

Written Brief Regarding Bill C-15:
An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples

Submission to the Senate Standing Committee on Aboriginal Peoples

Submission by:

The Reconciliation and Responsible Investment Initiative, a partnership of the Shareholder Association for Research and Education (SHARE) and the National Aboriginal Trust Officers Association (NATOA)

May 31, 2021



The Reconciliation and Responsible Investment Initiative (RRII) is a partnership between the Shareholder Association for Research and Education (SHARE) and the National Aboriginal Trust Officers Association (NATOA). SHARE is a non-profit organization dedicated to mobilizing investor leadership for a sustainable, inclusive, and productive economy. NATOA is a charitable organization committed to providing Indigenous peoples with the resources and information that will help them efficiently create, manage, and operate trusts as a means to ensure the seven generations yet unborn can benefit from the goals and dreams of the present generation. Together through RRII, we work with Indigenous and non-Indigenous investors to foster a financial system that empowers Indigenous perspectives, recognizes the role of community values in investment decision making, creates positive economic outcomes for Indigenous peoples, and contributes to protecting Indigenous rights and title.

Our approach is grounded in the Truth and Reconciliation Commission's Principles of Reconciliation and Call to Action 92,ⁱ which calls upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* (the UN Declaration, or UNDRIP) as a reconciliation framework and to apply its principles, norms, and standards to corporate policies and core operational activities.

The Government of Canada's introduction of Bill C-15 to establish a framework for the implementation of the UN Declaration in Canada and ensure that Canadian laws are consistent with the UN Declaration, is laudable. Bill C-15 is critical in raising the minimum standards of Indigenous rights in Canada. Its implementation would also support reconciliation efforts broadly by adding to the existing expectations of all economic actors to support the participation and meaningful engagement of Indigenous Peoples in business opportunities.

Through our work with Canadian institutional investors, including Indigenous trusts, foundations, religious organizations, universities, and pension funds, we have worked to embed Indigenous rights and commitments to reconciliation across capital markets and within Canada's corporate sector. One major aspect of our work centres upon shareholder engagement. Through SHARE's engagement program, today representing over \$70 billion in assets under management, we have engaged with over 50 Canadian and international companies to secure corporate commitments to Indigenous rights and reconciliation in recent years. As a result, over a dozen companies have taken meaningful steps to respond to Call to Action 92, for instance by incorporating Indigenous rights into their human rights policies, by establishing regular public disclosures on Indigenous employment and procurement, and by committing to education for management and staff on Indigenous rights and history.

Currently, companies in Canada are at very different stages in terms of developing policies and practices that align with the *United Nations Declaration on the Rights of Indigenous Peoples*. For

example, we recently conducted research exploring corporate disclosures from companies listed on the Toronto Stock Exchange and found that in 2016, only one percent of our sample had made a public commitment to implementing UNDRIP compared to 12 percent in 2019.ⁱⁱ Public commitments to free, prior, and informed consent (FPIC), a cornerstone of the Declaration, have also increased, from three percent in 2016 to nine percent in 2019.ⁱⁱⁱ These trends are higher in sectors such as energy and materials where the materiality of Indigenous rights is deemed to be greater. Anecdotally, from our engagement work, we can also affirm that public companies from across the Toronto Stock Exchange are actively soliciting input and guidance on Indigenous rights due diligence.

As noted in the United Nations Guiding Principles on Human Rights, states must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises.^{iv} However, such standards have not yet been developed in relation to Indigenous peoples' human rights. This merits consideration during Bill C-15's implementation process. While the UN Declaration does not specifically mention corporations, the contributions of businesses would nonetheless be essential for the effective implementation of UNDRIP in Canada.

Investors recognize that Indigenous rights recognition and progressive Indigenous relations are critical for business success. Failure to conduct sufficient due diligence on Indigenous rights, and particularly to seek and obtain FPIC, can result in financial losses and other material costs.^v Companies that do not operate in a way that respects an international law standard like the UN Declaration expose themselves to risks of reputational damage, regulatory intervention, litigation, project delays and disruptions, shutdowns, and financial loss.^{vi} Investor confidence is heightened where companies have made clear commitments to UNDRIP and FPIC, as upholding Indigenous rights and engaging productively with potentially impacted rights-holders provides legal and regulatory certainty.

