

## Key Elements of an Effective Indigenous Relations + Reconciliation Policy

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January 31, 2021

In 2015, the *Truth and Reconciliation Commission of Canada (TRC)* released its 94 Calls to Action<sup>1</sup> to effect reconciliation with the Indigenous peoples of Canada. Call to Action 92 specifically asks the corporate sector and its leaders to adopt the *United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)* as a reconciliation framework and to apply its principles, norms and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources.

In 2019, British Columbia became the first jurisdiction to incorporate UNDRIP into law.<sup>2</sup> In 2021, the federal government followed suit by passing of the *UNDRIP Act*.<sup>3</sup> The *UNDRIP Act* is intended to provide a framework for the federal government's implementation of UNDRIP in Canada and specifically mandates the federal government to develop an action plan to that end. While the full legal ramifications of UNDRIP legislation remain to be seen,<sup>4</sup> there is no question these milestones set the stage for a critical shift in Canadian norms and standards.

An Indigenous Relations + Reconciliation policy presents an opportunity for any Canadian business to proactively move the needle on better relations and measurable reconciliation with Indigenous peoples. For a natural resource developer, whose operational activities almost surely depends on the access and use of traditional lands of Indigenous peoples, the adoption of a sound and effective corporate policy may also be essential to the growth and overall success of its business.

### A. What Makes an Effective Policy?

Before setting out to develop or update any policy, it is worthwhile to understand exactly what constitutes a "policy" and better yet, what defines an "effective policy"?

A "policy" can be defined in many different ways but is essentially a set of rules and directives that manage an organization's behavior. Most policies are designed and implemented to support the overarching goals and objectives of the organization and typically, apply to the entire organization.<sup>5</sup>

A key feature of an effective policy is that it requires compliance and enforcement (i.e. a set of consequences for non-compliance). Many corporations commit to certain behaviors or adopt a specific international instrument (e.g. **UNDRIP**) however, simply articulating a set of commitments

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<sup>1</sup> *Truth and Reconciliation Commission of Canada: Calls to Action* [https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls\\_to\\_Action\\_English2.pdf](https://ehprnh2mwo3.exactdn.com/wp-content/uploads/2021/01/Calls_to_Action_English2.pdf)

<sup>2</sup> SBC 2019, c 44.

<sup>3</sup> SC. 2021, c 14. The *UNDRIP Act* recognizes the inherent right of Indigenous peoples to self-determination and affirms UNDRIP as a source for the interpretation of Canadian law. The two key goals of the legislation are to affirm UNDRIP as a universal international human rights instrument with application in Canadian law and second, to provide a framework for the Government of Canada to implement the Declaration.

<sup>4</sup> See *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.* at para. 212 where the British Columbia Supreme Court wrestled with the potential implications of UNDRIP in its analysis and questioned whether UNDRIP legislation will herald a substantive change in the common law respecting Aboriginal rights including Aboriginal title.

<sup>5</sup> See *Drafting Legal Documents: Principles of Clear Writing* <https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html> and *How to Write an Effective Policy*, <https://go.mypolicies.com/write-effective-policy>.

would fall short of effective policy. Good policies clearly articulate the desired corporate behavior as well set out the consequences for behavior that is not compliant with those policies.

Further, the wording of an effective policy must be clear and easily understood in order to encourage compliance. Employees are less likely to embrace a policy if they do not understand the content or what is expected of them. The wording of the policy should also use an active voice to direct behavior (will, must, shall) and be consistent in structure, format and language with other corporate policies already in place. Good policy can be measured and enforced, and therefore guides employees to achieve their tasks effectively.

This consideration is particularly germane in the context of an Indigenous Relations + Reconciliation policy as there are currently a plethora of well-intended commitments and policies which, upon scrutiny, do not meet the hall mark of clear expectations with related consequences should an employee deviate from the desired conduct. If a corporation is not quite ready to adopt new and compliant behavior throughout its organization, then the development of a statement of commitment or set of guidelines may be the better approach.

Finally, an effective policy must apply to the organization as a whole. In the past, Indigenous-related policies have often been driven by or “owned” solely by the land or stakeholder relations department, or perhaps put in place for a specific project. There is now general recognition that in order to ensure the integrity of the business’ conduct as a whole, an effective policy must apply to and be implemented across all business units.

## **B. Why Develop an Indigenous Relations + Reconciliation Policy?**

Any policy is a company’s public expression of its commitment to meet its responsibilities to not only follow the law but to respect international and Canadian standards.

All companies have a basic responsibility to respect Indigenous rights, which means to avoid unauthorized infringement of those rights and to address impacts where they occur. A policy provides a basis for embedding the responsibility to respect Indigenous rights throughout all business functions, which leads to increased trust and the opportunity to understand and address the true concerns of Indigenous peoples. Good policy also provides a process that alerts the company to new areas of risk and demonstrates good business practice.

