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# An Indigenous Response to Canada's UNDA Action Plan

This feedback was compiled primarily by FMB, with support and input from many Indigenous institutions. It was produced to communicate present concerns and ideas surrounding the UNDA Action Plan. More importantly, we are signaling the need and willingness for Indigenous institutions to have participation in the successful implementation of UNDRIP, as part of a long-term, ongoing and collaborative approach. Collectively, Indigenous institutions hold wisdom and knowledge, as well as the trust of Indigenous peoples and governments. Leadership and participation from these institutions greatly strengthens any efforts made by the Canadian government.

## Executive Summary

The Government of Canada, pursuant to the requirements of its domestic legislation, has developed a draft *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA) Action Plan to inform and advance implementation of the Act. Through the UNDA Action Plan, Canada has begun the task of how it intends to implement UNDRIP (*United Nations Declaration on the Rights of Indigenous Peoples*). The draft UNDA Action Plan has been met with concerns expressed by numerous Indigenous organizations. Many of those concerns revolve around the effectiveness of the measures contained in the plan and the extent to which it reflects the vision of UNDRIP.

In summary, the major concerns regarding the development and content of the UNDA Action Plan are:

- The development of the UNDA Action Plan must be Indigenous led. The current consultation process is insufficient. Instead, Indigenous Peoples should hold the pen and invite the Government of Canada to comment.
- Implementation of UNDRIP must be a whole-of-government approach, both at the federal level and in collaboration with the provinces and territories.
- The current UNDA Action Plan draft inadequately addresses the fiscal and economic powers and jurisdictions that Indigenous governments require.
- The Action Plan must provide a path for a meaningful sharing of wealth and authority.
- There must be an accountability framework in place to ensure monitoring and evaluation of the UNDA Action Plan. This accountability framework must be Indigenous led.
- The UNDA Action Plan must include language on Indigenous jurisdiction for the exercise of rights and powers.
- The Action Plan must provide optional paths to self-government for interested First Nations.
- The UNDA Action Plan must address Indigenous jurisdiction over lands and resources.



The First Nations Financial Management Board, as well as other Indigenous led institutions, are willing, ready, and able to move forward with the Canadian government in a stronger and more complete implementation of UNDRIP. Individually, these groups are already working with and supporting Indigenous nations and peoples in establishing greater autonomy, and healthier, wealthier nations. Working together, with Indigenous thought leadership like FMB's RoadMap as a guide, will help move the UNDA Action Plan forward in a good way.

## Vision

The UNDA Action Plan must mean a sharing of power between governments in Canada and Indigenous governing bodies, along with a transfer of wealth to ensure the sustainability of Indigenous governments. As originally intended through the treaty process, Indigenous governing bodies require the authority to govern and the fiscal capacity to fund the cost of government. As article 4 of UNDRIP states, “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”<sup>1</sup>

With the right to authority over “matters relating to their internal and local affairs,” Indigenous governing bodies require the sharing of power. Only when governments within Canada relinquish the keys to self-determination will Indigenous nations finally escape the barriers of colonialism and unlock their full potential. Authority over internal and local affairs necessitates decision-making power within clearly defined Indigenous authorities. As Stephen Cornell of the Harvard Project points out, “one of the most difficult things for non-Indigenous governments to do is relinquish control over Native nations.”<sup>2</sup> Yet the implementation of UNDRIP requires nothing short of expanded jurisdictions and decision-making power, as well as strong institutions to support the capacity to govern.

With the right to “ways and means for financing their autonomous functions,”<sup>3</sup> Indigenous governing bodies require a new fiscal relationship based on revenue, not on transfers alone. Funding based on programs and services will never achieve self-determination. Instead, Indigenous Services Canada must get out of the way.

Indigenous governing bodies, like all governments, require independent revenue to fund the cost of governing, without interference from other governments. There must be a new fiscal relationship based on the sharing of fiscal powers and resource revenue. A revenue-based fiscal relationship will reduce federal control over Indigenous decision-making, fund the cost of government, and support Indigenous self-determination.

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<sup>1</sup> United Nations. *United Nations Declaration on the Rights of Indigenous Peoples*. Adopted in 2007.

<sup>2</sup> Stephen Cornell and Joseph P. Kalt. *Two Approaches to Economic Development on American Indian Reservations: One Works, the Other Doesn't*. Harvard Project on American Indian Economic Development and the Native Nations Institute for Leadership, Management, and Policy on behalf of the Arizona Board of Regents, 2006. Pg.18.

