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Coalition for the Human Rights of Indigenous Peoples
Submission to the United Nations Expert Mechanism on the Rights of Indigenous Peoples

Input to the study on "Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration"

The Coalition for the Human Rights of Indigenous Peoples brings together Indigenous governments and representative bodies, Canadian human rights organizations, and individual experts actively engaged in promoting the human rights of Indigenous Peoples. The Coalition was originally formed almost 25 years ago to support the finalization and adoption of the *UN Declaration on the Rights of Indigenous Peoples*. Our members have continued to work together to support the full implementation of the *Declaration* by Indigenous Peoples and federal, provincial, and territorial governments in Canada.

The Coalition members endorsing this submission are listed at the end of the document.

1. Implementation of the *UN Declaration* through legislation

In June 2021, the Parliament of Canada passed federal legislation to implement the *United Nations Declaration on the Rights of Indigenous Peoples* (the *United Nations Declaration on the Rights of Indigenous Peoples Act*[1] or the Act). Adoption of the legislation was the result of years of advocacy led by Indigenous governments and representative organizations. It followed the adoption of similar legislation by the province of British Columbia (BC) in collaboration with Indigenous leadership.[2] In both cases, adoption of legislation was intended to establish an unambiguous legal commitment to full implementation of the *Declaration* that can outlast future changes in government.

The federal legislation and the BC legislation are similar in intent and structure. For the purpose of this submission, we will quote primarily from the federal legislation. The key components of this model are as follows:

- The preamble to the federal Act explicitly "rejects all forms of colonialism" and states clearly that "all doctrines, policies and practices based on or advocating the superiority

[1] SC 2021, c 14. Royal Assent, 21 June 2021.

[2] Declaration on the Rights of Indigenous Peoples Act, SBC 2019, Chapter 44, 28 November 2019. https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044

of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and *terra nullius*, are racist, scientifically false, legally invalid, morally condemnable and socially unjust."

- The Act affirms that the *Declaration* is a "universal international human rights instrument" that has "application in Canadian law."[3] Recognition that the *Declaration* has legal effect independent of the Act, or other legislation, is consistent with established Canadian jurisprudence which has recognized that the interpretation of domestic law should seek to uphold Canada's international human rights commitments. Affirmation of this principle in the Act is nonetheless significant given past efforts by political leaders in Canada to categorize the *Declaration* as merely aspirational and without legal consequence.

- The Act repeatedly uses the phrase "in consultation and cooperation with Indigenous Peoples" when defining Canada's obligations. This phrasing is consistent with the *UN Declaration*. As the Expert Mechanism has previously noted, the "combined term" of consultation and cooperation implies a significantly greater decision-making role for Indigenous Peoples than mere consultation and is also the starting point for achieving the requirement of free, prior and informed consent.[4] The repeated affirmation of the standard of consultation and cooperation is particularly significant given the federal government's prior history of acknowledging only a narrowly defined obligation to consult.

- The Act requires the federal government to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." Furthermore, this provision explicitly states that such measures must be undertaken "in consultation and cooperation with Indigenous Peoples".[5] In the Coalition's view, the phrase "laws of Canada" necessarily includes not only the text of legislation, but also how these laws are interpreted and applied through regulations, policies and programs.

- The Act requires the federal government to "prepare and implement an action plan to achieve the objectives of the Declaration." This must also be carried out in consultation and cooperation with Indigenous Peoples.[6] The Act also makes it clear – through a further requirement to monitor, review and amend the action plan as needed – that the action plan is intended to be ongoing and evolving.

- The Act further specifies that the action plan must include measures to "address injustices, combat prejudice and eliminate all forms of violence, racism and

[3] Section 4, "Purposes".
[4] UN Human Rights Council, *Efforts to implement the United Nations Declaration on the Rights of Indigenous Peoples: indigenous peoples and the right to self-determination – Report of the Expert Mechanism on the Rights of Indigenous Peoples*, 4 August 2021. UNDOC A/HRC/48/75
[5] Section 5, "Consistency".
[6] Section 6, "Action Plan".

discrimination, including systemic racism and discrimination." This provision goes on to provide a welcome, expansive interpretation of Articles 21.2 and 22 of the *Declaration* by specifically naming the need for measures to address discrimination and violence "against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons."[7]

- In addition, the act requires that Canada's action plan must include measures related to "monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration." The exact form such measures should take is not specified in the Act itself, a matter which we will address below.

