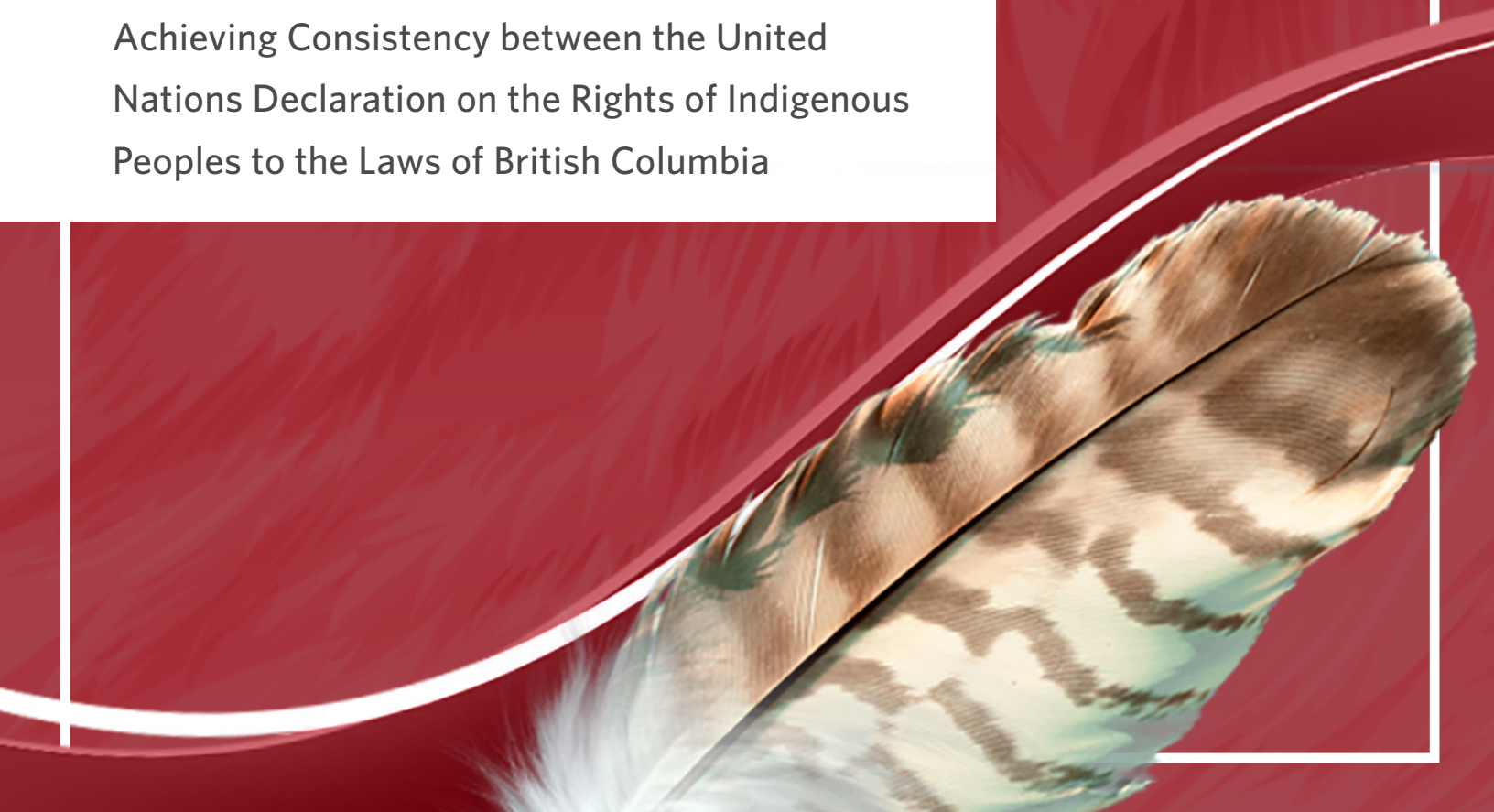
IMPLEMENTING UNDRIP IN BC: A DISCUSSION PAPER SERIES
BY THE RESIDENTIAL SCHOOL HISTORY AND DIALOGUE CENTRE

Achieving Consistency between the United Nations Declaration on the Rights of Indigenous Peoples to the Laws of British Columbia



INTRODUCTION

In 2019 we saw some historic developments with respect to the recognition of the fundamental human rights of Indigenous peoples. In particular, after decades of denial and failed initiatives, we saw some governments beginning to take steps in partnership with Indigenous peoples to change legislation in ways that can assist with the vital work of decolonization. The most notable example of this was the passage of British Columbia's *Declaration on the Rights of Indigenous Peoples Act.*

The *Act,* which was co-developed through a process established with the First Nations Leadership Council of British Columbia, affirms the application of the *United Nations Declaration on the Rights of Indigenous Peoples* to the laws of BC, requires the alignment of British Columbia's laws with the standards of the UN Declaration, and the development of an action plan to meet the objectives of the UN Declaration. The Act is undoubtedly the clearest and most direct effort by a government to date to heed to the Truth and Reconciliation Commissions Call to Action 43 to adopt the UN Declaration as "the framework for reconciliation."