<sup>3</sup> United Nations, *ibid*.

## Economic Reconciliation

Indigenous Peoples have long been ready for economic reconciliation and are eager to unlock economic growth. Indigenous Peoples and governments know that with independent revenues and new fiscal powers they will not only build prosperity in their own communities, but also provide a major boost to the Canadian economy.

The UNDA Action Plan needs to address economic reconciliation in a thorough and detailed way. Many Indigenous governments still face systemic barriers to achieving their governance and economic development goals. While the federal government has committed to new fiscal relationships with Indigenous nations, a practical plan forward needs to be developed.

Economic reconciliation is core to reconciliation. The Action Plan must be expanded to include more specific actions that drive economic reconciliation and fulfill the vision of UNDRIP. FMB's recently released RoadMap Project is an example of a practical, implementable pathway to economic reconciliation with full optionality for First Nations. RoadMap is a plan that breathes life into UNDRIP and supports the move from a system of the federal government managing poverty to a framework for First Nations generating wealth. While RoadMap's focus is First Nations specific, the principles and ideas presented therein can be expanded to other Indigenous communities and governments as well.

## Participation in Decision-making and Indigenous Institutions

### Co-Development vs Indigenous-led Co-Development

The term “co-development” is mentioned several times in the UNDA Action Plan. Distinctions-based consultation and cooperation are also used in the draft plan, as well as other documents released by the federal government in the past several years (departmental plans, legislation, policies, etc.). This approach is a significant departure from how legislation and policy regarding First Nations peoples, lands, and issues have been handled in the past by Canada. The departments and civil servants adapting to this new approach should be commended for acting in good faith and making inroads to reconciliation. But they need to come further still.

Good intentions and good faith towards reconciliation are positive first steps, but the resulting UNDA Action Plan still brings a somewhat paternalistic approach. The *Indian Act* was a top-down imposition, developed and enforced without consultation that First Nations people could not, do not, and will not trust. The federal government's attitudes and intentions with UNDRIP and UNDA are vastly different, but the top-down approach is similar. Without true co-development, UNDA may become another top-down, government plan that fails to garner trust from First Nations people.

A better approach, consistent with the articles of UNDRIP and the spirit of reconciliation, is for the federal government to transform from a “co-development” model to an Indigenous-led model. Indigenous nations across the country are growing their capacity, wealth, and opportunity with support from Indigenous-led organizations and wisdom from Indigenous thought leaders. Indigenous-led solutions such as the *First Nations Fiscal Management Act*, the *First Nations Land Management Act* (and subsequent *Framework Agreement on First Nations Land Management Act*), and Indigenous institutions such as the First Nations Financial Management Board, First Nations Finance Authority, First Nations Tax Commission,



Lands Advisory Board, National Indigenous Economic Development Board and many others support First Nations in making positive changes at a systemic level. Indigenous-led solutions are trusted by First Nations governments and people, have better contacts and experience in First Nations communities, and are agile enough to keep pace with the needs of First Nations – priorities that a top-down, federally driven initiative or department programs could never accomplish.

Indigenous-led co-development means Indigenous Peoples hold the pen and articulate what the implementation of UNDRIP means, what they need, and what they want to accomplish. Government officials can react and adjust accordingly. The participation process for the UNDA Action Plan needs to have First Nations representatives, Indigenous organization representatives, and government representatives at the same table to work out recommendations and proposals from Indigenous voices. A process similar to the New Fiscal Relationship tables between Canada and First Nations could be a means to achieve Indigenous-led co-development – working groups with expert advisors on lands, governance, infrastructure, etc.

The roles of First Nations governments and institutions must be recognized in the UNDA Action Plan and resourced accordingly to continue to build capacity in First Nations communities. Increased and sustained capacity in more Nations will allow for greater participation in Indigenous-led solutions, ensuring Nations know can determine the best ways for them to respond to UNDRIP's implementation and accurately represent their needs and goals. Capacity development and funding the cost of government for First Nations must be part of Indigenous-led co-development to allow for full engagement.

## Ensuring Oversight and Accountability on the Implementation of the Declaration

One of the largest challenges to successful implementation of the UNDA Action Plan is ensuring that it is a whole-of-government approach. Siloing the implementation of UNDRIP will mean movement in some areas and none in others, leading to improvements but not systemic change. The Government of Canada should endeavor to implement the UNDA Action Plan as a government-wide initiative. Additionally, it should convene a First Ministers' meeting to inform and advance the implementation of UNDRIP at the provincial and territorial levels.