- Finally, the Act requires annual reporting to Parliament on the creation and implementation of the action plan and on measures undertaken to ensure Canada's laws are consistent with the *Declaration*.

Notwithstanding concerns set out below, adoption of implementation legislation by the federal government and the province of British Columbia were remarkable achievements for Indigenous Peoples and a positive development in Canada's recognition of the human rights of Indigenous Peoples. In the Coalition view, the key elements set out above provide an important model deserving careful consideration in other national and international contexts.

The significance of implementation legislation is underlined by a notable 2023 decision by a lower court in the province of Quebec. In *R. c. Montour,*[8] the Quebec Superior Court ordered a permanent stay of criminal charges against two Mohawk men convicted in connection with the cross-border tobacco trade. In reaching its decision, the court found that established Supreme Court of Canada jurisprudence on what constitutes a Constitutionally protected Aboriginal right must now be revisited based on "profound changes" in the social and legal landscape, including the adoption of the *UN Declaration* and Canada's legislated commitment to its implementation.[9]

Because there has been considerable public misinformation about the *Declaration* in Canada, it is also important to be clear what the implementation act *does not* do. The purpose of international human rights instruments is to guide states in changing laws and practices to meet and exceed the minimum standards agreed to by the global community. These minimum standards cannot be unilaterally lowered through domestic law or its interpretation. Canada's implementation act explicitly requires the federal government to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." Nowhere does the Act

[7] Section 6 (2), "Content".

[8] R. c. Montour, 2023 QCCS 4154.

even suggest the contrary view that interpretation and application of the *Declaration* should be constrained by the laws of Canada.

The main weakness of Canada's legislation is the absence of formal structures and processes – and an appropriate budget – for monitoring implementation and ensuring accountability and Indigenous consultation and cooperation. It was expected that such structures and processes would emerge as part of the joint development of Canada's first action plan. Unfortunately, this did not happen. Instead, the action plan released by the federal government in June 2023 only reiterates the government's commitments to develop such measures in the future.

The *Declaration* is a living instrument which must always be interpreted in accordance with present-day conditions and new developments in law. The alignment of governmental practices, regulations, policies and other measures with the *Declaration* must be an ongoing activity that is able to evolve over time in keeping with ever-changing circumstances facing Indigenous Peoples, as well as the progressive development of international and Canadian law.

The *Declaration*, as a consensus international human rights instrument, is itself embedded in a large body of other relevant international instruments which must also be meaningfully taken into account. This includes, for example, the American Declaration on the Rights of Indigenous Peoples which was adopted by the Organization of American States (OAS) on June 15, 2016 by consensus. in any specific situation, the required minimum standard for upholding the human rights of Indigenous peoples may be found in either instrument and the Government of Canada is obligated to uphold whichever standard is higher. Yet, the *American Declaration* is not even mentioned in Canada's UN Declaration Action Plan.

A crucial and growing issue facing Indigenous Peoples is climate change and its increasing impacts and challenges in the traditional territories of Indigenous Peoples. As the Act emphasizes in its preamble: "implementation of the Declaration can contribute to supporting sustainable development and responding to growing concerns relating to climate change and its impacts on Indigenous peoples". Effective ongoing mechanisms for oversight, evaluation and recourse must take into account this expanding crisis.

The Coalition has identified the following implementation gaps that must be addressed in Canada and which we would encourage EMRIP to consider in its advice to states and Indigenous Peoples in other regions.

- There is no clear whole-of-government coordinating point to ensure consistency in implementation across government departments and agencies. The Act states that any government minister may be designated to carry out the specific responsibilities named in the Act. Since the adoption of the Act, the designated minister has been the federal Minister of Justice. However, there has been minimal coordination with other departments. The result is a first action plan that is piecemeal, rather than comprehensive and coordinated, and which is inconsistent in how it interprets and applies the *Declaration*. Furthermore, uncertainty about Indigenous Peoples will be

engaged in implementing the plan, and lack of funding for corresponding capacity development among Indigenous Peoples, raises concern about the plan being carried out through ineffective and unilaterally developed measures.

