



Government of the Northwest Territories
Response to Committee Report 55-19(2): Report on Bill 85: *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*

Background

The Report summarizes Committee's review of Bill 85, starting with engagement with Indigenous governments and Indigenous organizations, the Government of the Northwest Territories (GNWT), and the public. This report also describes Committee's efforts to strengthen Bill 85, including 13 motions to amend the Bill – 10 of which were adopted at the clause-by-clause review – and eight recommendations.

Recommendation 1

That the GNWT, in collaboration and cooperation with Indigenous Governments or Organizations, develop and release a clear statement on how it interprets and intends to apply free, prior and informed consent.

GNWT Response

The GNWT agrees with the findings of the report. Free, prior and informed consent (FPIC) is important to the advancement of reconciliation and is understood differently by different people. The GNWT notes some challenges in defining FPIC in a way that may be operationalized responsively, inclusively and collaboratively.

Any statement on FPIC should be flexible to apply in various context in contrast to a “one size fits all” approach. FPIC will hold different meanings for different groups and a single statement may not be appropriate in all instances. The FPIC required for legislation may not be the same as for a project on lands where there are overlapping Indigenous interests. Having a single statement ignores the diversity of Indigenous peoples and the unique interests and historical influences that have occurred in the NWT. The GNWT will interpret and implement FPIC in a way that reflects the diversity of needs and the unique nature of the Indigenous peoples of the NWT. Having a single statement that tries to capture all these nuances would not follow the intention of FPIC.

At this time, the Action Plan Committee (APC) is responsible for bringing forward the interests of Indigenous governments and Indigenous organizations in relation to the UN Declaration and is currently focused on the process of identifying priorities the UN Declaration Action Plan (the Action Plan). The GNWT can only meaningfully operationalize FPIC in cooperation with Indigenous governments and Indigenous organizations. There will have to be a conversation about the best time and forum to engage in finding the best path forward in ensuring that FPIC is a part of governance in the NWT. The NWT Council of Leaders may be a good starting point for this conversation.

The GNWT recognizes that the full implementation of the existing land, resources and self-government agreements is a means to obtaining FPIC on decisions. Article 37 of the UN Declaration says:

- 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.*
- 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.*

Existing treaties, land and resource agreements in the NWT must be implemented and acknowledge that some aspects of these agreements may be expressions of FPIC. The Intergovernmental Council is another forum where aspects of FPIC are implemented.

Recommendation 2

That the GNWT, in collaboration and cooperation with Indigenous Governments or Organizations, include in the action plan developed under section 9 of Bill 85 specific measures to confirm rights, develop jurisdiction, build institutional capacity, strengthen fiscal autonomy, set service standards, and facilitate nation-to-nation relationships, among others. This work should refer to the written submission of the First Nations Financial Management board (FNMB) to Committee's review of Bill 85

GNWT Response

The GNWT agrees that the FNMB recommendations are relevant to the UN Declaration implementation in the NWT, as they refer to the importance of this process being Indigenous led.

Indigenous governments and Indigenous organizations also agreed that FNMB recommendations were important. They indicated to the GNWT that they were less applicable to the work of the APC and best addressed at Aboriginal Rights Agreements negotiations and implementation tables.

The Action Plan continues to be Indigenous led, based on consensus and open participation to all Indigenous governments and Indigenous organizations in the NWT. The APC has terms of reference, and the Indigenous caucus of the APC is leading the development of the Action Plan with the support of the GNWT. The GNWT is following the lead of Indigenous governments in every aspect of the implementation of the UN Declaration in the NWT.

The APC is currently considering themes, for the Action Plan, that would accurately reflect priorities of Indigenous governments and Indigenous organizations to advance the implementation of the *Act*. Should FNMB recommendations be raised while developing the Action Plan, the GNWT will support the APC develop content that reflects their vision. Capacity is an ongoing challenge for all parties at

the APC. Making resources available to support progress on the Action Plan and ensuring it reflects the vision of Indigenous governments and Indigenous organizations is a priority for the GNWT.

The GNWT supports having the Indigenous governments and Indigenous organizations of the APC hold the pen and take the lead in the drafting of the Action Plan. The APC is a consensus body that collaboratively drafts all documents. Any member of the APC can volunteer to take the pen on any document with the support of the group. Having Indigenous governments and Indigenous organizations hold the pen and lead the drafting documents builds capacity in Indigenous communities and fosters Indigenous-led solutions.

