**MANITOBA KEEWATINOWI OKIMAKANAK, INC.**

**NGO in Special Consultative Status with ECOSOC**

**SUBMISSION TO:**

**EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES**

**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”**

**“Visioning an UNDRIP Implementation and Action Plan:**

**Making UNDRIP Enforceable in Canada”**

**The Manitoba Keewatinowi Okimakanak Inc. (MKO) is an NGO in Consultative Status with ECOSOC. MKO represents the 67,000 citizens of the twenty-six First Nations in northern Manitoba, Canada. The MKO First Nations entered into Treaty No. 4, Treaty No.5, Treaty No. 6 and Treaty No. 10 with the Crown of Great Britain and Ireland on behalf of the Dominion of Canada between 1874 and 1910.**

**MKO’s 17-Year Engagement Process on UNDRIP Implementation in Canada:**

MKO responded to the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* by the United Nations Human Rights Council on June 29, 2006 and by the United Nations General Assembly on September 13, 2007 by collaborating in and supporting the development, introduction and consideration of national legislation and constructive measures that would recognize and affirm the Declaration as a universal international human rights instrument with application in Canadian law. MKO supported the development and introduction of Bill C-569, the *Declaration on the Rights of Indigenous Peoples Act*, which was introduced and given first reading on June 18, 2008. MKO also supported the reintroduction of Bill C-569 as Bill C-469 on January 28, 2013 and the introduction of this legislation on April 21, 2016 as 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*.

On December 3, 2020, Canada’s Minister of Justice introduced and gave first reading to Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act*. MKO appeared before the House of Commons Standing Committee on Indigenous and Northern Affairs and before the Standing Senate Committee on Aboriginal Affairs (as it then was) to recommend several amendments to Bill C-15. The theme and objectives of MKO’s recommended amendments to Bill C-15 were guided by the outcomes of MKO’s engagements with the MKO First Nations and MKO citizens, which universally began with or included the question being asked, “is UNDRIP enforceable in Canada?”. The objective of MKO’s recommended amendments to Bill C-15 were therefore to “make UNDRIP enforceable in Canada”.

As set out in a March 25, 2021 presentation of Chief David Monias of the Pimicikamak Okimawin, acting as Vice-Chief of MKO, entitled, “Making UNDRIP Enforceable in Canada”:

***“The central objective in making the principles of UNDRIP enforceable in Canada is to turn the legal and constitutional paradigm around 180 degrees... by having mining companies and forestry companies and energy companies take Canada to court over actions taken by government to recognize, affirm and protect Indigenous rights... instead of the current and historic paradigm in which First Nations endlessly take Canada to court for failing to take actions to recognize, affirm and protect Indigenous rights...”***

Bill C-15 was given Royal Assent and became law on Canada on June 21, 2006 as the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (the “UNDA”).

**Making UNDRIP Enforceable in Canada**

The “Lessons Learned” and the lived experiences of the MKO First Nations about the practical enforcement of rights recognized and affirmed by s. 35 of the *Constitution Act, 1982* is that, since 1982, Canada has done a very poor job of making administrative and judicial decisions to give practical effect to the protection of the rights of Indigenous peoples that are recognized and affirmed by s. 35 of the *Constitution Act, 1982*.

None of MKO’s detailed statutory amendments to what was then Bill C-15 were incorporated into the UNDA as passed by Canada’s Parliament, with the result that Canada’s national legislation remains aspirational and is not enforceable as a universal international human rights instrument with application in Canadian law. In order for Canada to move beyond aspiration and ambition and to achieve the ends of the Declaration, it is necessary for these ends to be statutorily mandated and for these laws, measures and reforms to be constructively interpreted and administered and subject to judicial notice.

On December 30, 2022, MKO presented to Canada’s Minister of Justice a comprehensive “UNDRIP Implementation and Action Plan”, which sets out a suite of amendments to the laws of Canada – including to the UNDA. MKO says these amendments are necessary to ensure consistency with and to achieve the ends of the Declaration and *“to make the principles of UNDRIP enforceable in Canada.”*

The *United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan* that was submitted by the Minister of Justice to the Parliament of Canada on June 21, 2023 does not call for any of the specific legislative or policy amendments recommended by MKO and remains largely aspirational in respect of achieving the ends of the Declaration. The Action Plan submitted by the Minister does not “make UNDRIP enforceable in Canada”.

**Non-Derogation or Constructive Affirmation?**

While non-derogation clauses have historically been included within several national laws in Canada, MKO takes the position that s. 35 of the *Constitution Act, 1982*, establishes a constitutionally enforceable obligation to ensure that federal and provincial laws do not, nor are interpreted so as to, abrogate or derogate from or unjustifiably infringe the aboriginal and treaty rights of the aboriginal peoples of Canada.

