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Prepared By: Native Women’s Association of Canada

Prepared For: Expert Mechanism on the Rights of Indigenous Peoples

Date: January 31, 2024

Re: Call for inputs on establishing effective mechanisms at the national and regional levels for implementation of United Nations Declaration on the rights of Indigenous Peoples.

*Overall analysis:*

Canada has taken meaningful steps to breathe life into the rights affirmed within the UNDRIP by passing federal legislation promising to align all federal laws with the UNDRIP. Canada co-developed an Action Plan to implement this legislation through engagement with Indigenous organizations and communities, including the Native Women’s Association of Canada (NWAC). Canada has begun taking concrete steps to affirm Indigenous Rights as elucidated in the UNDRIP, but has a long journey to reconciliation that requires substantial increases in funding, legislative amendments, judicial rulings and mechanisms for redress and enforcement.

After all, what is a right without a remedy?

*Indigenous gender rights, the UNDRIP, and Canada*

 The rights elucidated in the UNDRIP are inherent rights Indigenous people already possess, and yet many cannot freely access and claim them in Canada. The UNDRIP lays out these rights within its Articles, and Canada must now enforce these rights. These rights are inherent, and minimum standards to ensure Indigenous Peoples’ wellbeing. Until now, Canada’s colonial laws and policies have not prioritized these minimum standards, and this is a chance to do better. The UNDRIP is Canada’s framework for reconciliation, and the Action Plan is Canada’s chance to make good on that promise.

 Indigenous Women, Girls, Two-Spirit, Trans and Gender-Diverse (WG2STGD+) People in Canada face specific barriers to accessing their Indigenous rights. These barriers include the lack of clarity surrounding gender equality rights under s. 35 of the *Constitution Act, 1982*, the Canadian government's historic disregard for the treaties signed with Indigenous People, the pattern of excluding Indigenous women from decision-making frameworks, provincial and federal divisions that obstruct Indigenous People's right to self-determination, sex-based discrimination within Indigenous governing bodies, and colonial harms.

*Canada has set the framework and begun implementation*

 In June 2021, Canada enacted the *United Nations Declaration on the Rights of Indigenous Peoples Act*.[[1]](#footnote-1) This Act mandated Canada to develop and implement an Action Plan to achieve the UNDRIP’s objectives and ensure Canada’s federal laws align with the rights affirmed in the UNDRIP. The Act mandated Canada to table the Action Plan within two years.

 NWAC applied to and was accepted to participate in funded engagements with Canada to provide priorities and feedback as Canada developed the Action Plan between 2021 and 2023. NWAC’s role was and remains to provide input from a Culturally Relevant Gender-Based Analysis (CRGBA+) perspective. NWAC held several virtual roundtables with experts in Indigenous laws, Indigenous WG2STGD+ People and Knowledge Keepers to develop a list of priorities for Canada’s UNDRIP Action Plan.

 NWAC submitted these priorities in two written reports (one [interim](https://nwac.ca/assets-knowledge-centre/NWAC-Interim-Report-UNDRIP-Nov-2022.pdf) and one [final](https://nwac.ca/assets-knowledge-centre/NWAC-UNDRIP-Final-Report-English.pdf)). NWAC also provided written feedback to Canada on its draft Action Plan documents.

 In June 2023, Canada tabled its Action Plan. This five-year Action Plan includes Measures to implement the UNDRIP. Throughout the drafting stages and upon its release, NWAC [expressed criticism](https://nwac.ca/media/nwac-canadas-undrip-action-plan-ignores-the-vital-role-of-indigenous-people-in-regaining-their-own-power-and-place) that Canada’s Action Plan did not affirm Indigenous WG2STGD+ People’s leadership in implementing the *UNDRIP Act*. NWAC remains critical that the Action Plan does not include timelines for achieving the Measures, enforcement mechanisms, nor redress mechanisms.

*NWAC participated in engagement to provide input*

Canada received NWAC’s input throughout 2022 and 2023 as it worked to build the Action Plan and begin its implementation.