Recommendation 3

That the GNWT should set up a funding framework to support Indigenous Governments or Organizations' capacity to engage with work to implement the Declaration going forward.

GNWT Response

The GNWT agrees with Recommendation 3 expressed by Standing Committee on Standing Committee on Government Operations (SCOGO) and reiterated by Indigenous governments and Indigenous organizations. The GNWT views having an effective funding framework to support the work of implementing the UN Declaration as essential.

Work is currently under way to implement this recommendation. The GNWT is studying the best practical approach to make funding support accessible and predictable to Indigenous governments and Indigenous organizations while remaining fiscally responsible. An interim solution of reimbursement of participation costs is currently in place until the permanent approach is implemented. The GNWT is open to sharing its funding framework with the SCOGO once it is finalized.

Article 39 of the Declaration says:

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.

Providing funding to Indigenous governments and Indigenous organizations supports the building of their internal capacity which is not only essential to the work of implementing the UN Declaration but also for the long-term effective governance of the NWT. This important work is heavily dependent on a good working relationship, and staff of Indigenous governments and Indigenous organizations and GNWT must all have the resources required to engage effectively to move this work forward. The work of the APC on guiding the priorities and approach to implementing the UN Declaration is an investment in the future of the territory.

Capacity building can also be achieved by developing knowledge, skills and abilities of Indigenous governments and Indigenous organizations staff. Please refer to Recommendation 2 to see how supporting Indigenous governments and Indigenous organizations hold the pen for the Action Plan supports capacity building.

The GNWT is aware of its responsibility to ensure that Indigenous governments and Indigenous organizations have the resources to participate meaningfully in implementing the UN Declaration within the territorial government. The GNWT also believes the federal government has roles to play in this, as with the implementation of their own *Act*.

Recommendation 4

That the GNWT, in consultation with the Standing Committee on Accountability and Oversight (SCAO) and Indigenous governments and organizations, set up a mechanism that ensures Regular Members can access timely, comprehensive, and details information about the Action Plan Committee's work.

GNWT Response

The GNWT agrees that MLAs have an important role to play when it comes to public accountability for government action. The terms of reference for the APC allows for observers to attend APC meetings. Any MLA is welcome to attend an APC meeting upon request and that request being supported by the APC. GNWT staff can facilitate communication between MLAs and the APC. Indigenous governments and Indigenous organizations expressed that communication on the work of the APC between the GNWT and MLAs should not be disruptive, unnecessarily delay progress of the Action Plan and the APC should retain some discretion on providing updates.

The GNWT is also open to providing briefings to SCOGO when requested. For the next two years, the APC will focus on developing the Action Plan (government-to-government work). This work includes all governments participating on the APC putting forward proposed actions to include in the Action Plan and selecting actions based in agreed priorities. Public input will be solicited prior to the finalization of the Action Plan. MLAs will have the opportunity to propose actions for inclusion in the Action Pan at that time.

The GNWT takes note of the Standing Committee's interest in the work of the APC and would be pleased to discuss when the Standing Committee should be updated on the work of the APC.

Recommendation 5

That the GNWT should, without delay, make all authorization provided to a Minister to negotiate or enter into a shared decision-making agreement under the *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act* publicly available by publishing it on a government-maintained website.

GNWT Response

The GNWT thanks the Standing Committee for Recommendation 5 and notes that provision 13(4) of the *Act* obligates the GNWT to make all Shared Decision-Making Agreements (SDMA) publicly available on a government-maintained website once they are concluded. Provision 13(5) further requires the GNWT to provide notice to the Standing Committee of an authorization provided under an SDMA. GNWT's policies to ensure transparency of government actions to the public will apply to SDMAs.

The APC expressed their satisfaction with the GNWT's existing processes to make the appropriate information available to the public. Indigenous government and Indigenous organizations and the GNWT will collaboratively determine the sequence to share SDMA's with the public that is best suited to each SDMA's. The GNWT is inclined to use a flexible approach suited to each SDMA's in contrast to a "one size fits all" process for agreements that have never been negotiated and that may have specific needs in terms of information sharing. For example, it may be appropriate in some cases for other Indigenous governments and Indigenous organizations affected by an SDMA to have prior knowledge of the SDMA before the agreement is released to the public.