- The federal government has engaged with Indigenous Peoples' organizations over potential reform to a number of specific laws and legal provisions of long-standing concern, including the standard non-derogation text used to affirm that new laws should must be interpreted in a manner consistent with the rights of Indigenous Peoples. Despite this, however, there is no collaborative or prioritization process to examine federal laws, regulations, and policies as a whole in order to identify where action is required and which laws should be prioritized to ensure consistency with the *Declaration*.

- No ongoing mechanisms have been established to assess progress in implementation of the *Declaration* or to provide recourse for Indigenous Peoples when their rights are violated. The Coalition acknowledges that establishing such mechanisms is a difficult challenge. Indigenous Peoples in Canada are distinct from each other and the needs of their citizens are diverse. The mechanisms that may work for one people will not necessarily work for others. It is concerning, however, that the June 2023 Action Plan only reiterates the government commitment to eventually establish an independent Indigenous rights mechanism or mechanisms, without any clarity on how the government will work with Indigenous Peoples to achieve that goal.

- Similarly, there is a lack of clarity about how the current action plan will be monitored, assessed, and revised. The plan refers to the creation of an "advisory body" but leaves it open to the government's discretion whether and when this body will be called on. The ongoing revision of the action plan was identified as a critical priority for Indigenous Peoples' organizations particularly given the perceived lack of engagement and consultation in the development of its first iteration.

- There is an ongoing lack of transparency about measures to train civil servants in the interpretation and application of the *Declaration*. If any such training is taking place, it appears likely that it is being carried out internally by other government staff. The Coalition feels strongly that while training is urgently needed, but such training must accurately reflect Indigenous Peoples' own understandings of the *Declaration* and its interpretation. Consistent with the text of the Act and the *Declaration*, such training must be developed and carried out in consultation and cooperation with Indigenous Peoples.

Critically, any implementation/monitoring body must have sufficient authority to be able to mandate measures required to ensure alignment with the Declaration and other relevant international and Canadian law. In order to ensure the integrity and independence of such a mechanism, it should have an "arm's length" relationship to Government. Such body must not be politicized. It is essential that it receive adequate funding to support such a far-reaching

mandate and that it be predominantly led, represented and staffed by Indigenous Peoples to ensure its legitimacy.

2. Implementation through legal precedent

Indigenous Peoples have achieved significant victories before Canadian courts, especially through the Supreme Court of Canada's interpretation of the affirmation of "existing Aboriginal and treaty rights" in the Canadian Constitution. EMRIP has previously commented, for example, on the landmark Tsilhqot'in decision which recognized the Tsilhqot'in People's unextinguished title to a large part of their traditional territory in central British Columbia.[10] This is just one decision in a vast body of Canadian jurisprudence affirming inherent rights of Indigenous Peoples in respect to lands, territories, and harvesting practices; setting out a state duty to consult and accommodate Indigenous Peoples on all decisions impacting their rights; and setting a high threshold of justification for any action that would limit those rights.

Such progress, however, comes at a high price for Indigenous Peoples. The Tsilhqot'in case, for example, took more than two decades to make its way through the courts. In this adversarial process, Indigenous Peoples are at an extreme disadvantage given the vastly greater resources that can be marshalled by federal, provincial and territorial governments, as well as private corporations, if they choose to oppose the Indigenous claimants. [11] At all times, Indigenous Peoples face the risk that the courts will establish negative precedents, setting back their rights and the rights of other Indigenous Nations.

In a recent BC court case concerning laws permitting mineral staking on Indigenous lands, the provincial government successfully argued that the consistency requirement in its own *UN Declaration* act does not establish any binding legal obligations affecting the application of current laws.[12] The Gitxaala Nation has announced its decision to appeal parts of this decision, including the regressive interpretation of the BC implementation act.[13]

As noted in the previous section, however, a Quebec court recently came to a dramatically different conclusion, finding that the adoption of the UN Declaration, and Canada's legislated commitment to its implementation, was of such profound importance that it requires revisiting restrictive interpretations of Indigenous rights set out in established Supreme Court of Canada jurisprudence. In that case, the Attorney General of Quebec tried to argue that because the Declaration is not a binding legal treaty, national legislation established only a framework to

[10] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, 26 June 2014. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do

[11] The inadequacy of the court system to ensure timely and effective access to justice for Indigenous Peoples in Canada was addressed in the Inter-American Commission's 2009 admissibility ruling on a petition brought by the Hul'qumi'num Treaty Group. Inter-American Commission on Human Rights (IACHR), *Report No 105/09 on the admissibility of Petition 592-07, Hul'qumi'num Treaty Group, Canada*. 30 October 2009.

