I approach this discussion with humility, an appreciation of native history, culture, and contribution to Canada, and the baggage of being a Euro-Canadian with strong cultural affinities to western Europe. I spent five intensive years as your chief colonial administrator under the Crown a quarter-century ago, and six less intensive years as an external member of DIAND’s audit and evaluation committees. It is always instructive to contemplate the results of one’s mistakes of years ago. But the rest of my life has been spent doing economic stuff, more or less, and I bring that pragmatic cast of mind to our discussion.

Our new government has committed to implementing the 94 recommendations of the Truth and Reconciliation Commission, one of which is the United Nations Declaration on the Rights of Indigenous Peoples. UNDRIP was negotiated over 30 years and finally adopted in 2007. Its lengthy preamble and 46 articles lay out a series of collective and individual human rights that the world has decided should be the minimum enjoyed by indigenous peoples the world over. There is an excellent Handbook about it, written for the Indigenous Law Association by Prof. Brenda Gunn.

But UNDRIP not without challenges. It is written, for example, in such high-flown and general language that it is sometimes difficult to figure out what it means, or whether or not Canada already meets the standard. In this it reflects the compromises and hard drafting necessary by indigenous leaders, advocates, bureaucrats and diplomats coming from widely disparate countries, each with its own sacred cows (and sins) to protect. But legislation (I include the accompanying regulations) requires precision, and detail. With all due respect to the process that gave rise to the Declaration, there are some quite important ambiguities that would have to be resolved if Canada were to proceed to legislating its key provisions. For example:

- It is clear that the Declaration is principally about collective rights that inhere in peoples. What should we do when they collide with individual rights, perhaps especially with regard to lands and the housing and businesses thereon? What about third-party interests in lands which may be found to be ‘theirs’? Is it possible that both nationally and internationally we have given too much weight to collective rights and kind of forgotten individuals?

- Rights are never absolute. They imply on the one hand responsibilities, and on the other a mechanism for resolving conflicts among them. UNDRIP is a ringing statement of rights without a word on responsibilities, or conflict resolution, and is therefore seriously incomplete. Can legislation deal with the obvious hiatuses?
• If these rights are collective rights, there needs to be some practical definition of who these peoples are. Self-evidently the peoples will have to define themselves—the long history of, for example, defining *Indian Act* bands as First Nations is a nonsense, as Judge Vickers and later the Supreme Court strongly implied. It may take some time, in some places, before a particular national indigenous consciousness arises; must time stop for the rest of us?

• A related question concerns the members of these collectivities. Who are the people, as opposed to peoples? We have a rough-and-ready approach to this in Canada, mostly leaving it up to the collective to define membership. While this may flow from indigenous law or custom, it has implications for both federal and provincial budgets. Not for nothing is there a brisk trade in status cards. And what happens when strict blood-quantum definitions result in exile, as at Kahnawake, or where an adopted kid isn’t allowed to play soccer?

• How shall we decide which are the “lands, territories, waters and coastal seas and other resources” which they “traditionally owned or otherwise occupied”? There isn’t much of Canada that might not be included in an expansive definition of these phrases (from Article 26). And yet the fundamental purpose of our principal law-making body, the Supreme Court, is “reconciliation.” That seems to mean sharing, after a process of good-faith negotiation. Note that negotiation always has an adversarial component. Is it possible to follow the constitutionally-protected dictates of the Supreme Court in a manner consistent with the Declaration?

• Ownership and control of ‘their’ lands implies at least partial self-government, as well as self-determination, a theme ringing through the Declaration. The governments to be set up by our indigenous peoples are to have a large measure of independence from the legal and other systems of the larger society. In Canada, aboriginal title lands may be governed by pre-contact norms; the question of their being consistent with the Charter hasn’t been decided. For example, will we force gender equality on societies whose traditional governance had strongly gendered roles? Perhaps everywhere but on aboriginal title lands, will we require voting as a means of making communal decisions, a method all but unknown before contact? Is slavery forbidden?

• How is ‘free, prior and informed consent’ to be made manifest? A referendum? A consensus, perhaps of elders? What does ‘free’ mean? Would the promises of jobs following a positive decision invalidate the result? Was the billion dollars offered to Lax Kw’alaams legitimate, or illegal? And, by the way, do we really mean to endow a subset of our population with political rights not enjoyed by the rest of us? As a victim of the Harper government’s omnibus Budget bills I would assert that ‘free prior and informed consent’ was hardly the measure of their legitimacy.

• If indigenous peoples are not to have the right of independent statehood (Article 46), in my view a fundamental precondition to Canada’s acceptance of the Declaration, does that mean that all laws of general application should apply to these peoples, or their territories, or both? Or only some, depending on where they are? What should be the criteria? We have been developing a
rough-and-ready accommodation to this dilemma in many different places. Must they be consistent with each other? Or consistent with the Charter?

I put these forward as some of the difficulties that will attend the implementation of the Declaration in Canada. I’ve gone through the Declaration looking for specifics that we either do already—quite a few—or which may conflict with other areas of established Canadian law. Article 2, for instance, is more or less done in Canada, although the Indian Act is certainly discriminatory. Article 7(2) may conflict with the UN Declaration on the Rights of the Child, and certainly does with most provincial laws, which put the rights of the individual child ahead of the collective rights of its ethnic group, where those conflict. Article 16(2) says that States should “ensure that State-owned media duly reflect indigenous diversity.” It would be hard to fault the CBC on this, and APTN is the best-kept good secret in the country. But there is a powerful convention that the Government of Canada should not interfere with the editorial decisions of the media. If a new Duncan Campbell Scott should become president of the CBC, does the Government have a positive duty to tell him what to do? Not that this could happen—just as it’s impossible the Republicans could nominate Donald Trump.