Canada held biweekly meetings with NWAC to exchange updates on engagements, share feedback from Indigenous WG2STGD+ People, and express concerns about the forthcoming UNDRIP Action Plan. NWAC accommodated requests from Canada to provide additional materials at earlier deadlines. NWAC received draft Action Plan materials it was expected to respond to later than some other organizations, causing NWAC concern that as an Indigenous women’s organization, it was being disadvantaged on the basis of gender. NWAC expressed these concerns to Canada, including to the former Justice Minister David Lametti in a meeting held in March 2023.

*Canada did not integrate NWAC’s feedback amplifying UNDRIP’s role and gendered perspectives*

NWAC made written submissions, and held in-person and virtual consultations with Canada, repeating two key positions:

1. The UNDRIP Act implementation Action Plan must be amended to reflect Indigenous WG2STGD+ People’s gender-specific needs and roles; and
2. A non-derogation clause in the federal *Interpretation Act* must specifically affirm the rights contained in the UNDRIP.

Much of NWAC’s proposed wording, recommendations and feedback were not integrated into the UNDRIP Action Plan. Much of NWAC’s proposed changes amplified the importance of including Indigenous WG2STGD+ People’s perspectives, leadership and recognition within decision-making frameworks. Though Canada invited NWAC to provide such input, and specifically sought suggested wording to improve gender-responsiveness, these recommendations did not appear in the final [Action Plan](https://www.justice.gc.ca/eng/declaration/ap-pa/index.html).

NWAC’s recommendations for the UNDRIP Action Plan can thematically be described as belonging to one of the following three key changes:

1. Create measurable timelines (short, medium, and long-term) and assign responsible authorities for all measures;
2. Commit to address all 231 Calls to Jusice recommended by the National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG); and
3. Specify responsible authorities and dedicate sustainable funding.

Canada’s Action Plan and ongoing engagement with NWAC in the Action Plan’s implementation phase suggest the federal government is more interested in being seen to hear NWAC’s recommendations rather than meaningfully implement those recommendations and resolve systemic discrimination against Indigenous WG2STGD+ People.

Canada tabled Bill S-13, which seeks to amend the federal *Interpretation Act* with a universal non-derogation clause (NDC), clarifying that no federal legislation should be interpreted so as to derogate from Indigenous rights, as affirmed in treaties and under s. 35 of Canada’s *Constitution Act, 1982*. NWAC, and other Indigenous advocates, demanded that in order to give full effect to the Canada’s commitment to reconciliation by achieving the UNDRIP’s the UNDRIP must also be specifically named in the federal NDC. NWAC believes it is crucial a federal Interpretation Act NDC include section 35, treaty and UNDRIP rights to breathe life into reconciliation promises.

NWAC met with several government representatives and [appeared before](https://sencanada.ca/Content/Sen/Committee/441/LCJC/briefs/2023-10-05_LCJC_S-13_Brief_NWAC_e.pdf) the Senate Committee on Legal and Constitutional Affairs as they studied Bill S-13. To date, there has been no move to include the UNDRIP in the federal NDC, casting doubt as to how serious Canada is about advancing and protecting the rights affirmed in the UNDRIP. NWAC has not received a clear explanation for why the UNDRIP is not included in the proposed NDC.

*Limited judicial decisions shaping UNDRIP’s application*

Canada has not ruled on many cases interpreting the UNDRIP; more judicial rulings are necessary to advancing the UNDRIP’s application in Indigenous Peoples’ daily lives.

Lower court cases interpreting the UNDRIP’s application seem comfortable to consider it contextually when shaping their rulings, but have not gone so far as creating a standalone test for its application, with one notable exception in *Montour*. When read together, the current cases interpreting the UNDRIP’s application do not reach as far as bestowing it standalone authority when determining whether a right affirmed within the UNDRIP has been violated, but hint that this may occur in the future. For example, in [*Da'naxda'xw First Nation v. Peters*](https://canlii.ca/t/jw9z7), the Federal Court held that the plaintiffs could rely on the *UNDRIP Act* when “affirming their right to self-determination, participation in decision making, as well as requiring free, prior and informed consent in advance of implementing administrative measures that may affect them, including the confirmation of their governance custom.”[[2]](#footnote-2)