[12] *Gitxaala v British Columbia (Chief Gold Commissioner),* 2023 BCSC 1680, 26 September 2023. https://www.canlii.org/en/bc/bcsc/doc/2023/2023bcsc1680/2023bcsc1680.html

[13] Mandell Pinder LLP, "Case Summary –Gitxaala v British Columbia (Chief Gold Commissioner)," 13 December 2023. https://www.mandellpinder.com/gitxaala-v-british-columbia-chief-gold-commissioner-2023-bcsc-1680-case-summary

guide implementation measures, without impact on the legal landscape. This argument was rejected by the court which found:

- On the importance attached to human rights declarations in the UN process: "…even though the violation of the *UNDRIP* cannot attract the same international law remedies that a ratified treaty or convention would, when dealing with international human rights, the international community's expectations that states will comply with a Declaration can be as high as for a treaty or convention [para 1177]."

- On the Government of Canada's awareness that the Declaration had significant legal implications, as indicated by Canada's initial opposition to the Declaration and the long delay in finally endorsing it: "Such caution proves that Canada was well aware of the potential legal consequences of such a step and it runs contrary to an interpretation that would strip this instrument of any legal consequences. If Canada had considered this instrument merely as a symbolic gesture, an "empty box", it would not have felt the need to vote initially against the nearly unanimous UN General Assembly declaration supporting it, with all the stigma attached to such a position at the international level [para 1189]."

- On the significance of the Act's provisions: "The legislator is deemed not to speak in vain, and he has expressed his clear intention that the *UNDRIP* be given application in Canadian law [para 1199]."

This decision is being appealed by the Attorney General of Quebec.[14]

While the adversarial process of litigation is not the preferred path to reconciliation, it is often the only available recourse to defend the rights of Indigenous Peoples and has, over time, resulted in significant shifts in law and policy. Articles 27, 28, and 40 of the *UN Declaration* require access to "fair, independent, impartial, open and transparent" recourse and adjudication mechanisms able to give "due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights." Canada should be working with Indigenous Peoples to develop alternatives to litigation that would be consistent with these standards. Canada should, in parallel, also reform the legal system to make litigation more fair, accessible and responsive to the rights of Indigenous Peoples. The Coalition would like to highlight the following critical areas of legal reform.

- The need for judicial training has been widely noted, including the Calls to Action of the Truth and Reconciliation Commission of Canada (see below). Judges hearing Indigenous rights cases may have little or no prior training or experience with Indigenous rights in

[14] For further analysis, see: Kate Gunn and Cody O'Neil, "Reframing Aboriginal Rights: *R. c. Montour*," 18 January 2024. First Peoples Law. https://www.firstpeopleslaw.com/public-education/blog/reframing-aboriginal-rights-r-c-montour

Canadian law, or any specific knowledge of the cultures and legal traditions of the Nations concerned. If the judge does have prior experience of Indigenous litigation, it is most likely because in the previous legal practice they have represented a government or private corporation on the opposing side of an Indigenous rights case. The federal government's own Action Plan to implement the *UN Declaration* commits to developing judicial training but no further details are provided. As stated earlier in respect to training of civil servants, it is critical that such training be developed in consultation and cooperation with Indigenous Peoples.

- In 2018, the federal Attorney General made public new guidelines for federal litigators in Indigenous rights cases. The 20-point guidelines states that legal counsel representing any federal department "must ensure that their submissions and positions do not have the direct or collateral effect of undermining or restraining" the rights of Indigenous Peoples. Coalition members have observed that the guidelines have tempered federal engagement in the courts, although more needs to be done to ensure the federal government is an active advocate for the rights of Indigenous Peoples. The guidelines were put in place prior to the adoption of the *UN Declaration* implementation act and fall short of the Act's affirmation of the *Declaration*'s legal effect or the Act's commitment to consistency. The federal government should work in consultation and cooperation with Indigenous Peoples to update these guidelines. Other jurisdictions in Canada should adopt similar measures.

- In 2017 the federal government re-established an independently administered national program to help fund legal challenges "of national significance" related to human rights or official languages. A parallel, independent mechanism or mechanisms should be established to support legal challenges by Indigenous Peoples, particularly where such challenges have the potential to help resolve conflicting views over interpretation of the inherent rights of Indigenous Peoples.

