Sheryl Lightfoot

Must Indigenous Rights Implementation Depend on Political Party? Lessons from Canada

Abstract

Canada and New Zealand were two of only four countries which voted against the United Nations Declaration on the Rights of Indigenous Peoples in 2007, before eventually moving to support. Since then, this declaration has influenced Canadian politics and practices, particularly the Truth and Reconciliation Commission's 2015 'calls to action', legislation, and subsequent action plans on both the federal and provincial levels. Different political parties' priorities affect the implementation of indigenous rights policies. Nonetheless, Canada demonstrates the importance of normative change, outside of legislation or formal policy change. Norms of co-development, co-design and co-drafting create opportunities for indigenous peoples to have a say in policies that affect them.

Keywords indigenous rights, Canada, Truth and Reconciliation Commission, United Nations, free, prior and informed consent

Sheryl Lightfoot is Anishinaabe, a citizen of the Lake Superior Band of Ojibwe, enrolled at the Keweenaw Bay Community. She is currently chair and North American member on the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP). She is a former Canada Research Chair in Global Indigenous Rights and Politics, and is a professor of political science in the School of Public Policy and Global Affairs at the University of British Columbia, as well as a faculty associate in the Institute for Critical Indigenous Studies.

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— Bernard Valcourt (Conservative Party of Canada), minister of aboriginal affairs and northern development, Canada

I agree that it's unacceptable that some communities are still waiting. I can assure you that everywhere there's a long-term drinking water advisory left there's a project team and an action plan in place to resolve it.

— Justin Trudeau (Liberal Party of Canada), prime minister of Canada

In a manner analogous to New Zealand, the relational dynamics between the Canadian government and indigenous peoples undergo notable shifts in emphasis and tone corresponding to the government in power at any given time. While both countries generally acknowledge the imperative to engage with indigenous communities and pursue some form of restorative justice, the strategies employed often exhibit substantial variations, frequently contingent upon the political party in power. The October 2023 election in New Zealand is the most recent example of how widely political gyrations that can occur vis-à-vis indigenous peoples, when the Labour-led government was voted out in favour of a new coalition of the National, ACT and New Zealand First parties. In overly general terms, the political ideology of centre-right parties tends to prioritise economic and resource development, whereas centre-left parties frequently adopt a more social services-oriented approach centred on narrowing disparities. At the same time, however, when it comes to indigenous peoples, the public service has always had a tendency to view its role through the lens of effective service delivery rather than indigenous rights implementation as articulated in the United Nations Declaration on the Rights of Indigenous Peoples, or, put another way, as treaty partners, or in nation-to-nation style relationships. This prompts a critical enquiry: are divergent political ideologies fundamentally incongruent in the implementation of indigenous rights, or could there be viable avenues for more consistent realisation of indigenous peoples' rights, irrespective of partisan orientations and governmental changes, where the public/civil service plays a key role? Is there a way that indigenous rights, as defined by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), can be more consistently implemented within the public service and rise above huge variations in political will within different political ideologies and governing coalitions? While the two national contexts clearly differ in some important historical, geographical, legal and demographic respects, are there lessons from the Canadian experience implementing UNDRIP that are relevant to New Zealand's public service?

This article presents the Canadian experience implementing UNDRIP. It explores the mechanisms driving the implementation of UNDRIP in Canada, tracing Canada's evolving relationship with indigenous rights across several governing ideologies. Special attention is paid to the ongoing development of two concrete areas of implementation that are especially relevant to the public service: implementation legislation and action plans, which together help advance socialisation of partnership norms at both the federal and provincial levels of the public service. The convergence of these elements holds the potential to at least partially surmount political oscillations, fostering greater uniformity in the recognition and implementation of indigenous rights within the day-to-day workings of government.

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Indigenous peoples of Canada

Similarly to New Zealand, Canada was inhabited by indigenous peoples before contact and colonisation by European powers. Indigenous peoples of Canada include a multitude of cultures, languages and ethnicities, currently totalling approximately 1.8 million indigenous individuals and 5% of the total population (Statistics Canada, 2021). For comparison, approximately 900,000 New Zealanders identify as Māori, 17% of the population (Statistics New Zealand, 2023).

