
Centre for International
Governance Innovation



Wiyasiwewin Mikiwahp
Native Law Centre

UNDRIP Implementation More Reflections on the Braiding of International, Domestic and Indigenous Laws

SPECIAL REPORT



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Governance Innovation



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Native Law Centre**

UNDRIP Implementation

More Reflections on the Braiding of International,
Domestic and Indigenous Laws



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CIGI Masthead

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Acronyms and Abbreviations



ABS	access and benefit sharing
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
DCA	duty to consult and accommodate
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
FPIC	free, prior and informed consent
GR	genetic resources
ITK	Inuit Tapiriit Kanatami
MOU	memorandum of understanding
NGO	non-governmental organization
RCAP	Royal Commission on Aboriginal Peoples
SCC	Supreme Court of Canada
TK	traditional knowledge
TRC	Truth and Reconciliation Commission
UNDRIP/UN Declaration	United Nations Declaration on the Rights of Indigenous Peoples

Preface



Oonagh E. Fitzgerald and Larry Chartrand

The International Law Research Program (ILRP) of the Centre for International Governance Innovation (CIGI), together with the Wiyasiwewin Mikiwahp Native Law Centre of the University of Saskatchewan College of Law, are pleased to present this collection of short essays discussing how international law, domestic constitutional law and Indigenous peoples' own laws can work together to bring about full implementation in Canada of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹ This second report on the theme of braiding international, constitutional and Indigenous laws continues and deepens the conversation broached in the 2017 CIGI Special Report entitled *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*.²

Since the Government of Canada's "embrace" of UNDRIP at the United Nations Permanent Forum of Indigenous Peoples in May 2016,³ much has happened to set the stage for an ambitious implementation agenda. Yet actual progress remains slow and largely illusory. It is fair to recognize the numerous positive steps taken by the federal government. In September 2017, on the occasion of Canada's 150th anniversary, Prime Minister Justin Trudeau made an impassioned speech to the UN General Assembly in which he acknowledged that Canada's first peoples had a history that stretched back many millennia before the arrival of Europeans, and that the nation called Canada was best seen as "a work in progress."⁴ He referred to Canada's colonial legacy, the broken promises and the harms that racist policies have inflicted on Inuit, Métis and First

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

2 Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, CIGI, Special Report, 31 May 2017.

3 Minister of Indigenous and Northern Affairs Carolyn Bennett, "Announcement of Canada's Support for the United Nations Declaration on the Rights of Indigenous Peoples" (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016).

4 "Prime Minister Justin Trudeau's Address to the 72nd Session of the United Nations General Assembly" (21 September 2017), online: <<https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeaus-address-72th-session-united-nations-general-assembly>>.

Nations peoples, and he renewed promises to use domestic implementation of UNDRIP as “a way forward” to correct past wrongs, support nation-to-nation, government-to-government, and Inuit-Crown relationships, and achieve reconciliation.

A working group of federal ministers was struck to review “federal laws, policies, and operational practices to ensure that the Crown is meeting its constitutional obligations, and adhering to international human rights standards—including the *United Nations Declaration on the Rights of Indigenous Peoples*.”⁵ The federal Department of Justice articulated 10 “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples,” noting that “The implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* requires transformative change in the Government’s relationship with Indigenous peoples.”⁶ The old department of Indigenous and Northern Affairs was dissolved and replaced by two new departments: Crown-Indigenous Relations and Northern Affairs Canada; and Indigenous Services Canada.

In February 2018, the prime minister announced that the Government of Canada would develop a Recognition and Implementation of Indigenous Rights Framework, consisting of both legislation and policy. According to the government website this “will ensure that the Government of Canada recognizes, respects and implements Indigenous rights, including inherent and treaty rights, and provides mechanisms to support self-determination. The framework will support Indigenous peoples’ rights as recognized and affirmed in section 35 of the *Constitution Act, 1982*, while also aligning with the articles outlined in the *United Nations Declaration on the Rights of Indigenous Peoples*. It will also be consistent with the Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples.”⁷

Meanwhile, other federal departments have taken initial, tentative steps to work with Indigenous peoples in the development of policy on such matters as climate change, environmental assessment reform, international trade, intellectual property law reform and protection of traditional knowledge, and preservation and revitalization of Indigenous languages. In May 2018, Bill C-262, introduced as a private member’s bill by Member of Parliament Romeo Saganash, passed in the House of Commons (206 votes in favour, 79 against)⁸ and proceeded to the Senate.

While these are steps in the right direction, many of the contributors to this special report explain that more is needed to effect actual change on the ground for First Nations, Inuit and Métis peoples in Canada. UNDRIP represents the concerted efforts of Indigenous leaders from around the world to stem the destructive and disempowering effects of colonialism and to create conditions for Indigenous peoples to reclaim their social, cultural, linguistic, spiritual, political, economic, environmental and legal autonomy. As such, its embrace by the Government of Canada should create opportunities to make substantial progress in recognizing Indigenous peoples’ rights in Canada. Yet many of the contributors

5 “Remarks by the Prime Minister in the House of Commons on the Recognition and Implementation of Rights Framework” (14 February 2018), online: <<https://pm.gc.ca/eng/news/2018/02/14/remarks-prime-minister-house-commons-recognition-and-implementation-rights-framework>>

6 Department of Justice, “Principles respecting the Government of Canada’s relationship with Indigenous peoples”, online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

7 Canada, “Overview of a Recognition and Implementation of Indigenous Rights Framework” (14 February 2018), online: www.aadnc-aandc.gc.ca/eng/1536350959665/1536350978933>.

8 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

to this report — much like the authors of the Yellowhead Institute’s report on Canada’s Indigenous Rights Framework⁹ — express considerable concern that Canada’s vision of Indigenous jurisdiction over lands and resources is a very narrow one, and perhaps little more than a modified version of the status quo.

The contributors to this special report explain how Indigenous peoples’ own laws offer world views that should now be given an opportunity to develop and flourish. Implementation of UNDRIP into both the international and domestic legal landscape will require legal change to recognize and accommodate different legal orders. With the metaphor of braiding, contributors to this series examine the potential opportunities and risks entailed in trying to bring coherence and harmony into the strands of international law, colonial domestic law and Indigenous peoples’ own laws, while taking seriously nation-to-nation relations and reconciliation.

About the Authors

As director of CIGI’s ILRP, **Oonagh E. Fitzgerald** oversees a research agenda that includes international economic law, environmental law, intellectual property law and innovation, and Indigenous law. She has extensive experience as a senior executive in the federal government, providing legal services and leadership in international law. In her most recent posting before coming to CIGI in 2014, Oonagh served as national security coordinator for the Department of Justice.

Oonagh has a B.A. (honours) in fine arts from York University. She obtained her LL.B. from Osgoode Hall Law School, and was called to the Bar of Ontario in 1983. She obtained an LL.M. from the University of Ottawa, an S.J.D. from the University of Toronto and an M.B.A. from Queen’s University.

Larry Chartrand is the academic director of the Native Law Centre. He is currently on leave from the Faculty of Law at the University of Ottawa, where he has been a faculty member since 1994, and assumed the role of full professor in 2013. He was born on the western plains and is a proud citizen of the Métis nation. He has previously served as director of the Aboriginal Self-Government Program at the University of Winnipeg, Métis advisor to the Senate Standing Committee on Aboriginal Peoples and director of the Indigenous Law Program at the Faculty of Law, University of Alberta.

In 2017, Larry was awarded the distinguished Law Society Medal of Upper Canada in recognition of outstanding service in accordance with the highest ideals of the legal profession.

⁹ Hayden King & Shiri Pasternak, *Canada’s Emerging Indigenous Rights Framework: A Critical Analysis*, Yellowhead Institute, Special Report, 5 June 2018, online: <<https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf>>.

Introduction

Challenging Law



John Borrows

The Centre for International Governance Innovation (CIGI) has worked with Indigenous and other scholars over the past two years to consider Indigenous issues from various international, domestic and Indigenous legal perspectives. The goal of this effort has been to “explore and reconceive the relationship between international law, Indigenous peoples’ own laws and Canada’s constitutional narratives” in order “to reflect on the past and envision what the future may hold for this country and its relationship with... Indigenous peoples.”¹ As a result of these efforts, on May 31, 2017, a CIGI Special Report was released that addressed the braiding of these three legal approaches as they relate to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The report, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, showcased nine papers that argued UNDRIP could not be implemented without bringing international and domestic law in line with Indigenous legal traditions.

Bringing international and domestic law in line with Indigenous peoples’ own laws is not a linear process. Lines can be parallel, but they can also weave, cross and entwine with one another. Indigenous peoples do not want to see their own legal norms and decision-making processes obscured or extinguished through their interaction with other legal systems. The threads of Indigenous law must be vibrant, strong and recognizably distinct when they interact, effect and are influenced by other legal traditions. Braiding was chosen as a metaphor for the first CIGI report to reinforce this view. Oonagh Fitzgerald and Risa Schwartz introduced the metaphor’s importance in the following terms:

The braiding metaphor is relevant to many Indigenous traditions in Canada. For example, braided Metis sashes represent the weaving

¹ Oonagh Fitzgerald & Risa Schwartz, “Introduction”, in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, CIGI, Special Report, 31 May 2017 at 13.

together of different traditions. The braiding of sweetgrass indicates strength and drawing together power and healing. A braid is a single object consisting of many fibres and separate strands; it does not gain its strength from any single fibre that runs its entire length, but from the many fibres woven together. Imagining a process of braiding together strands of constitutional, international and Indigenous law allows one to see the possibilities of reconciliation from different angles and perspectives, and thereby to begin to reimagine what a nation-to-nation relationship justly encompassing these different legal traditions might mean.²

Throughout the past year, CIGI has continued to work within this metaphor to address the relationship between international law, national law and Indigenous law. This report continues the theme of braiding begun in CIGI's earlier publication. The 14 papers that follow examine the relationships between international law, national law and Indigenous law in helpfully perceptive ways. While some scholars braid all three sources together within specific papers, others pick up one or two of the strands to examine how they might interact with one another in more general terms.

Regardless of the precise approach, the broader message of this report remains the same: the sources of law must positively react and respond to one another in ways that give effect to Indigenous peoples' laws, values, customs, norms and traditions. The language of Indigenous rights is the language used by international and national law to accomplish this objective, yet, as Sa'ke'j Henderson reminds us in this report, Indigenous peoples have their own ways of describing what is meant by Indigenous rights within their own systems.

The challenge for people working in this field, as the authors of this report acknowledge, is to see Indigenous laws as possessing their own histories, contexts, powers and meanings. Indigenous peoples' own laws may be more broadly construed than either international law or domestic law envisions or allows. As a result, it may not always be easy to place these legal traditions in conversation with one another. Yet these deeply rooted differences should not prevent us from recognizing Indigenous laws on their own terms.

Indigenous laws flow from specific landscapes, ecosystems and peoples, as Aimée Craft and Cheryl Knockwood illustrate in this report. Indigenous laws should be recognized for what they are, without necessarily altering them to fit international or national law sensibilities. Yet their profound differences may challenge some practitioners and theorists of international and national law. For example, international law, in particular as it relates to human rights, is often presented as being universal, while Indigenous law might at times be more context specific. Moreover, national law is thought to be paramount in its sphere. These views about international and national law often leave little room for Indigenous law to question and perhaps even overturn the assumptions of practitioners in these other traditions. While Indigenous peoples' laws may contain so-called universal principles, at points, and they may interact with national laws in some ways, they cannot be wholly contained within either approach. Indigenous peoples' law is *sui generis*; it is not a creation of either international or national law, although it might be recognized and affirmed by other systems.

The braiding of Indigenous law with international and national law is thus a unique undertaking that helps us to reconceive the very idea of law. As suggested, Indigenous peoples' law questions the claims of both international and national laws to universality and supremacy. Law can be multidirectional in sources and application. It might be created by clans, flow from experiences with glaciers or rivers, or be sourced in custom and grassroots practices, as well as being created by legislatures, courts and executive authorities. In this light, some sources of Indigenous law might not make sense or even seem like law

² *Ibid* at 3.

to people working in other legal traditions. Therein lies the challenge in braiding Indigenous law with international and national law: authority, responsibility, obligation, enforcement and persuasion, *inter alia*, may be differently construed in Indigenous contexts. Law is a social institution that has normative, analytical and specifically cultural components — it differs in time and place, and from group to group, when measured against the broader sweep of history.³ It does not flow only from Westphalian, religious, secular or other so-called conventional sources.

The papers in this collection explore how Indigenous law is both similar and different from international and national law, and where Indigenous law and international and national law might combine to mutually support each other's objectives.

The first four papers in this report explore international law perspectives as they relate to UNDRIP.

Sa'ke'j Henderson starts this report with a discussion of how the concept of inherent dignity underlies many international rights norms and instruments. Sa'ke'j encourages us to understand inherent dignity by engaging Indigenous knowledge systems and languages when interpreting this term. Benefits of this approach include seeing more clearly how Eurocentric concepts of dignity treat humankind as distinct from other life forces. Sa'ke'j's paper also considers how the concept of inherent dignity might relate to inherent Indigenous rights and to the correction of historical wrongs suffered by Indigenous peoples.

Sheryl Lightfoot writes about UNDRIP's future implementation through national legislation. She explains how national Indigenous organizations, the Truth and Reconciliation Commission (TRC) and the Canadian Parliament's Bill C-262⁴ are important for this goal to be realized. The role of national legislation is to help bring clarity, consistency and momentum around UNDRIP's full implementation and to create open space for repealing the Indian Act, accommodating Indigenous law and overturning discriminatory laws through the principles of free, prior and informed consent.

Gordon Christie's paper critiques conservative commentators who express caution about UNDRIP's implementation in the Canadian context. He warns that these critics are attempting to undercut measures designed to address structures of domination forged by colonialism, dispossession, oppression, loss of self-determination and cultural genocide. Gordon deconstructs these critics' arguments or concerns along three lines: first, that a broad interpretation of UNDRIP would require a fundamental restructuring of Canada; second, that UNDRIP would use non-Western notions of property and jurisdiction to address Indigenous territoriality; and, third, that UNDRIP would provide a veto to Indigenous peoples in relation to development of their lands. Gordon addresses each of these issues by pointing out the critics' "aversion to the notion Canada should relinquish absolute power over lands and resources unjustly taken from Indigenous peoples."

Brenda Gunn discusses how UNDRIP can be used to address the special needs of Indigenous women in a Canadian context. She points out not only that Indigenous women are in a deficit position when it comes to rights implementation (through violence and discrimination), but also that Indigenous women have much to offer in positive terms to UNDRIP's application. She argues that using a gendered lens to enact UNDRIP can help parties to resist fundamentalism in the interpretation of Indigenous rights and to appreciate how rights are indivisible, interdependent and interrelated, thus avoiding troubling hierarchies that otherwise might inadvertently be embedded in the implementation of this document.

Each paper examines the implications of braiding international, national and Indigenous law, and the next group of papers zero in more specifically on the role of Indigenous law in implementing UNDRIP.

3 Brian Tamahana, *A Realistic Theory of Law* (Cambridge, UK: Cambridge University Press, 2017).

4 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

Larry Chartrand's paper issues a challenge to Metis leaders to account for the agreements they sign with governments in Canada. He argues that the concept of reconciliation found within their work falls far short of international standards and those found in the TRC because the agreements reproduce narrow interpretations of Aboriginal and treaty rights in Canada's constitutional jurisprudence. Larry questions whether Metis leadership is "selling out" by adopting watered down versions of reconciliation found in the Aboriginal and treaty rights section of Canada's Constitution. While Larry considers the Canadian government's potential hypocrisy in pushing a deficient reconciliation agenda when its public comments are much broader, his paper is important because he raises the question of Indigenous peoples' own complicity in failing to follow the higher standards of reconciliation in documents such as the TRC and UNDRIP.

Aimée Craft discusses article 25 of UNDRIP that references, *inter alia*, Indigenous peoples' spiritual relationship with their waters and their responsibilities to future generations in this field. Her paper outlines an Anishinaabe approach to implementing this provision by reference to Anishinaabe peoples' own laws. She suggests this is done through advancing Anishinaabe peoples' sacred treaty relationships with "nibi [water], water beings and all of Creation," in an argument that is particularly attentive to how Anishinaabe language describes these relationships. The paper highlights the role of relationality in deepening Anishinaabe responsibilities toward water through spiritual, natural, customary and human ways.

Cheryl Knockwood provides a road map for Mi'kmaw governance to be recognized and affirmed through UNDRIP's implementation. She breaks this process into the smaller pieces of Mi'kmaw relationships with Mother Earth, experiences of injustice at the hands of government, the implementation of treaties and Aboriginal rights, including developing a Mi'kmaw Aboriginal and Treaty Rights Implementation Act and hosting a Mi'kmaw Summit to develop a nation-building action plan. Along the way, Cheryl discusses the role of Mi'kmaw legal traditions, including stories, language and teachings about sustainability. By focusing on principles of being responsible, honourable, wise and respectful to rebuild the Mi'kmaw Nation, this paper highlights the role of Indigenous law in resurgence and reconciliation.

Sarah Morales writes about the importance of UNDRIP for addressing violence experienced by Indigenous women in the extractive industry sectors. She explains that some of these impacts that are specifically gendered are related to personal safety, health, environment, culture and economic participation. Using a human rights framework, Sarah suggests that rights to culture, religion, health and physical well-being, and decision making hold the potential to break the worst abuses faced by Indigenous women when extractive industries operate within Indigenous territories. The paper is significant because it shows how Indigenous peoples' right to sustainable development must reflect the concerns and solutions of both Indigenous men and Indigenous women to achieve reconciliation and implement Indigenous legal traditions in specific contexts.

Hannah Askew discusses how the implementation of UNDRIP requires a significant investment of time and resources to learn about Indigenous legal orders. Drawing on former British Columbia Court of Appeal Chief Justice Lance Finch's phrase "duty to learn" in relation to Indigenous law, Hannah highlights resources that can be accessed to learn more about Indigenous legal traditions, including "traditional stories, online audio recordings of storytellers and speakers, language lexicons, nation and band council websites, cross-disciplinary Indigenous scholarship including graduate theses, anthropological writing past and present (treated with caution as it is often authored by non-members), public lectures, visual art such as carvings, poles, and weaving, as well as dance, music and film." Moreover, Hannah discusses the place of land-based learning, social media and Indigenous leadership in this work. She expresses caution about some of the dangers involved in reinvigorating Indigenous law, all while acknowledging the gift that Indigenous law might provide for other Canadians as Indigenous law becomes a more significant force in the land.

The final group of papers in this collection takes up more specific questions related to national law's implementation of UNDRIP, while never losing sight of the place of international law and Indigenous law in these endeavours.

Joshua Nichols contrasts what he identifies as status quo reconciliation, which contains Indigenous jurisdiction within federal and provincial power, with nation-to-nation federalism, which would reject “racist fictions of discovery and *terra nullius*” and replace them with “processes of mutual agreement and consent that are found in the histories of treaty making.” The significance of Joshua’s paper is that he identifies why it is necessary to change the narrative from an assimilatory one to one that recognizes Indigenous self-determination in flexible and mutually beneficial ways.

Robert Hamilton writes about how UNDRIP’s definitions of self-determination and of free, prior and informed consent do not fit within section 35(1) of the Constitution Act, 1982’s doctrines of consultation and accommodation. In fact, Robert argues that section 35(1)’s reliance on categories of “asserted” and “established” rights is incompatible with UNDRIP implementation. The reason for this difference is that UNDRIP supports “a model of legal pluralism and negotiated jurisdictional sharing which the domestic Aboriginal rights framework has difficulty accommodating.” Robert interrogates these distinctions in his paper and concludes by providing examples of Indigenous/Crown relations that remove the asserted/established right distinction from Canadian law.

Ryan Beaton looks at UNDRIP’s article 46, which recognizes that Canada can justify infringements of Aboriginal and treaty rights if it does so to “respect...the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.” Ryan’s paper argues that article 46 cannot be applied in isolation. Specifically, he notes that article 27 of UNDRIP requires governments to co-create dispute resolution processes with Indigenous peoples to address potential infringements before they occur. In making this point, Ryan asserts that this means that section 35(1)’s justification for allowing governments to infringe Aboriginal and treaty rights cannot be sustained in light of UNDRIP’s implementation.

Kerry Wilkins begins his paper by discussing the political cost of implementing UNDRIP for Canadian governments, and chronicles how UNDRIP challenges the status quo. He also discusses the costs for Indigenous peoples of not pursuing the implementation of UNDRIP. To examine these issues in greater depth, Kerry details four pressing questions that must be answered during UNDRIP’s implementation: who are the Indigenous peoples that are to benefit from UNDRIP, what are the territorial spaces to which it will apply, how might it be enacted as domestic Canadian law and what is the Crown’s role toward Indigenous peoples after implementation? The paper represents a valuable contribution to the literature because it clearly identifies the most pressing challenges both Indigenous peoples and the Crown must face if they are going to successfully realize UNDRIP’s promises.

Joshua Nichols and Robert Hamilton’s concluding contribution to this report discusses how Indigenous peoples might receive a fair and equitable distribution of benefits arising from the use of their genetic resources should they decide they want to allow this to occur. Examining the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, adopted as a supplementary agreement to the 1992 Convention on Biological Diversity, the authors propose a system for access and benefit sharing based on UNDRIP’s standards that facilitates nation-to-nation dealing in this field.

About the Author

John Borrows is a senior fellow with CIGI’s International Law Research Program. In this role, John provides guidance and helps shape the program’s international Indigenous law research. He is also the Canada Research Chair in Indigenous Law at the University of Victoria Law School and the Nexen Chair in Indigenous Leadership at the Banff Centre for Arts and Creativity.

Part I

International Law Perspectives



Jonvier RGA.

The Necessity of Exploring Inherent Dignity in Indigenous Knowledge Systems



James (Sa'ke'j) Youngblood Henderson

The Indigenous concept of inherent dignity is often assumed to be the same as European versions of dignity, yet the many Indigenous concepts of inherent dignity are distinct from the European versions of dignity. Indigenous knowledge systems and languages in Canada are distinct knowledge systems that have in them many diffused and eclectic manifestations of the concept of inherent dignity that have not been systematically explored or unpacked by Indigenous elders, academics, lawyers or policy analysts. In the collective Indigenous concept, inherent dignity is viewed as inviolable and sacred in all life forms; inherent dignity gives meaning to all of reality and constitutes its supreme value. Grounded holistically in a connected material and spiritual relationship, these Indigenous concepts give meaning and value to all life forms. No clear dividing line exists that separates humans from other life forms. These holistic concepts blend spirituality and consciousness, subjectivity and objectivity, receptivity, relationality, identity and creativity. Inherent dignity generated the Indigenous perspective of ecological, collective, family and individual dignity. It also informs Indigenous law, treaty interpretation and the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration).¹

¹ The UN Declaration was adopted by the United Nations in 2007. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

Human rights are not aspirational or soft law; they are natural rights held by humans, as distinct from artificial governments. They are consensual norms of a non-coercive global legal order that articulate the inherent rights of humans as a remedy to the historical and ongoing racial and cultural superiority of European colonization. Human rights are standards and binding obligations that the consensually ratifying states have promised to respect, protect and fulfill to generate inherent human dignity and protect the self-determination of peoples. Furthermore, the states have no ability to limit these human rights.

Given the diverse views held about and the power relations at play in deciding on the state or the nature of human dignity, an inherent dignity approach to human rights is essential to overcome the past inequalities, discriminatory practices and unjust distributions of power that have impeded developmental progress of peoples. The inherent dignity approach begins with a rejection of violence as a form of social control by the state through its legal system and its administration of justice. An inherent dignity approach to human rights is more than a contextual element that assists in the interpretation of the Constitution, the construction of ambiguous legislation and the filling of gaps in the common or civil law.

The principle of respect for inherent human dignity holds a prominent and canonical position in UN and intergovernmental instruments. It is the starting point, the shaping principle or the overarching principle of the law of human rights. It affirms the centrality of the spirit of the dignity of human beings as persons or of personhood. It emphasizes the significance, uniqueness and inviolability of each human, each person, against the background of their essentially relational dimensions. Inherent dignity is indispensable for living a just life. Yet we are not born knowing how to live or act by this fundamental truth. The spirit and intent of the existing knowledge systems have to teach us how to live and nourish our inherent dignity throughout our lives. The various concepts of inherent dignity of humans need to be boldly, but skilfully, woven and harmonized among distinct knowledge systems to achieve a new national and global order.²

Currently, a comprehensive view of the concept of inherent human dignity is explicitly enshrined in international human rights law. The preamble of the Charter of the United Nations states that the peoples of the United Nations are determined “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person.”³ The preamble of the Universal Declaration of Human Rights (Universal Declaration)⁴ of 1948 declares that “the inherent dignity” of all members of the human family is “the foundation of freedom, justice and peace in the world.” Article 1 of the Universal Declaration declares, “All human beings are born free and equal in dignity and rights.” The Universal Declaration established “the idea that human dignity and human rights are core values which should be respected when pursuing any policy.”⁵ In addition, “it establishes that human dignity and rights are afforded to all human beings” and “that all human action must act in accordance with human dignity.”⁶ This concept limits the concept of sovereignty and power. The then rapporteur to the Human Rights Commission, Charles Malik from Lebanon, summarized this fundamental issue as whether the state existed for the

2 For sources that examine the concept of dignity in greater depth, see e.g. Patrick Capps, *Human Dignity and the Foundations of International Law* (Oxford, UK: Hart Publishing, 2009); Erin Daly, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* (Philadelphia: University of Pennsylvania Press, 2012); Michael Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012); Oscar Schachter, “Human Dignity as a Normative Concept” (1983) 77 AJIL 848–54.

3 *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Can TS 1945 No 7.

4 The Universal Declaration was enacted by the United Nations in 1948. *Universal Declaration*, GA Res 217A(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71 [*Universal Declaration*].