Negotiation of SDMA's should retain some confidentiality. Given that SDMA's cannot fetter Ministerial discretion, public disclosure of negotiation details may not be beneficial to the public and may not be the best approach to achieving democratic accountability. The public is rarely, if ever, involved in GNWT's government-to-government negotiations. The GNWT negotiates agreements with Indigenous governments regularly and is not required to make details of those negotiations' public. A negotiated authorization in an SDMA may also differ from the initial authorization sought by an Indigenous government or Indigenous organization and approved by Cabinet. Part of the process of negotiating is that parties have in-depth conversations of their interests and agree to an outcome that meets their interests. Disclosing negotiation details may result in public confusion. Democratic accountability is achieved by provision 13(3) of the *Act* that requires having Cabinet approve any final SDMA resulting from an authorization to negotiate while government transparency to the public is achieved by provision 13(4) that requires the publishing a final SDMA on a government-maintained website.

Recommendation 6

That the GNWT provide notice to and seek comments from the SCAO before entering into a shared decision-making agreement under the *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*.

GNWT Response

The GNWT thanks the Standing Committee for Recommendation 6 and is open to discussing how and under what circumstances communication with the Standing Committee should occur. The GNWT values the input of regular MLAs and has an interest in meeting communication expectations of both MLAs and of Indigenous governments and Indigenous organizations.

Indigenous governments and Indigenous organizations expressed confusion on the scope of involvement of regular MLAs in concluding SDMA's and concerns over potential delays. SDMA's fall under the government-to-government relationship between the GNWT and Indigenous governments and Indigenous organizations and may touch on circumstance related to Aboriginal rights which rests with the GNWT's Crown obligations. SDMA's are intergovernmental agreements and public input may not be appropriate. Aboriginal Rights Agreements or intergovernmental agreements with other provinces or territories are typically not reviewed by the public before they are finalized.

Please refer to Recommendation 5 to see how the *Act* provides for accountability and transparency to the public.

Recommendation 7

That the GNWT, in its capacity as a member of the Action Plan Committee, advocate for the Action Plan Committee to choose an independent person or entity to lead the five-year review of the *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*.

GNWT Response

The GNWT thanks the Standing Committee for Recommendation 7. The APC communicated that it was open to having an independent reviewer for the 5-year review of the Action Plan (5-year review) and agreed that oversight is warranted. However, the APC expressed the preference to maintain discretion and determine, at the time of the 5-year review, who and how it should be conducted.

Having an independent entity conduct the 5-year review may appear to be more effective and but may not provide more accountability. Having the APC carry out the 5-year review would be equivalent to the 5-year review being done by all member governments.

The APC is a body independent from the GNWT and is composed of representatives from Indigenous governments and Indigenous organizations that all have their own interests. The APC is the forum where these different views come to a common table to discuss the best way forward to meet everyone's interests. The GNWT is only one member of the APC and is accountable to the other member governments towards building consensus on all actions. The GNWT is not comfortable advocating for an option that is not supported by the APC. The GNWT is following the lead of Indigenous governments and Indigenous organizations in every aspect of the implementation of the UN Declaration in the NWT, including how the 5-year review of the Action Plan is carried out.

Recommendation 8

That the GNWT consult the SCAO when developing guidelines for statement of consistency required under the *United Nation Declaration on the Rights of Indigenous Peoples Implementation Act*.

GNWT Response

The GNWT thanks the Standing Committee for Recommendation 8 and is open to discussing with Standing Committee what elements could be included in a statement of consistency. The statement of consistency is an important component of implementing the UN Declaration and is a tool to ensure that laws of the NWT are consistent with its articles.

Nothing in the *Act* obligates bills of private members to use the same statement of consistency as GNWT bills. The GNWT could share its statement of consistency approach that could be adopted by private members or used to inspire MLAs in developing their own statement of consistency. The GNWT encourages MLAs to discuss with their legal council how a statement of consistency could reflect their vision. To continue meeting the priorities of the 19th legislative assembly who put forward the implementation of the UN Declaration as a priority and developed these

recommendations, the GNWT believes that all future legislation should be consistent with the UN Declaration, regardless of its sponsor, Ministers, or MLAs.

The Department of Executive and Indigenous Affairs would be pleased to provide any support required to facilitate communication between MLAs with Indigenous governments and Indigenous organizations in obtaining the free, prior and informed consent of when contemplating the proposing legislation. There are many forums that could facilitate discussions around how consent could be confirmed. This is something that could be discussed with the APC or through the NWT Council of Leaders to get further guidance from Indigenous governments and Indigenous organizations on their preference in regard to having their views considered on any private member legislation.