Unlike New Zealand, where the context for relationships between the indigenous peoples and the Crown is established by a national overarching treaty (te Tiriti o Waitangi), many agreements and treaties have been signed between the Canadian Crown and various indigenous peoples, including pre-confederation peace and friendship treaties, the Robinson treaties, the Douglas treaties, and then the numbered treaties, and more recent modern treaties since 1973 addressing land rights (Hall, 2011). The Canadian government has frequently breached obligations under these treaties and from time to time seeks to address these breaches through negotiating specific land claims (Gretchen, 2015). Existing treaties between the indigenous peoples of Canada and the Canadian Crown were reinforced by section 35 of the Constitution Act 1982, which forms part of the Canadian constitution. Section 35 recognises and affirms existing aboriginal and treaty rights.

Canada is a federal state, made up of ten provinces and three territories, with a population of approximately 40 million people, or eight times that of New Zealand. Provinces derive their power from the Constitution Act 1867, whereas territories are governed by federal statute that delegates powers. In theory, provinces have a great deal of power and are considered co-sovereign. Provinces are responsible for delivering the largest share of public services, such as health care, education and social welfare, funded through transfer payments from the federal government. In

practice, the policies relating to transfer payments afford the federal government considerable influence on how services are delivered (Beaudoin, 2006).

Canada's evolving relationship with UNDRIP

Canada's engagement with UNDRIP has been a complex and evolving journey, reflecting changes in the country's approach to indigenous rights and their implementation. There are a number of notable milestones and developments in Canada's relationship with UNDRIP over time, from initial resistance to eventual support, followed by subsequent concrete steps taken to implement indigenous human rights in a more consistent and long-lasting manner, where the public service plays a key role.

Canada was actively involved in, and generally supportive of, the drafting process and negotiation of the draft Declaration on the Rights of Indigenous Peoples between the launch of the UN Working Group on Indigenous Populations in 1982 by the Economic and Social Council (ECOSOC) and the consideration of the draft declaration at the Human Rights Council for decision in 2006 (House of Commons Standing Committee on Aboriginal Affairs and Northern Development, 2006). When the draft declaration came to a vote in the Human Rights Council in June 2006, Canada, under the leadership of Conservative prime minister Stephen Harper, cast a contentious vote against it. The vote against the draft declaration was primarily rooted in concerns about the potential impact of its provisions, particularly those related to free, prior and informed consent, resource development and national sovereignty. The government under Harper was apprehensive about how these provisions might limit its ability to make decisions about resource extraction on indigenous lands (ibid.).

When the draft declaration was presented to the Human Rights Council for a vote in 2006, only Canada and the Russian Federation, out of 47 members of the council, voted against (United Nations, 2006). Up until that point, Canada had a long-standing tradition of supporting and championing human rights on the global stage. Voting against the draft declaration in 2006 represented a stark departure from this long tradition, raising eyebrows both domestically and internationally. The vote sparked concern about whether Canada was willing to support and align with global standards on indigenous rights, as articulated in the draft declaration (Joffe, 2010).

In 2007, New Zealand voted against the declaration on the floor of the General Assembly while led by a centre-left government, and in 2010 announced its support for [United Nations Declaration on the Rights of Indigenous Peoples] under a centre-right government ...

The following year, Canada repeated its stance by voting against UNDRIP in the United Nations General Assembly. The only countries to join Canada in voting 'no' on the floor of the General Assembly were the United States, Australia and New Zealand, all of which gave very similar reasons for their opposition (Government of Canada, 2007). As in 2006, Canada's primary concern revolved around the right of self-determination and the concept of free, prior and informed consent, which was seen as a possible impediment to economic development on indigenous lands, often inaccurately described as an indigenous 'veto' (Papillon and Rodon, 2019). This vote further solidified Canada's image as a nation resistant to recognising the inherent rights of indigenous peoples on the international stage, contrasting with its usual global reputation as a human rights leader.

In the next couple of years, Canada's stance on UNDRIP began to gradually shift, and in 2010 the government, still under Prime Minister Harper, issued a qualified endorsement of the declaration. The government stated that while it could not fully support the document as written and this endorsement would not give latitude to change Canadian law, it would work towards implementing its principles in a manner consistent with the Canadian constitution (Government of Canada, 2010). This qualified support marked a subtle but significant change in Canada's approach to UNDRIP, given the contentious opposition votes at the Human Rights Council in 2006 and the General Assembly in 2007.