To date, many resource companies have put in place an “Indigenous Relations Policy”. The often-stated goal of an Indigenous Relations Policy is a commitment to engage with and develop long term mutually beneficial relationships with the Indigenous communities impacted by the company’s activities. These early policies were often developed in response to the evolution of Aboriginal consultation law and in particular, the delegation of the procedural aspects of Crown consultation to project proponents. Many companies were also acting on a sincere intention to build strong and mutual beneficial relationships in the communities where they operate, or otherwise impacted.

An effective Indigenous Relations + Reconciliation policy is an opportunity for a company to proactively learn about Canada’s history from an Indigenous perspective, and to shift to a culture that understands and respects Indigenous rights while also advancing Indigenous inclusion and prosperity. By crafting the policy to address specific organizational conduct, the policy also creates a foundation for concrete and measurable acts of reconciliation.

## **C. Steps to Developing the Policy**

Developing an Indigenous Relations + Reconciliation Policy can and should be a dynamic process. It does not have to be perfect the first go. Many good examples took shape over several years as the culture of the company evolved. A commitment to review the policy and any associated procedures, and to update to address new issues and expectations should be included in the policy itself.

Some initiatives for policy can be initially “top-down” as the leaders of the company signal a new direction or shift in company values. Others grow more out of a grass-roots need from a single department, which is often the case where those interacting with Indigenous communities on a regular basis see the need and importance of moving in a certain direction before senior management.

Each of the steps below are important however the precise order can vary.<sup>6</sup> The sequence of the steps in developing the policy is not as important as an inclusive and collaborative process to develop the policy followed by a strong commitment from senior management to endorse and implement the policy.

### **1. Assign a Senior Manager to Drive the Process**

This is a key step in any policy development as someone needs to “own” the policy internally and take responsibility for its implementation. It is also important that any new policy be championed for it to take root across the organization.

### **2. Establish a Cross-Functional Team**

Many companies put in place a cross-functional team or committee to steer policy development (Indigenous relations, human resources, legal, procurement, etc.) to build common understanding and a sense of common purpose. The important point is to capture in-house knowledge from across the various business units, consider the varying legal jurisdictions the company operates in and draw on internal and/or external expertise.

### **3. Include Indigenous Voices**

It is also critical to identify and draw on internal and/or external Indigenous voices and perspectives to fully inform the process. Engage with and bring in an Indigenous partner, employees or allies into the process. If your company has Indigenous board members consider engaging those board members directly in developing the policy.

### **4. Conduct a Preliminary Gap Analysis or Policy Mapping Exercise**

This step is important to determine what policy statements are either missing or already covered by the company’s existing policies. An Indigenous Relations + Reconciliation Policy can be a stand-alone policy however, it is entirely possible to integrate it into an existing policy or set of policies. For example, an Indigenous Relations + Reconciliation Policy could be made part of an existing Sustainability Policy or Human Rights Policy. The goal is to produce a coherent set of policies that can be effectively implemented and managed on a day-to-day basis.

### **5. Engage Indigenous Communities**

In addition to ensuring that the policy is informed by Indigenous voices and perspectives, the team should also identify and consult key Indigenous communities to ensure that the policy is fit for purpose and addresses the concerns and expectations of Indigenous communities potentially impacted by the company’s activities. Involving potential critics in the process will give it a reality check. This is particularly important if the purpose is to adopt true reconciliation behaviors as the concept has many different definitions and points of view. Again, the goal is not perfection but rather to move towards the culture that the company is trying to build.

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<sup>6</sup> For more detailed steps, please see *A Guide for Business How to Develop a Human Rights Policy* (2015), United Nations Global Compact [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2Fhuman\\_rights%2FResources%2FHR\\_Policy\\_Guide\\_2nd\\_Edition.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Fhuman_rights%2FResources%2FHR_Policy_Guide_2nd_Edition.pdf)

## D. Key Elements of an Effective Policy

Key elements of an effective policy include:

### 1. Purpose of the Policy

One of the first steps to writing an effective policy is to clearly state the purpose of the policy. What are you trying to achieve? Corporate policies are typically written to address a specific aim of the company, for example to comply with certain laws and regulations (e.g. Workplace Health & Safety Policy) or to set standards for appropriate behavior (e.g. Code of Conduct). Other policies are trying to promote or build a certain corporate culture for the company (e.g. Corporate Social Responsibility or Environmental, Social Governance Policy).

In the case of an Indigenous Relations + Relations policy, the primary purpose may be internal or external. An internal purpose would be:

The purpose of this policy is to build an internal culture that is knowledgeable and highly understanding of the rights and perspectives of Indigenous peoples such that the workplace is inclusive and respectful of Indigenous workers.

An external purpose might be:

The purpose of this policy is to develop strong partnerships and relationships with the Indigenous communities with whom we engage and do business.

A second example could read:

The purpose of this policy is to pursue and develop long-term mutually beneficial relationships with Indigenous peoples in support of the Company's business and corporate social responsibility objectives in Canada.

### 2. Scope of the Policy

The purpose section should also clearly set out to whom it applies - either all personnel or specific departments. The policy should also clearly state how it applies to relationships with suppliers, contractors and other entities with which the company does business. Some companies utilize a clear definition of "Personnel" to include both employees and contractors.