Some judicial decisions have gone so far as to downplay the UNDRIP’s application The BC Superior Court considered the provincial UNDRIP legislation to find that provincial legislators did not intend to create binding obligations.[[3]](#footnote-3)

Most recently, the Quebec Superior Court affirmed in R v Montour that the *UNDRIP Act*’s values, principles and rights are a valid source of interpretation in Canadian law.[[4]](#footnote-4) The Court in Montour supplanted a new test for assessing Indigenous rights, replacing the previous test from the Supreme Court of Canada’s *Van der Peet* ruling (the *Van der Peet* test). This new test, crafted in alignment with the *UNDRIP Act*, now requires Indigenous People affirming a right be able to:

1. Identify the collective right that an Applicant invokes;
2. Prove that such a right is protected by his or her traditional legal system; and
3. Show that the litigious practice or activity in question is an exercise of that right.[[5]](#footnote-5)

 The province is appealing the ruling, and it is expected to ascend to the Supreme Court of Canada for ultimate clarification.

*Indigenous Women continue to experience systemic violence in ongoing MMIWG genocide*

Canada’s National Inquiry into Missing and Murdered Indigenous Women and Girls (MMIWG) Calls on Canada to implement the UNDRIP to protect Indigenous women from discrimination within law and politics. While Canada’s *UNDRIP Act* implementation Action Plan makes reference to the national inquiry’s calls with promises to “end systemic violence against Indigenous women, girls and gender-diverse people,” its mechanisms for achieving this are vague and without concrete, measurable actions.

NWAC’s [annual review](https://nwac.ca/assets-documents/FEDERAL_ANNUAL_SCORECARD_ACTIONPLAN_2022-23_2023-06-01-030405_kxwx.pdf) of Canada’s progress addressing the national inquiry’s Calls for Justice in 2023 revealed a failing grade, denoting minimal progress on taking meaningful actions to end systemic violence against Indigenous WG2STGD+ People. This failure does not align with Indigenous Women’s affirmed right to equality, to be free from violence and discrimination and from state action to end systemic violence, all rights affirmed in the UNDRIP.

*Measures yet to be taken*

 Canada continues to table legislation and policies that refer to the UNDRIP without adequately ensuring that they truly align with the UNDRIP. There is currently no legislative monitoring mechanism in place at the federal level to review legislation for its alignment with the UNDRIP, only a promise that this may happen someday.

 Two notable pieces of recent federal legislation seeking to align with the UNDRIP have faced considerable scrutiny. [*An Act respecting First Nations, Inuit and Métis children, youth and families*](https://laws-lois.justice.gc.ca/eng/acts/F-11.73/FullText.html)seeks to affirm Indigenous People’s right to govern their own child and family service provision, but currently faces opposition from provinces seeking to retain jurisdiction over those areas. The decision from the Supreme Court of Canada on this issue is expected shortly. The [*Impact Assessment Act*](https://laws.justice.gc.ca/eng/acts/i-2.75/FullText.html) seeks to advance Indigenous People’s rights related to land management when the federal government assesses environmental impacts of proposed development projects. The Supreme Court of Canada recently [struck down](file:///C%3A%5CUsers%5Crodriguez%5CAppData%5CLocal%5CMicrosoft%5CWindows%5CINetCache%5CContent.Outlook%5C14NXX8C4%5CSupreme%20Court%20of%20Canada%2C) portions of this legislation, and only addressed Indigenous rights insofar as they were protected by the *Constitution Act*, *1982*, not the UNDRIP.

1. [*United Nations Declaration on the Rights of Indigenous Peoples Act*](https://laws-lois.justice.gc.ca/eng/acts/u-2.2/FullText.html), SC 2021, c 14. [↑](#footnote-ref-1)
2. *Da'naxda'xw First Nation v Peters*, 2023 FC 386 at para 67. [↑](#footnote-ref-2)
3. *Gitxaala v British Columbia (Chief Gold Commissioner),* 2023 BCSC 1680. [↑](#footnote-ref-3)
4. *R c Montour*, 2023 QCCS 4154. [↑](#footnote-ref-4)
5. *Montour* at para 1297. [↑](#footnote-ref-5)