5 Daly, *supra* note 2; Rosen, *supra* note 2.

6 Capps, *supra* note 2 at 107.

sake of the human person or the person for the sake of the state: the human rights regime articulates that the state exists for the sake of the human.⁷

The idea of inherent human dignity has been at the heart of the major overarching human rights treaties that grew out of the Universal Declaration, which was initially conceived of as a soft law instrument. Today, the idea of inherent human dignity is widely recognized as the innovative concept of the entire international human rights system.⁸ The importance of inherent dignity continued to be foundational in the International Convention on the Elimination of All Forms of Racial Discrimination,⁹ the International Covenant on Civil and Political Rights¹⁰ and the International Covenant on Economic, Social and Cultural Rights.¹¹

The Universal Declaration paved the way for the adoption of more than 70 UN treaties, which are applied today on a permanent basis at global, regional and national levels. It also served as a model for many constitutions and laws throughout the world and helped to ground countless decisions of national and international courts. The concept of inherent human dignity is prioritized in several subsequent UN laws, thereby helping to expand the intertwining of human dignity with different areas of legal regulation: the rights of children; the prohibition against torture, slavery, inhumane and degrading treatments and discrimination of all sorts; the prohibition against sexual harassment; the regulation of abortion, euthanasia and the handling of mortal remains; the rights of asylum seekers; and so on.¹² The 1993 World Conference on Human Rights in Vienna reaffirmed inherent human dignity as the basis for, and as a fundamental principle of, human rights.¹³ References to inherent human dignity in international legal acts spread to the Council of Europe and the European Union and into the constitutions of many European states. Inherent human dignity is the foundation and justification for rights and duties: because of inherent human dignity, human beings have rights and duties.¹⁴

The UN Declaration¹⁵ implements the customary international law and the existing human rights treaties and covenants that Canada has fully endorsed.¹⁶ Article 1 implements for Indigenous peoples the binding UN treaties on human rights: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights

7 Charles Malik, “Four Basic Principles,” in Habib C Malik, ed, *The Challenge of Human Rights: Charles Malik and the Universal Declaration* (Oxford, UK: Oxford University Press, 2000) at 38.

8 Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2012).

9 *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969) [*Racial Discrimination Convention*].

10 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976) [*ICCPR*].

11 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976) [*ICESCR*].

12 See e.g. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, GA Res 39/46, UNGAOR, 39th Sess, Supp No 51, UN Doc A/139/51 (1985), 1465 UNTS 85 (entered into force 26 June 1987); Council of Europe, *Convention on Human Rights and Biomedicine*, ETS 164 (Oviedo, 1997), online: <<http://conventions.coe.int/Treaty/EN/Treaties/html/164.htm>>; *Racial Discrimination Convention*, supra note 9; *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990); *The United Nations and Human Rights 1945–1995* (New York: UN Department of Public Information, 1995); *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, UN Doc A/RES/45/158, 30 ILM 1517 (entered into force 1 July 2003).

13 UN, Office of the High Commissioner for Human Rights, *Vienna Declaration and Programme of Action*, 12 July 1993, UN Doc A/CONF.157/23 at para 10.

14 Doron Shultziner, “Human Dignity – Functions and Meanings” (2004) 3:3 *Global Jurist Topics* at 3.

15 *UNDRIP*, supra note 1.

16 Indigenous and Northern Affairs Canada, “United Nations Declaration on the Rights of Indigenous Peoples”, online: <www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

law.¹⁷ In addition, the remaining articles of the UN Declaration clarify and envisage the beginning of a process in the states to actualizing or realizing the interrelated human rights of Indigenous peoples. This flexible process allows countries and their Indigenous peoples to engage in dialogue and gradually become familiar with the global consensus or normative standards to achieve shared consensus on issues that are especially complex or sensitive.

Although the principle of inherent human dignity is at the core of the major international human rights instruments, it is never explicitly defined in the principles or established as a theoretical basis for these instruments. Due to a lack of consensus on the definition of inherent human dignity, the various regional human rights protection systems attribute somewhat similar, but somewhat different, meanings to the idea of inherent human dignity. Consequently, inherent human dignity can be described as a contested concept; this means that it is constantly subject to interpretative analyses from different knowledge systems that need more exploration. A need exists for clearer guidelines from Indigenous knowledge systems and languages in Canada to help clarify the structure and importance of the concept of inherent human dignity in Indigenous human rights. Such clarity could assist in achieving a consistent interpretation of the concept of the inviolability of inherent human dignity.

Instead of providing a definition, the Universal Declaration and other international human rights covenants provide guidance for understanding the principle of inherent dignity as a foundation of justice in the world: first, that dignity is “inherent...to all members of the human family”¹⁸; second, that all human beings are “free and equal in dignity and rights”¹⁹; and, third, that human rights “derive from the inherent dignity of the human person.”²⁰ Thus, the meaning of inherent human dignity remains open to all knowledge systems.

The first important consequence of relying on inherent human dignity in international law is that the principle of inherent dignity and its manifestations in the human rights of Indigenous peoples in the UN Declaration has to be carefully understood and unpacked from many Indigenous knowledge systems and languages because it is distinct from Eurocentric concepts of dignity. A careful analysis of human rights law and intergovernmental policy documents, and of the discussion that led to their adoption, provides evidence that the recourse to inherent human dignity reflects a deep concern about the need to ensure respect for the inherent worth of every human being. Eurocentric knowledge systems have a difficult time with accepting or defining “inherent,” especially the inherent dignity of all members of the human family. Samuel Pufendorf, writing in the natural law tradition in the eighteenth century, claimed that natural rights are derived from human dignity or *dignatio* and not from state authority.²¹ However, the contemporary rights systems, in common or civil law, are derived from the sovereign, or state, or are socially constructed as a person’s position or status. These legal systems have difficulties in comprehending inherent dignity or rights. European dictionaries usually define inherent as “involved in the constitution or essential character of something,”²² “intrinsic”²³ or a permanent or characteristic attribute of something.²⁴ The idea expressed in these shallow definitions, when it is accompanied by

17 James (Sa’ke’i) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing, 2008) at 75.

18 *Universal Declaration*, *supra* note 4, Preamble.

19 *Ibid*, art 1.

20 ICCPR, *supra* note 10, Preamble; ICESCR, *supra* note 11, Preamble.

21 Eckert Joern, “Legal Roots of Human Dignity in German Law” in David Kretzmer & Eckart Klein, eds, *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) at 44.

22 Merriam-Webster, *sub verbo* “inherent”, online: <www.merriam-webster.com/dictionary/inherent>.

23 *Ibid*.

24 See *English Oxford Living Dictionary*, *sub verbo* “inherent”, online: <<https://en.oxforddictionaries.com/definition/inherent>>.

the adjective “human,” is that dignity is a mysterious endowment inseparable from the diversity of the human condition (but really a gift of likeness to a personal God that intervenes in daily life). These definitions derive from the belief that human nature is exceptional, elevated and distinguishable from other life forms.

The second important consequence of the reliance on inherent human dignity in international law is that basic rights are equal for everyone: if inherent dignity is the same for all and the foundation of all human rights and of freedom, justice and peace in the world, then all human beings possess equal rights. This is the reason why discrimination — the unjust distinction in the treatment of different categories of people — is directly contrary to inherent human dignity. Article 2 of the UN Declaration affirms that Indigenous peoples and individuals are free, are equal to all other peoples and individuals, and have the right to be free from any kind of discrimination in the exercise of their rights, in particular, of their rights based on their Indigenous origin or identity. This is consistent with the Supreme Court of Canada’s decision in *R v Oakes*,²⁵ which declared that the promotion of inherent human dignity is the lodestar for the protection of all the rights guaranteed by the Canadian Charter of Rights and Freedoms.²⁶ However, subsequently, the court held in *R v Kapp*²⁷ that the concept of inherent human dignity is too subjective and abstract to be applied as a legal test. Thus, Canadian jurisprudence lacks a principled definition of inherent human dignity. However, the court has continually recognized that the existing Aboriginal and treaty rights of Aboriginal peoples are inherent rights derived from Aboriginal knowledge and laws.²⁸

The third important consequence of a reliance on inherent human dignity in international law is the understanding that human rights “derive from the inherent dignity of the human person”²⁹; this emphasizes that human rights are not derived from, or given by, state authority, but are distinct and independent from state authority. These human rights are inherent in every human being; thus, they cannot legitimately be taken away by any human, peoples, governments or societies.³⁰ This does not mean that laws are unnecessary to protect initial dignity because it is an integral part of every human being; it means that governments need to respect and protect inherent human dignity to remedy past abuses and wrongs. The UN Declaration is a global remedy to correct past wrongs against the inherent human dignity of Indigenous peoples. The declaration’s purposes are, first, to prevent discrimination against Indigenous peoples for being who they are and, second, to advance or realize the full development of the talent, capacities and visions of Indigenous peoples in their chosen paths.

From these three consequences, we can understand that the purposes of relying on the inherent dignity of Indigenous peoples as the source of their human rights is an attempt by Indigenous peoples to generate an Indigenous concept of human rights. It is not an attempt to promote a Eurocentric ideological construct or cognitive imperialism that relies on past philosophies of dignity. The UN Declaration was a hard-won recognition and consensus that inherent dignity is at the heart of every Indigenous person and family.

While the European monologue on dignity and rights is another part of the global dialogue, this monologue cannot or should not be used to construe the inherent dignity or rights of Indigenous

25 *R v Oakes*, [1986] 1 SCR 103 at para 64.

26 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

27 *R v Kapp*, [2008] 2 SCR 483 at paras 21–22.

28 James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, 2006) at 116–77.

29 Alan Gewirth, “Human Dignity As the Basis of Rights” in Michael J Meyer & WA Parent, eds, *The Constitution of Rights: Human Dignity and American Values* (Ithaca, NY: Cornell University Press, 1992) at 10.

30 Oscar Schachter, “Human Dignity as a Normative Concept” (1983) 77 AJIL 848–54.

peoples. An international discussion began in 2011, during a conference of the Norwegian Academy of Science and Letters in Oslo, Norway. The conference opened a Eurocentric discussion that made reference to “The Concept of Human Dignity in Indigenous Philosophies,”³¹ but there has been little follow-up on this concept in Canada or beyond. Similarly, while many Indigenous scholars have begun to address Indigenous understanding in their language and knowledge systems, and in their concepts of well-being and good living, little attention has been focused on their efforts. The conversations and explorations of this concept of the inherent dignity of Indigenous peoples need to be resumed in the implementation of the UN Declaration with the participation of Indigenous leaders, coming from within their diverse and distinctive knowledge systems and languages. Inherent dignity is an integral core of all rights. This concept must be vigorously articulated by Indigenous scholars and peoples.

About the Author

James (Sa’ke’j) Youngblood Henderson is a research fellow at the Native Law Centre of Canada, University of Saskatchewan College of Law. He was born to the Bear Clan of the Chickasaw Nation and Cheyenne Tribe in Oklahoma in 1944 and is married to Marie Battiste, a Mi’kmaw educator. In 1974, he received a juris doctorate in law from Harvard Law School.

During the constitutional process in Canada (1978–1993), Sa’ke’j served as a constitutional adviser for the Mi’kmaw Nation and the National Indian Brotherhood, Assembly of First Nations. He has continued to write about Aboriginal and treaty rights and treaty federalism in constitutional law. Sa’ke’j is a noted international human rights lawyer and authority on protecting Indigenous heritage, knowledge and laws and has served as a member of the Advisory Board to the Minister of Foreign Affairs. He was one of the strategists, expert advisers and drafters of the United Nations Principles and Guidelines for the Protection of Indigenous Heritage and the United Nations Declaration on the Rights of Indigenous Peoples.

For his achievements, he received the Indigenous Peoples’ Counsel award in 2005, the National Aboriginal Achievement Award for Law and Justice in 2006 and an honorary doctorate from Carleton University in 2007. He became a fellow of the Royal Society of Canada in 2013.

³¹ See “Conference about the Concept of Human Dignity In Indigenous Philosophies” (2011), international conference organized by the Norwegian Academy of Science and Letters, the Oslo Center for Peace and Human Rights and the University of Oslo, online: <www.norlarnet.uio.no/pdf/events/2011/dignity_background.pdf>.



Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples



Sheryl Lightfoot

“Effective implementation of the Declaration will be the test of commitment of States and the whole international community to protect, respect and fulfill indigenous peoples collective and individual human rights. I call on governments, the UN system, Indigenous Peoples and civil society at large to rise to the historic task before us and make the UN Declaration on the Rights of Indigenous Peoples a living document for the common future of humanity.”

Victoria Tauli-Corpuz, chairperson of the United Nations Permanent Forum on Indigenous Issues, on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples, September 13, 2007

In the celebrations immediately following adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)¹ by the UN General Assembly on September 13, 2007, minds were already turning to crucial questions of its implementation, both on the international level and in domestic contexts. The UN Declaration, which calls on all states to fully restructure relationships with Indigenous peoples, was a transformational moment in world politics. As Victoria Tauli-Corpuz, chairperson of the UN Permanent Forum on Indigenous Issues, noted in her celebratory remarks on the

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

passage of the declaration, “This is a Declaration which sets the minimum international standards for the protection and promotion of the rights of Indigenous peoples. Therefore, existing and future laws, policies and programs on Indigenous peoples will have to be redesigned and shaped to be consistent with this standard.”²

In the decade since its passage, the UN Declaration has gained universal consensus as an international human rights instrument and has been reaffirmed by consensus eight times in the General Assembly.³ A report to the Human Rights Council by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) on the 10-year progress of the UN Declaration noted that it now informs the work of many global actors, has influenced the drafting of multiple new state constitutions and statutes and has contributed to the development of laws and policies pertaining to Indigenous peoples worldwide.⁴ A similar 10-year anniversary report by the Permanent Forum on Indigenous Issues recounted progress in the areas of increased constitutional recognition of Indigenous peoples and a growing body of jurisprudence, including important legal victories for Indigenous rights in the African Commission, Bangladesh, Belize, the Caribbean Court of Justice and Indonesia.⁵

Even with these positive steps, however, full implementation of the UN Declaration remains elusive around the world and in Canada. Even in countries with strong legal frameworks for supporting Indigenous peoples’ rights and well-being, severe implementation gaps between legal recognition and concrete action steps on the ground remain, and, therefore, actual implementation on the rights of Indigenous peoples has been limited.⁶

Barriers to implementation, common to all states with Indigenous peoples, include difficulties operationalizing Indigenous rights due to a lack of awareness about the rights and standards, difficulties in identifying practical steps for implementation and conflicting interpretations of the content of Indigenous rights.⁷ The 2014 UN special rapporteur’s report on Canada’s implementation progress noted that “the numerous initiatives that have been taken at the federal and provincial/territorial levels to address the problems faced by Indigenous peoples have been insufficient.”⁸ Yet, as New Democratic Party member of Parliament Romeo Saganash (Abitibi-Baie-James-Nunavik-Eeyou) has aptly pointed out, “Implementation of the Declaration is a political, moral and...legal imperative, without qualification.”⁹

The Need for Legislative Frameworks in Implementation Efforts

Former UN special rapporteur on the rights of Indigenous peoples James Anaya stated that the UN Declaration, as a consensus international human rights instrument, “reflects legal commitments that are

2 United Nations Permanent Forum on Indigenous Issues, Press Release, “Message of Victoria Tauli-Corpuz, Chairperson of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples” (13 September 2007), online: <www.un.org/esa/socdev/unpfi/documents/2016/Docs-updates/Statement-Press-Release-IDWIP-2007.pdf>.

3 Paul Joffe & Sheryl Lightfoot, “Legislative Framework Essential for UN Declaration”, *The Hill Times* (10 January 2018) at 13.

4 EMRIP, *Ten years of the implementation of the United Nations Declaration on the Rights of Indigenous Peoples: good practices and lessons learned – 2007–2017*, UNHRC, 10th Sess, UN Doc A/HRC/EMRIP/2017/CRP.2 (2017).

5 UN Permanent Forum on Indigenous Issues, *Tenth anniversary of the United Nations Declaration on the Rights of Indigenous Peoples: measures taken to implement the Declaration*, UNESCO, 16th Sess, UN Doc E/C.19/2017/4 (2017).

6 Sheryl Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Abingdon, UK: Routledge, 2016).

7 Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous peoples*, UNHRC, 27th Sess, UN Doc A/HRC/27/52 (2014).

8 James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples, Addendum, The situation of indigenous peoples in Canada*, UNHRC, 27th Sess, UN Doc A/HRC/27/52/Add.2 (2014) at para 81.

9 *House of Commons Debates*, 41st Parl, 2nd Sess, No 206 (4 May 2015) (Romeo Saganash) (debate on Private Member’s Bill C-641, *United Nations Declaration on the Rights of Indigenous Peoples Act*).

related to the UN Charter, other treaty commitments and customary international law.”¹⁰ Because the UN Declaration is a pivotally important international human rights instrument, states have a political and moral obligation to implement it in domestic law and policy. The UN General Assembly has called for full implementation of the UN Declaration at both the national and international levels.

Implementation of Indigenous rights in domestic settings is expected to be comprehensive and systematic. Implementation has always been thought to include judicial reform, policy reform and legislative avenues, the synergy of which will lead to full implementation. A national legislative framework, one that includes mandates for a review of existing laws and policies, a national action plan, annual reporting mechanisms and a complaints mechanism, is an especially powerful first step toward full implementation.

As article 38 of the UN Declaration sets out, “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”¹¹ Former UN special rapporteur on the rights of Indigenous peoples Rodolfo Stavenhagen wrote, “[T]he rights in the Declaration can be seen as a framework of reference, a point of departure leading perhaps, among other things, to new legislation, to a different kind of judicial practice, to institution building and also, whenever necessary, to a different political culture.”¹² As Stavenhagen describes it, a process of “glocalization” will occur where global-level standards, such as the UN Declaration, influence and contribute to changes in national and local-level political processes, and “it is precisely at the regional and country levels that the rights of the Declaration must be made to apply.”¹³ EMRIP’s 10-year report on the UN Declaration implementation reads: “As States have the principal responsibility for adopting legislative measures and public policies to implement the rights recognized in the Declaration (article 42), they should adopt measures to achieve this aim, including through the implementation of recommendations and decisions of all human rights bodies referred to above.”¹⁴

The UN special rapporteur noted in her 2017 report to the General Assembly, “The effective implementation of the rights of indigenous peoples requires States to develop an ambitious programme of reforms at all levels to remedy past and current injustices. This should involve all the branches of the State, including the executive, legislative and judiciary, and implies a combination of political will, legal reform, technical capacity and financial commitment. Implementation should be measured against compliance with these requirements, and not on the basis of rhetorical claims of commitment or isolated measures.”¹⁵

The handbook for parliamentarians on implementing the UN Declaration, published by the Inter-Parliamentary Union and several UN agencies, cites the law-making role of parliaments as of particular importance in the implementation of the UN Declaration.¹⁶ The handbook suggests that legislative review and reform are essential first steps in implementation efforts and that all future national legislation should be evaluated for compliance with the UN Declaration as an ordinary part of the legislative process. The handbook provides existing examples of national implementation legislation already adopted by Bolivia in 2007 and the Republic of the Congo in 2011. A similar manual for national human rights institutions

10 James Anaya, *Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, UNGA, 65th Sess, UN Doc A/65/264 (2010) at para 62.

11 UNDRIP, *supra* note 1, art 38.

12 Rodolfo Stavenhagen, “Making the Declaration Work” in Claire Charters & Rodolfo Stavenhagen, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group for Indigenous Affairs, 2009) 352 at 357.

13 *Ibid* at 356.

14 EMRIP, *supra* note 4 at 15.

15 Victoria Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples*, UNGA, 72nd Sess, UN Doc A/72/186 (2017) at para 22.

16 Inter-Parliamentary Union, UN Office of the High Commissioner for Human Rights, United Nations Development Programme & International Fund for Agricultural Development, *Implementing the UN Declaration on the Rights of Indigenous Peoples: Handbook for Parliamentarians No. 23* (Geneva: Inter-Parliamentary Union, 2014) at 38.

states that national legislation is an important first step toward domestic implementation, but “legislation alone is generally not sufficient”; thus, a national action plan should also be developed that includes legislation, a review of existing laws and policies, a complaints mechanism, stakeholder education and active involvement of Indigenous peoples in the development and implementation of the action plan.¹⁷

The World Conference on Indigenous Peoples, at the UN headquarters in New York in September 2014, was held specifically to share best practices on Indigenous rights and their implementation. The more than 1,000 participants of the World Conference included member states, Indigenous organizations, non-Indigenous non-governmental organizations (NGOs), UN agencies and organizations and independent experts. Plenaries were held on specific issues shared by Indigenous peoples around the world, such as land, territories, development and resources, and also about system-wide implementation of the UN Declaration within the UN system as well as in individual national contexts. The outcome document of the World Conference clearly stated the necessary elements for national implementation of the UN Declaration and the collective commitment of the UN member states participating: “We commit ourselves to taking, in consultation and cooperation with indigenous peoples, appropriate measures at the national level, including legislative, policy and administrative measures, to achieve the ends of the Declaration.... We (also) commit ourselves to cooperating with indigenous peoples, through their own representative institutions, to develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the Declaration.”¹⁸

While no state has yet achieved full implementation, it stands to reason that implementation of Indigenous rights can ultimately be achieved — methodically — through a comprehensive approach including national legislation, a national action plan, policy reform and litigation. Māori legal scholar Claire Charters argues that Indigenous rights norms in both legal and political contexts are mutually enforcing. She finds that their repeated use in Indigenous political and legal advocacy, over time, will enhance the political and legal value of the UN Declaration as states internalize the need to comply with Indigenous rights norms. Charters’ study finds that “norm conformity can be achieved not only through legal sanctions or compulsion but also through the gradual normalisation and acceptance of the legitimacy of norms by the state and also the public at large.”¹⁹

Calls for a National Legislative Framework in Canada

Calls for concrete national legal and political reform measures in Canada began as early as 2011 at the UN Permanent Forum on Indigenous Issues when the Canadian Indigenous Rights Coalition of Indigenous organizations and non-Indigenous NGOs issued a joint statement, delivered by National Chief Shawn Atleo of the Assembly of First Nations, on behalf of the coalition. The statement called on all UN member states to formulate national action plans to implement the UN Declaration with clear priorities and timelines and annual reporting, as well as a full review of existing laws and policies to assess their compliance with the UN Declaration.²⁰

17 *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for Human Rights Institutions* (Sydney & Geneva: Asia Pacific Forum of National Human Rights Institutions & Office of the United Nations High Commissioner for Human Rights, 2013) at 78.

18 *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, GA Res 69/2, UNGAOR, 69th Sess, UN Doc A/RES/69/2 (2014) at paras 7–8.

19 Claire Charters, “Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Māori Legal and Political Claims” in Andrew Eruei, ed, *International Indigenous Rights in Aotearoa New Zealand* (Wellington, AU: Victoria University Press, 2017) 138.

20 Joint statement of Assembly of First Nations, Chiefs of Ontario, Grand Council of the Crees (Eeyou Istchee), First Nations Summit, Haudenosaunee of Kanehsàtā:ke, Innu Council of Nitassinan, Indigenous World Association, International Organization of Indigenous Resource Development, Louis Bull Cree Nation, Montana Cree Nation, Native Women’s Association of Canada, National Association of Friendship Centres, Samson Cree Nation, Union of BC Indian Chiefs, Amnesty International, First Peoples Human Rights Coalition, Canadian Friends Service Committee (Quakers), Amnistie Internationale, Hawai’i Institute for Human Rights, KAIROS: Canadian Ecumenical Justice Initiatives, “Implementation of UN Declaration” (19 May 2011) UN Permanent Forum on Indigenous Issues, online: Assembly of First Nations <www.afn.ca/2011/05/19/permanent-forum-on-indigenous-issues-free-prior-and-informed-consent/>.

In June 2015, the Truth and Reconciliation Commission of Canada (TRC) announced the release of its summary report: *Honouring the Truth, Reconciling for the Future*.²¹ This announcement concluded six years of intense and highly emotional work on the part of the TRC, which was created by the Indian Residential Schools Settlement Agreement.²² The TRC was authorized to settle class action legal claims brought forward by residential school survivors. It conducted an extensive study of the century-long, church-run and government-funded Indian Residential Schools program in Canada, in order to reveal the truth about the program and its legacy impacts on Indigenous peoples.

The TRC summary report notes that healing the harm done to the relationship between Canada and Indigenous peoples, lasting more than a century and a half, will be hard. But, reconciliation, the report states, “is about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country.”²³ While finding out the truth of residential schools was important, it was only the initial step in what is to be a very long process. The process of reconciliation will need to involve actions — actions that will fundamentally change behaviour at all levels of government and in all facets of society.

The TRC included 94 sweeping Calls to Action²⁴ as part of its report. These 94 recommendations, which were intended to form the blueprint for reconciliation into the future, call upon all layers of government — federal, provincial, territorial and municipal — to make fundamental changes in policies and programs in order to repair the harm caused by residential schools.

In its 2012 interim report,²⁵ the TRC first suggested that the UN Declaration could play an important role in any reconciliation project in Canada and suggested further exploration of this avenue. In the 2015 summary report, the TRC stated that it “remain(s) convinced that the *United Nations Declaration* provides the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada.”²⁶ The report goes on to note that an appropriate reconciliation framework would be one where the various legal and political systems of Canada, its educational institutions, religious institutions, corporations and civil society all operate in ways consistent with the principles of the UN Declaration, which provides a guiding framework for the sweeping changes necessary for Canada to work toward respectful relationships between Indigenous and non-Indigenous peoples.

TRC Call to Action 43 states: “We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.”²⁷ Then, Call to Action 44 states: “We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.”²⁸ In all, 16 of the 94 Calls to Action refer to the UN Declaration.

21 TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) [TRC, *Honouring the Truth*], online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>.

22 *Indian Residential Schools Settlement Agreement* (8 May 2006), online: <www.residentialschoolsettlement.ca/IRS%20Settlement%20Agreement-%20ENGLISH.pdf>.

23 TRC, *Honouring the Truth*, *supra* note 21 at 6.

24 TRC, “Calls to Action” (Winnipeg: TRC, 2015) [TRC, “Calls to Action”], online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf>.

25 TRC, *Truth and Reconciliation Commission: Interim Report* (Winnipeg: TRC, 2012), online: <www.myrobust.com/websites/trcinstitution/File/Interim%20report%20English%20electronic.pdf>.

26 TRC, *Honouring the Truth*, *supra* note 21 at 20.

27 TRC, “Calls to Action”, *supra* note 24 at Recommendation 43.

28 *Ibid* at Recommendation 44.

