TRUTH BEFORE RECONCILIATION NETWORK
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Briefing Note on Canada's Use of UNDRIP as Cover for implementing White Paper 2.0 National Termination Plan

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By Russ Diabo

Canada's National "*Reconciliation*" Plan is a response to the **United Nations World Conference on Indigenous Peoples**, held in 2014, where state governments committed to developing "*National Action Plans*" to implement the **United Nations Declaration on the Rights of Indigenous Peoples**.

The government of Canada plans on introducing a Bill into Parliament in December 2020 to implement the Canadian Definition of UNDRIP.

CANADIAN DEFINITION OF UNDRIP

In 2016, Canada gave qualified support to UNDRIP when Indigenous Affairs Minister, Carolyn Bennett "***We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution***." [emphasis added]

Since forming government in 2015, the current Trudeau government has been developing a **Canadian Definition** of UNDRIP, for example in April 2016, then federal Minister of Natural Resources, Jim Carr told the Standing Committee on Indigenous and Northern Affairs:

> "***the government is in the process of providing a Canadian definition to the declaration****…The government is currently in the process of providing greater clarity to these definitions…We are going to get there by following a process and a regulatory regime*". [emphasis added]

In May 2016, before Minister Bennett stated Canada's qualified support for UNDRIP, then federal Minister of Justice, Jody Wilson-Raybould told the UNPFII:

> "**There is a need for a national action plan in Canada, something our government has been referring to as a Reconciliation Framework**" [emphasis added]

Following this statement to the UN Permanent Forum on Indigenous Issues, then federal Justice Minister Jody Wilson-Raybould told the 2016 AFN Chiefs' Assembly in Niagara Falls:

> "*adopting the UNDRIP as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work required to actually implement it…**Ultimately, the UNDRIP will be articulated through the constitutional framework of section 35***." [emphasis added]

FEDERAL 10 PRINCIPLES ON INDIGENOUS RELATIONSHIPS

In 2017, then federal Minister of Justice, Jody Wilson-Raybould issued **10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples**, which undermine the international minimum standards regarding the rights of Indigenous Peoples, where the federal government acknowledges "*self-determination*" on one hand but then put it squarely under the umbrella of "*European assertion of sovereignty*", based on the colonial Doctrine of Discovery on the other hand.

In the "*10 Principles*", Canada does not directly refer to, but it continues to rely on its **Constitution Act 1867**, which was unilaterally passed by British parliament as the **British North America Act** over 150 years ago and enshrines these colonial systems and structures and the division of powers between the federal and provincial government, leaving no room for recognition of equal Indigenous jurisdiction and power, absent fundamental (constitutional) reforms, which are not contemplated in the "*10 Principles*".

Under international law, Indigenous Peoples are subjects of international law and the holders of internationally protected Indigenous rights. The federal "*10 Principles*" are a blatant attempt to lower or unilaterally undermine the essence of international obligations, international legal principles and international customary law.

RECOGNITION AND IMPLEMENTATION OF INDIGENOUS RIGHTS FRAMEWORK (LEGISLATION & POLICY)—WHITE PAPER 2.0

White Paper 2.0 is the **Recognition and Implementation of Indigenous Rights Framework** announced by the PM in the House of Commons on February 14, 2018 and includes federal policies and laws forming a "*Framework*", the Trudeau government wanted a one window concept through a single law and proposed a First Nations, Metis, Inuit, pan-Indigenous Bill to be introduced into Parliament by December 2018.

According to a September 2018, "*overview document*" from the federal government on the "*Rights Recognition*" Bill, the federal "*overview*" stated how the federal government would control "*recognition*" of "*Indigenous Nations and Collectives*":

> *"To summarize, the legislation could:*
- *enable the Government of Canada to **recognize Indigenous Nations and Collectives as legal entities with the status and capacities of a natural person***
- *enable the self-determined exercise of governance by **federally recognized** Nations and Collectives*

- *affirm Canada's intent to enter into government-to-government fiscal relationships with* ***recognized Nations and Collectives***
- *require Canada to co-develop further measures to support these elements****"*** [emphasis added]

This proposed "*Rights Recognition*" Framework Bill was rejected by First Nations across Canada so the federal government announced in October 2018, that it would delay the "*Recognition*" Bill until after the 2019 federal election.