For context, New Zealand's position on UNDRIP also changed over the same period. In 2007, New Zealand voted against the declaration on the floor of the General Assembly while led by a centre-left government, and in 2010 announced its support for UNDRIP under a centre-right government (Key, 2010).

In the years to follow, the Harper government did little with its qualified support of the declaration, continuing to operate on the premise that full support was not plausible and not necessary, given the advanced legal framework in Canada, where section 35 of the Canadian constitution already recognised existing aboriginal and treaty rights. During these same years, the Truth and Reconciliation Commission of Canada (TRC) was working to address the legacy of residential schools and promote reconciliation between indigenous and non-indigenous peoples in Canada.

The Truth and Reconciliation Commission and its 94 'calls to action', released in June 2015 (Truth and Reconciliation Commission of Canada,

2015), played a pivotal role in bringing new attention to the need for implementation of UNDRIP in Canada. Many of the calls to action explicitly reference UNDRIP or are closely aligned with its principles. Call 43, for example, describes the adoption and implementation of UNDRIP as 'the framework for reconciliation in Canada' and specifically calls on 'federal, provincial, territorial and municipal governments to adopt and fully implement' the declaration. Additionally, several calls to action emphasise other key principles of UNDRIP, including self-determination, participatory decision making, and free, prior and informed consent, in decisions affecting indigenous peoples' rights. This alignment helped to draw attention to the relevance and importance of UNDRIP in addressing the historical injustices and ongoing challenges faced by indigenous peoples.

The TRC's emphasis on implementing UNDRIP throughout all levels and sectors of society demonstrated a new and very tight connection between domestic reconciliation efforts and international human rights standards. The normative discourse in Canada began to shift, in all sectors and at all levels, including within the public service.

The direct connection the TRC drew between reconciliation and UNDRIP implementation underscores the significance of UNDRIP as an internationally recognised framework for indigenous rights, and it raises awareness about the need for Canada to adhere to these standards and principles. Its call for the creation of mechanisms to monitor and report on the government's progress in implementing these actions also solidified the importance in adhering to international human rights standards (ibid.). This focus on doing day-to-day business differently as well as on accountability mirrors UNDRIP's emphasis on accountability and transparency in upholding indigenous rights. By highlighting the need for monitoring and reporting, the TRC contributed to a broader conversation about how to ensure UNDRIP's effective and consistent implementation.

Following the release of the calls to action in 2015, there was an increased level of pressure on the Canadian government, both domestically and internationally, to take more concrete and lasting steps towards reconciliation and the implementation of indigenous rights as articulated in UNDRIP. The TRC's work garnered significant public attention, leading to increased awareness and advocacy of indigenous rights. While, in the eyes of the Canadian courts, UNDRIP was not binding in Canada in the same way that international treaties and conventions are, the TRC's calls to action gave a significant boost to the declaration's normative effects and expectations. This broader public awareness, coupled with renewed political advocacy by indigenous leaders and organisations, created new momentum and political appetite for aligning Canadian laws, policies, and governmental practices, with the principles of UNDRIP in order to better advance reconciliation and justice for indigenous peoples.

In many respects, the Truth and Reconciliation Commission's calls to action were Canada's 'game changer' on UNDRIP. They brought renewed attention to the declaration, which had been nearly set aside by the Harper government following its 2010 partial endorsement and tepid response. Further, the TRC acted as an important catalyst, making clear the connection between domestic reconciliation efforts, in all sectors – public, private and non-profit – and the global normative framework provided by UNDRIP. The commission made the domestic applicability of UNDRIP explicit and highlighted the need for comprehensive recognition of and respect for indigenous rights in Canada at all levels of governance, and regardless of political party. The clear and concise direction provided by the TRC, which clearly defined reconciliation in Canada as implementation of UNDRIP, began to shift the public conversation on UNDRIP: from this point forward, one could not be opposed to UNDRIP without also being opposed to the TRC, and, conversely, supporting the TRC also necessarily meant supporting implementation of UNDRIP. Expectations within the public service also began to shift and an UNDRIP lens began to appear, gradually, in practice as individual public servants became aware of UNDRIP and its expectations for a more partnership approach to indigenous affairs.

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Just months after the release of the Truth and Reconciliation Commission's calls to action, the 2015 federal election in Canada brought about a change in leadership, with Justin Trudeau's Liberal Party forming the government. Fully implementing the calls to action was a piece of the Liberal Party's election platform, including, but not limited to, the implementation of UNDRIP (Trudeau, 2015).