The UNDA Action Plan does not sufficiently detail how the federal government will collaborate with First Nations governments and organizations in implementing these necessary steps to build trust, build capacity in Indigenous communities, and implement sufficient institutional frameworks to advance towards economic reconciliation. An Indigenous-led co-development model would include these aspects, whereas a top down, status quo model does not.

Other key features in implementation and accountability that need to be expanded upon are the mechanisms for monitoring and evaluating the effectiveness of proposed initiatives. The UNDA Action Plan acknowledges that it needs and plans to have these features, but there is no detail. This needs to be addressed in detail in any subsequent draft. All parties involved want accountability and transparency. The right metrics and measured progress over time holds the federal government as well as Indigenous

governments and organizations accountable to Indigenous Peoples.. Detailed timelines and associated metrics are required for each element detailed in the UNDA Action Plan.

Indigenous-led solutions need to be part of reporting and measurement of progress. Without a strong Indigenous-led presence in oversight and reporting, it will be difficult to ensure accountability for progress in the implementation of UNDRIP. The UNDA Action Plan should stipulate that reporting be done to both Parliament and an Indigenous body such as the Indigenous Advisory Committee. Indigenous-led perspectives on progress and measurement will garner better results than reporting to Parliament alone. The Indigenous Advisory Committee will have far greater trust from and more experience in First Nations communities, allowing them to ask the right questions and build the best metrics to measure success. Parliament will then be able to act more decisively, quickly, and with greater confidence in passing necessary legislation and developing policy to effect greater systemic change and live up to the commitments Parliament made in adopting UNDRIP.

## Indigenous Rights and the Means to Realize Those Rights

The Government of Canada's recognition of Indigenous rights through the adoption of UNDRIP is a critical step towards reconciliation. Yet the recognition of rights must be accompanied by the means to exercise them. There are two elements pertaining to rights that the UNDA Action Plan must address: consistency of their application, and the inclusion and implementation of jurisdiction and capacity to allow Indigenous peoples to exercise their rights.

The consistent application of rights requires a government-wide approach, and shared definitions, interpretations, and applications of Indigenous rights. If Indigenous rights are treated differently by different levels of government (resistance to legitimate land claims, for example), it will erode trust and undermine UNDA Action Plan initiatives. There must be a commitment and plan for a government-wide approach with core principles as to the application of Indigenous rights. It might be difficult to attain, but consensus on shared core principles is imperative to both early and sustained success of any UNDA Action Plan initiatives and needs to be included for successful implementation.

Along with the consistent application of rights is the ability to exercise them. Having rights without the means to exercise them is a hollow victory, and one that does not achieve reconciliation. The inclusion and implementation of jurisdiction will allow First Nations to exercise their rights. Starting with the UNDA Action Plan, anything pertaining to Indigenous rights should include elements about Indigenous jurisdiction. The UNDA Action Plan contains the word jurisdiction exactly one time, while discussing child and family services. Canada and Indigenous nations have the opportunity to prioritize this vital component of exercising Indigenous rights in the UNDA Action Plan. The Action Plan needs to include specific initiatives to strengthen financial management capacity, revenue generation, and economic participation to fund the real cost of government for Indigenous communities.

Ultimately, reconciliation must include a sharing of wealth through Indigenous rights, and a sharing of power through the recognition and exercise of Indigenous authorities. This was usually part of the fabric of the original intents of treaties signed between Indigenous nations and the Crown over the past few centuries. While these key facets of peaceful and equitable cohabitation of the continent were buried

and forgotten for a time, the adoption of UNDRIP and its implementation through the UNDA Action Plan represent an opportunity that Canada cannot miss.

## Self-Determination

Indigenous governing bodies have very little decision-making power compared to other levels of government within Canada, and only a fraction of the fiscal resources required to govern effectively. The UNDA Action Plan needs to include the language of Indigenous jurisdiction. It must create a path to clearly defined Indigenous jurisdictions, including taxation rights. It must outline the role of legislative authority for Indigenous governing bodies, and must ensure that federal, provincial, territorial, and municipal governments recognize Indigenous jurisdiction.