It is uncontroversial that judicial notice must be given to s. 35 of the *Constitution Act, 1982*, and at the same time, to s. 52 (1) of the *Constitution Act, 1982*, the latter which provides that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

However, this is precisely the current paradigm that MKO suggests must be reversed 180 degrees, as described by Chief Monias to the Senate Committee as reiterated above, in order to meaningfully give effect to and give constructive affirmation of the principles and to achieve the ends of the Declaration.

MKO’s central objective is to expressly ensure that the federal Crown and its officials are subject to an enforceable obligation to “read in” s. 35 of the *Constitution Acy, 1982* and the principles of the Declaration into the construction, application and administration of federal laws, particularly in order to address “gaps” in those statutory mechanisms necessary to constructively recognize, affirm and protect rights and where there are unmistakable conflicts in laws.

That is, any non-derogation provision in an *Interpretation Act* in Canada must be ***constructive*** in terms of processes and mechanisms that will be established, implemented, monitored and enforced, as distinct from merely ***aspirational*** or ***presumptive*** in respect of the constitutional correctness or alignment with the UNDA of any action or decision of the federal government.

**Application of s. 5 and s. 6 of the UNDA – Moving to Include All Legislation, Policies and Guidelines -**

Section 5 of the UNDA is the central operative provision of the Act. Section 5 requires that the “Government of Canada take all measures necessary to ensure that the laws of Canada are consistent with the Declaration”. However, there is no definition of the “laws of Canada” in the UNDA, with the result that the definitions of “enactment” and “regulation” as set out in the *Interpretation Act* would likely apply to determine the scope of the necessary “measures”. The *Canadian Bill of Rights*, S.C. 1960, c. 44, at s. 5(2), does contain a definition of a “Law of Canada”, which generally encompasses the definitions of “enactment” and “regulation” as set out in the Interpretation Act:

*"Law of Canada" defined*

*(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.”*

**Amending the Laws of Canada - A Practical Example of Achieving the Ends of the Declaration in Canada**

The expenditures by the MKO First Nations on essential community infrastructure, operations and services are almost entirely derived from federally-sourced funds, none of which funds are provided subject to express statutory obligations or measurable and enforceable standards arising from the laws of Canada. As extensively explored by the Supreme Court of Canada in *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, these funds are provided as a matter of policy pursuant to a Comprehensive Funding Agreement and not pursuant to a Treaty or agreement nor as a result of any statutory obligation.

As set out in Canada’s collaborative self-government fiscal policy, in part:

<https://www.rcaanc-cirnac.gc.ca/eng/1566482924303/1566482963919>

*Renewing the fiscal relationship*

*The fiscal relationship among Canada and Indigenous Governments is fundamental to the success of self-government. The fiscal relationship should seek to ensure that:*

*14.1. Indigenous Governments have sufficient fiscal resources to fulfill their responsibilities under their agreements and the associated expenditure need, and to provide public services that are reasonably comparable to public services available to other Canadians*

*14.2. Indigenous peoples have equal opportunities for well-being as other Canadians and that governments work to achieve and maintain socio-economic equity between Indigenous peoples and other Canadians*

*14.3. Indigenous Governments have the means to preserve, protect, use, develop and transmit to present and future generations their languages and the past, present and future manifestations of their cultures*

All of these policy objectives set out in Canada’s collaborative self-government fiscal policy clearly touch on principles set out in the Declaration and s. 5 of the UNDA. However, as noted, the achievement these of policy objectives is not rooted in any legislative or regulatory obligation setting out deterministic standards subject to being measured, monitored and enforced, including by the courts.

The determination and provision of the funding of expenditures for public safety and well-being, water systems, housing, policing, administrative operations, fire protection and other essential services are established by policy and not by any statutory obligation with expressly measurable and enforceable standards or objectives. The statutory authority for the Minister to enter into funding agreements flows from the Treasury Board submission approval process governed by the *Financial Administration Act* and by legislation related to the Business of Ways and Means and the Business of Supply.

It is not clear whether “laws of Canada” in the context of s. 5 of the UNDA includes the *Financial Administration Act* and legislation related to Ways and Means and Supply and thus to apply the principle of the Declaration and the UNDA so as to require the reform of the policies and arrangements by which First Nations receive funding.