In 2016, under the leadership of Prime Minister Trudeau, Canada announced its unqualified support for UNDRIP (Government of Canada, 2016). This marked a significant departure from the previous government's stance and signalled a commitment to recognising and implementing the rights of indigenous

peoples in accordance with UNDRIP. It committed Canada, as a whole, to shifting its behaviour vis-à-vis indigenous peoples. The minister of indigenous and northern affairs, Carolyn Bennett, stated that Canada is now a full supporter of the Declaration, without qualification, is an important step in the vital work of reconciliation' (ibid.). The minister further departed from the previous government's concerns about incompatibility between tenets of the declaration and Canadian law, affirming that this shift was 'breathing life into Section 35 of Canada's Constitution, which provides a full box of rights for Indigenous peoples'. Though there were many steps still to take before a complete box of indigenous rights could come to exist in Canada, full support of UNDRIP opened a door for formal frameworks to facilitate more consistent implementation at all levels of government.

Also in 2016, Cree member of Parliament Roméo Saganash introduced private member's bill C-262 in the House of Commons, which sought to ensure that Canadian law is consistent with the declaration. The Trudeau Liberal majority government, looking to translate its support for UNDRIP into legislative action, voted unanimously to adopt the bill. However, despite passing in the House of Commons (by 206 to 79 votes), the bill faced challenges in the Senate and ultimately failed to become law (Parliament of Canada, 2019). This setback underscored the complexities and challenges associated with implementing UNDRIP at the federal level despite ongoing and intensifying political will to do so among elected legislators.

While federal implementation of UNDRIP faced obstacles, the province of British Columbia took a proactive step by adopting its own implementation legislation in 2019, co-developed and co-drafted with indigenous peoples of the province, thus enacting the partnership principles of UNDRIP in the process of drafting legislation. British Columbia's Declaration on the Rights of Indigenous Peoples Act 2019 requires the provincial government to work collaboratively with indigenous peoples to align British Columbia's laws with the principles of UNDRIP. Reflecting both the Truth and Reconciliation Commission's and the declaration's emphasis on accountability, the Act requires that the provincial government draft an action plan to meet the declaration's objectives and conduct regular, transparent reporting on progress. Further, British Columbia reinforced the connection between domestic reconciliation efforts and the global framework offered by the declaration by citing the Act as part of the province's efforts to meet the TRC's calls to action. The Declaration on the Rights of Indigenous Peoples Act passed unanimously in the provincial legislature in November 2019, and its passage demonstrated the potential for other governments in Canada to develop their own implementation legislation, and work across party lines to do so.

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British Columbia's Declaration Act Action Plan, released in 2022, was also co-developed by the provincial government in partnership with indigenous peoples of the province. The action plan articulates the steps that all government ministries will take over a five-year period to implement UNDRIP within their portfolios. It includes 'achievable actions in the areas of self-determination and self-government, rights and title, ending anti-Indigenous racism, and enhancing social, cultural and economic well-being' (British Columbia, 2023).

In 2021, the federal government, still under Prime Minister Trudeau, introduced government bill C-15, which was also co-developed and co-drafted with national indigenous organisations. This legislation passed in both houses of Parliament, received royal assent and became law (An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples, 2021). The Act requires that the government of Canada ensure that the laws of Canada are consistent with the UN declaration and work actively to advance its objectives. Like British Columbia's implementation legislation, it contains a direct tie to the TRC's calls to action, enshrining the close relationship between domestic action and legislation and the UN declaration in Canadian law. This marks a significant milestone in Canada's efforts to implement UNDRIP at the national level.

Similarly to British Columbia's legislation, Canada's federal legislation also required the creation of a five-year national action plan, in consultation and cooperation with indigenous peoples of Canada. This plan 'outlines a whole of government roadmap for advancing reconciliation with indigenous peoples through a renewed, nation-to-nation, government-to-government, and Inuit–Crown relationship based on recognition of rights, respect, cooperation, and partnership as the foundation for transformative change' (Department of Justice Canada, 2023, p.20). Like in British Columbia, the vast majority of the steps outlined in the action plan are specifically directed at the public service, and represent the emergence of a new paradigm of partnership and cooperation rather than a top-down, public service delivery approach, even in the absence of significant implementation progress with the courts.