However, federal Minister of Crown-Indigenous Relations announced at the same time, that:

> "*Our Government is committed to advancing the framework, and to continue actively engaging with partners on its contents…****We continue to make substantial progress in accelerating the recognition and implementation of Indigenous rights through policy changes and the development of the Recognition of Rights and Self-Determination Tables****…We look forward to continue working with our partners on developing more of this crucial framework.*" [emphasis added]

FEDERAL "RECOGNITION AND SELF-GOVERNMENT AGREEMENTS": A METIS/FIRST NATIONS TEMPLATE

There is now evidence that despite the wide-spread rejection by First Nations of the 2018 federal "*Rights Recognition*" Bill, when it comes to "*Recognition and Self-Government Agreements*" the federal government is promoting the same agreement the **Metis Nation of Alberta** and the **Metis Nation of Ontario** signed with Minister Bennett in 2019, before the federal election, as a template agreement to First Nations at individual discussion/negotiation tables.

The rejected 2018 "*Rights Recognition*" Bill would have recognized "*Indigenous Nations and Collectives as legal entities* ***with the status and capacities of a natural person***". [emphasis added]

Federal Minister of Crown-Indigenous Relations said in 2018, her government would "*continue to make substantial progress in accelerating the recognition and implementation of Indigenous rights through policy changes and the development of the Recognition of Rights and Self-Determination Tables*".

A clear example of federal "*progress*", is set out in section 7, of the **Metis Agreements (Alberta & Ontario)** and the **proposed First Nations template** listed here, which is being shopped at federal "*Recognition and Self-Determination Tables*":

> ***CHAPTER 7: LEGAL STATUS AND CAPACITY***
> *7.01 As of the Self-Government Implementation Date, the Métis Government and each of its Governance Structures* ***will be a legal entity with the rights, powers, and privileges of a natural person at law****, which include the capacity to:*

(a) enter into agreements and contracts with any person, government, organization, or other legal entity;
(b) acquire, hold, or dispose of property and any interests therein;
(c) sue or be sued and act on its own behalf in legal proceedings;
(d) hold, spend, invest, or borrow money and secure or guarantee the repayment of money borrowed;
(e) create, operate, contribute to, act as trustee of, or otherwise deal with trusts;
(f) be appointed as and act as an executor, administrator, or trustee of an estate; and
(g) do other things ancillary to the exercise of its rights, powers, and privileges. [emphasis added]

PART IV FIRST NATION X GOVERNMENT'S LEGAL STATUS, ROLE, JURISDICTION, LAWS, AND AUTHORITY

CHAPTER 7: LEGAL STATUS AND CAPACITY
7.01 As of the Self-Government Implementation Date, the First Nation X Government and each of its Governance Structures ***will be a legal entity with the rights, powers, and privileges of a natural person at law****, which includes the capacity to:*

(a) enter into agreements and contracts with any person, government, organization, or other legal entity;
(b) acquire, hold, or dispose of property and any interests therein;
(c) sue or be sued and act on its behalf in legal proceedings;
(d) hold, spend, invest, or borrow money and secure or guarantee the repayment of money borrowed;
(e) create, operate, contribute to, act as trustee of, or otherwise deal with trusts;
(f) be appointed as and act as an executor, administrator, or trustee of an estate; and
(g) do other things ancillary to the exercise of its rights, powers, and privileges. [emphasis added]

Essentially what the federal "*Recognition and Implementation of Indigenous Rights Framework*" involves is converting Indian Act bands through enabling "*self-government*" legislation into an ethnic Indigenous corporation, similar to a municipality, which is a provincial corporation.

As a 2016, internal federal Department of Indigenous Affairs document titled "*Regulatory Gap and Jurisdiction Working Paper"* explains:

"*Power of natural person - The concept of "natural person powers reverses the concept of prescriptive delegation of authority by giving to municipalities all of the powers and capacity of a natural person. Thus, the municipality is given the power to enter into contracts, deal with all matters of an administrative nature, buy and sell goods and services, buy and sell land, hire and fire employees, make investments and borrow money. Therefore, natural person powers are intended to give municipalities greater latitude in its ability to act administratively."However, as a natural person, municipalities do not have the power to make laws, this is addressed by "spheres of jurisdiction" provision, as discussed in the paragraph below.*"

"*Spheres of Jurisdiction - Unlike most prescriptive legislative authorities that stipulate very narrow areas under which regulations may be enacted, spheres of jurisdiction allows municipalities to govern within broad areas. Municipalities are free to interpret whether they are operating within the sphere of jurisdiction they have been assigned, rather than continually request express permissions from the province*."