3. Implementation through commissions of inquiry

The 2014 Final Report of the Truth and Reconciliation Commission of Canada (TRC) helped build important momentum for implementation of the *UN Declaration.* The Commission, which was established as part of legal settlement with Survivors of Canada's Indian Residential School system, stated that the *UN Declaration* provides "the framework for Reconciliation at all levels and across all sectors of Canadian society." The Commission issued 94 separate Calls to Action directed at various levels of government, public institutions, the corporate world and civil society. Implementation of the *UN Declaration*, including through training and education, was highlighted in 16 of those Calls to Action.

The federal government committed to full implementation of the Calls to Action, as did provinces and territories and numerous public and private institutions. However, progress on fulfilling these promises has been uneven at best.[15]

Before completing its mandate, the TRC established the National Centre for Truth and Reconciliation, as a permanent archive and an ongoing hub for public education. The Centre is a rare example of Commission of Inquiry being able to establish an ongoing body able to continue critical aspects of its mandate.

The TRC also called for the creation of a second ongoing institution, a National Council for Truth and Reconciliation (Calls to Action 53-6). The Council was to be an independent oversight body gathering and assessing data on progress toward achieving the other Calls to Action. While some steps have been taken toward creating this body, including forming a transitional council, at the time of writing the National Council does not yet exist.

These measures can be seen as a direct response to the long-standing problem of non-implementation of inquiry recommendations. Persistent, grave violations of the human rights of Indigenous Peoples have led to a large number of public inquiries, including the 2019 National Inquiry on Missing and Murdered Indigenous Women and Girls, the 2013 Ipperwash Inquiry, the 2004 Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform, the 1996 Royal Commission on Aboriginal Peoples, the 1991 Manitoba Aboriginal Justice Inquiry and the 1989 Royal Commission on the Donald Marshall, Jr. Prosecution. Together, the recommendations of these and other inquiries provide a concrete and detailed roadmap for recognizing and advancing the human rights of Indigenous Peoples. However, while the inquiry process generates public pressure for government action, initial promises are routinely abandoned once the spotlight fades.

The TRC had a profound impact on public awareness of Indigenous rights and helped mobilize significant pressure for change. At the same time, the TRC has faced the problem common to previous and subsequent national inquiries: the challenge of turning government commitments into action. The Coalition wants to highlight and recommend to EMRIP the TRC's efforts to address this challenge by creating ongoing institutions directed either to continuing aspects of the TRC's mandate or evaluating the progress made on fulfilling its Calls for Action.

In light of this experience, the Coalition asks that EMRIP consider the potential applicability of the following points to other national and international contexts:

[15] See for example, Eva Jewell and Ian Mosby, *Calls to Action Accountability: A 2023 Status Update on Reconciliation*, Yellowhead Institute, December 2023. https://yellowheadinstitute.org/wp-content/uploads/2023/12/YI-TRC-C2A-2023-Special-Report-compressed.pdf; Assembly of First Nations, Walking the Healing Path: Progress on Realizing the Truth and Reconciliation Commission's Calls to Action, June 2022. https://afn.bynder.com/m/7525714cc5a982b0/original/Progress-on-Realizing-the-Truth-and-Reconciliation-Commission-s-Calls-to-Action-June-2022.pdf

- As a core component of their mandates, national commissions of inquiry concerning systemic violations of the rights of Indigenous Peoples should be empowered and resourced to establish permanent, publicly accessible archives of the documentation and testimony that they gather, consistent with the UN Joinet-Orentlicher Principles on bear witness to grave human rights violations.

- Where Commissions of Inquiry concern matters of such urgent importance, independent, ongoing mechanisms should be established to provide credible assessment of implementation measures, including revisiting recommendations as needed to reflect changing needs and circumstances.

ENDORSED BY:

British Columbia Assembly of First Nations; British Columbia Treaty Commission; First Nations Summit; KAIROS: Canadian Ecumenical Justice Initiatives; Canadian Friends Service Committee (Quakers); Union of British Columbia Indian Chiefs; Cheryl Knockwood, Chair, Nova Scotia Human Rights Commission; Katsi'tsakwas, Ellen Gabriel; Hup-Wil-Lax-A, Kirby Muldoe, Tsimsian/Gitxsan Grassroots Human Rights Defender; Lea Nicholas-MacKenzie.