Yet, as the Inuit political organization Inuit Tapiriit Kanatami (ITK) has observed, Canada's position to date on implementing the UN Declaration is one of "inaction"; ITK notes that more than 10 years since the declaration's adoption by the General Assembly, seven years since Canada's first endorsement and nearly two years since Canada's full endorsement, without qualification, of the UN Declaration at the UN Permanent Forum, Canada's commitments are more rhetorical than reflective of any concrete actions toward implementation.²⁹ The Assembly of First Nations has passed three separate resolutions calling for implementation of the UN Declaration through a legislative framework and national action plan.³⁰ A legislative framework is also supported by numerous other Indigenous organizations, non-Indigenous NGOs and churches.³¹

In September 2017, the Committee on the Elimination of Racial Discrimination (CERD), which is the monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination (which Canada signed in 1966 and ratified in 1970), conducted its periodic review of Canada. The CERD report on Canada applauded the current government's commitment to implement all of the TRC's 94 Calls to Action but mentioned that the CERD is "concerned at the lack of an action plan and of full implementation."³² The CERD recommended that Canada develop, in consultation with Indigenous peoples, a concrete action plan to implement the TRC's 94 Calls to Action and that it implement the UN Declaration, and adopt a legislative framework to do so, along with a national action plan, annual public reporting and a full legal, policy and regulation review to ensure that all laws and policies are consistent with the UN Declaration.³³

On May 30, 2018, a private member's bill, C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples,³⁴ brought forward by Saganash, passed the House of Commons by a vote of 206 to 79, with only Conservative members of Parliament opposing.³⁵ It then proceeded to the Senate.

The Benefits of National Legislative Frameworks for Implementation (in Canada and beyond)

A national legislative framework to help implement the UN Declaration has been called for by international human rights institutions, the TRC, Indigenous organizations, non-Indigenous NGOs and churches. The UN special rapporteur on the rights of Indigenous peoples, EMRIP and the CERD have all advised that Canada move forward with a full national implementation plan, including a legislative framework. Doing so would be a major step toward bringing Canada into compliance with international human rights standards and the TRC's expectations.

A legislative framework would also help provide clarity and consistency in implementation efforts and demonstrate the priority status of implementation. It would affirm the centrality of the UN Declaration to reconciliation. Importantly, a legislative framework would compel the government to act promptly

29 ITK, "Position Paper: Implementing the UN Declaration on the Rights of Indigenous Peoples" (2017), online: <<https://itk.ca/wp-content/uploads/2017/01/ITK-Position-Paper-Implementing-the-UN-Declaration-on-the-Rights-of-Indigenous-Peoples-English.pdf>>.

30 Assembly of First Nations, Resolutions 38/2015, 28/2016, 60/2016, online: <www.afn.ca/resolutions/>.

31 See e.g. KAIROS Canada, online: <www.kairosCanada.org/what-we-do/indigenous-rights/undrip-campaign>, and "Open Letter to All Members of Parliament: Bill C-262 provides principled framework for implementing the UN Declaration on the Rights of Indigenous Peoples" (28 May 2018), online: <<https://quakerservice.ca/wp-content/uploads/2018/05/Open-Letter-to-All-Members-of-Parliament-re-Bill-C-262-May-28-.pdf>>.

32 *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, UN CERD, 93rd Sess, UN Doc CERD/C/CAN/CO/21-23 (2017) at para 17.

33 *Ibid* at para 18.

34 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the UN Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018).

35 "Vote Details: Vote No. 684", online: House of Commons Canada <www.ourcommons.ca/Parliamentarians/en/votes/42/1/684>.

to harmonize its laws and policies with the UN Declaration and provide an accountability mechanism for implementation efforts. A national legislative framework would help produce momentum toward completion of a national action plan, legal and policy reform and annual reporting on progress.

Implementation efforts will have more stamina with a national legislative framework in place. It would thereafter be difficult for future governments to arbitrarily roll back progress toward implementation.

A national legislative framework would set a precedent for provincial and territorial governments to follow suit and pass their own implementation legislation, as recommended in TRC Call to Action 43. Implementation legislation in Canada would also provide a role model for other countries to follow.

Judicial interpretation could be aided by a national legislative framework, which — if it enshrines the principle of free, prior and informed consent — could help provide an alternative pathway to litigation and adjudication; this should eventually lead to a decreased need for court action. As the UN Declaration is being increasingly cited by courts, in Canada and overseas, legislation could help support legal implementation.

The TRC Calls to Action require explicit repudiation of all colonial doctrines, laws and policies, and a national legislative framework would help bring this into reality. It would also aid efforts to repeal and replace the Indian Act, and other colonial and discriminatory doctrines and laws, with more appropriate mechanisms, based upon the requirement of free, prior and informed consent of Indigenous peoples. Because the repeal of colonial and discriminatory laws is a requirement under the UN Declaration, legislation would help propel this major agenda item forward in Canada, building a coalition of support across several political parties.

A national legislative framework could also potentially support an opening for the accommodation of Indigenous law and legal traditions within Canadian law. Such progress is also required by the TRC Calls to Action.³⁶

In sum, a national legislative framework is an important first step toward implementing the UN Declaration, in particular when that framework mandates many of the other crucial steps in the implementation process, including national action plans, a review of existing laws and policies and an annual reporting mechanism. It would also set an important, positive tone for the wider implementation efforts required by provinces and territories, municipalities, corporations and civil society under the TRC Calls to Action.

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³⁶ John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 191–92.



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Implementation of UNDRIP within Canadian and Indigenous Law

Assessing Challenges



Gordon Christie

Shortly after the last federal election, Canada signalled its intent to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).¹ At that time, conservative commentators — Blaine Favel and Ken Coates — raised concerns they argued should lead us to prefer caution over hasty moves.² As, shortly after, the federal government also signalled its support for a private member's bill that essentially calls for adopting UNDRIP into Canadian law,³ these voices — now joined by Dwight Newman, Arend Hoekstra, Harry Swain and Jim Baillie — have been re-energized, claiming such

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

2 Blaine Favel & Ken S Coates, *Understanding UNDRIP* (Ottawa: Macdonald-Laurier Institute, 2016) [Favel & Coates, *Understanding UNDRIP*], online: <www.macdonaldlaurier.ca/files/pdf/MLI-10-UNDRIPCoates-Flavel05-16-WebReadyV4.pdf>; Ken S Coates & Blaine Favel, *Understanding FPIC* (Ottawa: Macdonald-Laurier Institute, 2016) [Coates & Favel, *Understanding FPIC*], online: <<https://macdonaldlaurier.ca/files/pdf/MLINumber9-FPICCoates-Flavel04-29-WebReady.pdf>>.

3 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>. As of summer 2018, the bill was before the Senate, having passed through third reading in Parliament.

a move “verges on the simplistic” and is “laden with circular tension.”⁴ Swain and Baillie called for the legislation to be withdrawn, while Newman called for reconsideration and redrafting.⁵

At the same time, although less prominently displayed in the dominant media, Indigenous peoples and nations have expressed concerns about the implementation of UNDRIP.⁶ These are very different sorts of concerns, given that UNDRIP is the product of decades of Indigenous solidarity at the global level and promises a shift in Canada to a decolonizing discourse. Nevertheless, these concerns are as pressing and substantial as concerns raised by the voices of caution, and the two sets of concerns should be carefully examined to enhance the chances of adopting a strategy that would be most productive.

My intent is to examine the strongest arguments for caution raised by conservative commentators, placing these against concerns held by Indigenous peoples. Much of what conservative critics present is clearly meant to spread fear among the general Canadian public and to pander to powerful interests, but woven in and among their claims (some of which are simply absurd⁷) are arguments that those who welcome a generous implementation of UNDRIP should consider carefully. This is not simply a matter of knowing arguments that arise on the other side, but also of being aware of how those who raise such arguments hope to frame or contain the discourse. The danger is that even just in the act of responding in certain ways to some of these arguments, the battle is lost, as the terms of the debate are thereby set in ways that preclude meaningful reconciliation. Much of the concern on the Indigenous side is about how such voices of caution may play into a mode of implementation that strips from UNDRIP the very promise it holds out as a decolonizing instrument.

Voices of Caution

While I label the most vocal commentators “conservatives,” at the core of their common ideology lies a strong liberal philosophy. They wish to conserve the world of liberalism. Terms of discourse set by these commentators are set down by allegiance to an individualistic, liberal conception of Canadian society, one that assumes Indigenous peoples are already contained within this ideological world. Coates and Favel, for example, caution us of the likelihood that implementing UNDRIP will undermine ongoing efforts to improve the lives and social conditions of the Aboriginal peoples of Canada. In this sense, they argue, UNDRIP might turn out to be “counterproductive” and cost-prohibitive.⁸

This focus — on the suffering of peoples as individuals — shifts attention away from centuries of colonialism, dispossession, oppression, loss of self-determination and cultural genocide. Indigenous peoples resist this framing not because working to improve the lives of Indigenous peoples is somehow improper, but because *that* objective has its proper place in Canada in *other, separate* discussions. If Canada were to live up to its own self-description (as a liberal democracy), Aboriginal citizens would

4 Dwight Newman & Ken Coates, “Bill on implementing UNDRIP ‘simplistic and laden with circular tension’”, *The Hill Times* (14 December 2017), online: <www.hilltimes.com/2017/12/14/bill-implementing-undrip-simplistic-laden-circular-tensions/128903>; Thomas Isaac & Arend JA Hoekstra, “Implementing UNDRIP in Canada: Challenges with Bill C-262”, online: Cassels Brock Lawyers <www.casselsbrock.com/CBNewsletter/Implementing_UNDRIP_in_Canada_Challenges_with_Bill_C_262>; Harry Swain & Jim Baillie, “The Trudeau government signs on to give Aboriginals veto rights nobody else has”, *Financial Post* (26 January 2018), online: <<http://business.financialpost.com/opinion/the-trudeau-government-signs-on-to-give-aboriginals-veto-rights-nobody-else-has>>.

5 Dwight Newman, “Written Brief to House of Commons Standing Committee on Indigenous and Northern Affairs re Bill C-262”, online: <www.ourcommons.ca/Content/Committee/421/INAN/Brief/BR9762671/br-external/NewmanDwight-e.pdf>; Dwight Newman’s oral presentation to the House of Commons Standing Committee on Indigenous and Northern Affairs, online: <www.ourcommons.ca/DocumentViewer/en/42-1/INAN/meeting-101/evidence>.

6 Many of these concerns were presented in evidence before the House of Commons Standing Committee on Indigenous and Northern Affairs re Bill C-262 at meetings held from April 17 to May 8, 2018 [Standing Committee on Bill C-262], online: <www.ourcommons.ca/Committees/en/INAN/StudyActivity?studyActivityId=9965131#DT20180508INANMEE107ID9965131>.

7 A number of the oddities contained in Isaac and Hoekstra’s piece, *supra* note 4, are detailed by Paul Joffe; see “Commentary – UN Declaration on the Rights of Indigenous Peoples”, online: Quaker Friends Service Committee <<https://quakerservice.ca/news/commentary-un-declaration/>>.

8 Coates & Favel, *Understanding FPIC*, *supra* note 2.

not have to fight for non-discriminatory levels of supply of basic services. We should not have to call upon UNDRIP when it comes to concerns in Canada over how Indigenous peoples should have access to equal measures of basic services meant to relieve poverty, provide clean drinking water, address suicide and addictions, and other related or similar matters. In other countries around the world, parts of UNDRIP might have to be called upon to prod states to begin delivering meaningful levels of basic social, economic and cultural support, but we should not have to think of UNDRIP playing this role in the Canadian context. Rather, its primary function in the Canadian context should be clear, given Canada's deep colonial nightmare — it can play a substantial role in our domestic context in working to address Canada's colonial history.

Let us move on, then, to arguments that do intersect with those aspects of UNDRIP's discourse that make sense in the Canadian context. Canada's original reservations about UNDRIP (raised when Canada voted against the General Assembly resolution to adopt UNDRIP and echoed a few years later when it equivocally signed on⁹) focused on three sorts of issues, each reflected in more recent conservative commentary. While the current Liberal government distances itself from earlier positions taken by Conservative governments, this is presently only at the level of rhetoric, and so whether these concerns still animate policies and actions of the current government remains an open question.

First, there was concern with those articles (such as 3 and 19) that Canada argued would require a fundamental restructuring of Canada's legal and political landscape (the "fundamental restructuring" concern). Article 3 recognizes an Indigenous right to self-determination, while article 19 requires that a state "consult and cooperate in good faith with the indigenous peoples concerned...in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."¹⁰

Second, article 26 speaks of Indigenous rights to lands and resources, holding, in particular, that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use."¹¹ This is a right that — Canada argued — is far too broad in application and does not line up with Canadian jurisprudence on Aboriginal title (the "Indigenous territory" concern).

Finally, there was the argument that UNDRIP would provide Indigenous peoples with a veto power not enjoyed by other Canadians, a power over such matters as resource development projects on their lands or waters. This power presumably arises through the application of the requirement that free, prior and informed consent (FPIC) be obtained, a requirement that we noted earlier appears in article 19, but that is also present in article 32¹² (the "FPIC as veto" concern).

9 In 2010, when Canada first expressed support for UNDRIP (as an "aspirational" document), the federal government stated:

In 2007, at the time of the vote during the United Nations General Assembly, and since, Canada placed on record its concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States and third parties.

Aboriginal and treaty rights are protected in Canada through a unique framework. These rights are enshrined in our Constitution, including our *Charter of Rights and Freedoms*, and are complemented by practical policies that adapt to our evolving reality. This framework will continue to be the cornerstone of our efforts to promote and protect the rights of Aboriginal Canadians.

See "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples", online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

10 UNDRIP, *supra* note 1.

11 *Ibid.*

12 *Ibid.*, art 32(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 their mineral, water or other resources."

As we will see, while recent critics seem to add to these three sorts of concerns, all their explicit concerns do fit into the three categories. By examining what is said, we can dig down to the critics' actual concerns (underlying what they seem to spell out).

Analyzing Stated Concerns

What sort of fundamental restructuring is being imagined, and how does it arise as an argument against fully implementing UNDRIP? We need to examine carefully how it might be that implementing UNDRIP would require fundamental changes to the domestic legal and political landscape.

Those voicing this concern all note the way UNDRIP came into being, as it was the product of many years of intense negotiations marked by remarkable, global Indigenous solidarity.¹³ Less prominently noted, however, is a key part of that story, revolving around its last chapter, when states took over what had been a more open and mutually respectful process.¹⁴ Behind closed doors, out of sight of Indigenous representatives, a number of powerful alterations were made to the text, most notably with the addition of article 46. Subsection 3 states: "The provisions set forth in this *Declaration* shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."

Implementing UNDRIP means, of course, implementing the instrument as a whole, and so article 46 will play a key role in how this process unfolds. This is even if — or, more accurately, this is particularly so if — UNDRIP should be imported into Canada by way of a legislative framework. What, then, can this first concern amount to, if implementation of the instrument must be in accord with principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith? Are commentators wilfully ignoring this clear circumscription, or do they think UNDRIP might somehow be implemented in disregard of these constraints?

We need to consider another alternative, one that admits of a breakdown into two sub-concerns. We might wonder whether perhaps these commentators recognize that the current Canadian legal and political structure violates these constraints, and that implementing UNDRIP calls, then, for an injection of justice, non-discrimination and so forth into the Canadian landscape. This might be because established "classic" understandings of justice, non-discrimination, equality and human rights are such that Canadian law and policy cannot stand up when measured against them. Alternatively, it may be because emerging progressive understandings of justice, non-discrimination, equality and human rights clearly indicate that current Canadian law and policy are far outside what is just now coming to be understood to be just and fair.¹⁵

This third general option is the only reasonable one available (assuming the commentators read the entire UNDRIP and assuming they know that the governments of Canada — overseen by Canadian courts — will be in a vastly stronger position to dictate how the instrument actually unfolds in Canada, ensuring nothing is slipped somehow into new structures that emerge). It must be, then, that conservative concerns with possible changes to Canada's legal and political landscape have to do with the fact that critics know the current landscape either does not accord with established principles of justice, non-discrimination and so forth or that these principles are themselves in flux, and that progressive developments promise an expanded world of justice to Indigenous peoples. The first

¹³ See e.g. Favel & Coates, *Understanding UNDRIP*, *supra* note 2, and evidence tendered by several witnesses at sessions of the Standing Committee on Bill C-262, *supra* note 6, such as that tendered by Miles Richardson and Paul Chartrand at the April 17 session.

¹⁴ For example, this is buried in Favel & Coates, *Understanding UNDRIP*, *supra* note 2, n 6.

¹⁵ It is most likely a mix of the two — commentators are aware that Canadian law and policy continues to offend established notions of justice, while they fret about expanded notions on the horizon (those that accord responsible weight to collective rights and interests, in particular as these relate to self-determination), where these notions even more deeply challenge the status quo of colonial law and policy.

concern, then, can be reframed quite accurately as a concern that implementing UNDRIP might lead to Canada having to abide by such things as principles of justice, non-discrimination, good faith, respect for human rights, equality, good governance and democracy.

A similar line of attack deflects concerns about article 26 and Indigenous land interests. Over the last few decades, the Supreme Court of Canada has been developing substantive doctrine concerning Aboriginal title, and in 2014 the first instance of this Canadian legal instrument appeared in full form, with the Tsilhqot'in Nation being found to possess Aboriginal title over about 1,900 km² of their traditional territory.¹⁶ But what does this legal instrument and its development rest upon? Before Canada asserted sovereignty and came to believe its unilateral acts could slip Crown title under Indigenous claims, all lands and territories in what is now Canada were tied to Indigenous peoples.¹⁷ Purportedly acting under a “doctrine of discovery” (that even in its more benign forms holds that European powers, simply by being more “civilized,” could “discover” Indigenous lands and thereby mysteriously gain powers over these territories¹⁸), the Crown pushed aside Indigenous peoples, disregarding their legal orders and systems of authority. Indigenous relationships to their lands were not like those that mark nation-state concepts of title and jurisdictional authority, but to say they did not on their own amount to connections able to authoritatively stand up to foreign intrusion is clearly and unequivocally racist.

The fact is that UNDRIP speaks directly of Indigenous lands and territories in ways that do not import Western notions of property or jurisdiction to delimit this language of Indigenous land interests. When we speak of implementing UNDRIP in the Canadian context, what we witness, then, is a spotlight being shone directly on failures that lie at the heart of Canadian jurisprudence. The nature of Aboriginal title as it has developed within Canadian law (as non-territorial, tied to non-Indigenous tests of use and occupation, with little or no measure of jurisdictional authority attached¹⁹) might have been acceptable if it were the product of negotiations between Indigenous and non-Indigenous authorities, but that is not the case. It has been developed entirely by non-Indigenous jurists, working within a narrow and parochial understanding of justice (one that attempts to mask racism at the core of standing precedent).

Once again, for commentators to raise these sorts of concerns — this time about differences between land interests as articulated under UNDRIP and Aboriginal title as developed by Canadian courts — is for them essentially to agree with Canada’s failure to live up to broad and substantive principles of justice and non-discrimination. Non-Indigenous judges, with no input at all from Indigenous peoples connected to their territories, continue to build on the racist doctrine of discovery that lies at the very foundation of Canadian law concerning Aboriginal rights and title. Critics of importing UNDRIP are standing behind this, arguing that nevertheless, somehow, the “arc of history is bending toward justice.”²⁰ The tree of Canadian jurisprudence is firmly planted in a racist doctrine, so any bending it is doing is merely some swaying in the breeze.

Which brings us to the third concern (FPIC as veto), one that arguably moves us closer to the actual fears of Canadian governments (Liberal and Conservative), their courts and those who voice caution about UNDRIP. This third concern seems to connect most closely with the notion that implementing UNDRIP would provide Indigenous peoples in Canada with special rights not enjoyed by other Canadians.

16 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*].

17 I use the locution “tied to” to leave open the varied ways different Indigenous peoples would describe their own specific relations to the lands and waters they have lived with for countless generations. Each Indigenous nation would have to fill in what sorts of relationships they enjoy, and how they are to be understood within their own legal orders.

18 In its more malignant form, the doctrine holds that a European power, on “discovering” Indigenous lands, would find there no authority, claim or right that would need to be considered in its actions. Whatever positive action such a European power might take toward Indigenous peoples living in these lands would be only through its generosity.

19 *Tsilhqot'in Nation*, *supra* note 16 at paras 67–76.

20 Swain & Baillie, *supra* note 4 (paraphrasing a quotation by Theodore Parker, but most often associated with Martin Luther King Jr).

The first response to this should be fairly obvious by this point: when one reads the declaration in its entirety and thinks about how article 46 is meant to function, it is not clear how articles 19 and 32 could emerge in the Canadian landscape in a way that somehow violates principles of justice and non-discrimination. Non-discrimination on its own would seem to ensure that, whatever emerges from the implementation of UNDRIP, Indigenous peoples in Canada will not enjoy special rights. Having substantial input into what happens on their lands and waters is, however, another matter.

The real challenge here is with what is clearly a brazen attempt to frame the discourse, the point of concern of Indigenous peoples raised earlier. Conservative commentators hope to have the matter of UNDRIP's implementation be captured within liberal discourse, within the language of rights (where any citizen's access to rights must reflect rights equally accessible — at least in principle — to all). But consider the question of a veto with this in mind. A private property holder in Canada with fee simple title enjoys the largest estate known in the common law world. Nevertheless, the Crown — possessed of sovereignty and underlying radical title — can infringe upon, and indeed expropriate, this property. Note, however, that a key point underlying the sense of this is that all property interests held by non-Indigenous parties in Canada issue originally (at least in principle) from grants by the Crown. What the Crown originally granted, the Crown can later interfere with (or take away). What UNDRIP acknowledges in law is the fact that Indigenous peoples do not hold their property interests as a result of original grants from the Crown. Indigenous peoples in Canada do not hold special rights in relation to jurisdictional authority and ownership of lands — rather, they enjoy original, pre-Crown interests. If any other citizen of the state were (somehow) in the same position, that citizen, too, would enjoy the sorts of interests UNDRIP speaks to. Once again, what UNDRIP is expressing is clear — it is built on broad notions of justice, equality, human rights and non-discrimination, the sorts of notions that can promise a new dialogue of decolonization and meaningful reconciliation.

Actual Concerns and Appropriate Responses

We arrive, then, at the nature of concerns recent conservative commentators must actually have in mind. They would rather have Canada continue on its slow track toward parochially defined justice, as this pulls us further and further away from substantive forms of justice, and preserves the status quo, built on racism and colonialism. In clearly seeing things this way, we simultaneously arrive at the deep concerns of Indigenous peoples in Canada — that the implementation of UNDRIP will be hijacked by conservative liberals, those who are devoted, knowingly or not, to the special interests that the Canadian state is built around and that it protects, those of a neoliberal-capitalist-extractive complex.

The principal concern with recent movement toward creating a legislative framework within which UNDRIP becomes a legal domestic instrument is clear when this core concern with UNDRIP is laid bare — conservative-liberal forces would rather all these matters be left to the political arena (where the appropriate “balancing” of interests can be managed), with the law playing a secondary role. Should UNDRIP come to be part of Canadian law, it would set hard legal standards, could form the basis for legal arguments, would suggest legal remedies, would be legally binding and, in particular, would generate enforceable legal obligations. Given that UNDRIP is suffused with principles and processes that point toward decolonization, married with a commitment to broad principles of justice, democracy, human rights, non-discrimination, good faith and good governance, the result would be a shift in Canada's legal and political landscape, one that redistributes power from the sole sovereign (power currently wielded by those who answer to special moneyed interests) to two sources of authority inhabiting a post-colonial world.

When conservative commentators speak of slowly evolving relations that could be derailed by the sudden importation of UNDRIP into the mix, what they are principally referring to are agreements — primarily economic in nature — that stand as the latest efforts to subvert shifts to decolonizing strategies. Governments and industries now frequently resort to negotiating local, one-off agreements

(outside the treaty context), holding out financial and other incentives to impoverished communities and playing off factions within these communities, all to produce buy-in to the neoliberal-capitalist-extractive program. In the face of this, UNDRIP does, in fact, promise uncertainty. Injecting broad forms of justice into a system resting on racism and colonialism will be fraught with challenges, and it is impossible to foresee how many of the most difficult matters will play out.

The troubling form of uncertainty, however, is in relation to how the federal government will act over the next few years. It is currently sending mixed signals, occasionally offering indications it is willing to move the country in the direction of a full embrace of the spirit and intent of UNDRIP, but also on occasion sending strong signals that it hopes to “embrace” UNDRIP in a way that would sap UNDRIP of its decolonizing strength in the Canadian context.²¹ We have seen that concerns of conservative critics are principally about decolonization and an aversion to the notion Canada should relinquish absolute power over lands and resources unjustly taken from Indigenous peoples. The most pressing concern, however, is that held by Indigenous peoples, as they wait to see whether the promise of decolonization translates into a fitting response to the persistent core of racism infecting Canada’s legal and political environment.

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21 In July 2016, at a meeting of the Assembly of First Nations, Attorney-General Jody Wilson-Raybould stated: “Simplistic approaches such as adopting the United Nations declaration as being Canadian law are unworkable and, respectfully, a political distraction to undertaking the hard work actually required to implement it back home in communities.” See “Justice Minister Jody Wilson-Raybould says adopting UNDRIP into Canadian law ‘unworkable’”, *APTN National News* (12 July 2016), online: <<http://aptnews.ca/2016/07/12/justice-minister-jody-wilson-raybould-says-adopting-undrip-into-canadian-law-unworkable/>>.



Bringing a Gendered Lens to Implementing the UN Declaration on the Rights of Indigenous Peoples



Brenda L. Gunn

The role of Indigenous women is an issue that exists in many Indigenous communities today, given the amount of colonial interference, including interference with gender roles, within these societies. When working toward implementing the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration)¹ in Canada and, in particular, when bringing together Indigenous and constitutional law, it is important to bring a gendered lens to ensure that Indigenous women benefit equally from the implementation. Another issue related to the role of Indigenous women is whether the movement toward realizing Indigenous peoples' right to self-determination, as recognized in the UN Declaration, "will promote the ability of indigenous groups to violate the rights of vulnerable members, particularly women."²

Women have a special role in many Indigenous societies, including special responsibilities. These roles often include leadership aspects that were critical for the nation.³ An often

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UN Declaration].