Slow legal progress and variations in political will

Amid increasing public and political awareness, but prior to mandates, actionable policy or implementation legislation, the objectives and principles

of UNDRIP appeared in court rulings at both the federal and provincial levels. Even before the draft declaration's consideration at the Human Rights Council in 2006, *Haida Nation v. British Columbia (Minister of Forests)* asked whether the Canadian government had a duty to consult with and accommodate indigenous peoples before making decisions that could affect indigenous rights and title claims and whether a duty of that nature would extend to other parties (Ugochukwu, 2020). The British Columbia Court of Appeals determined that both governments and third parties, including non-governmental organisations and corporations, were obligated to consult and accommodate. On appeal, the Supreme Court of Canada determined instead that 'third parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown' *(Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 SCR 511).

Thirteen years later, *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)* ([2017] SCC 54) considered the issue of indigenous sacred sites and the duty to consult and accommodate identified in *Haida Nation v. British Columbia (Minister of Forests)*. Though the Ktunaxa case demonstrated increased awareness of UNDRIP among participating lawyers making submissions in the case who encouraged the court to use UNDRIP as an interpretive tool, the Supreme Court ruling did not mention UNDRIP, nor does it draw on its objectives. In doing so, despite arguments in favour of UNDRIP being available to the Supreme Court, to inform their decision the court opted to adhere to the limits of precedent rather than the recent full endorsement of UNDRIP. In light of these rulings, Andrew M. Robinson finds that the Canadian constitution does not currently have 'a full box of UNDRIP rights' and that, in terms of sacred sites, Canada's constitutional jurisprudence appears to be 'out of step' with UNDRIP. Robinson therefore recommends against an over-reliance on the courts to implement UNDRIP and, rather, that a multi-pronged legislative, regulatory and constitutional approach should be taken (Robinson, 2020).

Norm socialisation and behavioural change

There have been hurdles in realising mandates, endorsement and policy at both the provincial and federal levels of government until very recently, and hesitance from the courts to depart from the limited rights afforded by precedent in favour of those laid out by UNDRIP. Federico Lenzerini, rapporteur of the International Law Association's Committee on the Implementation of the Rights of Indigenous Peoples, calls on scholars to continue to assess 'the level of effective implementation of the international legal standards concerning Indigenous peoples' rights – particularly those enshrined in the UNDRIP' (Lenzerini, 2019). Lenzerini urges scholars to make the results of their studies and the information they collect available to the public around the world so that they may push governments and international institutions to intensify their actions in the field and make the implementation of the declaration more effective. Indeed, behavioural change among public servants, private industry, scholars and institutions in favour of declaration implementation is firmly underway in Canada, at least in part due to the action plan and reporting mandates of implementation legislation.

While the federal obligation to UNDRIP does not directly extend to the regulatory level of industry, Basil Ugochukwu notes that corporations in Canada seem to understand that they also have obligations to uphold indigenous peoples' human rights (Ugochukwu, 2020). Canadian law is clear that states hold primary responsibility for protecting indigenous peoples' rights and that responsibility cannot be transferred to private corporations. Indeed, UNDRIP is not aimed at corporations, but at UN member states. Private industry is not mentioned in the declaration's articles or preambular paragraphs, but corporations are 'routinely implicated in situations and environments where massive violations of Indigenous rights have occurred' (ibid.), making private industry a key player in UNDRIP implementation. Ugochukwu argues that even though corporations are not specifically mentioned in the declaration, it is necessary to subject them to UNDRIP standards as a key part of implementation. This is particularly true for resource extraction industries, which are often located on indigenous peoples' lands, domestically and internationally. The key element for corporations is establishing free, prior and informed consent before a corporation engages in activity that might have an impact on the rights of indigenous peoples.

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The implementation of the principle of free, prior and informed consent is highly contested globally, and Canada is no exception. As in many other parts of the world, the norm is often problematically characterised as either a full indigenous 'veto' at one end of the spectrum, all the way to a procedural obligation to seek, but not necessarily obtain, consent (Papillon and Rodon, 2019). Canadian governments and industry tend to limit their interpretation of free, prior and informed consent to consultation, as seen in *Haida Nation v. British Columbia (Minister of Forests)*, and subsequent litigation, policy and practice (ibid.).

