrary. In *Durham Regional Police Association v Durham Regional Board of Police Commissioners*, [1982] 2 SCR 709 (DRPA), the Supreme Court held that a statutory discretion to indemnify police officers for legal expenses arising from judicial proceedings did not preclude inclusion in a collective agreement authorized under subsequent legislation of a term requiring reimbursement of legal expenses incurred by police officers charged with and acquitted of offences. But unlike the kinds of statutory decisions to which UNDRIP, note 2 above, refers, the discretion at issue in DRPA had no impact on the interests of any third parties. And the subsequent judicial decisions citing DRPA have all done so in the context of collective bargaining disputes. For these reasons, it would, I think, be unwise to rely exclusively on DRPA and the BC Act, note 17 above, to anchor an administrative regime based on consent or on joint Indigenous-Crown decision-making.

<sup>278</sup> See, for example, Blake, note 268 above, at 110 (“A tribunal may not make promises as to the future exercise of its powers because to do so improperly fetters the tribunal’s future discretion. A tribunal may not, by contract, bind itself to exercise its discretion in a particular way. A tribunal may not give an undertaking that prevents it in the future from exercising its discretion in the public interest or requires it to make a decision without following its usual procedures”) (citations omitted); Brown & Evans, note 269 above, at p 12-41 (“‘Fettering’ can also occur if, without exercising any independent judgment in a matter, a decision-maker makes a decision in accordance with the views of another, or where a contract or some other undertaking is regarded as determinative of the exercise of a statutory power”) (citations again omitted).

<sup>279</sup> See, for example, *Roncarelli v Duplessis*, [1959] SCR 121 at 156, Martland J (“Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission ... The Commission cannot abdicate its own functions and powers and act upon such direction”); Brown & Evans, note 269 above, at p. 12-55 (“Just as decision-makers cannot fetter their judgment, so they cannot permit another to direct the decision to be made”).

discretion. One finds a recent effective example of this in the 2009 amendments to the *Indian Oil and Gas Act*,<sup>280</sup> which took effect, along with the new regulations,<sup>281</sup> in August, 2019.<sup>282</sup> Section 6(1.1) of the amended *IOGA* authorizes regulations requiring, among other things, “that a power of the Minister under this Act in relation to first nation lands be exercised only if prior approval of the council of the first nation is obtained, if the council is first consulted or if prior notice is given to the council, as the case may be.”<sup>283</sup> It is now an offence to explore for or to exploit oil and gas located on lands to which the amended *IOGA* applies except as authorized by that Act or the new regulations;<sup>284</sup> authorization takes the form of an oil and gas contract issued by the Minister of Indigenous Services. There are different kinds of oil and gas contracts,<sup>285</sup> but all of them, under the new regulations, require prior approval, by resolution, of the council of the First Nation to whose lands the proposed contract would pertain.<sup>286</sup> The minister also requires First Nation council approval to enter into any agreement that would vary royalties payable for oil or gas recovered from lands subject to the amended Act.<sup>287</sup>

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<sup>280</sup> SC 2009, c 7, amending RSC 1985, c 1-7 (amended *IOGA*).

<sup>281</sup> Indian Oil and Gas Regulations, SOR/2019-196 (IOGR, or the new regulations).

<sup>282</sup> SI/2019-39.

<sup>283</sup> Amended *IOGA*, note 280 above, s 6(1.1)(a).

<sup>284</sup> *Ibid*, ss 16-17.

<sup>285</sup> *Ibid*, s 2(1) “contract.”

<sup>286</sup> IOGR, note 281 above, ss 29(1), (2)(a), (5) (exploration licences), 42(4)-(6), 44(2)-(3), 46(1) (subsurface contracts), 58(1)(b) (bitumen recovery projects), 73-74, 75(1)(a), (4)(b) (surface contracts).

<sup>287</sup> Amended *IOGA*, note 280 above, s 4(2).

First Nations, of course, may or may not be the collectives most appropriate for authentication as “indigenous peoples” for UNDRIP purposes.<sup>288</sup> Even so, the amended *IOGA* suggests a drafting strategy available in principle for adaptation and generalization to introduce formal consent requirements into a wider range of discretionary statutory frameworks. Deploying it might very well require amending a lot of different statutes (if only to include in each a power to make regulations analogous to those in the amended *IOGA*).<sup>289</sup> Attempting in any single statute durably to achieve this generic outcome would almost certainly require that the statute include explicit provisions giving it primacy over subsequent or more specific legislation,<sup>290</sup> and could require protecting it with a manner and form requirement.<sup>291</sup>

#### **IV. CONCLUSION**

The UN Declaration, for all its limitations, is a roadmap toward greater autonomy and greater security for Indigenous peoples and their members within existing nation-states. Giving UNDRIP enforceable legal effect in Canada will be both a monumental achievement and the least we can do to acknowledge and begin to redress the patterns of dismissal, marginalization and undervaluation that beset the Indigenous presence here. Those patterns continue to warp and to compromise life within Indigenous societies and, by no coincidence, to benefit, superficially at least, the rest of us. It is precisely for both of these reasons that effective UNDRIP implementation

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<sup>288</sup> See notes 38-48 above and accompanying text.

<sup>289</sup> See note 283 above and accompanying text.

<sup>290</sup> See notes 232-237 above and accompanying text.

<sup>291</sup> See notes 238-264 above and accompanying text.

here will be so difficult and so controversial. If UNDRIP is to prepare the way for meaningful improvement in the circumstances of Indigenous peoples in Canada, the implementation effort as a whole must meet, not disappoint, their reasonable expectations. It must take account of the challenges that colonized societies face when given space for self-determination. And it must be designed and executed well enough to endure attempts to dilute it, supersede it, repeal it, read it down and attack its constitutionality.

Accomplishing all this will require considerably more commitment, care and cooperation than anticipated. I hope the thoughts and suggestions I've offered here are of some help. I wish profoundly that this task were easier. It is hardly the fault of the Indigenous peoples that it is not.