2 Rebecca Tsosie, "Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination" (2010) 15 *UCLA J Intl L & Foreign Aff* 187 at 187.

3 See Maria Campbell's introduction for her discussion on the role of Métis women: Nicole St-Onge, Carolyn Podruchny & Brenda Macdougall, eds, *Contours of a People: Metis Family, Mobility and History* (Norman, OK: University of Oklahoma Press, 2012) at xiii.

cited example is the Haudenosaunee: “During the formation of the Five Nations Confederacy, a woman was the first person to accept the Peacemaker’s message of peace and unity. This woman was given the name Jikonsahseh, the ‘Mother of Nations’, by the Peacemaker, who explained that all women would have an important role in this peace.”⁴

Beyond the writing about the prototypical example of the matriarchal and matrilineal Haudenosaunee clan system, much has been written about the particular roles of Indigenous women.⁵ Val Napoleon is critical of written history, which portrays Indigenous women’s role as limited to dealing with the meat men bring home from the hunt.⁶ In many Indigenous societies, Indigenous women were revered and played key roles in politics and leadership. Sharon Venne speaks about Indigenous women’s authority in entering into Treaty 6: “The Creator gave women the power to create. The man is the helper to the woman, not the other way around. Women are linked to Mother Earth by their ability to bring forth life. The women sit beside the Creator as a recognition of their role and position.”⁷

Métis women also play an important role in the development and maintenance of the Métis nation: “[I]t was indigenous women who carried the history of the land and identity of the people, which they then shared with their families. An individual’s connection to place was made through family, but those connections were derived from their maternal ancestry.”⁸ Brenda Macdougall notes that, historically, one’s Métis identity arose from one’s “maternal connection to home, land and family.”⁹ Generally, Métis children took their fathers’ last names but resided in the homelands of their mothers’ families.¹⁰

The Royal Commission on Aboriginal Peoples’ (RCAP’s) final report considers the roles of Indigenous women, including Inuit women: “There is agreement that women were traditionally responsible for decisions about children, food preparation and the running of the camp. While clear divisions of labour along gender lines existed, women’s and men’s work was equally valued.”¹¹ The work of the RCAP highlights that, despite their different roles, men and women are to be equally respected and valued. While colonialism may have interfered with the internal workings of some Indigenous communities, Indigenous women continue to play key roles within their societies.

These different roles also mean that Indigenous women have different knowledge, including regarding Indigenous laws: “This means that, for the most part, women’s knowledge of the land and resources remains unacknowledged politically and legally. Since men and women often have different traditional knowledge of natural resources in relation to ‘habitat, conservation, management, use, storing, and processing’, women’s knowledge can, and will disappear. This includes knowledge relating to access to, and control and use of, natural resources, which are basic elements of indigenous law. Without the

4 Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples: Volume 4, Perspectives and Realities* (Ottawa: Supply and Services, 1996) at 7, online: Library and Archives Canada <<http://data2.archives.ca/e/e448/e011188230-04.pdf>>. See also Robert A Williams Jr, “Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context” (1989–1990) 24 Ga L Rev 1019.

5 See e.g. Megan Davis, “Aboriginal Women and the Right to Self-Determination” (2012) 16:1 AILR 78. See also Kiera L Ladner, “Gendering Decolonisation, Decolonising Gender” (2009) 13:1 AILR 62; Emma LaRocque, “Metis and Feminist: Ethical Reflections on Feminism, Human Rights, and Decolonization” in Joyce Green, ed, *Making Space for Indigenous Feminism* (Winnipeg: Fernwood Publishing, 2007) 53; Nathalie Kermool & Isabel Altamirano-Jimenez, *Living on the Land: Indigenous Women’s Understanding of Place* (Edmonton: Athabasca University Press, 2016).

6 Val Napoleon, “Aboriginal Discourse: Gender, Identity and Community” in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford, UK & Portland, OR: Hart Publishing, 2009) 233 at 241.

7 Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 173 at 191.

8 Brenda Macdougall, *One of the Family: Metis Culture in Nineteenth-century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010) at 344–45.

9 *Ibid* at 343.

10 *Ibid*.

11 RCAP, *supra* note 4 at 22.

thoughtful and deliberate inclusion of aboriginal women, the aboriginal discourse will continue to be impoverished, incomplete, and therefore profoundly flawed.”¹²

Scholars have noted that Indigenous women’s rights have failed to be included within the political and legal agendas. Rauna Kuokkanen notes, “Indigenous women’s rights remain a contentious and often neglected issue both at international and local levels.”¹³ This failing to address and include Indigenous women’s issues or to take a gendered analysis is perpetuated in the existing literature on Indigenous rights.¹⁴ As noted by Nathalie Kermaal and Isabel Altamirano-Jimenez, “to ignore the specific ways in which Indigenous women know is to undermine them as active producers of knowledge that participate in complex socio-environmental community processes.”¹⁵ And, so, this paper considers the need to bring a gendered perspective to implementing the UN Declaration in Canada.

Indigenous Rights Movements and the UN Declaration

The UN Declaration makes few references to women. Where the UN Declaration does reference Indigenous women, it has been criticized for its deficit approach. For example, article 21, which recognizes the right to the improvement of economic and social conditions, includes a need for states to take special measures, paying particular attention to the special needs of Indigenous women. The other specific reference to Indigenous women is in article 22(2), which notes the need for states to take measures to prevent violence against Indigenous women.

Despite this deficit approach in the UN Declaration, this article argues that greater attention needs to be paid to the requirement for states to pay particular attention to the special needs of Indigenous women when implementing the UN Declaration.¹⁶ As well, article 44 recognizes that all the rights guaranteed in the UN Declaration are guaranteed equally to Indigenous men and women. In light of this provision, it is important that states undertake a gendered approach when implementing the UN Declaration. However, I argue that a gendered approach is necessary not only because Indigenous women have special needs, but also because Indigenous women have particular knowledges that contribute to Indigenous nations and laws, and that need recognition and protection.

Where the literature does address Indigenous women, the focus tends to be on experiences of violence. This literature too often portrays Indigenous women as victims in need of special assistance, thus perpetuating the deficit model in which Indigenous women are found lacking the ability to help themselves and in need of state assistance. However, this approach fails to support Indigenous women’s agency and fails to identify the problem as the gendered impacts of colonialism. It further fails to address the broad range of human rights violations that Indigenous women experience:

Indigenous women face violations of their civil and political rights when they are marginalized or excluded from their communities and when their membership is denied. They encounter abuses of their economic and social rights in the intersections of racism, sexism, poverty, and discrimination, which lead to a lack of employment opportunities, and access to health care and social services. They are confronted with violations of their personal integrity and human dignity in the form of sometimes extreme physical and sexual violence. Failure to recognize that

¹² Napoleon, *supra* note 6 at 243.

¹³ Rauna Kuokkanen, “Self-Determination and Indigenous Women’s Rights at the Intersection of International Human Rights” (2012) 34 *Hum Rts Q* 225 at 231.

¹⁴ Napoleon, *supra* note 6 at 235.

¹⁵ Kermaal & Altamirano-Jimenez, *supra* note 5 at 4.

¹⁶ *UN Declaration*, *supra* note 1, art 22.

indigenous women's rights are violated not only as indigenous people but also as women ultimately leads to a failure in promoting and protecting indigenous rights in general.¹⁷

Given that Canada's colonial project engaged in gendered attacks, including the various provisions in the Indian Act that removed power and representation from Indian women (for example, the prohibition against voting and running in band council elections and the provisions that caused many women and their descendants to lose status), a gendered analysis is necessary to ensure that implementation of the UN Declaration addresses these harms of colonization as well. Taking a gendered approach is particularly important to reveal the structures of power that "create hierarchical and differential access to resources, representation, political influence, and to being 'heard' in indigenous societies."¹⁸

Despite the recognition that colonization had a gendered impact, both Indigenous rights movements and women's rights movements have failed to address Indigenous women's issues and participation: "both rights movements often require Indigenous women to make trade-offs (either as women or as Indigenous peoples) rather than make space for the more fully intersectional frameworks that Indigenous women have been lobbying for."¹⁹

As efforts are made to implement the UN Declaration, the different ways Indigenous women experience human rights violations, including the intersectional discrimination based on race, gender, ability and sexuality that impacts both their individual and collective rights, must be recognized and addressed.²⁰ One example of the particular ways in which Indigenous women experience violations of their rights is their experience of environmental pollution resulting from large resource extraction projects, as such pollution not only limits access and control over traditional lands, but can also "compromise women's ability to take care of their children and families due to health problems, contamination, displacement, and increased violence."²¹

Moving Forward

A couple of key issues must be addressed moving forward, including the recognition that implementation of the UN Declaration must consider gender in order to ensure that Indigenous women's rights are protected. This requires understanding how Indigenous women experience violations of their rights. Unfortunately, Indigenous women experience violations of their rights both from the state and from within their own nations and communities. Regardless of whether the oppression that Indigenous women face is the result of the colonial process, or existed prior to contact, "gender imbalances exist in Indigenous communities today, [and] so must be addressed."²²

While one of the aims of a gendered lens approach to implementing the UN Declaration is to ensure that Indigenous women's roles within Indigenous societies are protected and respected, it is important that we not romanticize traditions. This approach may also require working against fundamentalism, especially where the invocation of tradition aims "to silence multiple truths, experiences, and

17 Kuokkanen, *supra* note 12 at 249.

18 *Ibid* at 226.

19 Laura Parisi & Jeff Cornthassel, "In Pursuit of Self-determination: Indigenous Women's Challenges to Traditional Diplomatic Spaces" (2007) 13:3 *Can Foreign Pol'y* 81 at 81.

20 Mairin Iwanka Raya, "Indigenous Women Stand Against Violence: A Companion Report to the United Nations Secretary-General's Study on Violence Against Women" (Presented at the United Nations 16 October 2006) at 8.

21 Kuokkanen, *supra* note 13 at 231–32.

22 Emily Snyder, "Indigenous Feminist Legal Theory" (2014) 26 *CJWL* 365 at 367.

knowledges.”²³ Rebecca Tsosie asks the following questions: “There is a strong sense in the Declaration that indigenous peoples ought to have the right to practice and revitalize their cultural traditions and customs. But what if these customs and traditions are not gender neutral? What if they are perceived as discriminatory toward Native women? It is a fact that the traditional governmental systems of some tribes do not allow direct participation by women. In some tribes, membership policies may be gender-based.”²⁴

As we engage a gendered lens, it is important to draw on Indigenous understandings of gender. Tracey Lindberg provides an example of such an understanding: “Maybe the reason that our languages seldom differentiate between gender and sex is because we are supposed to stand as one. In Cree, as *Neheyiwak* we are people. As *Iskwew* (women), we have specific stories, ceremonies, dances, and traditions but *Iskwew* are not a segment of *Neheyiwak*. We are the people; womanhood is our obligation and gift. That gendered line, as I mentioned at the outset, is not clear, and it zigs, zags, and becomes invisible depending on who we are with, what we are doing, and when we are doing it.”²⁵

When working to implement the UN Declaration, we must remember that human rights are indivisible, interdependent and interrelated. This means that the realization of Indigenous women’s rights cannot be achieved by prioritizing certain rights over others. For example, one cannot prioritize self-government and land rights at the expense of rights to clean water, housing, health care and to be free from violence. There is no hierarchy of human rights. The denial of any human right impacts other human rights. The interrelatedness of human rights is particularly important for Indigenous women’s rights. This means that when developing processes for implementing Indigenous peoples’ right to participate in decision making, including free, prior and informed consent, to include Indigenous women is critical. Indigenous women’s inclusion provides an opportunity not only to fully appreciate the scope of potential impact of any proposed measure, but also to benefit from Indigenous women’s knowledge. Including Indigenous women and their knowledge in these processes broadens the available information, as “Indigenous women’s ways of knowing are shaped by their livelihoods and shared experiences of racism, colonialism, and by their experiences as leaders, mothers, sisters, and grandmothers,” which may not be known otherwise.²⁶ Including the recognition that “Indigenous women’s experiences are integral to decolonizing knowledge production”²⁷ will ensure that Indigenous women benefit equally from implementation of the UN Declaration.

Conclusions

Given that the colonial project had particular gendered aspects, and that Indigenous women continue to experience violations of their human rights in particular fashions, it is critical that the implementation of the UN Declaration includes a gendered analysis to ensure that Indigenous women and Indigenous men benefit equally from its implementation.

Engaging in a gendered approach that aims to ensure Indigenous men and Indigenous women benefit equally requires governments to engage directly with the rights holders, including Indigenous women, to ensure that women’s rights, knowledges and roles are specifically considered. This requires moving beyond the national Indigenous organizations (the Assembly of First Nations, Inuit Tapiriit Kanatami, the Métis National Council, the Native Women’s Association of Canada and the Congress of Aboriginal Peoples) and, potentially, even political/territorial organizations, such as the Chiefs of Ontario, the

23 *Ibid* at 368.

24 Tsosie, *supra* note 2 at 217.

25 Tracey Lindberg, “Not My Sister: What Feminists Can Learn about Sisterhood from Indigenous Women” (2004) 16 *CJWL* 342 at 351.

26 Kermool & Altamirano-Jimenez, *supra* note 5 at 9.

27 *Ibid* at 4.

Assembly of Manitoba Chiefs, the Federation of Sovereign Indigenous Nations and so on. While these various political organizations have great expertise on Indigenous women's concerns and particular violations of rights, the negotiation of rights must occur directly with the rights holders. Engaging with rights holders, including traditional knowledge holders, ensures that Indigenous women's rights and knowledges are protected. Additionally, many of the negotiations will require engaging at a very local level on specific issues, unless women specifically delegate negotiating authority to political organizations.

Taking a gendered analysis in the implementation of the UN Declaration will also require the working group on the review of laws and policies to take a gendered analysis of existing Canadian laws and policies to determine how these different laws and policies impact Indigenous men and women differently. This requires going beyond the obvious directly gendered policies, such as the Indian Act provisions that caused Indigenous women to lose their status when they married non-status men. There may be general laws, such as environmental legislation, that have a different impact on Indigenous men and women.

A gendered analysis also requires implementing economic, social and cultural rights with the same priority as civil and political rights.²⁸ This means that Canada must stop thinking about education, social housing, health care and so on as policy issues and must start with a rights-based approach to these issues. For example, the lack of affordable housing has contributed to an increased rate of child apprehension (often experienced as another form of violence).²⁹ Other government policies, including forced sterilization programs and the forced removal of children, have had negative impacts on Indigenous women.³⁰ As part of the process of implementing the UN Declaration with a gendered lens, Canada should ensure that other instruments that protect Indigenous women's rights, such as the International Covenant on Economic, Social and Cultural Rights,³¹ are also fully implemented.

A final step that will be important in taking a gendered approach to implementing the UN Declaration is to continue to interpret the UN Declaration in light of (and in conjunction with) other international human rights instruments. While the Convention on the Elimination of All Forms of Discrimination Against Women³² is an obvious relevant international human rights treaty, there are others as well, including the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women.³³

28 Sarah Morales, "How can Canada's economic, cultural and social human rights obligations inform the National Inquiry?" (Paper delivered at Planning for Change: Towards a National Inquiry and an Effective National Action Plan, Symposium on Murders and Disappearances of Indigenous Women and Girls, Ottawa, 31 January 2016) [unpublished]. Copy on file with author.

29 M Celeste McKay & Craig Benjamin, "A Vision for Fulfilling the Indivisible Rights of Indigenous Women" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Saskatoon: Purich Publishing, 2010) 156 at 167.

30 See Yvonne Boyer, "First Nations, Métis and Inuit Women's Health" (2006) National Aboriginal Health Organization Discussion Paper Series in Aboriginal Health: Legal Issues No 4.

31 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6 ILM 360 (entered into force 3 January 1976).

32 *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 3 (entered into force 3 September 1981).

33 *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women*, 9 June 1994, OAS A-61 (entered into force 5 March 1995).

About the Author

Brenda L. Gunn is a fellow with CIGI's ILRP. In this role, Brenda explores comparative approaches and best practices for the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) internationally. Her work at CIGI involves engaging Indigenous peoples on the topic through workshops, conferences and other fora.

Brenda is also an associate professor in the Robson Hall Faculty of Law at the University of Manitoba, where she teaches constitutional law, international law and advocacy for the rights of Indigenous peoples in international law. Prior to joining the University of Manitoba, Brenda worked at a community legal clinic in Rabinal, Guatemala, on a case of genocide submitted to the Inter-American Commission on Human Rights. She has worked with First Nations on Aboriginal and treaty rights issues in Manitoba and provided technical assistance to the United Nations Expert Mechanism on the Rights of Indigenous Peoples in the analysis and drafting of the report summarizing the responses to a survey on implementing the UN Declaration.

A proud Métis woman, Brenda combines her research with activism. She is recognized for developing a key handbook in Canada on understanding and implementing the UN Declaration. Brenda has a B.A. from the University of Manitoba and a J.D. from the University of Toronto. She completed her LL.M. in Indigenous peoples' law and policy at the University of Arizona and was called to the Bars of Ontario and Manitoba.

Part II

Indigenous Law Perspectives



Mapping the Meaning of Reconciliation in Canada

Implications for Métis-Canada

Memoranda of Understanding on Reconciliation Negotiations



Larry Chartrand

Introduction

The primary purpose of this paper is to determine the understanding of reconciliation being applied to the recent Métis-Crown memoranda of understanding (MOUs) on reconciliation and to compare them with the different understandings of reconciliation, as understood from the perspective of the Truth and Reconciliation Commission (TRC) and as understood from the perspective of the courts.¹ This comparison necessarily involves a discussion of how the courts define reconciliation and how the TRC defines reconciliation. I argue that the courts take a decidedly narrow and impoverished understanding of reconciliation based on constitutional doctrine the courts have

¹ There are three similar agreements entered into between Canada and the Métis Nation of Ontario, the Métis Nation of Alberta and the Manitoba Metis Federation. See *Memorandum of Understanding on Advancing Reconciliation*, Manitoba Metis Federation and Canada, 27 May 2016, online: <www.mmf.mb.ca/land_claims_MOU.php>; *Memorandum of Understanding on Advancing Reconciliation*, Métis Nation of Ontario and Canada, 3 February 2017, online: <www.aadnc-aandc.gc.ca/eng/1500480929912/1500480979726>; *Memorandum of Understanding on Advancing Reconciliation*, Métis Nation of Alberta and Canada, 30 January 2017, online: <www.aadnc-aandc.gc.ca/eng/1500571091177/1500571137936>. These agreements are anticipated and consistent with a Canada-Métis Nation Accord entered into between Canada and the Métis National Council and its provincial affiliates. See *Canada-Métis Nation Accord*, Canada and Métis National Council, 13 April 2017, online: <<https://pm.gc.ca/eng/canada-Metis-nation-accord>>.

applied in relation to the interpretation of section 35 of the Constitution Act, 1982.² This understanding of reconciliation differs quite dramatically from the approach the TRC takes, due in large part to the TRC's grounding of reconciliation in the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).³ The human rights principles adopted in UNDRIP are considerably more robust and fuller than Canada's domestic Aboriginal rights law at the present time.

Based on the comparison between the TRC/UNDRIP and the judicial understanding of reconciliation, I then turn specifically to concerns regarding the recent Métis-Crown "reconciliation" agreements. Perhaps surprisingly, it becomes quite evident that these agreements have chiefly adopted the impoverished doctrinal approach to reconciliation and not the TRC/UNDRIP approach. After demonstrating that this is the case through a primarily textual analysis of the agreements, I then raise preliminary questions about why these Métis provincial organizations are willing to accept this impoverished approach to reconciliation.⁴ I provide some very tentative and speculative reasons as to why this might be the case, admitting that I have not undertaken a comprehensive study. At this stage, I only wish to raise a few questions. I then urge, by way of policy advice to both Métis and Canadian authorities and leadership, that the understanding of reconciliation flowing from the TRC/UNDRIP is what should be applied in guiding any agreements or treaties to be negotiated in the future between Canada and the Métis. Otherwise, we are seriously disadvantaging Métis interests and, indeed, violating Métis human rights.

Differing Understandings of Reconciliation

Legal commentators and lawyers often interpret the meaning of "reconciliation" as the successful resolution of a section 35 rights claim. This is not surprising, since the Supreme Court of Canada (SCC) has stated on more than one occasion that the purpose of section 35 is to achieve reconciliation between Aboriginal rights and British/Canadian Crown sovereignty. This is, however, a very impoverished understanding of "reconciliation" and not one that is at all consistent with critical Indigenous legal scholars or the TRC report and its understanding of reconciliation, which is much deeper and more profound.

From the TRC's and critical Indigenous legal scholars' perspectives, reconciliation cannot be achieved by simply resolving claims based on existing Aboriginal rights doctrine, since that very doctrine itself is viewed as a major source of the problem that has caused the inequitable and unjust relationship in the first place. Such perspectives maintain that one cannot achieve reconciliation by using tools that are tainted by racism and are founded on the belief that Indigenous peoples are inferior and uncivilized.⁵

2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. Section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed. (2) In this Act, 'Aboriginal Peoples of Canada' includes the Indian, Inuit, and Métis Peoples of Canada." This paper assumes that the reader has some familiarity with Métis history, identity and politics. It is beyond the scope of the paper to offer an account of who the Métis are. For a full discussion of the issues around Métis identity and recognition, see Chris Anderson, "Métis": *Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014).

3 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

4 Evidence of the purpose and intent of the agreements can be found in the various preamble clauses and objectives sections of the agreements and national accord.

5 Robert Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005). For the purposes of this paper, I define critical Indigenous scholars as those who recognize that the entirety of the doctrine of Aboriginal rights and the unilateral use of the common law itself (without reference to Indigenous peoples' own laws) is unjust and harmful in and of itself. This excludes non-Indigenous (or Indigenous scholars, for that matter) who simply study the doctrine in terms of reforms toward making sense of it, but within existing parameters. One can distinguish such scholars by asking whether the work is directly challenging the status quo (advocating for a paradigm shift in regard to Indigenous-Canada relations) or whether the work is validating or reinforcing the legitimacy of the doctrine indirectly by arguing to fix it by making it "fairer," more logical or clearer? Are the scholars working with the doctrine or challenging it directly as fundamentally flawed and based on racist principles of discovery and imposed sovereignty?

What is needed are tools that view both sides with respect and dignity, while addressing past harms through meaningful decolonization and restoration of lands and governance authority. UNDRIP and the constitutional reforms advanced by the TRC are the alternative tools grounded in human rights discourse that are needed and should be applied instead of section 35 Aboriginal rights doctrine which, as one jurist remarked, is “rotten to the core.”⁶ After all, when one takes a section-by-section comparison of the principles of Aboriginal rights defined domestically by the Canadian courts and aligns them with the minimum human rights standards under UNDRIP, in every case the Canadian judicial understanding is weaker than the international human rights understanding.

Table 1 provides this comparison with respect to governance, lands and resources, and state relations.⁷

Table 1: Comparison between Aboriginal Rights Doctrine and UNDRIP Principles

Domestic Aboriginal Rights Doctrine	UNDRIP
Governance	Governance
<ul style="list-style-type: none"> → Governance claims are treated no differently conceptually than other sui generis Aboriginal rights claims. → Governance authorities must be proven on a piece-meal basis (as a broad claim to governance as a whole will not be considered by the SCC).⁸ → These discrete piece-meal authority rights must have existed prior to European contact and have continuity to the present day. → These rights are treated like individual Charter rights (as opposed to political rights of an independent nation) and are therefore subject to unilateral justified infringement by federal or provincial authorities.⁹ → In theory, the inherent right to self-government exists (no court in Canada has yet recognized such a right), but is understood by Canadian authorities as narrow and circumscribed. 	<ul style="list-style-type: none"> → Preamble: “Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.” → Article 3: “Indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.” → Article 4: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to internal and local affairs, as well as ways and means for financing their autonomous functions.” → Article 5: “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”

6 Harry Laforme, “Section 25 of the Charter; Section 35 of the Constitution Act, 1982: Aboriginal and Treaty Rights; 30 Years of Recognition and Affirmation” in Stéphane Beaulac & Errol Mendes, *Canadian Charter of Rights and Freedoms, 5th Edition + Charte canadienne des droits et libertés, 5e édition* (Toronto: LexisNexis, 2013).

7 See also in this report, Gordon Christie, “Implementation of UNDRIP within Canadian and Indigenous Law: Assessing Challenges” for another, but different, account of comparing UNDRIP with the common law of Aboriginal rights. I compiled the chart as an instruction aide for classes on Aboriginal rights. The idea for developing the chart came from the work of Justice Laforme, *supra* note 6.

8 *R v Pamajewon*, [1996] 2 SCR 821, 1996 CanLII 161.

9 *R v Sparrow*, [1990] 1 SCR 1075 [Sparrow]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [Delgamuukw].

Domestic Aboriginal Rights Doctrine	UNDRIP
Land and Resources	Land and Resources
<ul style="list-style-type: none"> → Although Aboriginal title is a <i>sui generis</i> protected right in section 35, it is conceptually inferior to fee simple and <i>remains a mere burden on the Crown's underlying title</i> acquired by the fiction of discovery. In 1990, the SCC stated that there was “never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”¹⁰ → The Canadian Parliament retains ultimate jurisdiction and power and can, notwithstanding section 35, modify the exercise of rights without consent (albeit in a more restrictive manner). → Indigenous laws are relevant only as one source of possible evidence of occupation and are not considered as normative or legal in character. 	<ul style="list-style-type: none"> → Article 26(1): “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” → Article 26(2): “<i>Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.</i>” → Article 26(3): “States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”
State Relations	State Relations
<ul style="list-style-type: none"> → Proven and established Aboriginal interests to lands, resources (and, theoretically, governing authority) can be interfered with by federal and provincial governments, provided the Crown can show that it engaged in meaningful consultation with the rights holder. Only in extreme cases is consent required (no court has yet required consent in Canada).¹¹ → If rights are asserted, but not yet proven, the obligation of the Crown is only to consult and, in some cases, accommodate, but no agreement is necessary.¹² 	<ul style="list-style-type: none"> → Article 19: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions <i>in order to obtain their free, prior and informed consent</i> before adopting and implementing legislative or administrative measures that may affect them.”