It is important to recognize that policies do not always apply in every situation, and are always subject to the terms of operating permits or approvals once issued. Thus, any exclusions or grey areas should be identified and carved out when writing the policy.

### 3. Provide Context for the Policy

Given the complexity of Indigenous rights as well as evolving standards and expectations, it is helpful to include some context or an explanation for the policy. This background to the policy should be separated from the policy statements themselves. For example, if the company decides to fully adopt TRC Call to Action 92, it would be helpful to include the actual text, which reads:

#### Business and Reconciliation

92. We call upon the corporate sector in Canada to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* as a reconciliation framework and to apply its principles, norms, and standards to corporate policy and core operational activities involving Indigenous peoples and their lands and resources. This would include, but not be limited to, the following:

i. Commit to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects.

ii. Ensure that Aboriginal peoples have equitable access to jobs, training, and education opportunities in the corporate sector, and that Aboriginal communities gain long-term sustainable benefits from economic development projects.

iii. Provide education for management and staff on the history of Aboriginal peoples, including the history and legacy of residential schools, the *United Nations Declaration on the Rights of Indigenous Peoples*, Treaties and Aboriginal rights, Indigenous law, and Aboriginal–Crown relations. This will require skills based training in intercultural competency, conflict resolution, human rights, and anti-racism.

Well-written policies often contain a message about the meaning and value to the company to respect Indigenous rights and perspectives which provides context for the employees who may be responsible for implementing the policy.

#### 4. Define Key Terms

In the case of an Indigenous Relations + Reconciliation policy, it is also critical to define key terms as there is a general need to raise the knowledge and understanding of all Canadians of our true shared history including the inequalities and injustices that have marginalized Indigenous peoples. The policy itself is an opportunity to promote this awareness.

#### 5. Policy Statements

The most critical element of an effective policy is to include clear, actionable policy statements that guide the organization's behavior. The content of these statements will differ for every company and needs to align with its existing policies and operational activities. The important point is to ensure that each statement clearly articulates the company's expectations for the behavior of its employees.

For example, if one of the stated goals of the policy is to deepen employee's understanding of the history rights and cultures of Indigenous peoples including the history and legacy of residential schools, then a clear policy statement would read:

All personnel will take a Company-approved "Indigenous Awareness and Inter-Cultural Competency Training" course.

An explicit commitment to respect Indigenous rights may lead to a direct reference to adopt the spirit and intent of UNDRIP:

When engaging with Indigenous communities, all Personnel will respect the spirit and intent of the *United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)* and its guiding principles within the context of Canadian law. Personnel will ensure that they are conducting all business activities with integrity, responsibility and collaboration.

If the purpose of the policy is to advance economic reconciliation, then a policy statement would identify specific behaviours that the company would like its employees to engage in, for example:

When engaged in consultation activities with Indigenous communities, all Personnel will strive to engage Indigenous leadership to align and support their community's capacity and capabilities with the project requirements and qualifications such that the Indigenous communities will benefit economically from the opportunities available.

The corporate responsibility to respect Indigenous rights exists independently of the need to comply with Canadian domestic laws and regulations that protect rights. Compliance with the law should

be seen as meeting minimum standards. Challenges may arise when domestic law potentially conflicts with an international standard (e.g. the concept of free, prior and informed consent (**FPIC**)). In those circumstances, the policy statement should still try to identify the specific behaviour that the organization is trying to adopt, for example:

The Company adheres to the national law and regulation in each jurisdiction in which it operates. The Company also adopts the principles of UNDRIP including meaningful consultation and building respectful relationships with the Indigenous peoples potentially impacted by its activities. The Company will seek to obtain the free, prior and informed consent (FPIC) of Indigenous peoples before proceeding with the development of projects on Indigenous lands.

Information on how the company will implement its commitment, including taking action and tracking performance (e.g. identifying any specific measurement indicators), should also be included in the policy.

## **6. Compliance**

As discussed above, a key feature of an effective policy is that it requires compliance and enforcement. (i.e. a set of consequences for non-compliance).

All Personnel must comply with all aspects of this Policy. Personnel are responsible for promptly reporting suspected or actual violation of this Policy, applicable law or any other concern, including possible violation by their own conduct, so that it may be appropriately investigated and addressed. Personnel who fail to comply or knowingly permit Personnel under their supervision to not comply will be subject to appropriate corrective discipline action including dismissal.

This is the type of language that signals to the entire organization that the policy is intended to be taken seriously and that non-compliance will have consequences.

## **Conclusion**

While the task of developing a clear and compelling Indigenous Relations + Policy may be challenging, there is no question that the time has arrived for all Canadian businesses, and especially those in the natural resource sector, to consider taking on the task. Only by drafting and implementing effective policy, will the culture of corporate Canada begin to shift towards the concrete and measurable acts of reconciliation with Indigenous peoples that is now being expected of us.

Should you wish to learn more about developing an Indigenous Relations + Reconciliation Policy for your company or organization, please contact JoAnn P. Jamieson at [jjamieson@jamiesonlaurin.com](mailto:jjamieson@jamiesonlaurin.com)