Domestic implementation of the UN Declaration requires that companies play an active role in upholding Indigenous rights. In order to raise the standard of corporate governance in relation to Indigenous rights, additional guidance and disclosure requirements are merited. We recommend that the action plan established to implement Bill C-15 include ample review of the roles of investors and investee companies headquartered and/or operating within Canada in upholding UNDRIP. Particular attention should be paid to the responsibilities and expectations of companies as non-state actors in harmonizing UNDRIP with business activities, and thus upholding Indigenous rights. Further disclosure of potential impacts to rights and related due diligence measures is also needed. Remedying the lack of domestic guidance and regulatory direction on this should be considered through the action plan.

Human rights due diligence practice was first introduced in the United Nations Guiding Principles on Business and Human Rights in 2011 and has since been incorporated into various due diligence processes, such as the OECD Guidelines on Multinational Enterprises. However, leading business and human rights frameworks such as the UN Guiding Principles on Business and Human Rights and the United Nations Global Compact do not provide exhaustive guidance to businesses on Indigenous rights specifically. Moreover, the inclusion of Indigenous rights considerations is minimal within widely used sustainability accounting frameworks and reporting standards, such as the Global Reporting Index and the Sustainability Accounting Standards Board.

On other matters of human and labour rights, health, security, and environmental violations, companies have been compelled by states to build due diligence plans to identify and address risks across their global supply chains. For instance, France's 2017 *Loi relative au devoir de vigilance des sociétés mères et entreprises donneuses d'ordre* binds companies based in France to monitor their supply chains for human rights and other risks.^{vii} The French law specifically asks that companies draft a risk map, establish procedures for evaluating partners and subsidiaries, outline actions to mitigate risks and address violations, and set in place grievance mechanisms. Guidance should be considered in relation to Indigenous rights in the Canadian context, in order to clarify expectations of companies as non-state actors in attaining the standards outlined in the UN Declaration. Such guidance should be developed in consultation with Indigenous peoples.

Spurring widespread adoption of Indigenous rights policies, due diligence, and disclosures among Canadian companies through developing guidance at the national level would help improve outcomes for communities, investors, and businesses alike – and ensure effective complaint and mitigation measures are adopted to manage rights-based conflicts that may arise. Additionally, we recommend that the action plan for implementation of Bill C-15 include a review of national level oversight mechanisms such as the *Bank Act*, the *Canada Business Corporations Act*, and the Office of the Superintendent of Financial Institutions to ensure alignment between Bill C-15 and Canadian business law and regulatory standards.

For Bill C-15 to be successfully implemented, we submit that the role of companies and those that finance them in upholding UNDRIP should be clarified. Providing clear expectations – developed in consultation with Indigenous peoples – will help foster business and investment certainty and facilitate Indigenous economic inclusion. Bill C-15 affords us the opportunity to further embed Indigenous rights across Canadian capital markets, and advance economic reconciliation.

For more information on the Reconciliation and Responsible Investment Initiative (RRII), please visit reconciliationandinvestment.ca.

Endnotes

- ⁱ Truth and Reconciliation Commission of Canada. 2015. Calls to Action. Available at http://trc.ca/assets/pdf/Calls_to_Action_English2.pdf
- ⁱⁱ Wheatley, K., & Lau, J. 2021. Business and Reconciliation: An Update Exploring the Performance of Public Companies in Canada. Reconciliation and Responsible Investment Initiative. Available at https://reconciliationandinvestment.ca/wp-content/uploads/2021/03/SHARE-RRII-Business-and-Reconciliation_Update.pdf
- ⁱⁱⁱ Ibid.
- ^{iv} United Nations Human Rights Office of the High Commissioner. 2011. Guiding Principles on Business and Human Rights. Available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf
- ^v Fredericks, C. F., Meaney, M., Pelosi, N., & Finn, K. R. 2018. Social Cost and Material Lost: The Dakota Access Pipeline. *U of Colorado Law Legal Studies Research Paper No. 19-1*. First Peoples Worldwide. Available at https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf;
- SHARE. 2020. Energy and Mining Investment: Assessing Accountability for Indigenous Rights in Complex Investment Chains. Available at https://share.ca/wp-content/uploads/2020/10/SHARE_Mining-Report_FINAL_Web-High-Res1.pdf
- ^{vi} Fredericks, C. F., Meaney, M., Pelosi, N., & Finn, K. R. 2018. Social Cost and Material Lost: The Dakota Access Pipeline. *U of Colorado Law Legal Studies Research Paper No. 19-1*. First Peoples Worldwide. Available at https://www.colorado.edu/program/fpw/sites/default/files/attached-files/social_cost_and_material_loss_0.pdf;
- ^{vii} Assemblée Nationale. 2017. *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*. Session ordinaire de 2016-2017. Available at <https://www.assemblee-nationale.fr/14/ta/ta0924.asp>