

December 3, 2020

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
House of Commons
Ottawa, ON K1A 0A6

RE: Legislation Implementing the United Nations Declaration on the Rights of Indigenous Peoples

Minister,

The upstream oil and natural gas industry welcomes the federal government's efforts to advance reconciliation including its effort to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada. In 2016, [CAPP publicly endorsed](#) the principles of UNDRIP as an important framework for reconciliation, and continues to support its implementation in a manner that is consistent with the Canadian constitution and law. We have taken note that today you will introduce a Bill entitled, *An Act Respecting the United Nations Declaration on the Rights of Indigenous People*. We look forward to closer study of the Bill and to participating in the parliamentary process with respect to the Bill. Our comments below are informed by the consultation process and drafts which we have been shown to date.

We would like to thank the government for the engagement opportunities extended to us so far, both in our recent meeting with you and your staff and in an earlier Natural Resources Canada session where we were able to hear the perspectives of National Indigenous Organizations on key industry questions.

Our sector has made strides in developing relationships based on trust and respect with Indigenous communities, learning from Indigenous knowledge, and advancing reconciliation by identifying ways to share in the benefits and opportunities arising from resource development. We own our role in reconciliation and will continue to embrace it.

While our partnerships with Indigenous communities range from housing initiatives to environmental monitoring programs, to jobs and training, our most observable contribution has been as a driver of economic development and opportunity. In the oil

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sands alone, our members spent approximately \$1.8 billion per year between 2013-2016 procuring goods and services from Indigenous-owned businesses.¹ We offer good paying jobs, close to home and Indigenous employment rates in oil and natural gas exceed the Canadian workforce average. Indigenous companies are 40 times more likely to be involved in the resource sector than the average Canadian business,² and the downturn in our sector has meant a downturn for the Indigenous communities and businesses with whom we work. For additional context, the oil and gas producing members of the Indian Resource Council are projected to lose 95% of their royalties this year as compared to 2012.³

Business and job opportunities in proximity to Indigenous communities provided by our member companies support the development of sustainable local economies and, as expressed by many Indigenous community leaders in Canada, are important to increased self-determination. Indeed, in Western Canada, the oil and gas sector is “central to Indigenous plans for poverty reduction, improved autonomy from Ottawa, employment and business development.”⁴ The ability of our member companies to compete globally for investment supports this aspect of reconciliation – if our industry cannot compete and attract investment due to lack of predictability, these opportunities will cease. For these reasons, it is crucial that the implementing legislation for UNDRIP be well-designed.

Recommendations

Our industry supports the development of an Action Plan – as proposed in draft versions of UNDRIP implementing legislation – that fosters tangible change and sustainable outcomes with Indigenous peoples in Canada. Done well, the Action Plan will be a powerful tool to build alignment of expectations between governments, Indigenous peoples and all Canadians. It should clearly communicate shared priorities, ensure the provision of adequate resources and create accountability. Any Action Plan should define expected performance improvement metrics and timelines to close the existing and significant gaps for Indigenous Canadians in areas such as housing, public safety, access to water, infrastructure, access to health care and education. We are pleased that an annual Action Plan process is now being contemplated to create a dedicated standing forum for this important work.

¹ Economic Report Series: Toward a Shared Future (2018), CAPP. <https://www.capp.ca/wp-content/uploads/2019/11/CAPP-cap-economic-report-2018-4.pdf>

² Canadian Council of Aboriginal Business (2016). “Partnerships in Procurement”. <https://www.ccab.com/wp-content/uploads/2016/11/Partnerships-in-Procurement-FullReport.pdf>; Innovation, Science and Economic Development Canada (2019) *Key Small Business Statistics*. [https://www.ic.gc.ca/eic/site/061.nsf/vwapj/KSBS-PSRPE_Jan_2019_eng.pdf/\\$file/KSBS-PSRPE_Jan_2019_eng.pdf](https://www.ic.gc.ca/eic/site/061.nsf/vwapj/KSBS-PSRPE_Jan_2019_eng.pdf/$file/KSBS-PSRPE_Jan_2019_eng.pdf). See also Greg Desjarlais, “Indigenous communities need a strong oil and gas sector, too”, *Globe and Mail* (April 25, 2020). <https://www.theglobeandmail.com/opinion/article-indigenous-communities-need-a-strong-oil-and-gas-industry-too/>

³ Indigenous Services Canada. Oil and Gas Activity on First Nations Land – Snapshot. (May 28, 2020) GCDOCS 69976717. See also Indian Resource Council. “Open Letter to Prime Minister Justin Trudeau”. *Globe and Mail*. (June 20, 2020).

