Northwest Territories Eenjit
Dagwidįį'è' Tr'igwahtsii
Geenjit Nadhat Kat"

MEETING RIA 06-19-21

SPECIAL COMMITTEE ON RECONCILIATION AND INDIGENOUS AFFAIRS
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APRIL 23, 2021
COMMITTEE ROOM 'A' - YELLOWKNIFE, NT
12:45 PM

AGENDA

1. Prayer
2. Review and Adoption of Agenda
3. Declarations of Conflict of Interest
4. Public Matters:
    a) Presentation: United Nations Declaration on the Rights of Indigenous People with Dr. Hayden King
5. In-Camera Matters:
    a) Committee Business
6. New Business
7. Parking Lot
8. Date and Time of Next Meeting: At the Call of the Chair
9. Adjournment

Hayden King
Yellowhead Institute, Ryerson University

UNDRIP & FPIC IN CANADA: SUPER SCARY OR STATUS QUO?

Public Presentation for the Northwest Territories Legislative Assembly's Special Committee on Reconciliation and Indigenous Affairs

April 23, 2021

OVERVIEW OF PRESENTATION

- Timeline of UN's *Declaration on the Rights of Indigenous Peoples*
- Content and Contentious Articles of the UNDRIP
- The Evolution of Canadian Positions on the Declaration
- Core Elements of Existing Domestic UNDRIP Laws
- Enduring Challenges in UNDRIP Implementation
- Assessing the Nature, Scope and of Implementation of Consent

FROM “OBJECTS TO SUBJECTS” OF INTL. LAW

1493-1494: Establishment of the “Doctrine of Discovery”

1957: *Indigenous and Tribal Populations Convention*

1985: UN Working Group on Indigenous Populations

1989: *Indigenous and Tribal Peoples Convention*

2006: Draft Declaration on the Rights of Indigenous People

2006-2007: The Year of Conflict

2007: General Assembly adopts UNDRIP

*144 countries voting in support, 4 voting against and 11 abstaining.

CHANGES TO THE DRAFT DECLARATION

The CANZUS Group of States:

- In the 2006 Year of Conflict, these four states made the majority of the interventions in the Working Group on Indigenous Populations (from a group of 40-50 states) to dilute the Declaration.
- As the only member of the Human Rights Council at the time, Canada led the CANZUS group's organizing.
- In the end, they were able to remove 8 Articles, Amend 11, and add the contentious Article 46.
- Helped lobby African states to abstain from voting.

WHAT'S IN THE 2007 DECLARATION?

- 17 Articles focus on **culture revitalization** and the self-determination to direct how culture impacts education, healthcare, etc. These also encourage states to direct resources to this work;
- 12 articles promote **non-discrimination** in state law and policy making, while also allowing Indigenous people the right to remain distinct;
- 15 Articles promote Indigenous **participation in decisions** that affect their lives, within their own communities and among state governments. This includes 5 Articles that promote "free, prior and informed consent."
- 6 Articles encourage states to offer **redress** to Indigenous peoples for assimilation politics and to make amends for the loss of subsistence and development;

THE CONTENTIOUS ARTICLES

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.

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.

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.

CONSISTENCY OF CANADIAN OFFICIALS

2007: After UNDRIP's introduction to the UN General Assembly, Minister of Aboriginal Affairs Chuck Strahl shared Canada's position: "I am sorry we can't sign on…It's not balanced, in our view, and inconsistent with the Charter."

2010: Harper Government statement "endorsing" UNDRIP, though with a condition, stating they have "learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework."

2014: Despite their "endorsement" Minister of Aboriginal Affairs Bernard Valcourt responded to an article in Nunatsiaq News that "free, prior, and informed consent…could be interpreted in a way that would legally provide a veto to Aboriginal groups, and therefore, cannot be reconciled with current Canadian law."

THE CURRENT STATE OF UNDRIP IN CANADA

2016: Canada removed objections to UNDRIP in 2016

2016: Federal Private Member's Bill introduced

- Killed in the Senate, 2018

2019: Province of B.C. passes "DRIPA" legislation

- Implementation is ongoing

2019: Province of Ontario Private Member's Bill introduced

- Near-death in Committee

2020: Federal UNDRIP legislation in Parliament

- Second Reading, Referred to Committee

2021: Inuvik (following Fort Smith) commit to UNDRIP

ELEMENTS OF EFFECTIVE UNDRIP IMPLEMENTATION?