As can be seen from the brief comparison above, an understanding that reconciliation is to be achieved by compliance with section 35, as it is currently interpreted, is not what reconciliation looks like according to UNDRIP. As many know, there have been strong endorsements by the Government of Canada toward implementing the “Calls to Action” of the TRC,¹³ which includes adopting UNDRIP as the framework for reconciliation in Canada.¹⁴ Are we experiencing a true paradigm shift? Is Canada really committed to UNDRIP? If we examine some important reconciliation agreements, discussed below, between the Métis and Canada, there is serious reason to doubt Canada’s positive claims.

Métis Peoples and the Negotiation of Reconciliation

When Canada decided to unconditionally endorse UNDRIP, there was considerable optimism that the status quo would finally change and that there is now a willingness on Canada’s part to work toward reforming and changing the judicial doctrine of Aboriginal rights to conform with UNDRIP principles. When Minister of Indigenous and Northern Affairs Carolyn Bennett appeared before the United Nations

¹⁰ Sparrow, *supra* note 9.

¹¹ Delgamuukw, *supra* note 9.

¹² *Haida Nation v British Columbia*, [2004] SCR 511.

¹³ TRC, “Calls to Action” (Winnipeg: TRC, 2015).

¹⁴ TRC, *The Final Report of the Truth and Reconciliation Commission of Canada: Reconciliation, Volume 6* (Montreal, QC & Kingston, ON: McGill-Queen’s University Press, 2015).

to adopt UNDRIP unconditionally, she made the statement that “we intend nothing less than to adopt and implement the Declaration in accordance with the Canadian Constitution.”¹⁵

There was considerable concern raised that if this was how Canada was going to implement UNDRIP, then not much could be achieved because the Canadian Constitution, as it is currently interpreted, is itself the most significant barrier to equality of nationhood. As the above table demonstrates, Aboriginal rights doctrine flows directly from section 35 of the Canadian Constitution and, on a principle-by-principle comparison between UNDRIP and the domestic judicial doctrine of Aboriginal rights, the domestic doctrine falls short on each count. A review of recent “reconciliation” agreements with the Métis seems to affirm these concerns as valid.

When I reviewed the agreements being made between political representatives of major Métis associations and the federal Crown, like the recent Memorandum of Understanding on Advancing Reconciliation entered into between the Métis Nation of Alberta and the federal Crown, there seemed to be blind acceptance by Métis political authorities of the impoverished meaning of reconciliation.

Very telling is the fact that in the Métis Nation of Alberta-Canada agreement’s preamble, or in the substantive provisions themselves, there is no mention or reference at all to UNDRIP (or the TRC, for that matter). To be fair, however, there is reference to the idea of reconciliation, as the title of each memorandum says that it is for the purpose of “advancing reconciliation.” In addition, all three memoranda contain a preamble that refers to Canada’s commitment of working from a “nation to nation and government to government basis...to advance reconciliation.” However, it would appear that neither the UNDRIP nor the TRC understanding of reconciliation is what the drafters of the memoranda had in mind. Instead, there are references to section 35 of the Canadian Constitution as embodying the purpose of reconciliation. Indeed, there is no shortage of references to section 35 in the preamble, and in one clause, reconciliation is understood as the concept that is applied under section 35 when asserting Aboriginal rights. In other words, it appears that these memoranda are based on the courts’ understanding of reconciliation, which many legal experts and scholars have consistently criticized as unjustly narrowly defined and based on perceptions of Indigenous peoples as inferior.¹⁶

The Métis-Canada agreements are revealing of the government’s understanding of reconciliation and they seem to affirm the view that it is the UNDRIP and the TRC legal standards that must defer to section 35 of the Canadian Constitution, not the other way around. For many, this stance differs markedly from the positive rhetoric of Prime Minister Justin Trudeau and federal officials who claim that Canada intends to adopt UNDRIP and to promote decolonization.

The positive rhetoric from federal officials is also characteristic of the recently released statement of “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples.”¹⁷ It speaks of transformative change and adopting UNDRIP. Yet when one examines each of the 10 principles closely, they involve no fundamental change whatsoever and, in fact, are simply positively framed statements of the existing status quo of Aboriginal rights doctrine or Canadian policy on self-government through treaties. They do not challenge Canada’s unilateral assertion of Crown sovereignty or the discovery doctrine in which this unilateral assertion is grounded. Nor do they question Canada’s ability and right

15 Carolyn Bennett, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Paper delivered at the United Nations Permanent Forum on Indigenous Issues, New York, 10 May 2016), online: <www.Métisnation.ca/wp-content/uploads/2016/05/Speech-Minister-Bennett-UNPFII-NEW-YORK-MAY-10-FINAL.pdf>.

16 Legal scholars include Felix Hoehn, Sa’ke’j Henderson, John Borrows, Justice Laforme, Gordon Christie, Joshua Nichols, Kent McNeil, June McCue, Angela Cameron, Aimée Craft, Brenda Gunn, Sarah Morales, Grace Woo, Karen Drake, Robert Hamilton, D’Arcy Vermette, Darren O’Toole, Brad Morse and many others.

17 Department of Justice Canada, “Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples”, online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

to unilaterally infringe Aboriginal rights in the broader interests of Canadian society.¹⁸ It is apparent from a close reading of the statement that the Department of Justice sees reconciliation as that endorsed by the courts in their interpretation of the purpose behind section 35 of the Canadian Constitution and that all we need to do is ensure that the rights contained therein are implemented.¹⁹

Selling Out?

Although the comments I present here may be regarded as somewhat controversial, I wish to raise questions about why Métis politics are accepting a largely colonial understanding of reconciliation. I think we do have choices and I think we need to respond forcefully and critically against any affirmation of domestic Aboriginal rights doctrine in any discussions or agreements going forward.

What is particularly puzzling about the Métis MOUs with Canada is that the Métis leadership did not seem to have objected to the limited understanding of reconciliation that is reflected in these agreements. I am not aware of any record in which the leadership expressed concern over agreeing to a process of reconciliation, where reconciliation is tied so directly to the colonial judicial understanding of reconciliation. One has to wonder if the leadership is more interested in looking like they are making progress on Métis rights recognition for their own political image instead of ensuring that the Métis they represent will actually benefit from a robust and decolonized understanding of reconciliation.²⁰ Or is it the negotiators or legal counsel that Métis leadership is relying on that are doing Métis peoples the disservice? There is some evidence from personal experience to suggest that the legal advice being offered is framed exclusively within the colonizer's Aboriginal rights framework and is accepting of this discriminatory framework without any acknowledgement of the enormous body of critical literature.

It is interesting to compare the Métis agreements with other agreements between Indigenous peoples and Canada. For instance, compare these with the agreement reached between the Haida Nation and Canada in 1993, called the Gwaii Haanas Agreement.²¹ Essentially, the parties agree to disagree regarding the rights of the Haida Nation to sovereignty over Haida Gwaii, while at the same time setting up a structure to cooperatively manage the natural resources of the island. In section 1.1 of the agreement, the parties acknowledge that their views “diverge with respect to sovereignty, title or ownership” of the island.²² In particular, regarding the Haida Nation, the agreement states: “The Haida Nation sees the Archipelago as Haida Lands, subject to the collective and individual rights of the Haida citizens, the sovereignty of the Hereditary Chiefs, and jurisdiction of the Council of the Haida Nation. The Haida Nation owns these lands and waters by virtue of heredity, subject to the laws of the Constitution of the Haida Nation, and the legislative jurisdiction of the Haida House of Assembly.”²³

18 *Ibid*, principle 7 of the statement states: “The Government of Canada recognizes that respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown’s fiduciary obligations.”

19 There is no positive statement that Aboriginal self-government is a right. Nor is there any challenge to the judicial doctrine that Aboriginal rights are defined by racist tests limited to customs, practices and traditions integral to the distinctive cultures of Indigenous peoples prior to European contact and untainted by European influence. See *R v Van der Peet*, [1996] 4 CNLR 177 (SCC).

20 Similar concerns were stated by representatives of the British Columbia Métis Federation (BCMF), which was formed by discontented members of the Métis Nation British Columbia association that is affiliated with the umbrella Métis National Council organization. According to the BCMF, the “Métis Nation BC decisions are more about a preservation of the ‘status’ and a ‘fear of loss.’ This makes one wonder about their view of reconciliation, which appears as ‘zero-sum politics’ and ‘competition for scarce resources’ and ‘handouts’ by governments.” See BCMF, “Métis Nation BC Builds Walls Instead of Bridges Between Métis” (29 January 2017), *BC Métis Federation News* (blog).

21 *Gwaii Haanas Agreement*, Government of Canada and Council of the Haida Nation, 30 January 1993, online: <www.haidanation.ca/wp-content/uploads/2017/03/GwaiiHaanasAgreement.pdf>.

22 *Ibid*, s 1.1.

23 *Ibid*.

In contrast, with regard to Canada, the agreement states: “The Government of Canada views the Archipelago as Crown land, subject to certain private rights or interests, and subject to the sovereignty of her Majesty the Queen and the legislative jurisdiction of the Parliament of Canada and the Legislature of the Province of British Columbia.”²⁴

I provide this illustration to show that it is possible to adopt a critical understanding of domestic Aboriginal rights and assert sovereignty and nationhood status, even if Canada is not prepared to do so. In contrast to the Métis MOUs, a more recent example of an agreement that does include language of self-determination and Crown-First Nation reconciliation is the Nenqay Deni Accord between the Crown (Province of British Columbia) and the Tsilhqot’in Nation regarding land management of Tsilhqot’in territory.²⁵ Importantly, the agreement acknowledges UNDRIP and the TRC principles of reconciliation in the preamble. Maybe the difference is due to the fact that the Tsilhqot’in have established Aboriginal title to the territory subject of the agreement and the Métis have yet to do so. However, that does not change the fact that the Nenqay Deni Accord references international law and UNDRIP as a basis for reconciliation and moving the agreement forward.

Perhaps the reasons I raise above regarding Métis complacency are not at all correct and the Métis leadership simply has no choice but to accept the colonial framework. Are federal officials insisting, then, that this is as far as they are willing to go? If so, it is a far cry from the positive rhetoric of political statements coming from Ottawa. Is it a “take it or leave it” approach? If so, then it is likely, perhaps, since Métis peoples have generally been without for so long, for the leadership to reluctantly accept limited and narrow rights recognition than nothing at all. More research is needed as to why First Nations agreements differ in this respect from Métis agreements.

Conclusion and Policy Recommendations

One option for section 35 of the Canadian Constitution, as it has been interpreted by the SCC, to become consistent with UNDRIP is to require the SCC to denounce past principles of Aboriginal title, including the various legal tests for the recognition of Aboriginal rights, as well as denouncing the findings it has rendered thus far regarding the legal nature of existing treaties and the rights contained therein. Because the existing doctrine and SCC pronouncements on the nature of those rights is a binding precedent on lower courts as a result of the doctrine of *stare decisis*, it is going to make it very difficult for Parliament or any other legislative body to change that constitutional doctrine, in particular as it provides for the means of provincial governments and the federal government to continue to interpret their relationship with Indigenous peoples in the manner the courts have provided thus far. Any changes by Parliament would not affect the constitutional ability of the provinces to infringe proven Aboriginal rights according to the *Sparrow*²⁶ or *Badger*²⁷ tests, unless the federal legislation was very clear that the provinces could not rely on the justification tests set out in those decisions.

Alternatively, we need to remember that the SCC is not immune from societal changes in values and has, on occasion, reversed itself or significantly modified existing precedent to accommodate changing values. There are especially compelling arguments these days for the court to change its position, not the least of which is that UNDRIP represents the minimum human rights standards in regard to state relations with Indigenous peoples and that the doctrine of Aboriginal rights violates many of those minimum human rights standards every day.

²⁴ *Ibid.*

²⁵ *Nenqay Deni Accord*, Province of British Columbia and Tsilhqot’in Nation, 11 February 2016, online: <www.tsilhqotin.ca/Portals/0/PDFs/Nenqay_Deni_Accord.pdf>.

²⁶ *Sparrow*, *supra* note 9.

²⁷ *R v Badger*, [1996] 1 SCR 771.

The federal government can, however, do much despite the SCC's definition of Aboriginal and treaty rights. The state can enact laws that uphold UNDRIP's articulation of Indigenous peoples' rights. Those laws would have to be followed by Canada and others, even if they are far more progressive and richer than domestic judicial doctrine, as it is presently understood, is prepared to go. Despite *Tsilhqot'in*²⁸ and *Grassy Narrows*,²⁹ Parliament still has exclusive jurisdiction under section 91(24) to make the provinces subject to such federal legislation.³⁰ The doctrine of federal paramountcy would result in the federal law prevailing where provincial law is in an operational conflict with the federal law.

It is significant that Bill C-262 has recently passed second reading in the House of Commons. The intention behind the bill is to ensure consistency between the laws of UNDRIP and Canadian law.³¹ The act requires the federal government, in consultation with Indigenous peoples, to “develop and implement a national action plan to achieve the objectives of the United Nations Declaration on the Rights of Indigenous Peoples.”³² This sounds very promising, but are we fooling ourselves into thinking that this process will result in the principles of UNDRIP being enacted into law? After all, the Department of Justice could have easily issued a statement of reconciliation that mirrored the principles and rights of UNDRIP or those of the TRC statement of principles. Instead, the Department of Justice simply reframed, albeit in a constructive manner, the existing colonial doctrine of Aboriginal rights as defined by the SCC.

There is a deep divide and inconsistency between embracing reconciliation as the full and respectful implementation of the doctrine of Aboriginal rights and embracing reconciliation as the full and respectful implementation of the UNDRIP principles. So far, little has been demonstrated, other than rhetoric, about adopting UNDRIP into Canadian law. Other countries have done so already.³³

Regardless, Métis political organizations should not feel they are bound by the existing framing of reconciliation in future agreements arising under the MOUs or outside of them. Métis leadership needs to be much more open to the critical legal scholarship surrounding the entire doctrine of Aboriginal rights so they recognize how important UNDRIP is and why that framework should guide future negotiations instead of section 35 of the Canadian Constitution.

28 *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 256.

29 *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447.

30 I make this point with hesitation because I have argued elsewhere that section 91(24) should not be seen as a plenary power, but a restricted negotiation power only. See Larry Chartrand, “The Failure of the Daniels Case: Blindly Entrenching a Colonial Legacy” (2013) 50:1 *Alta L Rev* 181.

31 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

32 *Ibid*, s 5.

33 The Philippines, for example, has enacted a national law mirroring UNDRIP that, in some respects, goes beyond the protections offered by UNDRIP. See WIPO, Philippines, *The Indigenous Peoples Rights Act of 1997*, Republic Act No 8371, online: <www.wipo.int/wipolex/en/text.jsp?file_id=225130>. It must be recognized that adopting human-rights-affirming legislation is one thing; implementing the principles and rights by the state that the legislation protects is, however, another matter. The experience in the Philippines shows that recognition is largely hollow unless followed by real on-the-ground implementation. Although the rights recognized in Canada by domestic Aboriginal rights doctrine are less generous, what is recognized is much more readily implemented, due to the relative values placed on the principle of the rule of law between the two countries – Canada and the Philippines.

About the Author

Larry Chartrand is the academic director of the Native Law Centre. He is currently on leave from the Faculty of Law at the University of Ottawa, where he has been a faculty member since 1994, and assumed the role of full professor in 2013. He was born on the western plains and is a proud citizen of the Métis nation. He has previously served as director of the Aboriginal Self-Government Program at the University of Winnipeg, Métis advisor to the Senate Standing Committee on Aboriginal Peoples and director of the Indigenous Law Program at the Faculty of Law, University of Alberta.

In 2017, Larry was awarded the distinguished Law Society Medal of Upper Canada in recognition of outstanding service in accordance with the highest ideals of the legal profession.



Navigating Our Ongoing Sacred Legal Relationship with *Nibi* (Water)



Aimée Craft

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

United Nations Declaration on the Rights of Indigenous Peoples, article 25

I was in a boat with my Dad and Mishomis (grandfather) on the Winnipeg River. My Dad was steering and my Mishomis was giving directions because he knew all the spots along the river. At one point, my Mishomis pointed to one side. My Dad veered in that direction. We hit a rock and damaged the propeller on the motor. Later, when we arrived at our destination, my father asked “why did you lead me directly into the rock?” My Mishomis answered that he was pointing to the rock and explained that his role was to tell my father of the dangers, but not to tell him how to deal with them. “Your guide (teacher) will tell you what’s there; he’s not going to tell you what to do.”

This is just like Anishinaabe law. It’s a relationship of principles that are given to us by the Creator and modelled in our environment. What we do with it then as humans is up to us. It is based on our own willingness to comply with the will of the Creator and that of Creation itself.²

1 Aimée Craft, “Anishinaabe Nibi Inaakonigewin Report” (Winnipeg: Centre for Human Rights Research, Public Interest Law Centre, 2014) [Craft, “Nibi”], online: <http://create-h2o.ca/pages/annual_conference/presentations/2014/ANI_Gathering_Report_-_June24.pdf>.

Introduction

Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)² provides protection for the special relationship Indigenous people have with water.³ It marries the concept of legally enforceable rights with Indigenous legal articulations of responsibilities to act, protect and think ahead to future generations. The question we must then ask is: how do we give effect to this international legal recognition in the domestic context? One mechanism is through overarching legislation that aims to adopt and implement UNDRIP, as proposed in Bill C-262.⁴ However, as I suggest below, there is reason to reframe domestic application in the context of the exercise of Indigenous laws, *qua* Indigenous laws, reflecting on them both as the mechanism for recognition and the source of the spiritual relationships and responsibilities themselves.

The language and intent of article 25 is profoundly rich, not in the sense of material wealth (resource wealth being one of the Crown's primary concerns with the lands and territories clauses of UNDRIP), but rather in the article's inherent recognition of sacred spiritual relationships between Indigenous people and various parts of Creation (land, territories, water and resources). These sacred relationships with Creation have existed since the beginning of time and are the primary source of Indigenous legal understandings and Indigenous constitutionalisms throughout Turtle Island.⁵ Thus, article 25 can be read as a recognition of Indigenous legal traditions, beginning from sacred sources of law that engage the relationships of Creation.

In its final report, the Truth and Reconciliation Commission of Canada (TRC) adopted UNDRIP as the framework for reconciliation. According to the TRC, reconciliation requires the "establishment and maintenance of mutually respectful relationships," which, in turn, "requires the revitalization of Indigenous law and legal traditions."⁶ Giving effect to article 25 requires serious engagement with Indigenous legal traditions, on their own terms and utilizing their own Indigenous legal mechanisms.

For the purposes of this paper, I will focus on the implications of UNDRIP in the context of Anishinaabe legal relationships with water. Many of the concepts and arguments may apply equally to the circumstances and laws of other Indigenous nations.

Physicality: The Right to "Maintain and Strengthen"

UNDRIP article 25 entrenches the right to maintain and strengthen distinctive spiritual relationships with water. At its source, this is a recognition of an inherent right of Indigenous peoples to govern as self-determining peoples, in accordance with Indigenous systems of law. Article 25 enables our assertion of Indigenous legal jurisdictions over lands and territories, based on our own legal principles and values, as well as through our own legal mechanisms. It allows us to dismantle siloed jurisdictional approaches that consider water as a resource to be owned, managed and accessed, in favour of a spiritually based legal relationship with water.

2 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007), art 25.

3 Assembly of First Nations, "The United Nations Declaration on the Rights of Indigenous Peoples: What It Says and What It Means for First Nations in Canada" at 3-4, online: <www.afn.ca/uploads/files/07-12-4_un_declaration_flyer_fe.pdf>. The policy brief makes no direct mention of water. However, water issues have plagued Indigenous Canadians for years, from the need for safe drinking water, to navigation and to exploitation of water for hydroelectric generation, mineral extraction and oil and gas development.

4 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

5 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23-58.

6 TRC, *Canada's Residential Schools: Reconciliation, The Final Report of the Truth and Reconciliation Commission of Canada*, vol 6 (Montreal, QC & Kingston, ON: McGill-Queen's University Press, 2015) at 11-12.

The rights of water (in the forms of water bodies, waterways and nature as a whole) and/or the legal personhood of water have been recognized in various contexts internationally. Such recognition includes legislation, court rulings (and ongoing claims) and constitutional affirmations. While often generated out of and based in the premise of Indigenous peoples' sacred and spiritual relationships with lands and waters, this recognition rests in non-Indigenous legal mechanisms that are dependent on state recognition to be given full effect.

Examples of Western legal systems' claims and recognition of the rights of waters and lands and/or legal personhood include:

- Whanganui River, Aotearoa (New Zealand) — Act of Parliament (2017)
- Ganges and Yamuna Rivers (India) — High Court ruling (2017)
- Rights of Nature in Constitution (Ecuador) (2008)
- Rights of Mother Earth Law (Bolivia) (2010)
- Atrato River (Colombia) — Constitutional Court (2016)
- Colorado River — claim in Colorado District Court (US) (Fall 2017)
- Colombian Amazon — Colombia Supreme Court (January 2018)

While pragmatically useful to contest state control over water, Western legal mechanisms can fall short of the legal relationships that currently exist between Indigenous peoples and water. The danger is that by using non-Indigenous legal mechanisms for the affirmation and framing of sacred relationships in non-Indigenous languages, we may lose the spirit of the relationship itself.

Many have argued that if corporations can have rights as legal persons, so can other non-human entities. However, a distinction should be drawn between corporations (as non-living beings) and water (as a living being with whom we are in relationship). Anishinaabe *inaakonigewin* (law) sees water as a living, spirited being. While this is not the case in Canadian domestic law, there is room to grow the law to include Indigenous legal concepts.

If we think back nearly a century ago to the Persons case (*Edwards v Canada (AG)*⁷), we see that the central question was whether or not women were “persons” in law.⁸ The case explained the “living tree doctrine”: our legal understandings grow and morph over time. As our social values grow, so must our constitutional understandings.⁹ While no one would have disputed in the late 1920s that women were physical human beings, the recognition of women as persons in law required a shift in legal perceptions to recognize the rights that accompanied legal personhood. We are now at the precipice of understanding that water itself has and is life, and that it is an independent legal actor with whom we are in relationship.¹⁰

7 *Edwards v Canada (AG)*, [1929] UKPC 86; [1930] AC 124; 1929 CanLII 438 [*Edwards*], online: <www.bailii.org/uk/cases/UKPC/1929/1929_86.html>.

8 Tabitha Marshall & David A Cruickshank, “Persons Case” (7 February, 2006), online: Historica Canada <www.thecanadianencyclopedia.ca/en/article/persons-case/>.

9 *Edwards*, *supra* note 7.

10 Aimée Craft, “Giving and Receiving Life from Anishinaabe Nibi Inaakonigewin (Our Water Law) Research” in Jocelyn Thorpe, Stephanie Rutherford & L Anders Sandberg, eds, *Methodological Challenges in Nature-Culture and Environmental History Research* (New York: Routledge, 2016) at 109 [Craft, “Life”].

If given full effect, article 25 would support the full recognition of Indigenous legal mechanisms for the maintenance of spiritual relationships with water. In the context of Anishinaabe *inaakonigewin*, this would call for the support and maintenance of our sacred treaty relationships with *nibi*, water beings and all of Creation. In order to give effect to our legal relationships and exercise our responsibilities, we must define ourselves by the language of our law, the concepts that are understood through Indigenous languages.¹¹ This is essential for the reciprocal relationship with water, spirits, ourselves and all other beings in Creation. Any non-Indigenous language articulation or Western mechanism of law making will compromise Anishinaabe *inaakonigewin*.

Relationality (*Inendiwin*): Relationships and Responsibilities

Anishinaabe *nibi inaakonigewin* (water law) tells us that water is life — *nibi onje biimaadiiziwin*. We are born of water, and we are primarily composed of water. Not only does it give and take life, it is also a living being in and of itself that relies on a larger web of relationships to be well and to bring wellness to other beings.

When we think about *inaakonigewin* through sacred creation stories, we are reminded that, as human beings, we were the last to be placed on the earth and the most dependent of all the beings in Creation. As humans, we depend on a complex web of relationships in order to live well, to live our *mino-biimaadiiziwin*. Through the relationships that govern our interactions between beings, we develop a sense of our normative values and legal principles.¹² Relationships with land, water and other beings and among ourselves are equally sacred.¹³

“The Great Spirit instructed us to honor all of life and to respect all of Creation. He gave us laws that govern all our relationships, to live in harmony with Creation and with humankind. We are spiritually and culturally obliged to have in our interest, the total well being of this Earth, this Creation, and the people.”¹⁴

Anishinaabe law is centered in relationships.¹⁵ These relationships exist between all beings that are part of Creation, in a variety of permutations and according to a system of generalized reciprocity.¹⁶ Anishinaabe *inaakonigewin* is structured relationally, primarily in a realm of responsibilities (rather than the binary of rights and obligations). In some cases, one being has a responsibility toward another, not because there is an obligation that corresponds to a right, but rather because of a generalized responsibility to look after that relationship, potentially in relation to a variety of other relationships that are intrinsically connected. These legal relationships are multi-dimensional and reflect kinship structures. Therefore, in Anishinaabe law, when considering the impact of our actions, we do not think in terms of parties with a direct interest, but rather we evaluate the many combinations of relationships within a broader web of relationships that exist within Creation.

11 For example, the concept in article 25 that asserts the right over territories that are traditionally owned or otherwise occupied derives from concepts of common law where jurisdiction, akin to ownership, is recognized through consistent or continued land use. From an Anishinaabe perspective, one might refer to “the lands and waters that I belong to” or “akiin,” which speaks to the place your family and ancestors are from, places where you maintain your sacred relationships and responsibilities, the place you were born or where your belly button is buried.