Prime Minister Justin Trudeau said in 2016 "*Indigenous governments' are the fourth level of government in this country*." We now know he meant federally "*recognized*" "*Indigenous governments*" as a federal ethnic corporation, lower in status than the federal, provincial and municipal levels of government.

FEDERAL 'INHERENT RIGHT' TO "SELF-GOVERNMENT" POLICY

The **1995 'Inherent Right' to "Self-Government" Policy** was imposed by then Prime Minister Jean Chretien and remains the umbrella policy of the federal government in 2020.

A **Summary of the Federal 'Inherent Right' Policy** was done by the Assembly of First Nations in 1996, when they were still doing critical analysis of federal policy. The AFN summary of the Policy states:

INHERENT RIGHT POLICY [1995-2020]

- *Federal government says it recognizes that s.35 includes the "inherent right of self-government"*
- *Federal government limits & restricts the nature & scope of the right through its policy*
- *Federal government wants to get [First Nations] consent to a narrow definition of rights*
- *Federal government requires provincial role & allows provincial veto*

CANADA'S DEFINITION OF "INHERENT"

- *Matters that are "internal" & "integral to the culture" of a First Nation ie., internal governance, reserve lands, administration, delivery of services, culture*
- *Canada still retains ultimate control by defining the limits to what can be negotiated under each heading*

AREAS WHERE CANADA WILL DELEGATE

- *matters where Canada will not recognize any inherent right*
- *Canada will only delegate: [First Nations] must recognize paramount federal authority*
- *ie., taxation; trade & commerce; justice; gaming; fisheries; etc.*
- *Provinces get vetoes in their areas [section 92 constitutional powers]*

NON-NEGOTIABLES

- *Self determination*

- *Extinguishment & terra nullius*
- *Sovereignty, international treaty-making*
- *International trade, import & export;*
- *Trade & commerce*
- *Criminal law*
- *Fiscal policy*

[RECOGNITION TABLES, LEGISLATION, NEGOTIATIONS 2020]

- *the same "inherent right" policy is being applied by Canada at every [discussion and] negotiating table*
- *Canada's intention is to use negotiations to get [First Nations] consent to a narrow definition of the nature & scope of Aboriginal & Treaty rights*
- *in the process, fiscal resources are capped or reduced*
- *federal Crown abandons responsibility to ensure that needs are met without assuring adequate revenues for First Nations [new "Self-Government Fiscal Policy"]*

[FEDERAL LEGISLATION OVER FIRST NATIONS & INDIGENOUS PEOPLES]

- *continue interference by legislating in areas that even Canada admits are internal to [First Nations] and integral to their culture -ie., elections, lands, definition of "Band"*
- *modify legislative base to facilitate 'inherent right' negotiations*
- *consolidate ultimate control of Minister*
- *use legislation to limit nature & scope of right: [First Nations] consent when they opt-in*

FIRST NATION COMMUNITY LAND BASE – FROM RESERVES TO PRIVATE PROPERTY

One of the objectives in the 1969 White Paper on Indian Policy was the "*Control of Indian lands should be transferred to the Indian people*."

The 1969 White Paper laid out the process to eliminate Indian Reserves through different steps as follows:

> "***Between the present system and the full holding of title in fee simple lie a number of intermediate states. The first step is to change the system under which ministerial decision is required for all that is done with Indian land****. This is where the delays, the frustrations and the obstructions lie. The Indians must control their land.*"
>
> "*This can be done in many ways. The Government believes that each band must make its own decision as to the way it wants to take control of its land and the manner in which it intends to manage it.* ***It will take some years to complete the process of devolution****.*"

> "*The Government believes that full ownership implies many things. It carries with it the free choice of use, of retention or of disposition. In our society it also carries with it an obligation to pay for certain services.* ***The Government recognizes that it may not be acceptable to put all lands into the provincial systems immediately and make them subject to taxes****. When the Indian people see that the only way they can own and fully control land is* ***to accept taxation the way other Canadians do****, they will make that decision*." [emphasis added]

During his tenure as Prime Minister, Jean Chretien (1993-2003) saw his opportunity to have his 1969 White Paper objectives adopted and implemented through federal policy and laws by his government.

Besides the 'Inherent Right' Policy, the Chretien government passed the **First Nations Land Management Act** and the **First Nations Fiscal Management Act** to assimilate First Nations into Canada's property and tax systems.

Since the Conservative Harper government, a **First Nations Private Ownership Initiative** (proposed legislation) is being worked on by the federal bureaucracy to privatize former reserve lands into private property (fee simple) as the next step following the development of **First Nations Land Codes** (under the **FNLMA**).