The passage of the *Declaration on the Rights of Indigenous Peoples Act* has understandably placed an even greater focus on public discourse and dialogue about our progress in the work of reconciliation, the actions, roles and responsibilities that we all have, and the ways in which we should understand, respect and implement the UN Declaration. Important questions are being raised, perspectives shared, and ideas about the future developed. One of the features of the *Act* is that it lays a foundation of a future where ever-increasing work must be done together – the types of work, such as reviewing legislation and negotiating new models of decision-making agreements, that we have not done together in the past. As such, it is vital that we do the hard work of developing shared understandings and insights about the developments that are happening, so that we can see increasing success in the work we do into the future.

In order to help inform understandings and dialogue about the *Declaration on the Rights of Indigenous Peoples Act* and the *United Nations Declaration on the Rights of Indigenous Peoples* the Residential School History and Dialogue Centre will be periodically issuing short commentaries on what some of the developments that are taking place mean, issues we may consider when reviewing them, and ideas about the work we must collectively do going forward. These commentaries have been developed in dialogue with leading experts, including those on the front lines of driving forward some of the changes we are seeing. It is hoped that by sharing these perspectives, ever more informed, effective, and co-operative efforts will advance in support of true reconciliation.

Finally, these papers are meant to be a starting point for advancing dialogue – and in particular for encouraging a wide range of perspectives from all backgrounds and viewpoints. In addition to occasional written commentaries, the Centre anticipates hosting on-going dialogues regarding the progress of implementation of the UN Declaration. We welcome your feedback on these commentaries, as well as ideas you may have for other topics that would be helpful for us to focus on in the future.

The *Declaration on the Rights of Indigenous People Act* (DRIPA) has a purpose "to affirm the application of the Declaration to the laws of British Columbia" (2 (a)) and also confirms that nothing in DRIPA "is to be construed as delaying the application of the Declaration to the laws of British Columbia". In section 3, DRIPA also requires that "in consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration." This is a distinct obligation from the requirement for an action plan in section 4 of DRIPA.

What does it mean to say that the UN Declaration applies to laws of British Columbia? And why is it important that DRIPA states this?

1 Meaning of the application of the UN Declaration to the laws of British Columbia

The UN Declaration was developed from a long deliberative process over decades that included Indigenous peoples as well as State governments. A "declaration" at international law, is different than a "treaty" or a "convention." Treaties and conventions are formal agreements between States that define and modify their duties and obligations. When signed they create legally binding international obligations on States, and when a State ratifies a treaty or convention they become part of domestic law. A declaration, on the other hand, is a statement of standards that a State has agreed should be applied. A declaration is not legally binding on States simply by virtue of a State endorsing it. However, standards in a declaration may become legally binding if they reflect "customary international law" (an established practice or understanding that is observed). Domestically, declarations can be used to interpret the law where relevant, and States may also take steps to implement the standards in a declaration in various ways, including through legislative or other means.

In Canada, for an international instrument to become domestic law, government must clearly and explicitly express its intent to do so. To say it another way, for an international instrument to become binding in domestic law – "to have full force and effect" – the government must expressly say so through legislation. The Supreme Court of Canada has been clear that incorporation requires clear language (e.g. *Reference Re Pan-Canadian Securities Regulation,* 2018). The language of section 3 of DRIPA does not express that clear intent, nor would be typical to do so in relation to a declaration.

At the same time, the Supreme Court has also indicated that declarations and other international human rights instruments, as well as customary norms, are "relevant and

persuasive sources" for interpretation of domestic human rights law (*Reference re Public Service Employee Relations Act (Alberta); United States of America v. Burns*). Relatedly, it is not new for Canadian courts to refer to the UN Declaration, including as a source of interpretation, in many decisions that are explicitly in the context of human rights.

