

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

Co-operatively Resolving Conflicts Through the
Application of the United Nations Declaration
on the Rights of Indigenous Peoples



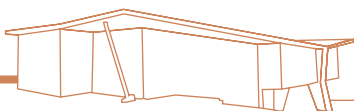
One of the central challenges with advancing true reconciliation has been an over-reliance on adversarial, expensive litigation processes. Such a reliance on the courts was never intended. When section 35 of the Constitution was adopted in 1982, its implementation was to be supported by a number of political conferences and processes. These political processes did not succeed, and were not effectively advanced. Rather, governments made the choice to force Indigenous Peoples to prove they had constitutionally protected rights prior to taking any action to respect them, despite the explicit working of section 35 that such rights were “recognized and affirmed.” The end result has been decades of delay in much of the real work of reconciliation, the maintenance of a culture of conflict, a disproportionate reliance on lawyers and legalistic processes, and lack of coherent and systematic change in how people think, relate, and act with one another with respect to the work of decolonization and reconciliation.

In recent years, as part of the shift to a focus on the recognition and implementation of Indigenous rights, as well as the adoption of the UN Declaration, an emphasis is being placed on moving away from adversarial forums and modes of engagement to new, principled, modes of co-operation. One explicit example of this was the adoption of the *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*, which were also adopted by British Columbia as the *Draft Principles that Guide the Government of British Columbia’s Relationship with Indigenous Peoples*. The *Principles* are intended to be part of shifting Crown governments towards working with Indigenous peoples from the starting point of recognition of rights, and shifting the focus of partnership and negotiations to the co-operative implementation of those rights. The federal government explicitly re-enforced this shift through *The Attorney-General of Canada’s Directive on Civil Litigation Involving Indigenous Peoples* which states:

Adversarial litigation cannot and should not be a central forum for achieving reconciliation. This is a message the Supreme Court of Canada has sent time and time again, strongly encouraging that the work of reconciliation take place through political, economic, and social processes that involve negotiating, building understanding, and finding new ways of working together. Adversarial litigation between the Crown and Indigenous peoples presents challenges for achieving reconciliation.

Many of the guidelines in the *Directive* are specifically focused on how to reduce the use and centrality of litigation as a forum for Crown-Indigenous relations, including by directing government lawyers to seek to simplify matters, find paths for alternative solutions, and limit taking denial-based positions that heighten conflict.

The *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) further builds on this recognition that a fundamental shift must be made from adversarial to more co-operative modes of



resolving conflicts. This is advanced through DRIPA in both direct and indirect ways.

An explicit commitment and vision of the UN Declaration is that by recognizing the human rights of Indigenous Peoples the opportunity for true co-operative building of greater equality and justice will occur. This is made explicit in the preamble to the UN Declaration which states:

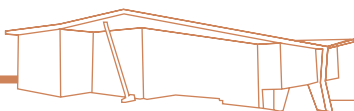
...that the recognition of the rights of Indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and Indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.

This is re-enforced in many of the articles of the UN Declaration that require the standard of co-operation to be met, including to implement the UN Declaration (article 38). At the same time, the UN Declaration calls on States to ensure there are “effective mechanisms” and “effective measures” in place to address a wide range of matters regarding the relationship between Indigenous Peoples and the State, including for the purposes of redress of wrongs, ending discrimination, and ensuring health and well-being (for example articles 15, 22, and 29).

Even more so, article 27 of the UN Declaration emphasizes the requirement for Indigenous peoples and the State to establish proper processes for recognition and adjudication of Indigenous rights in a manner that is inclusive of Indigenous legal traditions:

States shall establish and implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

By confirming the application of the UN Declaration to the laws of British Columbia, and requiring the alignment of laws (s. 3) an action plan to meet the objective of the UN Declaration (s. 4), DRIPA entrenches a legal basis for a shift to greater co-operation rooted in the recognition of the human rights of Indigenous Peoples. Beyond mere affirmation of the importance of making such a shift, by adopting the UN Declaration DRIPA requires a future where mechanisms are being built together, including new institutions and processes, to ensure the human rights of Indigenous Peoples are being respected and proper State-Indigenous relations are put into place.



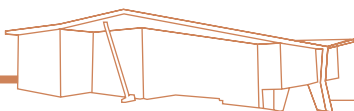
DRIPA also advances co-operative approaches to addressing conflicts by making space to address long-standing obstacles that have delayed and often undermined successful and effective negotiations and completion of agreements. This includes the recognition of Indigenous governments formed consistent with the standard of Indigenous self-determination through the definition of “Indigenous governing bodies”, and the removal of limitations that often prevented agreements with entities other than *Indian Act* Bands or those incorporated under federal and provincial statutes. DRIPA also creates space for agreements that include consent-based decision making, and thus more opportunity to innovate long-term agreements that reduce conflict by building shared structures and processes that provide predictability and clarity over how decisions are made on the land base.

DRIPA should also be viewed as a source for supporting, accelerating, and laying foundations for initiatives that were underway that had a focus on creating a climate that would reduce conflict. One example of this is the shared goal between First Nations and BC to establish an Indigenous Commission as part of the process under the *Commitment Document*, 2018.¹ This goal is defined as follows:

Establish an Indigenous commission: designed, established and driven by First Nations, to provide certain supports to First Nations, respectful and reflective of, and consistent with, First Nations’ rights of self-government and self-determination. The commission would provide a range of processes and options that First Nations may opt-in to use, from non-binding to binding outcomes. The commission would support First Nations upon request with respect to:

1. boundary resolution, in accordance with First Nations’ respective laws, customs, and traditions; and
2. nation and governance building including:
 - a. constitution development,
 - b. territory decision-making and land use/territory planning,
 - c. law-making,
 - d. policy development, and
 - e. development of political institutions, consistent with principles of the proper title and rights holder.

¹ 2018. *Joint Agenda: Implementing the Commitment Document | Concrete Actions: Transforming Laws, Policies, Processes and Structures*. https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/concrete_actions_final_26nov2018.pdf



Once established, it is expected that both the federal and BC provide the necessary, sustainable resources/funding for the effective functioning of the independent commission.

An Indigenous commission has long been identified as fundamental to addressing conflict that arises between and amongst First Nations as a result of colonially imposed divisions, and creates significant complexity regarding land and resource decision-making and the relationship between Indigenous and Crown jurisdictions.

The adoption of the UN Declaration in DRIPA establishes a clear, shared, and principled legal foundation for an Indigenous commission, and how it must be necessarily be aligned with self-determination and the inherent right of self-government. As well, the processes to align laws and develop an action plan within DRIPA can provide further grounding to advance and accelerate the work of establishing an Indigenous commission.