1. Introducing Federal Enabling Legislation
2. Co-Creation of National Indigenous Action Plans
3. Develop protocols of consent-based decision-making
4. Independent Monitoring Body

CORE ELEMENTS OF FEDERAL LEGISLATION

Legal obligations:

- Action Plan on UNDRIP Implementation
  - With consultation and collaboration with Indigenous peoples,
  - To “take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.”
  - Three-year window
- Report to Parliament on UNDRIP Implementation
  - With National Indigenous Organization Consultation

CORE ELEMENTS OF B.C.'s LEGISLATION

Legal obligations:

- Action Plan on UNDRIP Implementation
  - With consultation and collaboration with Indigenous peoples,
  - To "take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."
- Report on UNDRIP Implementation
  - With Indigenous Consultation

Distinct Element in DRIPA:

- Empowering Indigenous Governing Bodies with decision-making authority

IMPLEMENTATION CHALLENGES

- No independent monitoring bodies.
  - Will lead to interpretation gap on implementation.
- Process for Aligning Laws (new and old) is not yet clear.
  - Can laws be passed without alignment?
- The pace of implementation to date has been glacial.
- Absence of community voices in the process.
- UNDRIP and Section 35?
- Jurisdictional confusion in regions and across the country.
- Ongoing debates around consultation vs. consent.

THE DUTY TO CONSULT

- The SCC has established the principle of the Duty to Consult as a legal obligation for Crowns to consult where an established or asserted treaty or aboriginal right is impacted by government action.
  - “Established or asserted” = all of Canada.

- Spectrum of consultation, relative to the scope of impact.
  - Accommodation in cases of harm.

**Development may proceed in cases where an Indigenous community opposed, as long as Crown has consulted to the degree required and the project is in the “public interest.” But even without UNDRIP, this may become more and more difficult.

CONSENT: TREATY & PROCLAMATION

Indigenous Protocols and Treaty (1609-)

The Royal Proclamation (1763)

Pre-Confederation Treaties (1784-1867)

Numbered Treaties (1870-1921)

CONSENT: RESERVE LANDS

National Energy Regulator Act (2019)

> “A company must not, for the purpose of constructing a pipeline or engaging in the activities referred to in paragraph 313(a), take possession of, use or occupy lands in a reserve, within the meaning of subsection 2(1) of the Indian Act, without the consent of the council of the band.”

CONSENT: TITLE LANDS

SCC Tsilqot'in Decision (2013)

> "Once Aboriginal title is established, s. 35 of the Constitution Act, 1982, permits incursions on it only with the consent of the Aboriginal group or if they are justified by a compelling and substantial public purpose and are not inconsistent with the Crown's fiduciary duty to the Aboriginal group..."

Federal Rights, Recognition & Self-Determination Tables:

- Tuígila "to make a path forward" Agreement (2019)
- Canada, British Columbia and Wet'suwet'en MOU (2020)

CONSENT: “TRADITIONAL” TERRITORIES

Cases where Indigenous peoples have unilaterally asserted their own versions of consent and in some cases enforced them:

Recent Cases

- Neskantaga First Nation Development Protocol
- Kitigan Zibi Moose Moratorium
- Sakgeeng First Nation Consent Protocol
- Saugeen Ojibway Nation FPIC Model
- Tŝilhqot’in Mushroom Permitting
- Sepwepmec Tiny House Warriors

CONSENT: MODERN TREATY CONTEXT

Settlement Lands: Held in fee simple land tenure and Crown land use decisions are not applicable in these areas, and/or would require consent.

Regulatory Regime: Through co-management resource boards, LUP, the MVRMA, Nunavut Planning Commission, etc., substantive Indigenous participation in decision-making is legislated and even constitutionally protected.

- In cases governments have proceeded with significant regulatory decisions opposed by modern treaty holders, there have been consequences (Peel Watershed, NWT Superboard Proposal, SCC Clyde River Decision in Nunavut).
- Could the MVRMA be subject to the federal UNDRIP legislation, should it receive royal assent?

CONCEPTUALIZING CONSENT

COMMUNITIES	CROWN	COURTS
A natural condition of Indigenous jurisdiction;	Must be negotiated and formalized by agreement;	Preference for negotiation over litigation;
Rooted in Indigenous law and knowledge;	Rooted in Crown sovereignty, constitution, and underlying title;	Rooted in unreconciled title to lands;
Authorized by legitimate community leaders;	Negotiations primarily with “recognized” leaders;	The Aboriginal “group” that can prove title;
An ongoing condition, not a one time permission.	An expiry date, subject to re-negotiation.	Enduring until there is certainty of land tenure.

OPERATIONALIZING CONSENT

Process Options through UNDRIP Legislation:

- Cabinet “Decolonizing” Committees
- Joint Cabinet-Indigenous Committees
- Secretariat / Working Group / Leadership Tables

Process Options outside of UNDRIP Legislation:

- Impact/Environmental Assessment Processes
- Modern Treaty Implementation and Negotiated Agreements
- Adversarial Processes (i.e. the Courts)
- Indigenous-led Assertion and Enforcement