12 Craft, “Life”, *supra* note 10 at 109.

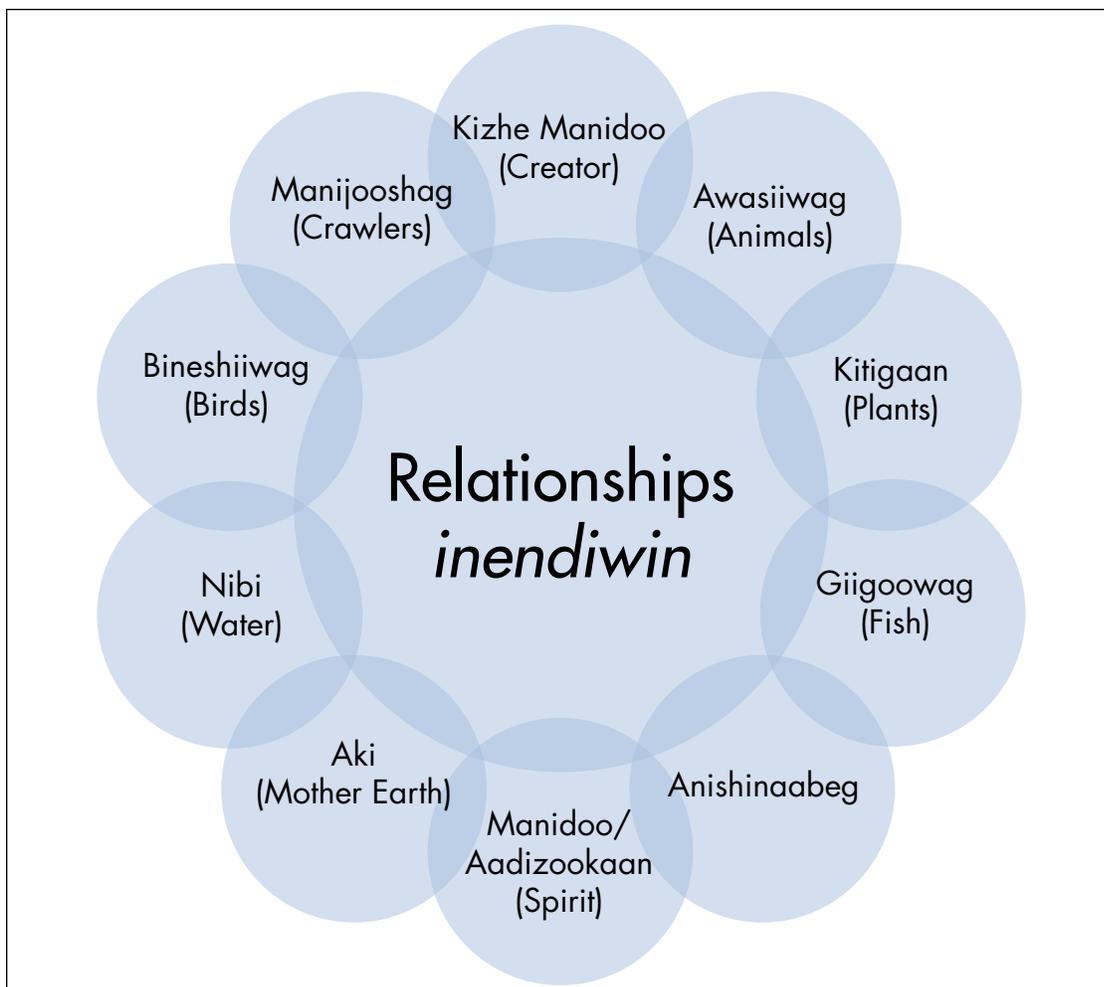
13 Sean Wilson, *Research is Ceremony: Indigenous Research Methods* (Halifax and Winnipeg: Fernwood Publishing, 2008) at 87.

14 Jim Dumont, “Seven Principles of Anishinaabe First Nationhood, Anishinaabe Izhichigaywin” in Lea Foushee & Renee Gurneau, eds, *Sacred Water: Water for Life* (Lake Elmo, MN: North American Water Office, 2010) at 15.

15 Craft, “Nibi”, *supra* note 1 at 8.

16 Aimée Craft, *Breathing Life Into the Stone Fort Treaty* (Vancouver: UBC Press, 2013) at 71 [Craft, *Breathing Life*].

Figure 1: Anishinaabe Legal Relationships¹⁷



Source: Aimée Craft, “Neither Infringement nor Justification: The SCC’s Mistaken Approach to Reconciliation”, in Brenda Gunn and Karen Drake, eds, *Renewing Relationships: Indigenous Peoples and Canada* (Saskatoon: Native Law Centre, University of Saskatchewan, forthcoming 2018; used with permission).

The multitude of relationships in inaakonigewin are not limited to those relationships between persons. Legal relationships between beings are structured on the basis of spirit. Spirit and life exist beyond the indicators of breathing entities and far beyond the human realm. For example, rocks, trees and water are all beings with whom Anishinaabe are in legal relationships. Responsibilities do not begin and end with the human relationships. Balance needs to be restored with recognizing responsibilities to the land, water and all other beings in Creation with whom we are related. “[W]hen we are talking about our relationship, our relationship to one another and our responsibilities as Anishinaabe people first because that’s our first responsibility, to ourselves, our nations of people. And then we have another responsibility because we are responsible too for this land, our land and all of our relatives on this land.”¹⁸

¹⁷ With thanks to Sherry Copenace for review of spelling and translation.

¹⁸ Elder Mary Deleary, Statement to the TRC (Winnipeg: TRC Forum on Reconciliation, Elders and Knowledge Keepers, 2014).

In other systems of law, water is treated as a subject or an object, often to be owned and used. In *inaakonigewin*, *nibi* (water) is treated as an actor in a relationship. Anishinaabe *inaakonigewin* does not starkly distinguish between land and water. The two are connected; their jurisdictions are complementary, mixed and overlapping. For example, we are taught through our creation stories that the land is our mother and the rivers are the veins of our mother. All of this belongs to and composes a spirited being that we personify as the original mother (in accordance with our creation stories). Our relationship with her is the foundation of our relationship with all of Creation. Bodies of water or waterways are also independent entities with spirits who look after them and who are acknowledged and named in ceremonies and prayer.

Elder Mary Deleary explains that the objective of reconciliation should be to restore balance to all relationships. She says, “Reconciliation must continue in ways that honour the ancestors, respect the land, and rebalance relationships.”¹⁹

While the law in Canada considers water as an object or subject, Anishinaabe law considers water to be an independent (yet interconnected) agent in relationships of coexistence with other beings, all part of a larger web of Creation. Legislation therefore would be limited to the Canadian jurisdictional water context, which falls short of understanding or implementing Anishinaabe *nibi inakonigewin*.

Sacredness: Our Spiritual Relationship with Water

Some Anishinaabe Elders share that there are four types of water: fresh water, salt water, rain water and birth water.²⁰ Water exists in many forms, with various spiritual entities that look after these types of water. Although this teaching has many permutations, all of which are true, the fact remains that Anishinaabe law sees water in its multiplicity. It recognizes water and all its guardians as living beings with whom we interact and to whom we must exercise responsibilities. We acknowledge that water is life — *nibi onje biimaadiiziiwin*. Anishinaabe *kweyag* (women), as keepers of sacred birth water, maintain a special relationship of care with water, somewhat akin to a fiduciary obligation. Prior to birth, and by being in water during our gestation period, we are imbued with an understanding of our living relationship with water. We are birthed from and through water. Our relationship with water is the most central and constant relationship of our human lifetime.

Through work with a faculty of Anishinaabe Elders from Treaty areas 1, 2 and 3, we were able to distill a set of primary legal principles relating to water.²¹

To understand Anishinaabe *inaakonigewin*, we are required to understand different levels of law, generated from different sources. This understanding and application of law requires a progression through levels, which might be described in a way that is similar to the teaching of progression from east to west during a lifetime, following the direction of the sun. It is a lifelong practice.

While some might assume that levels of law are hierarchical, that is not the intent of *inaakonigewin*. Each level of law represented below is part of a set of concentric circles dependent on each other for a complete legal understanding, all of it sourced in spiritual law. All beings have been gifted with the understanding of spiritual law. As humans, we observe the application of spiritual law in the natural environment, as applied by other beings in Creation. This basis of spiritual and natural law by which we are meant to model our human law has allowed us to develop our customs of interaction (customary law) over centuries of interaction among each other (and other beings). We then apply spiritual, natural and customary law to our current relational contexts, with a fuller understanding of our web of relationships and responsibilities.

¹⁹ *Ibid.*

²⁰ Note that there are variations on the number and forms of water, which vary with teachings and among Elders and regions.

²¹ Craft, “*Nibi*”, *supra* note 1 at 25–37.

Figure 2: Nibi Inaakonigewin (Water Law Principles)



Source: Craft, “Nibi”, *supra* note 2.

Spiritual law is the first form of law from which we derive all other legal understandings. It is referred to differently in different regions and anishinaabemowin (language) dialects.²² “The first law of our people is the Creator’s law,” the law which is given to us through ceremony, our creation stories and understanding the teachings about relationships to everything around us.²³

In essence, spiritual laws are the instructions that the Creator provides to each being (human, animal, bird and so on) that journeys through four levels before arriving on the earth.²⁴ When we arrive on earth, we have this set of underlying normative values or principles that reveal themselves to us regularly throughout our lives and come to gather more meaning as our understanding of the other forms of law is enhanced. The essence of the spiritual instructions is love and kindness (for ourselves, others and all of Creation).²⁵

Natural law is derived from spiritual law. With the basic spiritual instructions, we are able to connect to our original mother, the earth. From her and all other beings in Creation, we learn natural law. This is done primarily through observation of how the beings of the earth act and interact. From observing the earth and other beings that are placed on the earth, we are able to better understand the spiritual legal instructions that were given to us.

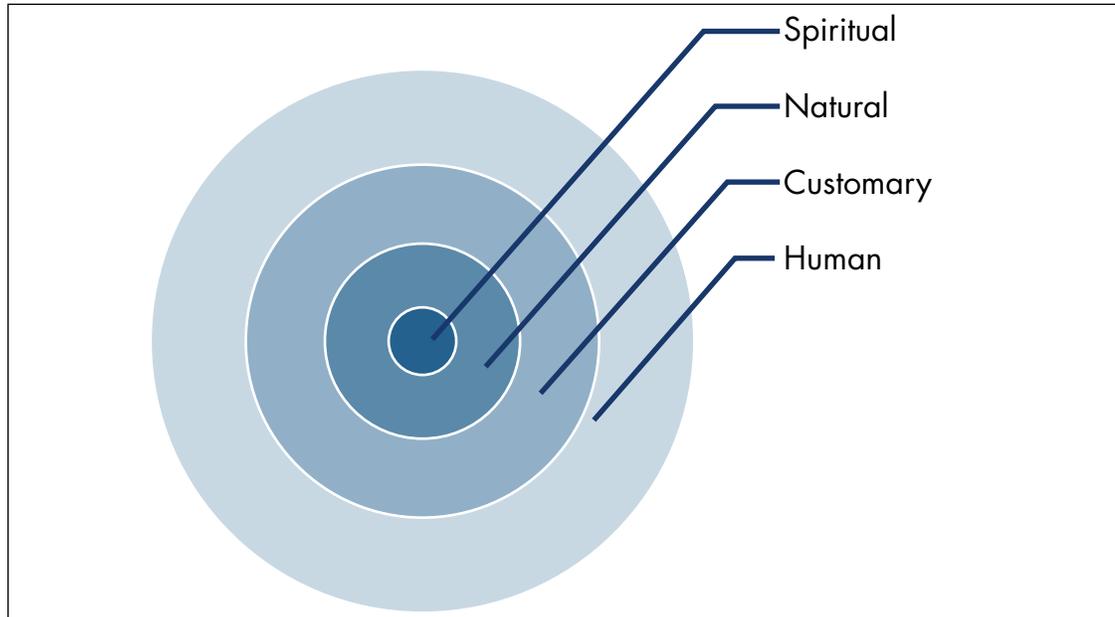
22 It is sometimes referred to as the Great Binding Law, Creator’s Law, Kitchi Tibaakonigewin and so on.

23 Personal communication from Harry Bone (5 August 2015).

24 Personal communication from Peter Atkinson (April 2012).

25 Often we are told that children are the closest to the Creator and have a pure understanding of those spiritual laws. This is why young children are said to have the purest, most untainted understanding of those spiritual instructions.

Figure 3: Sources of Anishinaabe Inaakonigewin (Law)



Source: Author.

In the creation story, human beings were the last to be placed on the earth. We often refer to the other beings — animals, birds, fish, insects, plants, trees and rocks — as our older brothers and sisters, acknowledging that they were placed here before us and that we have something to learn from them, while also being dependent on them for our survival.²⁶

From these older brothers and sisters (other non-human beings) and our mother (*akii* — the earth), we learn about our relationships and our responsibilities to one another. We discover that without the balance of those relationships, none of us would survive. We do this out of the love we have for each other (one of the Creator's spiritual instructions), as well as for the purpose of working toward *mino-biimaadiziwin*, our collective well-being.

Customary law is the application of spiritual and natural law in our ongoing human relationships. This entails accepting responsibility in relation to our relatives. Some explain customary law as the seven teachings of love, honesty, respect, courage, humility, wisdom and truth.²⁷

All of these sources of law come together to make up the principles by which we govern our interactions among beings. In order to give effect to those legal principles and responsibilities, we must understand their sacred, natural and customary sources and maintain the sacred relationships that allow us to access and apply our Indigenous legal obligations throughout many generations. Federal and/or provincial legislation as a mechanism to give effect to these legal responsibilities would fall short of Anishinaabe legal mechanisms and their ability to engage in the complex web of legal relationships relating to water.

²⁶ Dumont, *supra* note 14 at 34.

²⁷ Deborah McGregor, "Indigenous Women, Water Justice and Zaagidowin (Love)" (2013) 30:2-3 *Can Woman Stud* 71 at 71-78; John Borrows, "Seven Generations, Seven Teachings: Ending the Indian Act" (Ottawa: National Centre for First Nations Governance, 2008) at 11-30.

Temporality: “Uphold Responsibilities to Future Generations”

Anishinaabe inaakonigewin requires that we orient our decision making and actions toward mino-biimaadiiziwin. This foundational legal principle is aimed at the well-being of all parts of Creation, including those generations that come next. We accept that our well-being was considered and acted upon by previous generations. Article 25 confirms a right and an obligation to uphold responsibilities to lands and waters for future generations.

This approach is distinct from much of existing Canadian law, which is not oriented to sustainability or actions based on the wellness of future generations. However, the language of article 25 provides a shift that reflects Indigenous laws and creates an opening for a different matrix of long-term and sustainable decision making.

Conclusion

The domestic implementation of article 25 of UNDRIP requires a shift from domestic legislation that recognizes and implements UNDRIP to a recognition and implementation of Indigenous legal traditions within individual Indigenous Nations and territories. This recognition of Indigenous laws and legal constructs is built into the language of article 25. The wording and intent of article 25 recognizes the two foundational pillars of Anishinaabe inaakonigewin, namely, collective well-being (mino-biimaadiiziwin) and relationality (inendiwin). Further, article 25 makes individuals and the collective responsible for future generations, which is an essential temporal aspect of the application of Anishinaabe law.

The implementation of article 25 (and of UNDRIP, more generally) requires the recognition of self-determination, which includes the ability to revitalize Indigenous laws and to give them full force and effect. It also requires the ability to revitalize Indigenous languages that are the vessels for the transmission, interpretation and application of Indigenous laws. In Anishinaabe inaakonigewin, this would mean the ability to revitalize existing legal relationships with the water through the affirmation of treaties with water, water beings and water spirits.

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About the Author

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Aimée’s award-winning 2013 book, *Breathing Life Into the Stone Fort Treaty*, focuses on understanding and interpreting treaties from an Anishinaabe inaakonigewin (legal) perspective. In 2016, she was voted one of the top 25 most influential lawyers in Canada. She is the former director of research at the National Inquiry into Missing and Murdered Indigenous Women and Girls and the founding director of research at the National Centre for Truth and Reconciliation (University of Manitoba). She is a member of the Speakers Bureau of the Treaty Relations Commission of Manitoba.

In her decade of legal practice at the Public Interest Law Centre, Aimée worked with many Indigenous peoples on land, resources, human rights and governance issues. She is past chair of the Aboriginal Law Section of the Canadian Bar Association. In 2011, she received the Indigenous Peoples and Governance Graduate Research Scholarship.



RO EAR

Rebuilding Relationships and Nations

A Mi'kmaw Perspective of the Path to Reconciliation



Cheryl Knockwood

Introduction

In light of the promises¹ aimed at improving the core relationship between Canadians and Indigenous peoples² being made by Canada, under the leadership of Prime Minister Justin Trudeau to the Indigenous peoples in Canada, it is important to take a moment to reflect on what potential next steps should be made by federal, provincial and Mi'kmaw governments in order to make those promises a reality. Canada has committed to reconciliation,³ to honouring the nation-to-nation relationship, to endorsing the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration),⁴ and

- 1 Canada, Department of Justice, "Principles respecting the Government of Canada's relationship with Indigenous peoples" (14 February 2018), online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.
- 2 Canada, Indigenous and Northern Affairs Canada, "Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples" (12 November 2010), online: <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>. Furthermore, Canada stated, "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."
- 3 Canada, Indigenous and Northern Affairs Canada, "Minister Bennett Announces Interim Board of Directors for the National Council for Reconciliation" (14 December 2017), online: <www.canada.ca/en/indigenous-northern-affairs/news/2017/12/minister_bennettannouncesinterimboardofdirectorsforthenationalco.html>.
- 4 The UN Declaration was adopted by the United Nations in 2007. *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UN Declaration].

Amanda Polchies,
Water Protector,
October 17, 2013
Ossie Michelin

to passing a law ensuring that the laws of Canada are in harmony with the UN Declaration.⁵ This gives me, a Mi'kmaw person, great hope for the future. In this paper, I will outline what steps the federal, provincial⁶ and Mi'kmaw governments⁷ need to take to make those promises a reality and to start a legitimate reconciliation process based on the nation-to-nation approach.

Approach and Results

For reconciliation to succeed, the first step is for Canada and the provinces to understand and respect the Mi'kmaw worldview, in relation to Mother Earth. This knowledge is important, so that Canada and the provinces can understand why it is so vital for the Mi'kmaq to protect Mother Earth and therefore be involved in the decision making before any development occurs within Mi'kma'ki.⁸ The second step involves Canada and the provinces taking responsibility for both the historical and ongoing injustices they inflicted upon the Mi'kmaw Nation and then taking steps to end those injustices. This includes compensating the Mi'kmaw Nation for these past harms and injustices. The third step involves Canada and the provinces taking immediate measures to implement existing Mi'kmaw Aboriginal and treaty rights and honouring Aboriginal title, as is currently practised by the Mi'kmaw Nation and already recognized by the Supreme Court of Canada and outlined in the UN Declaration. This step involves Canada and the provinces passing a Mi'kmaw Aboriginal and Treaty Rights Implementation Act (MATRIA) and harmonizing existing laws with successful Supreme Court of Canada Aboriginal and treaty decisions and with the UN Declaration. The final step involves the Mi'kmaw Nation hosting a Mi'kmaw Summit, where common issues will be discussed in order to come up with an action plan for nation rebuilding.

Mi'kmaw Teachings of Mother Earth

The Mi'kmaw legal tradition is rooted within the teachings from our ancestors that have been passed down to us from generation to generation. Albert Marshall, a Mi'kmaw elder, shares that the Mi'kmaq have a knowledge base that has been evolving for thousands of years through our language and our belief systems.⁹ The teachings are imparted in many ways, but a common way is through the oral tradition via the sharing of legends and storytelling. In this section, I would like to share Mi'kmaw teachings related to the Mother Earth and our responsibility toward her. This responsibility of taking care of the lands and waters is embedded within the language and implicit within the oral tradition/stories that have been shared intergenerationally.

The Mi'kmaw legend, called the American Marten Apistane'wj¹⁰ & The First Pine Trees,¹¹ teaches how the pine trees came to be. We learn how three warrior brothers, in their quest for greatness, approach

5 James Munson, "Liberals will back U.N. Indigenous rights bill", *iPolitics* (20 November 2017), online: <<https://ipolitics.ca/2017/11/20/liberals-will-back-u-n-indigenous-rights-bill/>>.

6 Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island and Quebec.

7 Harold Franklin McGee Jr, "Mi'kmaq" in *The Canadian Encyclopedia*, revised by Michelle Filice (2017), online: <www.thecanadianencyclopedia.ca/en/article/micmac-mikmaq/>. The current status of Mi'kmaw communities is as follows: As of 2015, the number of people registered with Mi'kmaq First Nations was 58,763. Of that total, 23,997 were members of the Qalipu First Nation of Newfoundland, a landless community officially recognized by the Government of Canada in 2011. Excluding the landless Qalipu, 56 percent of Mi'kmaw people lived on reserves in 2015. Mi'kma'ki is home to 30 Mi'kmaq nations, 29 of which are located in Canada – the Aroostook Micmac Band of Presque Isle, Maine, has more than 1,200 members. All but two communities (the Qalipu Mi'kmaq First Nation and La Nation Micmac de Gespeg in Fontenelle, Quebec) possess reserve lands.

8 The traditional territory of the Mi'kmaq encompasses what is now known as the Gaspé region of Quebec, the eastern region of New Brunswick and Maine, Nova Scotia, Prince Edward Island and the island of Newfoundland.

9 Madeline Yakimchuk, "Netukulimk" (5 March 2010), online: YouTube <www.youtube.com/watch?v=wsNVewjgKxI>.

10 Mi'kmaw word for the animal commonly known as the marten.

11 UINRTV, "American Marten Apistane'wj & The First Pine Trees" (28 May 2015) ["American Marten"], online: YouTube <www.youtube.com/watch?v=RC0JzP7iAMI>.

Kluskap,¹² each with a wish. The first warrior wants to remain tall, the second warrior wants to sit and enjoy the beauty, and the third warrior — the oldest — wants wisdom and to be respected and to live longer than the others. Kluskap sees they are full of pride and grants their wishes, but turns them into pine saplings. He then asks Apistane'wj to plant them in the Unama'ki highlands. The warriors each got their wish: those pine saplings grew large and became the tallest, deeply and firmly rooted, and oldest living beings in the forest. The legend ends with a teaching: it is our job to take care of the forests so they can take care of us.

According to our legends, many animate beings can shape-change into different forms; for example, from a human to a pine tree or from a bear to the northern star.¹³ The thunder, wind, and the change of seasons and directions are animate and can shape-change. Mountains, lakes and icebergs can also shape-change into persons. Boulders and cliffs are sometimes revealed in stories as shape-changers who choose these forms when they wish to hide or to rest.¹⁴ Not only can they shape-change, but the sun, earth and moon are the ancestors of the Mi'kmaq.¹⁵ Because the Mi'kmaq view the earth as family, as kin, this is why it is so important for the Mi'kmaq to honour and respect her.

Another important Mi'kmaw teaching is related to sustainability. According to Marshall, the Mi'kmaw concept of sustainability is also embedded within the Mi'kmaw language. He shares the Mi'kmaw word that captures the concept of sustainability, “*Netukulimk*,” which means protecting the earth so as to not “compromise the future generations of their abilities, to sustain themselves but also to be able to appreciate and to maintain that connection to the source of life, which is our natural world.”¹⁶ *Netukulimk* has also been defined as “collective beliefs and behaviours in resource protection, procurement, and management to ensure and honour sustainability and prosperity for the ancestor, present and future generations.”¹⁷

Understanding that there is this familial relationship to Mother Earth and that Mi'kmaq have a responsibility to honour and take care of her for both current and future generations helps to enlighten others as to why it is so important to “defend” her and her rivers, her streams and her forests. It may help people to understand the motivation of Mi'kmaw individuals such as Amanda Polchies, who was photographed by Inuk photographer Ossie Michelin as she knelt before a line of police officers, her raised arm holding an eagle feather in defence of the water against exploratory shale gas drilling.¹⁸ As a Mi'kmaw person, she had been taught to protect the forests and Mother Earth not only because the earth and forests can take care of us, but to protect them for future generations.¹⁹

12 Jennifer Reid in *Finding Kluskap: A Journey into Mi'kmaw Myth* (University Park, PA: Penn State University Press, 2013) describes Kluskap as being responsible for the creation of landscape features throughout Quebec, New Brunswick, Nova Scotia and Cape Breton Island. His kettle was an island; his canoe was a large rock; and his dogs, at his departure, were turned into stone. He created turtles, tadpoles, crabs and leeches, took the noses from porcupines and toads, gave beavers their tails, gave frogs and loons their distinctive voices, and reduced all of the animals to the size they are now. He left his footprints in stone, cleared rivers for navigation, carved channels with his paddle, gave names to the principal places along the shorelines of the Maritime provinces and, finally, named all the stars and constellations. The natural environment was a theatre in which Kluskap helped to create a world, and in that world, he gave the Mi'kmaq primordial rights to harvesting various types of plants and animals. He was, primarily, a teacher. As Reid put it, “All that the Indians knew of what was wise and good he taught them.” Kluskap taught them the names of the stars and how to build canoes, but most often in the stories, he taught the Mi'kmaq how to hunt, fish and cure what they harvested, and how to find medicines to heal sickness.

13 Kowch, “Muin and the Seven Bird Hunters” (21 April 2009), online: YouTube <www.youtube.com/watch?v=3IYpP_pTF08>.

14 Ruth Holmes Whitehead, *Stories from the Six Worlds* (Halifax: Nimbus Limited, 1988) at 5. Whitehead also writes of the Mi'kmaq as “the People.” In Mi'kmaq, we call ourselves “L'nu,” which translates into “the people.”

15 *Ibid* at 8.

16 “*Netukulimk*,” *supra* note 9.

17 Kerry Prosper, I Jane McMillan, Anthony A Davis & Morgan Moffitt, “Returning to *Netukulimk*: Mi'kmaq cultural and spiritual connections with resource stewardship and self-governance” (2011) 2:4 *Intl Indigenous Policy J*.

18 Ossie Michelin, photo of Amanda Polchies, APTN (17 October 2013), online: <<http://osmich.ca/about/>>.

19 “*American Marten*,” *supra* note 11.