The Trudeau government has renamed this privatization land scheme as the **Indigenous Land Title Initiative**, but it is still a private property policy.

Self-Government Agreements like **Nisga'a**, **Sechelt** and **Tsawwassen** are examples of the final goal of the federal government land regimes.

The internal federal charts (see attached) illustrate various land regimes the federal government offers to First Nations to opt out of the Indian Act Reserve land system through different federally controlled and managed administrative/legislative steps leading to Canada's definition of Fourth Level, Ethnic, Indigenous "*Self-Government*" and the privatization of reserve lands as private property (fee simple), which the federal administrations of Chretien, Harper and now Trudeau allow.

FEDERAL UNDRIP LEGISLATION

In their 2019 election platform the **federal Liberal Party of Canada** promised to introduce legislation to implement UNDRIP, which as stated above will be a Canadian definition of UNDRIP. The Trudeau government is only now consulting certain First Nation groups and has about six weeks to introduce the proposed UNDRIP Bill into Parliament by December 2020 before Christmas break.

The **Draft Legislative Proposal** (see attached) by the federal Minister of Justice, David Lametti, is thin, only 9 pages and refers to a **National Action Plan**, which was committed to by state governments, including Canada, in the **2014 World Conference on Indigenous Peoples**.

In Canada, as described above, the **National Action Plan** in the 2014 UN document is the "*National Reconciliation Framework*" of the Trudeau government to domesticate UNDRIP minimum standards "*within the Canadian constitutional framework*" of federal and provincial laws and jurisdiction, while fiscally pressuring First Nations to negotiate through the one-sided federal self-government and land claims—de facto extinguishment and replacement of rights (surrender and grant back)—policies.

The **draft UNDRIP Bill** provides, in part:

> ***National action plan***
> *5 The **Government of Canada must**, in consultation and cooperation with the Indigenous peoples of Canada, **develop and implement a national action plan** to achieve the objectives of the United Nations Declaration on the Rights of Indigenous Peoples*. [emphasis added]

This section of the **draft UNDRIP Bill** would seem to elevate the Trudeau government's rejected **Recognition and Implementation of Indigenous Rights Framework (policy & law)** announced by Prime Minister Justin Trudeau in the House of Commons on February 14, 2018, into law.

This section of the **draft UNDRIP Bill** gives Canada a dominant role in interpreting UNDRIP "*principles*" in relation to federal laws, since under Canada's constitutional division of federal and provincial powers, the provincial governments have a veto in subject areas that may affect their jurisdiction.

Moreover, the reference to "*consultation and cooperation with the Indigenous peoples of Canada*" has meant for the past four years that the Trudeau government uses the three National Indigenous Organizations and three National Leaders, though what is called "*Bilateral Mechanisms*", which means three federal-Indigenous Cabinet Sub-Committees, where the federal government controls the funding, pen and agenda.

> ***Consistency***
> *4 The **Government of Canada**, in consultation and cooperation with the Indigenous peoples of Canada, **must take all measures necessary to ensure that the laws of Canada are consistent** with the United Nations Declaration on the Rights of Indigenous Peoples.*

The final part of the **draft UNDRIP Bill** involves annual reporting to Parliament:

> ***Annual report to Parliament***
> *6 During the 20-year period that begins on the day on which this Act comes into force, the Minister of Crown-Indigenous Relations must cause to be tabled in each House of Parliament, within 60 days after the end of each fiscal year — or, if the House is not then sitting, on any of the first 15 days of the next sitting of the House — a report on the implementation of the measures referred to in section 4 and the plan referred to in section 5 for that fiscal year.*

The **Annual Reports** will be controlled by the federal government and will likely not include matters like the invasion and removal of the **Wet'suwet'en Hereditary Chiefs and Clans**, the arrests of the **Mohawks at Tyendinaga**, or the **Six Nations Haudenosaunee Land Defenders at 1492 Land Back Land**.

The **Annual Reports** will also likely provide input from the three National Indigenous Organizations (First Nations, Metis, Inuit) who are collaborating on the federal section 35 "*framework*".

CONCLUSION

Overall, in the current pandemic context and based on the past four years experience with the Trudeau government's first mandate, it is clear that the **proposed federal Legislative Proposal to implement UNDRIP**, based on Canada's qualified support and domestic definition is a threat to the sovereignty, self-determination, original Treaties and land rights of First Nations.