⁴ “How Canada’s oil and gas industries assist in the project of reconciliation,” JP Gladu and Ken Coates, *The Globe and Mail* (September 2, 2020). <https://www.theglobeandmail.com/opinion/article-how-canadas-oil-and-gas-industries-assist-in-the-project-of/>

Our industry would support language in proposed legislation that removes ambiguity about whether it is the Act or the Action Plan that is the mechanism for implementation of UNDRIP in Canada. Addressing this ambiguity will be important to our investors as they make their own determinations about whether or not Canada remains a predictable environment for consultation, project approval and investment.

Courts can and do already refer to UNDRIP in rulings today. However, it must continue to be clear that international instruments like UNDRIP are sub-ordinate to the Canadian Constitution and decades of jurisprudence on Section 35 rights. Language we have seen in drafts of legislation could be understood to imply the immediate application of the whole of UNDRIP in Canadian law, ahead of the co-development of the federal Action Plan process; we understand that the Action Plan is the intended vehicle for implementation. We are concerned that such language could create confusion and, therefore, delay on both the important work of the Action Plan and industry project applications currently in progress. For our investors, this could signal a new standard that appears to apply immediately and broadly and will raise questions about:

- i. Whether federal and provincial governments retain their authority to make decisions in the broad public interest;
- ii. How Free Prior and Informed Consent (FPIC) will be the same or different from the current “consult and accommodate” as developed through decades of Section 35 jurisprudence;
- iii. Which Indigenous institutions are recognized as those with whom the Crown (or the proponents to whom it delegates) will meaningfully consult in the context of a project, or how and under what circumstances those institutions might change; as a matter of fairness for all involved, those institutions should be identified and confirmed at the beginning of a project review process.

In the interest of promoting reconciliation rather than conflict, UNDRIP legislation should define the meaning and application of free, prior and informed consent (FPIC) in Canada, where FPIC is a process through which all parties work together in good faith to aim to secure mutually acceptable arrangements, allowing Indigenous peoples to genuinely influence the decision-making process. When consensus is not reached, it must be clear that dissenting input will be accepted and considered. It must be clear that no group or groups will have a veto over others. All groups should be confident that governments will carefully consider their input. UNDRIP implementing legislation should ensure that federal, provincial and territorial governments will retain their authority to make final decisions that balance the interests of all aspects of society.

Finally, in order to support Indigenous peoples in strengthening and maintaining their institutions, for the purposes of obtaining FPIC, the legislation should outline a process

for Indigenous peoples to declare who will be their authorized representatives. This process for changing authorized representatives should be initiated by Indigenous peoples on timelines they determine and be independent of project adjudications. Governments and the proponents to whom they delegate must be able to identify the complete and final list of the representative institutions at the beginning of their regulatory processes so they can meaningfully consult.

In order to clarify that the Action Plan is the main vehicle for UNDRIP implementation in Canada, which we understand is the intent of enabling legislation, CAPP recommends that Section 3.1 of UNDRIP legislation read as follow:

Section 3(1)

The United Nations Declaration on the Rights of Indigenous Peoples that was adopted by the General Assembly of the United Nations as General Assembly Resolution 61/295 on September 13, 2007, and that is set out in the schedule is hereby affirmed as a **standard of achievement to be pursued in a spirit of partnership and mutual respect.**

This recommendation, based on language from the 2007 UN resolution adopting UNDRIP, will support the implementation of UNDRIP by preventing the creation of inadvertent barriers to economic reconciliation. Such clarity of intent and specific steps on the plan forward from the government are requested. This is an opportunity for Canada to increase competitiveness by driving predictable outcomes for Indigenous and non-Indigenous Canadians, as well as domestic and international investors. Together, we can continue to grow jobs, develop businesses and reach our full potential as a nation.

As Canada looks toward implementation, working with Indigenous people, communities and organizations on co-developing a federal Action Plan, CAPP and our members seek the opportunity to participate in this dialogue where appropriate to our industry. Under current Canadian law, the duty to consult rests with government; however, procedural aspects of the duty are often delegated to project proponents. For decades, our member companies, in partnership with Indigenous communities, have negotiated, developed and honoured the agreements and protocols they have established together, encouraging ongoing engagement and respect. By having a role in the Action Plan process and sharing these lessons learned, we can add value to the plan at the appropriate time. We hope this will include the updating of government guidance on consultation to ensure a consistent and well-informed approach.

Our sector understands that the successful implementation of UNDRIP is a significant aspect of reconciliation. It is critical to our industry, the communities we work with and

all of Canada that reconciliation continues to move forward, especially as we work together to recover from the challenges brought on by the COVID-19 crisis.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim McMillan". The signature is fluid and cursive, with the first name "Tim" written in a larger, more prominent style than the last name "McMillan".

Tim McMillan
President & CEO

Cc: Minister Seamus O'Regan, Minister of Natural Resources