I conclude with the observation that the Declaration contains a lot of high-faluting language; that Canada already meets most of its dicta, if not necessarily legislatively, and that the ambiguities in the Declaration ought to keep otherwise troublesome Parliamentarians fully occupied for decades. The real worry is that the electoral commitments of our new government—implementing UNDRIP and the recommendations of the TRC, a judicial inquiry into the missing and murdered women—may get in the way of more important and practical reforms. With UNDRIP and $2, any indigenous person in Canada can get a cup of coffee.


Article 1 Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. 

Article 2 Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity. 

Article 3 Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 

Article 4 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. The excellent BC AFN Handbook lays out a large number of routes to self-government presently available. Full implementation might require repeal or replacement of certain parts of the Indian Act.

**Article 5** Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State. *Done*

**Article 6** Every indigenous individual has the right to a nationality. *Done*

**Article 7**
1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. *Done*
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group. *Done, though best interests of a child may override; note possible conflict with UN Rights of the Child*

**Article 8**
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. *Done: no longer in Canada*
2. States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources; (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights; (d) Any form of forced assimilation or integration; (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them. *Done*

**Article 9** Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right. *Done, though the indigenous community or nation has the effective right to discriminate, according to its traditions*

**Article 10** Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. *Done, though it may be argued that Site C (and more egregiously, the Bennett Dam and hydroelectric development in Manitoba) are violations. The latter two are historic; the first is before the courts. First mention of FPIC.*

**Article 11**
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. *Done, more or less; provincial jurisdictions apply*
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs. *More or less done; a bit messy. FPIC again*
**Article 12**

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains. *Done, except with respect to cultural sites (Site C again) and somewhat ambiguously with respect to human remains.*

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned. *Done, more or less; seems to be current policy*

**Article 13**

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons. *Done*

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means. *Done, more or less*

**Article 14**

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning. *In progress; a long way to go.*

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination. *Done*

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language. *In progress*

**Article 15**

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information. *Done*

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society. *Done, officially*

**Article 16**

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination. *Done*

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity. *Not role of State? But CRTC nudges in this direction*

**Article 17**

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law. *Done*

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or
social development, taking into account their special vulnerability and the importance of education for their empowerment. \textit{Done}

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary. \textit{Done}

\textbf{Article 18} Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions. \textit{Done, effectively, under Indian Act and other measures; potential Charter conflict}

\textbf{Article 19} States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. \textit{Laws of general application too? More rights in this important respect than ROC? Courts not yet definitive, but taking dim view on LGA.}

\textbf{Article 20}  
1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. \textit{Very broad; likely done}
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress. \textit{Semi-done}

\textbf{Article 21}  
1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security. \textit{Done}
2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities. \textit{Done; can always spend more}

\textbf{Article 22}  
1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration. \textit{Done}
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination. \textit{In progress: judicial inquiry forthcoming}

\textbf{Article 23} Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions. \textit{Done, de facto}

\textbf{Article 24}  
1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. \textit{Done, though conservation of rare plants sometimes suffers}
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right. Done

**Article 25**

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard. Done, probably, though the meaning is obscure

**Article 26**

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Inconsistent with Canadian law. 100 percent of Canada? Only unceded lands? Meaning of "right"?
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. Done, assuming this means lands held under aboriginal title.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned. Done, if this means aboriginal title land; unacceptable if definition is as in 26(1)

**Article 27**

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. Treaty and claims policies establish this only poorly. Courts meet the standard, however.

**Article 28**

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Done; definition of FPIC an issue
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress. Done where possible: interesting precedent of TLC in Saskatchewan

**Article 29**

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. Done
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. Done (FPIC again)
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented. Done, sort of
**Article 30**
1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. *Done, though definition of relevant lands unclear.*
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities. *Done; lessons of Ipperwash still sting*

**Article 31**
1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions. *Done as a matter of law; question may be who pays*
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights. *Done, I think*

**Article 32**
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. *Done, subject to agreement on what “their” means*
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. *Site C demonstrates that we do not always do this; but Canadian law says that lands may be taken up for valid public purposes, subject to Sparrow tests*
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact. *Done; some contradiction with Article 32(2).*

**Article 33**
1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live. *Done*
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures. *Done, though the Indian Act makes it unnecessarily sticky in some cases. Alternatives exist.*

**Article 34** Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards. *Done, though juridical systems must operate under the general system of courts in Canada*

**Article 35** Indigenous peoples have the right to determine the responsibilities of individuals to their communities. *Meaning? Done, I think*
Article 36
1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders. Done, quite well
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right. Done

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements. Done
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements. Done; would have been helpful if the word “expanding” was included after “eliminating”

Article 38 States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration. Generally not started, except as part of laws of general application; some special Acts exist for modern treaties

Article 39 Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration. Done

Article 40 Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights. Done, through the courts

Article 41 The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established. Not applicable

Article 42 The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration. Not applicable

Article 43 The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world. OK

Article 44 All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals. Done through Charter, unless undone through Tsilhqot’in

Article 45 Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future. OK

Article 46
1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as
authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. \textit{Last clause is really important.}

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society. \textit{OK}

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith. \textit{OK}

\footnote{Nowhere is “indigenous peoples” defined. In Canada, it seems fairly obvious, though there is ambiguity about the Metis. Note that these are not rights inhering in indigenous persons, but in their collectivities. No corresponding responsibilities are named. Author’s comments are in bold italics.}