Rosemary Nagy agrees that the opportunity space for UNDRIP

implementation within section 35 of the Canadian constitution, which recognises aboriginal rights, is likely limited to 'mere tinkering with the colonial status quo' (Nagy, 2022). Nagy instead sees 'grassroots and transnational mobilisations and strategies' as the key to transforming systems and structures – including the public service – to align with UNDRIP. Where constitutional accommodations and court rulings have been limited in their interpretation of UNDRIP, especially regarding its application to private industry, Ugochukwu similarly argues that corporations are actually well equipped to work directly with indigenous peoples, engage with them and establish best practices (Ugochukwu, 2020).

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Demonstrations of free, prior and informed consent: private industry and indigenous normative implementation

Just as the UN Ruggie principles, which seek to voluntarily enshrine norms of social responsibility in private industry, favour offering guidance for non-governmental policy and practice over state mandates, the declaration provides guidance for private industry to shift practices related to free, prior and informed consent, even in the absence of governmental policy developments. Ugochukwu (2020) considers the applicability of UNDRIP to corporations, noting the preponderance of Canadian corporations with internal indigenous affairs departments and the formulation of indigenous policy principles to guide their actions. The rapid development of in-house policy among corporations is both an indicator of and a factor in increasingly consultative and relational practices between private industry and indigenous peoples.

The Canadian Council for Aboriginal Business has also created a monitoring mechanism for what they call 'progressive aboriginal relations' (Canadian Council for Aboriginal Business, 2022). Companies can earn gold, silver, bronze or committed status based on a number of metrics. Ugochukwu analyses the indigenous relations policies and practices of four corporations in Canada to assess the extent to which they are aligning with UNDRIP. Extending previous studies that examined business practices in Canada and how well they built relationships with indigenous peoples, Ugochukwu finds that UNDRIP has expanded the expectations for corporate and business practices. In some cases, policies are deliberately intended to align with UNDRIP; others purport to engage in best practice but make no mention of the declaration.

A number of indigenous peoples in Canada have begun to operationalise free, prior and informed consent through the creation of their own decision-making mechanisms, which can include community-driven impact assessments as well as full protocols. Papillon and Rodon (2019) highlight two cases in particular: the James Bay Cree mining policy and the community-driven impact assessment process of the Squamish Nation. The James Bay Cree mining policy was adopted in 2010. It indicates that the Cree are not necessarily opposed to mining development on their traditional territory, but states that all mining developments must respect existing policy. The forward to the policy indicates that no mining will take place without agreements with the Cree communities involved, and those agreements must take into account a range of environmental, economic and social concerns. While the policy has no legal force under Canadian law, its goal is to clearly lay out a process for the mining industry to follow, building on the existing duty to consult to encourage practices that better resemble free, prior and informed consent as articulated in the declaration.

The Squamish Nation created its own impact assessment process to assist it in decision making around development projects on its traditional territory and ensure that the nation's aboriginal rights and title are protected. In doing so, both the Squamish Nation and James Bay Cree redefined free, prior and informed consent beyond the duty to consult articulated by the federal and provincial governments, but rather as a question of indigenous jurisdiction over relevant projects. The process of engaging with free, prior and informed consent, then, moved away from being driven by the state to being a process driven by indigenous peoples. For example, the Squamish Nation signed an agreement with Woodfibre Natural Gas in 2014 wherein the project proponent agreed to three key considerations: financial coverage of the consultation process; information sharing; and, notably, a confidentiality clause meant to ensure that the proponent's engagement with the Squamish Nation did not substitute for the federal and provincial governments' duty to consult. This arrangement satisfied the need of the proponent to ensure legal certainty and provided a framework for the Squamish Nation to exercise authority in their territory, but was not recognised by the federal or provincial governments. Nonetheless, the Squamish Nation and proponent reached an agreement – including 25 conditions set out by the Squamish Nation and committed to by the proponent – subverting governmental hesitance around free, prior and informed consent and reframing what is expected of private industry. Even in the absence of governmental policy or participation supporting the implementation of the declaration, behavioural norms are shifting to support relational work on free, prior and informed consent between indigenous peoples and private industry.

Papillon and Rodon were writing before British Columbia's Declaration on the Rights of Indigenous Peoples Act and

federal implementation legislation, as provincial and federal governments sat on the precipice of necessary steps to move forward with UNDRIP implementation. Regardless, change was underway in society, well beyond governments. Neither the James Bay Cree nor the Squamish Nation developed frameworks or campaigns to be included in state government decision making regarding whether the duty to consult was fulfilled. Instead, both took ownership of free, prior and informed consent based on community-developed parameters and processes. This shift works to sever the association in Canada between free, prior and informed consent and the federal and provincial duty to consult, instead retying free, prior and informed consent to its declaration foundations in indigenous self-determination and wider expectations about relations between indigenous and non-indigenous peoples and institutions.