Be Responsible

The Royal Commission on Aboriginal Peoples wrote:

No segment of our research aroused more outrage and shame than the story of the residential schools...the incredible damage — loss of life, denigration of culture, destruction of self-respect and self-esteem, rupture of families, impact of these traumas on succeeding generations, and the enormity of the cultural triumphalism that lay behind the enterprise — will deeply disturb anyone who allows the story to seep into their consciousness and recognizes that these policies and deeds were perpetrated by Canadians no better or worse intentioned, no better or worse educated than we are today...It is also evident of the capacity of democratic populations to tolerate moral enormities in their midst.²⁰

For reconciliation to be successful, Canada and the provinces need to take responsibility for past harms, as well as historic and current injustices inflicted through assimilationist policies and laws imposed upon the Mi'kmaw peoples. The intergenerational trauma that the Shubenacadie residential school system inflicted upon the Mi'kmaw children and the nation was devastating to the mental, emotional and spiritual health of Mi'kmaw people, and caused huge losses to the Mi'kmaw language and culture by disrupting the Mi'kmaw core family unit. Both levels of government should work with Mi'kmaw leaders to develop a Mi'kmaw Nation restitution process aimed at redressing historical and current injustices and support the healing programs of the Mi'kmaw nation and the renewal of the Mi'kmaw language and culture.

Be Honourable

Amnesty International Executive Director Craig Benjamin, who presented before the House of Commons Standing Committee on Indigenous and Northern Affairs on March 27, 2018, stated that “requiring Indigenous peoples to go to court if they want their rights respected imposes an onerous and unfair burden, and such processes are inherently adversarial, something that runs contrary to the intention of reconciliation.”²¹

For reconciliation to be successful, Canada and the provinces need to honour their legal obligations by implementing all Mi'kmaw treaties²² and outstanding Supreme Court of Canada decisions.²³ To do so, the federal government and each respective provincial government operating within Mi'kma'ki should enact a MATRIA, legislating full implementation and protection of Mi'kmaw Aboriginal and treaty rights. This would eliminate the need for individuals within the Mi'kmaw Nation to continuously go to the courts to defend their Aboriginal and treaty rights, as well as their inherent rights to self-determination and their rights to lands, waters and resources as Indigenous peoples.

Be Wise

Engagement sessions with Indigenous nations have started within Canada to address what a Recognition and Implementation of Rights Framework²⁴ should look like. Instead of reinventing the wheel, Canada should refer to reports and recommendations made by the Royal Commission on Aboriginal Peoples in

20 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Supply and Services, 1996) at 601–02, online: <www.bac-lac.gc.ca/eng/discover/aboriginal-heritage/royal-commission-aboriginal-peoples/Pages/final-report.aspx>.

21 House of Commons, Standing Committee on Indigenous and Northern Affairs, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, No 100 (27 March 2018) at 16:45.

22 *Treaties of 1725, 1726, 1749, 1752, 1760-61, 1779*.

23 *Simon v The Queen*, [1985] 2 SCR 387; *R v Marshall*, [1999] 3 SCR 456.

24 Justin Trudeau, Prime Minister of Canada, “Government of Canada to create Recognition and Implementation of Rights Framework” (14 February 2018), online <<https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>>.

1996. Canada, the provinces and the Mi'kmaw Nation need to re-examine the 440 recommendations and implement them, especially those related to nation building, land and resource sharing, public education, and implementation of treaty and Aboriginal rights. Mi'kmaw and other Indigenous law will play a critical role in the development of the Recognition and Implementation of Rights Framework.

Be Respectful

Indigenous legal scholar Val Napoleon, in her response to the House of Commons Standing Committee on Indigenous and Northern Affairs about implementing Bill C-262, states, "I believe it is a modest and positive step toward reconciliation. With its call for alignment and for an application of UNDRIP [the UN Declaration] to federal laws, it lays a solid foundation for the future of reconciliation."²⁵

Not only should Canada harmonize Canadian law with the UN Declaration, but the provinces should do the same as well. To begin with, federal and provincial laws should be consistent with all articles from the UN Declaration, but priorities should be made to:

- honour the Mi'kmaw obligation for Netukulimk (sustainable development) (article 25);²⁶
- recognize Mi'kmaw Aboriginal title to Mi'kma'ki (article 26);²⁷
- compensate the Mi'kmaq for past injustices (article 28);²⁸
- establish a process that seeks the free, prior and informed consent of the Mi'kmaw Nation for any current or future resource-based activities within their territory before any development occurs (article 32);²⁹ and
- enforce Mi'kmaw treaties (article 37).³⁰

If Canada harmonized its laws with the UN Declaration, it would respect Mi'kmaw individuals such as Amanda Polchies and others like her who are fulfilling their duty to protect Mother Earth.

25 House of Commons, Standing Committee on Indigenous and Northern Affairs, *Minutes of Proceedings and Evidence*, 42nd Parl, 1st Sess, No 100 (17 April 2018) at 16:45 [Standing Committee] (referencing Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>).

26 *UN Declaration*, *supra* note 4, art 25, states: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

27 *Ibid*, art 26: "1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

28 *Ibid*, art 28: "1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

29 *Ibid*, art 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. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."

30 *Ibid*, art 37: "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."

I echo the cautionary message of Ken Coates, Canada Research Chair in Regional Innovation at the University of Saskatchewan, in his statement to the House of Commons Standing Committee on Indigenous and Northern Affairs:

When I think of what will actually make a difference for indigenous people, I see the re-empowerment of indigenous communities and nations with appropriate and equitable funding as being by far and away the most important thing we can have arise at the end of this, not necessarily more government programs.... My concern, and I ask you to take it very seriously, is whether Canada will once again over-promise and underperform regarding indigenous rights and entitlements. We have done so over and over again, and we have not broken that cycle.... Without the second part [the implementation of policy], without focusing on implementation, if this bill comes into effect, if we are going to harmonize these laws, how are we going to do it, what is the time period, and what are the funding allocations? Will real change actually occur at the other end of this? Without that second level of conversation and discussion, UNDRIP will lose its effectiveness and become yet another sort of failed promise to indigenous peoples.³¹

The recommendations shared in this paper will focus on implementation. We do not need more broken promises — we need action.

Conclusion

Before governments can hope to start a reconciliation process and to renew the nation-to-nation relationship with the Mi'kmaq, they must first acknowledge the wrongs and injustices they committed against the Mi'kmaq Nation in relation to the dispossession of their lands, waters and resources, and the assault on their languages, culture and governance system. This acknowledgement must include a commitment from the federal and provincial governments to compensate the Mi'kmaq Nation for those injustices and wrongs. Restitution is a vital step toward reconciliation, as well as a vital element of international human rights law.

Reconciliation must then include actions from both the federal and provincial governments to give full meaning and effect to section 35(1) of the Constitution Act and to the implementation of the Mi'kmaq Aboriginal and treaty rights already confirmed by the Supreme Court of Canada. These actions would include Canada, Newfoundland, New Brunswick, Nova Scotia, Prince Edward Island and Quebec enacting Mi'kmaq Aboriginal and treaty rights implementation legislation. It would also include the harmonization of both federal and provincial laws with the UN Declaration. Canada and the provinces need to start respecting the Mi'kmaq Nation's fundamental sacred law to protect and respect Mother Earth. Therefore, the Mi'kmaq Nation must be included in all federal and provincial decisions that impact the lands, waters and resources within their traditional territory. Finally, the Mi'kmaq Nation needs to rebuild the nation. An important step toward this goal is hosting a Mi'kmaq Nation Summit.

The recommendations listed below will be helpful in renewing a nation-to-nation relationship. The first three recommendations are aimed at the Mi'kmaq Nation and involve internal work that would help us prepare for rebuilding the nation. The remaining recommendations are aimed at both the federal and provincial governments, and if implemented, will set the groundwork for reconciliation and the renewal of the nation-to-nation relationship between Canada and the Mi'kmaq Nation.

³¹ Standing Committee, *supra* note 25 at 16:60–17:00.

Recommendations for the Mi'kmaw Nation include:

- building the Mi'kmaw Nation by organizing a Mi'kmaw Nation Summit where the highest level of Mi'kmaw government decision makers (Mi'kmaw chiefs and Council, Mi'kmaw Grand Council members, Mi'kmaw band managers, Mi'kmaw executive directors and other senior band staff) meet to discuss and strategize on nation rebuilding; governance; treaty and Aboriginal rights protection and implementation; sustainable development and implementation of the UN Declaration;
- honouring and celebrating the Mi'kmaw legal tradition by hosting an event where Mi'kmaw elders, storytellers, wampum-belt knowledge keepers, lawyers and language experts gather and reflect upon its application in modern times; and
- participating in international Indigenous fora such as the United Nations Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the World Intellectual Property Organization, and celebrating the UN International Day of the World's Indigenous Peoples on August 9.

Recommendations for federal and provincial governments include:

- understanding that an integral part of the Mi'kmaw worldview is to respect Mother Earth and to ensure sustainability for future generations (article 25) and therefore include Mi'kmaw Nation representatives in all decision making related to lands and resources within their territory. Governments must cease to criminalize Mi'kmaw individuals who protect Mother Earth;
- establishing a Mi'kmaw Nation restitution process aimed at redressing historical and current injustices related to the dispossession of lands and resources, as well as assimilationist policies;
- honouring their international and national obligations by implementing all Mi'kmaw treaties. To do so, the federal and provincial governments operating within Mi'kma'ki should enact Mi'kmaw and Aboriginal treaty rights implementation legislation to fully implement and protect Mi'kmaw Aboriginal and treaty rights;
- supporting and implementing the Royal Commission on Aboriginal Peoples' recommendations related to nation building, land and resource sharing, public education, and implementation of treaty and Aboriginal rights; and
- ensuring all federal and provincial laws and policies are consistent with the UN Declaration by:
 - recognizing Mi'kmaw Aboriginal title to Mi'kma'ki (article 26);
 - compensating the Mi'kmaq for past injustices (article 28);
 - establishing a process that seeks the free, prior and informed consent of the Mi'kmaw Nation for any current or future resource-based activities within their territory before any development occurs (article 32); and
 - honouring and implementing Mi'kmaw treaties (article 37).

About the Author

Cheryl Knockwood is an L'nu and proud citizen of the Mi'kmaw Nation. She grew up within the Sikniktuk District of Mi'kma'ki and currently resides in the Unama'ki District of Mi'kma'ki with her partner Candice and their family. Cheryl received her B.A. (honours) in anthropology from the University of New Brunswick. She later earned an LL.B. from the University of British Columbia and completed her LL.M. in Indigenous peoples' law and policy at the University of Arizona.

For 13 years, Cheryl worked as a senior policy analyst with the Atlantic Policy Congress of First Nations Chiefs, where she gave strategic advice in areas such as fisheries, environment, treaty education and economic development to the Mi'kmaw, Maliseet and Passamaquoddy chiefs and communities. Cheryl was called to the Nova Scotia Barristers' Society Bar in 2009, becoming the first Mi'kmaq-speaking female lawyer in Nova Scotia. In 2015, Cheryl was appointed to the Nova Scotia Human Rights Commission and still serves as a commissioner. Since 2010, Cheryl has been the governance coordinator for Membertou, Nova Scotia, where she engages the community in the development of laws in relation to lands and citizenship. She occasionally teaches courses at Cape Breton University on Aboriginal and treaty rights, governance and Indigenous economic development.



Canary in a Coal Mine

Indigenous Women and Extractive Industries in Canada



Sarah Morales

In Canada, and elsewhere in the world, the expansion of extractive industries into the traditional territories of Indigenous peoples is a continuing source of conflict and policy challenge for governments and industry and for Indigenous peoples themselves. While some individuals have highlighted the inroads made by industry with respect to changing corporate practices,¹ others point out that there is still a long way to go before Indigenous perspectives are appropriately integrated into decision making.² This view is largely influenced by the fact that although “Indigenous peoples are increasingly able to negotiate benefit agreements around projects approved by government, it is unlikely their voices will be heard if they believe a project should not proceed or should be substantially altered.”³ Federal and provincial governments have consistently denied that Indigenous consent to resource development is required, despite obligations under international law.

1 See Pamela Sloan & Roger Hill, *Corporate Aboriginal Relations: Best Practice Case Studies* (Toronto: Hill Sloan Associates, 1995); Fergus MacKay, “Indigenous Peoples’ Rights to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review” (2004) 4 *Sustainable Dev L & Pol’y* 43.

2 See Ciaran O’Faircheallaigh, “Indigenous Women and Mining Agreement Negotiations: Australia and Canada” in Kuntala Lahiri-Dutt, ed, *Gendering the Field* (Canberra, AU: ANU Press, 2011); Jacob Damstra, “Heroic or Hypocritical: Corporate Social Responsibility, Aboriginal Consultation, and Canada’s Extractive Industries Strategy” (2015) 25 *Transnat’l L & Contemp Probs* 153.

3 Amnesty International, *Out of Sight, Out of Mind: Gender, Indigenous Rights, and Energy Development in Northeast British Columbia, Canada* (London, UK: Amnesty International, 2016) at 5 [Amnesty International, *Out of Sight*].

Given that a growing body of research in Canada and worldwide draws linkages between intensive resource development and negative social impacts in host communities,⁴ Indigenous leaders and communities are adamant that recognition of their right to self-determination requires adequate consultation and, in some instances, consent.⁵ Implicit in this recognition must also be an understanding that Indigenous women should play a major role in these consultative processes.

In Canada and around the world, research has revealed that the introduction of large-scale development adversely affects women in Indigenous communities to a greater extent than men.⁶ In a KAIROS symposium held in the fall of 2014, entitled “Gendered Impacts: Indigenous Women and Resource Extraction,” participants identified the following five impacts of increased extractive development on Indigenous women: first, Indigenous women experience the social, health and environmental impacts before others and most acutely; second, a correlation exists between resource extraction and violence against women; third, women derive little benefit from the positive impacts of mining, such as employment and increased income; fourth, Indigenous women are at the forefront of their communities’ struggles for collective rights; and, fifth, Indigenous women are often excluded from the official consultation process and impact assessment.⁷

Arguably, the major factor that has contributed to the adverse impacts experienced by Indigenous women is that they have largely been excluded from negotiations concerning benefits from extractive industry development. International organizations such as the World Bank and Oxfam now recognize the potential disadvantage experienced by women with regard to extractive industries. These bodies now insist on the inclusion of gender aspects in impact assessments, and they promote gender equality as “smart economics.”⁸ Canada is adopting a Feminist International Assistance Policy that seeks to empower women and promote gender equality.⁹ However, currently, this policy does not speak to extractive industry support at all.¹⁰ In this period of increased extractive development, Canada must take a gendered approach to consultative processes if it is to uphold the rights of Indigenous women and girls and advance toward reconciliation.

This paper will examine the gendered impacts of increased extractive development on Canada’s Indigenous women and girls. It will then consider Canada’s human rights obligations to Indigenous women and girls and make recommendations on how both international law and Indigenous legal traditions can work to better protect the human rights of Indigenous women and girls in Canada. In particular, this paper will examine how greater participation by Indigenous women in decision-making processes can work to reduce some of the potentially harmful impacts of extractive industry development. The impact of extractive industries on Indigenous women demands consideration because it raises issues of colonization, racism and sexism, and the dangerous interaction between these violations of human rights.

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- 4 See e.g. Amnesty International, *Out of Sight*, *supra* note 3; O’Faircheallaigh, *supra* note 2; Damstra, *supra* note 2; Victoria Sweet, “Extracting More than Resources: Human Security and Arctic Indigenous Women” (2014) 37 *Seattle U L Rev* 1157.
 - 5 See Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult” in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, CIGI, Special Report, 31 May 2017, 63.
 - 6 See Sharmistha Bose, “Positioning Women within the Environmental Justice Framework: A Case for the Mining Sector” (2004) 8:3 *Gender, Tech & Dev* 407; Amnesty International, *supra* note 3; Joni Parmenter, “Experiences of Indigenous Women in the Australian Mining Industry” in Kuntala Lahiri-Dutt, ed, *Towards Sustainable Livelihoods for Mining Communities* (Canberra, AU: ANU Press, 2011).
 - 7 KAIROS, *Gendered Impacts: Indigenous Women and Resource Extraction, Executive Summary* (Toronto: KAIROS, 2014) at 6–7, online: <www.kairoscanada.org/wp-content/uploads/2015/05/KAIROS_ExecutiveSummary_GenderedImpacts.pdf>.
 - 8 World Bank, *Gender Equity as Smart Economics: A World Bank Group Gender Action Plan* (Washington, DC: World Bank, 2006), online: <<http://siteresources.worldbank.org/INTGENDER/Resources/GAPNov2.pdf>>.
 - 9 Global Affairs Canada, “Canada’s Feminist International Assistance Policy”, online: <www.international.gc.ca/gac-amc/campaign-campagne/iap-pai/index.aspx?lang=eng>.
 - 10 Craig Benjamin, “We can’t afford to ignore indigenous women and girls with resource development plans”, *The Globe and Mail* (4 November 2016).

The Gendered Impacts of Extractive Industries

Public discourses (Indigenous and non-Indigenous) around resource development often focus on economic growth and employment; however, these considerations are often emphasized at the expense of appreciating the deep and lasting social and cultural effects on communities. Women and other marginalized populations, including Indigenous peoples, people with disabilities, seniors and immigrants, experience these and other negative effects disproportionately.¹¹ The issues are compounded when one considers those individuals at the intersection of these communities, such as Indigenous women; therefore, it is imperative that persons most deeply affected by these industries have a voice in the consultations leading up to the approval of such development agreements.

Personal Safety Impacts

In Canada, the workforce in the extractive industries is overwhelmingly young and male, and the majority of these workers come from outside the region, often on a temporary basis.¹² This has led to a number of social issues for the Indigenous women in the northern and remote communities where these developments take place.

In his report on the effects of the extractive industries on Indigenous peoples, former UN special rapporteur James Anaya noted that Indigenous women have reported that introduction of outside workers has led to increased sexual harassment and violence in these communities, including rape and assault.¹³ Some Indigenous women reporting the violence are community members, and some are women working within the mining projects.¹⁴

Health Impacts

Resource development industries also pose direct and indirect health risks to Indigenous women. Direct health impacts can include injury, lung disease, increased rates of sexually transmitted infections and delayed intellectual development of children.¹⁵ Anaya reported that Indigenous women living in communities near oil, gas and mining operations are vulnerable to sexually transmitted diseases, including HIV/AIDS, which are often introduced by the outside workers brought into the territory.¹⁶ Mental health risks, such as stress, addiction and depression, are also of concern. Research has documented that the arrival of resource development projects can also affect communities' substance abuse rates.¹⁷

Environmental Impacts

While extractive industries can foster growth and economic prosperity, they can also cause irreparable damage to the environment. When these operations result in the loss of lands and natural resources upon which Indigenous communities have traditionally relied, the effects can be devastating. Once projects are complete, they leave behind polluted and pillaged land that is no longer suitable for a subsistence lifestyle.¹⁸

11 Amnesty International, *Out of Sight*, *supra* note 3 at 2.

12 *Ibid* at 37.

13 James Anaya, *Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples James Anaya to the International Expert Group Meeting on the Theme: Sexual Health and Reproductive Rights* (15 January 2014) [Anaya, *Statement*], online: <<http://unsr.jamesanaya.org/statements/statement-to-the-international-expert-group-meeting-on-the-theme-sexual-health-and-reproductive-rights>>.

14 *Ibid*.

15 Deborah Stienstra et al, *Gendered and Intersectional Implications of Energy and Resource Extraction in Resource-Based Communities in Canada's North* (Feminist Northern Network, 2016) at 10, online: <<http://fnn.criaw-icref.ca/images/userfiles/files/SSHRC%20KS%20Report.pdf>>.

16 Anaya, *Statement*, *supra* note 13; Ginger Gibson & Jason Klinck, "Canada's Resilient North: The Impact of Mining on Aboriginal Communities" (2005) 3:1 *Pimatisiwin: J Aboriginal & Indigenous Community Health* 115, online: <<http://caid.ca/JAICH2005v3n1p115.pdf>>.

17 Stienstra et al, *supra* note 15 at 10.

18 Jill K Carino, "Women and Mining in the Cordillera and the International Women and Mining Network" in Ingrid Macdonald & Claire Rowland, eds, *Tunnel Vision: Women, Mining and Communities* (Victoria, AU: Oxfam, 2002) at 18.

These projects can impact everything from water tables to soil fertility.¹⁹ Further, the infrastructure associated with resource development projects, such as pipelines, dams, roads and airports, can also disrupt wildlife migration patterns, pollute land and drinking water, introduce mercury into waterways and create large reservoirs that change local microclimates.²⁰ These negative effects are often compounded by the fact that disruptions to, and subsequent decreases in, harvesting activities (such as berry picking and trapping) have been linked to a range of physical and mental health impacts.²¹

Women often experience the environmental impacts caused by extractive industries first and most acutely because of the roles and responsibilities they have in the domestic home.²² Further, many Indigenous women are culturally connected to the land, and destroying the land destroys both their cultural and personal well-being. Indigenous women have said that they experience ecological and environmental destruction as violence: “So we’re talking about territory body/land because it is not just about defending women’s rights but also defending the land. This is because like it was said, it’s not that men don’t live the impacts of mining, but women live it in a different way, we think it’s much more violent.”²³

Cultural Impacts

Anaya’s 2011 report found that “several Indigenous and non-governmental organizations reported that the forced emigration of Indigenous peoples from their traditional lands — either because of the taking of those lands or environmental degradation caused by resource extraction projects — has had an overall negative impact on Indigenous cultures and social structures.”²⁴ These forced migrations have been described as turning “ecosystem people” into “ecological refugees.”²⁵ The migrations have been reported to have an especially negative effect on Indigenous women, who often experience loss of social, economic and decision-making power when moved from their traditional territorial occupations.²⁶ The Royal Commission on Aboriginal Peoples looked at two examples of communities relocated to make way for hydroelectric developments: the Cheslatta Carrier Nation in northwestern British Columbia lost its communities when the Kemano dam was built on the Nechako River in the 1950s, and the communities of the Chemawawin Cree were relocated because of construction of the Grand Rapids hydro dam in Manitoba a few years later.²⁷

Resource projects can also disrupt Indigenous traditions and cultural practices by blocking access to traditional land, affecting traplines, hunting grounds, family gathering sites and sacred sites. This has implications not only for the continuity of culture and traditions, but also for food security, well-being and many Indigenous peoples’ identities.²⁸ Language maintenance is also affected.²⁹ Often, these projects lead to the destruction of places of cultural and spiritual significance for Indigenous peoples, including sacred sites.

¹⁹ *Ibid.*

²⁰ Stienstra et al, *supra* note 15 at 11.

²¹ *Ibid.*

²² KAIROS, *supra* note 7 at 6.

²³ *Ibid.*

²⁴ James Anaya, *Extractive Industries Operating Within or Near Indigenous Territories*, UNHRC, 18th Sess, UN Doc A/HRC/18/35 (2011) at 10 [Anaya, *Extractive Industries*].

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 1: Looking Forward and Looking Back* (Ottawa: Supply and Services, 1996), online: <<http://caid.ca/DRepRoyCommAborigPple.html>>.

²⁸ Stienstra et al, *supra* note 15 at 11.

²⁹ *Ibid.*

Economic Impacts

Differing opinions exist with regard to the benefits of extractive industries, both within and outside of Indigenous communities. As previously stated, there is a tendency to stress the economic benefits to Indigenous peoples resulting from natural resource extraction projects, while often omitting the fact that some of the benefits are limited in scope and do not make up for the problems associated with these projects. This is especially true when one considers the effects of extractive industries on Indigenous women, who often face an increased risk of impoverishment when major extractive projects opening within their communities leave Indigenous women with little to no voice in how the projects proceed.³⁰

Access to employment in extractive industries varies considerably between Indigenous and non-Indigenous people and between Indigenous men and Indigenous women. Often, Indigenous women endure the extra burden of experiencing racism as well as sexism within the work environment. For example, at a mine in Australia, Indigenous women perceived themselves as occupying the bottom position of the mine site hierarchy, where non-Indigenous men were at the top, followed by non-Indigenous women, Indigenous men and then Indigenous women.³¹ This intersection of race and sex often results in Indigenous women occupying low service positions within the extractive industry, if they are able to secure a job at all. As stated by one Indigenous woman, “Mining has always been a men’s thing. We are the cleaners, we never get anywhere else. Men can always get in before a woman because it’s mining.”³² In addition to the challenges of accessibility, some Indigenous women choose not to participate in extractive industries because doing so would be counter to the customary laws regarding their relationship and responsibility to the natural world.

Indigenous women who are not able to or choose not to get service industry or mining jobs suffer when traditional livelihood opportunities are disrupted or lost as a result of the project. This most often occurs when the development projects damage the environment that was relied upon for traditional livelihoods, such as gathering and hunting activities.³³ When this occurs, Indigenous women have limited ability to provide for themselves and their families. Additionally, these economic challenges may be exacerbated after the development project has ended because often the local economy collapses, leaving workers dependent on a project that no longer exists and with fewer opportunities than originally existed in the area prior to the beginning of the project.³⁴

Extractive industry projects impact all members of a community, but the unique issues that impact women are rarely acknowledged or addressed. As stated by representatives of one Indigenous non-governmental organization, “Only when mining companies acknowledge this and fundamentally change the way they engage with women and support their participating in decision-making processes, can they truly contribute to sustainable and equitable development.”³⁵ The next section of this paper will examine how we can rely on international human rights law and Indigenous legal traditions to ensure that Indigenous women’s rights are recognized and acknowledged in extractive industry decision-making processes.

Moving Forward with International Human Rights Law and Indigenous Laws

In considering how international human rights law and Indigenous legal traditions can help to protect Indigenous women in a period of increased extractive industry, it is useful to consider Anaya’s recommendation to utilize an approach that “comprehensively takes account of the rights that may be

30 Margo Tatgenhorst Drakos, “The Corporate Human Rights Impact Assessment: Top-Down and Bottom Up” (2009) 18 *Intl Affairs Rev* 1.