All of this is to re-affirm that statements in s. 1(4) and 2(a) of DRIPA are confirming, in law, that the UN Declaration is to be used as an interpretive source for the laws of BC. For example, the judicial consideration of DRIPA was on January 8, 2020 in *Servatius* where Justice Thompson stated:

> [37] In its summary report, the TRC issued "calls to action" in order to redress the legacy of residential schools and advance the reconciliation process, including a call to build student capacity for intercultural understanding, empathy, and mutual respect, and a call for implementation of the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP]. In the week following the completion of the hearing of this case, the Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44, received royal assent. Section 3 of this Act provides that in consultation and cooperation with the Indigenous peoples of British Columbia, the government must take all measures necessary to ensure the laws of the province are consistent with UNDRIP. For the purposes of our case, it is notable that UNDRIP includes the right for Indigenous peoples to "manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies" (Article 12(1)); the right to "the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information" (Article 15(1)); and the right to "promote, develop and maintain their institutional structures and distinctive customs, spirituality, traditions, procedures, [and] practices" (Article 34).

The interpretive force of the UN Declaration is echoed by over 100 experts who interpreted similar, though distinct, language in federal Private Members Bill C-262 – on which DRIPA was based. They stated: "Bill C-262 affirms the Declaration as a universal international human rights instrument with application in Canadian law. This is consistent with the fact that the UN Declaration already has legal effect in Canada and can be used by Canadian courts and tribunals to interpret Canadian laws."[1] As well, the preponderance, evidence and expert opinion points to the UN Declaration as having the status of customary international law.

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1 The Canadian Partnership for International Justice, "Open Letter signed by 101 experts supporting Bill C-262." May 2019. https://cpij-pcji.ca/open-letter-signed-by-101-experts-supporting-bill-c-262.

2 Why is it important that the UN Declaration applies to the laws of British Columbia?

Why is it helpful and important that the UN Declaration be used as a source of interpretation for the laws of British Columbia?

The UN Declaration does not create any new rights. Rather, it expresses long-standing, broadly accepted international human rights norms in the specific context of the world's Indigenous peoples. These are human rights norms that have long been accepted by Canada and Canadians, including those in the *Universal Declaration of Human Rights*, and influenced the development of our *Charter of Rights and Freedoms.*

The idea of understanding Indigenous rights as fundamental human rights is an important and powerful one. The history of colonialism in Canada has at its core the denial of the basic of human rights of Indigenous people – effectively treating Indigenous peoples as subhuman. This colonial effort was not sporadic or isolated – it involved all aspects life, including breaking up family systems, dismantling governance structures, dispossession of land, banning of culture and ceremony, and interfering with the transmission of language and knowledge.

Section 35 of the *Constitution* has been one tool for addressing this legacy of colonialism. But the structure and meaning of section 35 is, in some ways, distinct from the UN Declaration.

Section 35 focuses on collective rights. The UN Declaration expresses both individual and collective human rights. Further, while constitutional and human rights overlap in many important ways, they are also distinct. Human rights are understood to be inalienable and inherent rights of human beings that exist and are intrinsic to being human, and to maintaining dignity as human beings. This is echoed in the UN Declaration which states that the standards within it are the minimum standards for the survival, dignity, and well-being of Indigenous peoples. This is different than section 35 rights, which are collective rights held by Indigenous peoples that inform and structure relations with Crown governments as a result of pre-existing Aboriginal sovereignty. As the Supreme Court of Canada has stated the goal of section 35 is to reconcile assumed Crown sovereignty with pre-existing Aboriginal sovereignty.

As well, as a result of a number of choices that were made after the adoption of section 35, the recognition and implementation of the constitutional rights of Indigenous peoples has been slow and incremental, and relied largely on long, expensive, adversarial court processes. The result of this is that the impacts of colonialism on Indigenous peoples – children, families, and communities – has continued in severe ways despite advances Indigenous peoples have made in breathing life into section 35.

These are amongst the reasons that the Truth and Reconciliation Commission in Call to Action 43 called for the UN Declaration to be adopted and implemented by governments as "the framework for reconciliation." Impactful, coherent, and co-operative action to address the legacy of colonialism by governments, Indigenous peoples, and all sectors of society, is long overdue. Such a framework must not only address collective matters such as the relationship to lands and resources, governance, and jurisdiction, but also how colonialism has distinctly impacted Indigenous individuals, children, women and girls, LGBTQ+, and others.

DRIPA, by applying the UN Declaration to the laws of BC – meaning that it will be used as an interpretive source – importantly requires a human rights lens be used to inform how the laws of British Columbia are interpreted and applied. By taking this step, an important foundation is laid to use reconciliation-centred approaches in British Columbia as a mechanism for addressing the impacts of colonialism, and shifting from the historic patterns.