Takeaways for the public service

By 2023, Canada not only had federal legislation that provides a framework for implementing UNDRIP, but the province of British Columbia had similar legislation in place, which passed unanimously in its provincial legislature. Following the adoption of federal and provincial legislation, both levels of government worked in consultation and cooperation with indigenous peoples on action plans to guide the practical implementation of UNDRIP, primarily within the public service. These action plans aim to address various aspects of indigenous rights, including economic development, land and resource management and cultural preservation, and they do so by fundamentally shifting the approach of the public service on indigenous issues from a service delivery model to a partnership and government-to-government approach. Implementation legislation, in both cases, also mandates annual reporting on progress. Alongside these efforts, advances in the judiciary and practices in industry demonstrate wider socialisation of indigenous rights norms in Canada. Advances in industry that support the principles of UNDRIP, even in the absence of a clear regulatory mandate, indicate that the principles of UNDRIP are increasing in normative strength, and across political party lines.

One of the key takeaways in the Canadian experience with UNDRIP implementation is the crucial importance of legislation which mandates legal reviews but, more importantly for the public service, mandates clear and concrete action plans and reporting mechanisms. These action plans and reporting requirements immediately and tangibly change the incentives of public servants and encourage day-to-day adaptation of policies, procedures and approaches towards ones that align with the principles of UNDRIP, including consultation, cooperation and partnership approaches. While ruling parties and their ideologies will come and go, once implementation legislation and action plans are in place and operational, it would take much more political effort to dismantle them, so greater consistency in implementation is achieved.

Another important takeaway is the major role the public service and other non-political actors play in wider normalisation of the principles of UNDRIP. Alongside the development and passage of implementation legislation, judicial advancements and gradual alignment of corporate practices, the Canadian public service has also become much more dialogical, relational and consultative with indigenous peoples and organisations in recent years, consulting indigenous peoples frequently and carefully considering their views and concerns in policy development and implementation, across ministries. Agencies such as Indigenous Services Canada, the attorney general's office, Crown–Indigenous Relations and Northern Affairs Canada and Global Affairs Canada have all developed a robust and active consultative and partnership relationship with indigenous organisations and rights holders. Norms of co-development, co-design and co-drafting have emerged and taken firm hold among public servants both federally and in British Columbia, following the practice of indigenous participation in decision making in matters that affect them, which was modelled so effectively in the co-drafting of UNDRIP implementation legislation itself.

New Zealand and Canada were among only four countries in the world to oppose the United Nations Declaration on the Rights of Indigenous Peoples in 2007, before both changed their stance and issued statements of support in 2010.

Further, inquiries like the Truth and Reconciliation Commission offer an opportunity to advance implementation of UNDRIP in a normative manner, even as political will vacillates – sometimes wildly – with changes in ruling parties, and as implementation proceeds slowly and sometimes unevenly through the legal system. Inquiries like the Truth and Reconciliation Commission hold the entire nation accountable for the systems and structures that caused and continue to perpetuate injustices against indigenous peoples, and can play a crucial role in establishing a new normative paradigm, based on UNDRIP, for how state systems and structures should relate to indigenous peoples.

Conclusion

New Zealand and Canada were among only four countries in the world to oppose the United Nations Declaration on the Rights of Indigenous Peoples in 2007, before both changed their stance and

issued statements of support in 2010. The effects of the declaration on the Canadian government at both federal and provincial level have been significant, but effects in New Zealand are not as easily identified. From initial resistance to unqualified support, only 12 years passed between the Canadian government opposing UNDRIP, and the passing of provincial legislation in British Columbia in 2019 and federal legislation in 2021.

At the same time, the principles of UNDRIP, specifically the importance of indigenous participation in decision making, have become increasingly socialised and active throughout public and private life across Canada. While political parties will most certainly continue to debate the value of economic development versus social service provision in their relationship with indigenous peoples, the norms and principles of UNDRIP, which Canada is gradually adapting, provide a longer-lasting and more robust pathway to UNDRIP implementation of the declaration.

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