There is, at present, no federal statutory framework governing the definition, provision and operation of First Nation essential services and infrastructure. The only potentially applicable federal statutory “standard” of which MKO is aware is s. 36(1)(c) of the *Constitution Act, 1982*:

*Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to*

*(…)*

*(c) providing essential public services of reasonable quality to all Canadians.*

The MKO “UNDRIP Implementation and Action Plan” recommends that Canada amend s. 2 of the *Department of Indigenous Services Act*, S.C. 2019, c. 29, s. 6 to include the following definition:

*“essential service” means a service, facility or activity of an Indigenous governing body, an*

*Indigenous organization or Indigenous peoples for which the Minister or Government of Canada exercises a policy objective or statutory obligation to support that is or will be, at any time, necessary for the safety or security of the Indigenous governing body, Indigenous organization or Indigenous peoples and shall be subject to defined standards of substantive equality, reasonable comparability, adequacy and effectiveness against which the achievement of such standards are subject to monitoring, evaluation, audit and enforcement.*

Therefore, the scope of any national Action Plan to operationalize s. 5 and s. 6 of the UNDA must expressly include the alignment of the non-statutory policies and guidelines that primarily govern Canada’s conduct of the “relationship among Canada and Indigenous Governments” to be consistent with the Declaration and the UNDA.

**MKO’s Proposed Amendments to the UNDA and Consequential and Other Amendments:**

Further to s. 5 of the UNDA, MKO makes the following recommendations to amend laws of Canada to be consistent with the Declaration as set out in the Schedule to the UNDA:

1. Amend the *United Nations Declaration on the Rights of Indigenous Peoples Act* to include a consequential amendment of the Interpretation Act to establish an enforceable “UNDRIP affirmation clause”:

***“Every Act or regulation is to be interpreted and administered in accordance with the United Nations Declaration on the rights of Indigenous Peoples and no Act or regulation is to be interpreted or administered so as to abrogate or derogate from that Declaration.”***

2. Amend Section 4(a) of the *United Nations Declaration on the Rights of Indigenous Peoples Act* by stating:

***“The purpose of this Act is to:***

***a) affirm the Declaration as a universal international human rights instrument and expression of binding principles of international treaty law and customary international law with application in Canadian law as both a source of interpretation and source of law.”***

3. Amend Section 2 of the *United Nations Declaration on the Rights of Indigenous Peoples Act* by replacing the present non-derogation clause to reflect the language of the proposed consequential amendment to the Interpretation Act:

***“This Act is to be interpreted and administered as protecting the aboriginal or treaty rights of the Indigenous peoples of Canada that are recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them.”***

4. Amend the *United Nations Declaration on the Rights of Indigenous Peoples Act* by including the following clause:

***“This Act is to be interpreted and administered as upholding the rights of Indigenous peoples as proclaimed in the Declaration and nothing in this Act is to be interpreted or administered so as to diminish, abrogate or derogate from those rights.”***

5. Taking into account s. 17 of the *Interpretation Act*, amend the *United Nations Declaration on the Rights of Indigenous Peoples Act* to ensure the Crown is bound by the amended Bill C-15 and the requirement to enforce the principles of UNDRIP in Canada:

***“The Crown is bound by this Act” or “This Act is binding on His Majesty in right of Canada****”.*

6. To amend the *United Nations Declaration on the Rights of Indigenous Peoples Act* to include a consequential amendment to the Interpretation Act to include a Universal Non-Derogation clause similar in structure to the recommended UNDRIP affirmation clause:

***“Every Act and regulation is to be interpreted and administered as protecting the aboriginal or treaty rights of the Indigenous peoples of Canada that are recognized and affirmed by section 35 of the Constitution Act, 1982, and not as abrogating or derogating from them.”***

7. To amend the *United Nations Declaration on the Rights of Indigenous Peoples Act* to include in the substantive provisions of the Act that the intent of the whereas provision of the Act which states, “Whereas all doctrines, policies and practices based on or advocating the superiority 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;” by Including in further amending legislation a consequential amendment to the federal Interpretation Act to state:

***“Judicial notice shall be taken that the doctrine of discovery and the doctrine of terra nullius do not form part of the statutory or common law of Canada.”***

8. That the *Guide to Making Federal Acts and Regulations* be amended to include: <https://www.canada.ca/content/dam/pco-bcp/documents/pdfs/fed-acts-eng.pdf>

1. at paragraph 2 of page 7 and immediately following “by the existing Aboriginal and treaty rights recognized and affirmed by section 35 of the Constitution Act, 1982”:

***“by the principles set out in the United Nations Declaration on the rights of Indigenous Peoples”***

1. to add a new paragraph following paragraph 6 on page 34:

***“The laws of Canada are to be developed, interpreted and administered as upholding the rights of Indigenous peoples as proclaimed in the United Nations Declaration on the rights of Indigenous Peoples.”***

1. the final paragraph at page 34 be amended to state:

***“It is also important to keep in mind that Canada has had three systems of law since the Quebec Act of 1774: common law and civil law and the Customary Law of Indigenous People.”***