As a starting point, the UNDA Action Plan needs to address the following requirements:

- Jurisdictional clarity between Indigenous governing bodies and federal, provincial, territorial, and municipal governments
- Legal paramountcy of Indigenous laws in their jurisdictions and clearly defined taxation rights
- Standards for service delivery and option to transfer service responsibility to Indigenous governments
- Autonomy over expenditures and use of reserve lands
- A mechanism to facilitate and acknowledge nation-to-nation relationships

**The UNDA Action Plan must create pathways for Indigenous governing bodies to fund their governments.** This requirement means sharing the wealth generated from Indigenous traditional territories and collected by other levels of governments. Other levels of government within Canada fund their costs through transfers, taxes, fees, sale of natural resources, and financing. In contrast, the program-based transfer system that funds Indigenous governing bodies provides neither the fiscal capacity nor the autonomy needed to govern. The UNDA Action Plan must create options for Indigenous nations to fund their governments through secure, independent revenue and long-term financing. This improved fiscal capacity must include the following options:

- Expanded revenue resources
- Expanded fiscal powers
- Formula-based transfers
- Monetization of transfers and other revenue for financing
- Autonomy over expenditures

Support structures and institutions are also critical to self-determination. While legislation upholds the right to self-determination, capacity support bolsters the ability to govern well. As Indigenous nations renew their jurisdictions and fiscal capacity, they will also need to renew their administrative capacity to govern effectively. Strong Indigenous institutions can support implementation of the traditional governing practices of transparency, accountability, checks and balances, and the duty of care. Authority over clearly defined jurisdictions and strong governance practices and institutions create the conditions for economic and social development.

The UNDA Action Plan must include the following support structures:

- Support for Indigenous institutions and organizations
- Pathways for the creation of new Indigenous institutions supported by modern legislation, including institutions to support treasury board, auditor general, and budget officer functions
- Institutional support for economic development planning and exercise of jurisdiction over lands and resources
- Expanded financing options and opportunities for Indigenous governments to use the same financial instruments that other levels of governments access for long-term financing, including the monetization of revenue.

## Lands, Territories and Resources

Indigenous access to and jurisdiction over traditional territories and natural resources are paramount to reconciliation between Canada and Indigenous peoples, including economic reconciliation. The UNDA Action Plan speaks to gaining free, prior, and informed consent from Nations on their lands or territories, and more equitable benefits from natural resource development on their lands. While this is a good start, it needs to be expanded to create good economic climates in Indigenous nations, drive economic reconciliation, and provide the means to fund government.

The UNDA Action Plan should include the following:

- Expedited Additions to Reserve Policy
- Expedited, expanded Treaty Land Entitlement process
- Revenue sharing from resource projects on traditional territories
- Access to capital, so Indigenous nations can leverage their assets
- Clarification of jurisdiction and shared core principles that governments and industry adhere to when contemplating projects on traditional lands
- In the spirit of reconciliation, formal repudiation of the Doctrine of Discovery

Lands, territories, and resources are important to Indigenous governments and peoples for multiple reasons, including cultural and traditional uses, living space, and economic development. For those Indigenous nations that do choose to use their lands and resources for economic development purposes, there should be a more thorough economic development framework included with the UNDA Action Plan, and in future documents. A more comprehensive framework would include elements such as business development strategies, access to capital, development of infrastructure, and equity investment. The most effective way to achieve economic reconciliation is to include plans for economic reconciliation in future initiatives, starting with the UNDA Action Plan.





## Summary of Recommended Next Steps

- The consultation and participation process needs to have Indigenous representatives and government representatives at the same table to work out the recommended changes, such as working groups with expert advisors on lands.
- The UNDA Action Plan needs to do more to respond to the capacity needs of First Nations governments and recognize that First Nations need support mechanisms such as the Lands Advisory Board Resource Centre and FMB's work on financial accountability and transparency
  - o Other support mechanisms to support Indigenous capacity development in all facets will need to be identified and recognized in the UNDA Action Plan so communities are able to participate meaningfully in the implementation of UNDA.
- There needs to be more time for institutions representing First Nations to engage with communities to receive clear instructions and confirm their mandates as it relates to the UNDA Action Plan.
- The UNDA Action Plan must have optionality. Different components will be relevant to different Indigenous nations; options for UNDRIP's implementation must be mindful of this and adjusted accordingly.
- More detailed timelines, expectations, and metrics for measuring success are needed, along with reporting mechanisms on progress and methods to hold the government accountable to the implementation of the UNDA Action Plan.
- A plan for all levels of government, as well as the private sector, to participate in the implementation of UNDRIP in a consistent manner is required, along with reporting mechanisms and accountability.