31 Parmenter, *supra* note 6 at 76.

32 *Ibid.*

33 Carino, *supra* note 18 at 17.

34 Drakos, *supra* note 30 at 4.

35 *Ibid.* This depletion of opportunities can occur when the natural environment has been so altered as a result of the development activity that women can no longer return to their traditional modes of livelihood, for example, gathering and hunting.

affected by extractive operations.”³⁶ In his report, Anaya points out that when examining the issue of extractive industries affecting Indigenous peoples, the majority of the focus centres on the principles of consultation and free, prior and informed consent.³⁷ Anaya takes issue with this approach because it “is blurring understanding about the relevant human rights framework by which to discern the conditions under which extractive industries may legitimately operate within or near indigenous territories.”³⁸ Rather, a better approach recognizes that consultation and consent are not stand-alone rights, but rather that “the principles of consultation and consent together constitute a special standard that safeguards and functions as a means for the exercise of indigenous peoples’ substantive rights.”³⁹ These substantive rights include rights to property, culture, religion and non-discrimination in relation to lands and natural resources, rights to health and physical well-being and rights to set and pursue Indigenous peoples’ own priorities for development, as part of their right to self-determination.⁴⁰

However, as the previous section of this paper demonstrated, the effects of extractive industries are not gender neutral, and so a comprehensive account of affected rights also requires one to consider the effects felt by Indigenous women alone. In fact, article 22 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁴¹ states that particular attention must be paid to the rights and special needs of Indigenous women and compels states to take positive measures to ensure that Indigenous women enjoy the full protection of UNDRIP.

Accordingly, human rights and Indigenous laws need to be considered and implemented in a manner that respects Indigenous women and their unique perspectives and needs. It is an approach that offers the most safeguards to Indigenous peoples and Indigenous women, if they choose to participate in, or even lead, resource extraction within their traditional territories.

Right to Culture

Article 11 of UNDRIP recognizes that “Indigenous peoples have the right to practise and revitalize their cultural traditions and customs.”⁴² Article 13 protects the right to transmit these cultural traditions to future generations.⁴³

As demonstrated by the previous section, extractive industry development can have hugely detrimental effects on Indigenous cultures, many of which are specific to Indigenous women. For many Indigenous peoples, the connection between land and culture is paramount. As a result, the harmful effects of

³⁶ James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UNHRC, 21st Sess, UN Doc A/HRC/21/47 (2012) at 12.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid* at 13.

⁴⁰ See Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UNESCO, 59th Sess, UN Doc E/CN.4/2003/90 (2003) at paras 6–30 (discussing the impact of large-scale development projects on Indigenous peoples’ rights, including rights over lands and resources); Rodolfo Stavenhagen, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UNESCO, 58th Sess, UN Doc E/CN.4/2002/97 (2002) at paras 39–57 (a review of international and domestic law and practice upholding Indigenous rights over lands, territories and natural resources); James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UNHRC, 9th Sess, UN Doc A/HRC/9/9 (2008) at paras 20–30 (a review of the practice of human rights bodies under international instruments of general applicability); OAS, Inter-American Commission on Human Rights, *Report on the situation of human rights in Ecuador*, OR OEA/Ser.L/V/II.96/Doc. 10, rev. 1 (1997) at c VIII (discussing conditions of environmental pollution resulting from oil development as inconsistent with the rights to life and physical well-being); OAS, Inter-American Commission on Human Rights, *Indigenous and tribal peoples’ rights over their ancestral lands and resources, norms and jurisprudence of the Inter-American Human Rights System*, OR OEA/Ser.L/V/II. Doc. 56/09 (2009) at paras 5–22 (reviewing the foundations of Indigenous rights over lands, territories and resources in international instruments, customary international law and the practice of treaty bodies).

⁴¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

⁴² *Ibid*, art 11.

⁴³ *Ibid*, art 13.

resource extraction on lands have serious consequences for many Indigenous cultural practices. For example, when traditional territories are contaminated to such a degree that they are no longer useable as a food source, this leads to a “loss of social and cultural capital,” more specifically, “to an erosion of traditional ways.”⁴⁴ Cultural knowledge about how to interact sustainably with the land and how to participate in traditional activities, such as hunting and gathering, may be lost.

Cultural knowledge is gender specific. Accordingly, there is a danger in only considering Indigenous males’ opinions about the permissibility of development in traditional territories. In speaking about the impact that privatization and development of land has had in the Coast Salish world, Charles Seymour shared: “Plants are used for spiritual preparation, cleansing and for medicinal purposes. I was raised by my grandmothers, so when I look back, I realize that I received quite a lot of ladies’ teachings. Both of my grandmothers each taught me about different plants. So when I look back, I can see what side of my family held each particular knowledge.”⁴⁵

Further, many Indigenous customary laws are deeply connected to traditional territories. These laws and legal practices can also be gender specific:

Swuqus, Mt. Prevost, is where one of our very first ancestors was dropped onto this earth.... Later on, our people actually used each of the two butte areas on the mountain. One side was for male and one side was for female — during coming of age.... There were ceremonies conducted on each side to help that person develop into a fully functioning adult in our society — to help bring them up properly.

That is not an area where we can do that sacred work anymore because we have the general public accessing the mountain and our access to the mountain is actually cut off.

Not having access to these areas, and not being able to continue these practices, is affecting the social health of our community.⁴⁶

Accordingly, in order to protect Indigenous women’s right to culture, it is necessary to consider the specific and unique ways in which extractive development can impact their cultural knowledge, practices and customary laws.

Right to Religion

Indigenous peoples’ “right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard” is also recognized in UNDRIP.⁴⁷

In much of the literature on Indigenous women and mining, Indigenous women point out that the harms caused to the environment by mining are having a direct and negative impact on Indigenous culture and spirituality.⁴⁸ As stated by one Indigenous woman, “Anything that I learned about water or hear about water as a child was always associated with the realm of *matasawin* (spirit). So when you think of the

44 Raywat Deonandan, Kalowatie Deonandan & Brennan Field, “Mining the Gap: Aboriginal Women and the Mining Industry” at 13, online: <<https://ruor.uottawa.ca/bitstream/10393/35187/1/deonandan%20-%20mining%20the%20gap%20SSHRC%20report.pdf>>.

45 Interview of William Charles Seymour by Sarah Morales (21 January 2010).

46 *Ibid.*

47 UNDRIP, *supra* note 41, art 25.

48 Deonandan, Deonandan & Field, *supra* note 44 at 12.

tar sands [development] or you see places where people are polluting water, it is pretty overwhelming. And you really think about what is going to happen to us.”⁴⁹ This understanding, that land is sacred, and that the resources from the environment are to be respected because they are a gift from the Creator, is common to many Indigenous communities.⁵⁰

For some Indigenous communities, the acknowledgement of their special and vital relationship to the lands and resources in their territories gives rise to specific legal principles. For example, the Tsleil-Waututh Nation describe their roles in maintaining their relationship to the land in the following way: “The Tsleil-Waututh Nation has a sacred, legal obligation to protect, defend and steward the water, land, air, and resources of our territory. Our stewardship obligation includes the responsibility to maintain and restore conditions that provide the environmental, cultural, spiritual and economic foundation for our nation and community to thrive.”⁵¹

As well, in some instances, extractive development threatens specific spiritual locales, or sacred sites, within Indigenous traditional territories. Indigenous women, while suffering discrimination, marginalization, violence and a host of human rights violations as a result of industrial operations in their traditional territories, are often at the forefront of protecting these sites.⁵² As described by Hul’qumi’num Elder Laura Sylvester: “There was a development, a sablefish hatchery, on Salt Spring Island at Walker’s Hook. When they built it, the sewer from the sablefish ran right through one of our graves.... I fought for that gravesite. I was prepared to go to jail to protect that gravesite. We went to court for two to three weeks in Victoria, fighting for Walker’s Hook because that’s where the Penelakut used to live.”⁵³

As a result, Indigenous women often face security issues as a result of their role as defenders of the sacred, the land and human rights.⁵⁴ This means that not only are Indigenous women fighting to protect their land, culture and spirituality, but also, often, they are struggling to maintain their right to physical safety and security at the same time.

Right to Health and Physical Well-being

UNDRIP also protects Indigenous peoples’ right to health and physical well-being through article 24.

Not only does increased extractive industry destroy Indigenous peoples’ traditional territories, it also destroys the resources they rely on to live a healthy life. Martina Joe, a young Coast Salish woman, described the effects in the following way:

My grandma knows some stuff about different medicines, but the medicines are on private lands in our traditional territory. She can tell me and describe the sites to me but because someone else bought the land, we can’t access it and I can’t see the actual plants. This happens in different parts of the traditional territory with different medicines or even traditional foods.

49 *Ibid.*

50 *Ibid* at 13.

51 Tsleil-Waututh Nation, Treaty, Lands & Resources Department, *Assessment of the Trans Mountain Pipeline and Tanker Expansion Proposal* at 3, online: Sacred Trust Initiative <<http://twnsacredtrust.ca/trans-mountain-assessment-report/>>.

52 Judy Pasimio, “Mining and Violence against Rural and Indigenous Women in the Philippines” (Quezon City, Philippines: LILAK, Purple Action for Indigenous Women’s Rights, 2013), online: <http://lilak.net/wp-content/uploads/2017/02/MiningVAW_online.pdf>.

53 Interview of Laura Sylvester by Sarah Morales (20 June 2010).

54 Inmaculada Barcia, “Women Human Rights Defenders Confronting Extractive Industries: An Overview of Critical Risks and Human Rights Obligations” (AWID and Women Human Rights Defenders International Coalition, 2017), online: <www.awid.org/sites/default/files/atoms/files/whrds-confronting_extractive_industries_report-eng.pdf>.

I remember my grandparents going to get different plants and driving to different parts of the traditional territory to gather wild Indian celery or *yu'lu*.... They used to tell me they were high in fibre and vitamins and natural enzymes that were good for you. Because of zoning and development, I don't have access to these areas anymore.

Development is not considerate of other people's cultures.⁵⁵

This inability to access, and the destruction of, traditional plants and medicines as a result of increased development is a violation of Indigenous women's right to health. It is well known that Indigenous women in Canada suffer from poor health as a result of "lower quality housing, poorer physical environment, lower educational levels, lower socioeconomic status, fewer employment opportunities, and weaker community infrastructure."⁵⁶ These socio-economic conditions are further exacerbated when extractive development encroaches on Indigenous territories.

As illustrated in the previous section, Indigenous women's right to physical health and safety is also compromised by increased extractive development in their communities. This is especially disconcerting when one considers that governments and law enforcement in Canada have acknowledged that Indigenous women and girls face more frequent violence, and more severe forms of violence, than other women and girls.⁵⁷ In describing the situation of Indigenous women in northern British Columbia (an area of increased extractive development), Helen Knott conveyed to Amnesty International that the risk to Indigenous women and girls in the area is increased by the large numbers of men who come to the region to work in the extractive industries and the way that their economic power emboldens them to express racist and sexist attitudes they might suppress elsewhere.⁵⁸ She said men use the racist and sexist stereotypes that Indigenous women and girls are "drunk, easy, and wanted it anyway" to justify harassment and violence.⁵⁹ In 2016, she told a reporter from a national newspaper that it is imperative to talk about the violence Indigenous women experience because the chaos created by resource development "really does create a dangerous place for our women and our young women coming up."⁶⁰ Therefore, if Canada is committed to implementing UNDRIP, it must consider the manner in which extractive industry development is negatively affecting the health and safety of Indigenous women and girls.

Right to Participate in Decision Making

UNDRIP recognizes Indigenous peoples' "right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."⁶¹ Indigenous peoples also have the "right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources."⁶² Further, states are required to "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in

⁵⁵ Interview of Martina Joe by Sarah Morales (9 April 2010).

⁵⁶ Society of Obstetricians and Gynecologists of Canada, "SOGC Policy Statement: A Guide for Health Care Professionals Working with Aboriginal Peoples" (April 2001) 2 J SOGC 3.

⁵⁷ See Amnesty International, *Canada: Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada* (2004), online: <www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf>.

⁵⁸ Amnesty International, *Out of Sight*, *supra* note 3 at 51.

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at 51 (interview of Helen Knott, Fort St. John, 16 October 2015).

⁶¹ UNDRIP, *supra* note 41, art 18.

⁶² *Ibid*, art 32.

order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”⁶³

The right of Indigenous peoples to participate in decision making in relation to extractive industries is interrelated with the right to self-determination, the right to autonomy, the right to be consulted and the duty of states to seek the free, prior and informed consent of Indigenous peoples. This right to participate in decision making in relation to extractive development activities is not confined to situations where Indigenous peoples have state-recognized title to the land where, or near to where, the extractive activity is to take place.⁶⁴ Rather, it extends to situations where Indigenous peoples own, use, develop and control land, territories and resources under their own Indigenous laws near to where, or on which, extractive activities take place or are proposed to take place.⁶⁵

In its follow-up report on Indigenous peoples and the right to participate in decision making, with a focus on extractive industries, the Expert Mechanism on the Rights of Indigenous Peoples noted that there are several unique considerations in relation to Indigenous women and the right to participate in decision making in the area of extractive industries.⁶⁶ Participants at the expert group meeting “Combating violence against indigenous women and girls: article 22 of the United Nations Declaration on the Rights of Indigenous Peoples,” identified violence against Indigenous women by state and non-state actors and corporate actors in the public domain as including: “militarization and the activities of multinational corporations and extractive industries that operate with impunity on Indigenous peoples’ territories. Those actors and their activities have a detrimental impact on Indigenous women and girls, which manifests itself in sexual assault, sex trafficking, prostitution, bonded labour, the exploitation of overseas contract workers, the internal displacement of women and environmental violence.”⁶⁷ The Expert Mechanism report also recognized, as discussed previously, that extractive industry development can have unique ecological, economic and spiritual impacts on Indigenous women in their role as traditional caretakers of the environment.⁶⁸ Accordingly, the Expert Mechanism noted that these unique impacts and forms of violence against Indigenous women and girls must be resolved through an “understanding of the structural nature of violence against Indigenous women, through the full participation of Indigenous women in all aspects of decision-making and through consideration of this problem by Indigenous communities as an integral part of self-determination.”⁶⁹

This exercise of including women in decision-making processes is in keeping with many Indigenous legal traditions. For example, Willie Seymour, a Hul’qumi’num elder, spoke of the importance of women participating in traditional consent-building processes:

[H]e beat on his drum again and that was his notice for the people to come, that there was business to be taken care of.

The people rushed down, “We need to talk about whatever the concern was.”

⁶³ *Ibid*, art 19.

⁶⁴ James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UNHRC, 12th Sess, UN Doc A/HRC/12/34 (2009) at para 44.

⁶⁵ Anaya, *Extractive Industries*, *supra* note 24.

⁶⁶ Expert Mechanism on the Rights of Indigenous Peoples, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, UNHRC, 5th Sess, UN Doc A.HRC/EMRIP/2012/2 (2012).

⁶⁷ Permanent Forum on Indigenous Issues, *Combating violence against indigenous women and girls: article 22 of the United Nations Declaration on the Rights of Indigenous Peoples*, UNESCO, 11th Sess, UN Doc E/C.19/2012/6 (2012) at para 21. See also Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 66 at 12.

⁶⁸ Permanent Forum on Indigenous Issues, *supra* note 67 at para 27.

⁶⁹ *Ibid* at paras 46, 50.

The women...they came in and joined and they were invited to continue the discussion. It was open and sometimes [the issues] involved women.

And they didn't leave until they came to a satisfied resolution.

They asked everyone; they asked every individual, “*nil ow' sthuthi' ni' 'utun shqualuwun.*” “Is it okay with you, okay with you personally? Is our decision effective? Is our decision acceptable?” They go around asking each individual and then they say, “*tun' ni' 'utunu 'il kwet ch*” — from this day on we put this to rest. Then they will appoint a couple of elders to go deal with the people involved.⁷⁰

As demonstrated by this account, women were always included in these processes and were asked for their input, especially when the issue to be resolved required a female perspective or dealt with an issue of which women had specialized knowledge.

Accordingly, if Canada is committed to implementing UNDRIP in a manner that addresses the rights of Indigenous women in relation to extractive industry development, it must ensure that Indigenous women's right to self-determination is respected by including them in all aspects of the decision-making processes and by actively seeking out their free, prior and informed consent to any development project taking place within or affecting their traditional territories.

Conclusion

Canada is rich in energy resources, but while some Canadians benefit immensely from the extraction of these resources, others are further marginalized and impoverished by development activities. As this paper has illustrated, Indigenous peoples whose lands and resources provide the basis for the wealth generated by these activities are often excluded from a meaningful role in decision making and suffer significant adverse effects in relation to housing, health, culture, safety, transportation and other social services. Further, Indigenous women and girls experience these negative effects disproportionately. The issue of extractive resource development and human rights involves a relationship between Indigenous peoples, governments and the private sector that must be based on the full recognition of Indigenous peoples' rights to lands, territories and natural resources, which in turn implies the exercise of their right to self-determination. Indigenous peoples' right to sustainable development means the right to determine their own pace of change, consistent with their own vision of development, including their right to say no. This right to self-determination must reflect the concerns and solutions of both Indigenous men and Indigenous women if Canada is to implement UNDRIP in a manner that seeks to achieve reconciliation and works to implement Indigenous legal traditions.⁷¹

About the Author

Sarah Morales is Coast Salish and a member of Cowichan Tribes. She holds a J.D. and a Ph.D. from the University of Victoria and an LL.M. from the University of Arizona and was a post-doctoral fellow at the University of Illinois. Sarah is an associate professor at the University of Victoria Faculty of Law, where her teaching and research focuses on torts, Aboriginal law, Coast Salish legal traditions and international human rights, with a focus on Indigenous peoples.

70 Interview of Willie Charles Seymour (23 June 2010) in Sarah Morales, *Snw'uyulh: Fostering an Understanding of the Hul'qumi'num Legal Tradition* (PhD Dissertation, University of Victoria, 2014) [unpublished] at 306.

71 Although I am not suggesting that it is solely the government's responsibility to determine the manner in which Indigenous women's voices are heard and considered during these decision-making processes (as every Indigenous legal tradition would have its own processes in place), I do believe that international human rights law places an onus on government to ensure that Indigenous women's views are considered in the decision-making process.



Fraser

UNDRIP Implementation, Intercultural Learning and Substantive Engagement with Indigenous Legal Orders



Hannah Askew

Introduction

Anishinaabe legal scholar John Borrows suggests that recent commitments made by both federal and provincial governments to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹ offer an opportunity to reset the relationship between settler and Indigenous peoples on an improved basis of mutual respect and equality.² Crucial to this project is respect for and engagement with Indigenous legal orders. UNDRIP recognizes that Indigenous peoples' rights are rooted in Indigenous peoples' own legal traditions, rather than a colonially imposed legal regime that defines Aboriginal rights according to European understandings of law.³ Settlers and settler governments committed to implementation of UNDRIP, and to the broader project of reconciliation, must therefore be prepared to invest significant amounts of time and resources into substantive engagement with Indigenous legal orders.

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

2 John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges", in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, CIGI, Special Report, 31 May 2017, 20.

3 Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult", in Fitzgerald & Schwartz, 63.

A “Duty to Learn”⁴ Indigenous Law

There is simply no shortcut away from the humility, patience, time and effort that is required for settlers to learn in a meaningful way about Indigenous law and governance. As former chief justice Lance Finch of the British Columbia Supreme Court eloquently put it: “How can we make space within the legal landscape for Indigenous legal orders? The answer depends, at least in part, on an inversion of the question: a crucial part of this process must be to find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves.”⁵

A particular Indigenous legal order is intimately connected to the culture and worldview of the nation to which it belongs. As Borrows states, “The underpinnings of Indigenous law are entwined with the social, historical, political, biological, economic, and spiritual circumstances of each group. They are based on many sources, including sacred teachings, naturalistic observations, positivistic proclamations, deliberative practices, and local and national customs.”⁶

As with all immigrants, settler Canadians (including their government representatives) must make the effort to seek out opportunities to learn about the laws of their adopted homelands. An obligation for settlers to learn about Indigenous legal orders does not imply a corresponding obligation for Indigenous peoples to teach settlers about their laws. This obligation would not exist in any event, but in particular in a context where the past and ongoing violence of colonialism is an open wound, Indigenous peoples are likely to have other more urgent priorities connected to healing and rebuilding their own communities. In circumstances where Indigenous peoples are willing and able to teach settlers, their time, knowledge and expertise should be valued and appropriately compensated.

It is important to note that Indigenous legal orders across Canada are diverse and unique, so that learning about the legal order of one nation does not guarantee, or even make likely, enhanced proficiency in understanding another. For settlers embarking on learning about the Indigenous laws governing the territories on which they live and work, there are many publicly available resources that can serve as a starting place to become familiar with Indigenous worldviews, values and understandings of place. Self-educating with publicly available sources can initiate a foundation from which, over time, a deeper and more sophisticated understanding of Indigenous law and legal process may be built.

Some Resources for Learning Indigenous Law

While it is beyond the scope of this paper to thoroughly canvass the diverse resources that exist for learning Indigenous law, some relatively accessible examples that may be drawn on include: published traditional stories; online audio recordings of storytellers and speakers; language lexicons; nation and band council websites; cross-disciplinary Indigenous scholarship, including graduate theses; anthropological writing, past and present (treated with caution, as it is often authored by non-members); public lectures; and visual art such as carvings, poles and weaving, as well as dance, music and film.⁷ It is critical that newcomers to a culture and legal order approach these sources with humility and open-mindedness, in particular if they have not been trained on how to interpret or contextualize them. However, engaging with these sources can

4 This phrase was coined by former chief justice of the British Columbia Supreme Court, the Honourable Justice Lance Finch; see Lance Finch, “The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice” (Paper delivered at the Indigenous Legal Orders and the Common Law Conference, Continuing Legal Education Society of British Columbia, Vancouver, November 2012).

5 *Ibid* at 20.

6 John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23–24 [Borrows, *Canada’s Indigenous Constitution*].

7 See e.g. the Accessing Justice and Reconciliation Project, “Project Documents”, online: <www.indigenousbar.ca/indigenouslaw/project-documents/>; *ibid*, “Video”, “Audio”, online: <www.indigenousbar.ca/indigenouslaw/audiovideo/>; Indigenous Law Research Unit, University of Victoria, online: <www.uvic.ca/law/about/indigenous/indigenouslawresearchunit/index.php>.

be done without burdening an Indigenous teacher and can help the learner to become aware of some of the basic values and structures of a specific Indigenous legal order.

Perhaps the richest opportunities to learn about a particular Indigenous legal order come from invitations to join the web of relations that structure Indigenous law by participating in land-based learning from knowledgeable community members, as well as the land itself. These precious learning opportunities are sometimes extended to individuals or groups by communities. One example is the Anishinaabe law camps led by John Borrows, co-taught by community members and invited instructors, and hosted by various Anishinaabe communities several times annually. Participants at these law camps have the opportunity to internalize Anishinaabe legal teachings by participating in relationships mediated by stories, ceremonies, shared meals and time spent on the land.⁸ The Tsilhqot'in Nation also hosts an annual culture camp, where various aspects of Nenqayni law and culture are shared through hands-on activities such as fishing and tanning hides. This camp is mainly for members of the nation, but outsiders who are willing and able to conduct themselves in a respectful way are also welcome.

In terms of universities serving as sites to access knowledge about Indigenous law, as increasing numbers of Indigenous peoples join academia as undergraduate and graduate students, professors, visiting Elders and in other roles, there is also a growing body of Indigenous legal scholarship being generated. Michael Coyle did a synthesis and review of this body of work in the fall of 2017.⁹ In summarizing this literature, he wrote: “The past two decades have witnessed an explosion of writing about Indigenous legal traditions in Canada. Those writings will be a valuable tool for Indigenous communities, government policy-makers, judges, and scholars. They offer important insights into questions like how to identify and interpret Indigenous laws, what are their sources, and how to understand Indigenous legal reasoning.”¹⁰ Some of the work being produced by Indigenous scholars is explicitly designed for audiences outside the university. For example, the Indigenous Law Research Unit at the University of Victoria has an entire website with resources on Indigenous law, including a graphic novel and their popular “Indigenous Law on Demand” short video series.

The Indigenous Law Research Unit has also designed a methodology to access Indigenous legal principles through stories and commentary on stories and regularly runs training sessions on request to teach this methodology to groups around the country and sometimes internationally. Val Napoleon and Hadley Friedland, the creators of the methodology, articulate their motivation as follows: “Interest in serious and sustained engagement with Indigenous legal traditions is building within Canada, across professional, academic and Indigenous communities. If the momentum is going to be sustained and grow productively, then we need shared frameworks for engaging with Indigenous legal traditions within and across these same Indigenous, professional and academic communities.”¹¹

8 For reflections on participants’ experiences of these law camps, see Osgoode Hall Law School, York University, “The Anishinaabe Law Camp”, online: <www.osgoode.yorku.ca/programs/jd-program/anishinaabe-law-camp/>; Lorne Sossin, “Anishinaabe Law Camp” (25 September 2017) *Dean Sossin’s Blog* (blog), online: <<https://deansblog.osgoode.yorku.ca/2017/09/anishinaabe-law-camp/>>; Lorraine Land, “Rethinking legal education: the Anishinaabe Law Camp”, online: <<http://oktlaw.com/rethinking-legal-education-anishnaabe-law-camp/>>; Hannah Askew, “Learning from the land: Anishinaabe law camp at Walpole Island First Nation” (15 May 2016), online: <www.wcel.org/blog/learning-land-anishinaabe-law-camp-walpole-island-first-nation/>; Serena Dykstra, Zachary Donofrio & Jasleen Johal, “Anishinaabe Law Camp”, (29 September 2014), online: <<http://obiter-dicta.ca/2014/09/29/anishinaabe-law-camp/>>; Allison Grandish, “Anishinaabe Law Camp 2015” (13 October 2015), online: <<http://obiter-dicta.ca/2015/10/13/anishinaabe-law-camp-2015/>>; Windsor Law, University of Windsor, “Anishinaabe Student Law Camp, March 29–April 1, 2018 Student Application Form”, online: <www.uwindsor.ca/law/aboriginal/sites/uwindsor.ca/law/aboriginal/files/pii_ki_gijigidod_2018_student_law_camp.pdf>; Faculty of Law, McGill University, “Anishinaabe Law Class: Law as a Human Experience” (1 November 2017), online: <<http://publications.mcgill.ca/droit/2017/11/01/anishinaabe-law/>>; Western Law, Western University, “Indigenous law camp imparts valuable lessons” (2017), online: <https://law.uwo.ca/news/2017/indigenous_law_camp_imparts_valuable_lessons.html>; Gemma Smyth, “Reflections on the Anishinaabe Law Camp (Bkejwanong Territory)”, (25 October 2016), online: <<https://reconciliationsyllabus.wordpress.com/2016/10/25/reflections-on-the-anishinaabe-law-camp-bkejwanong-territory/>>; John Borrows, “An emphasis on indigenous law could help shape a future that’s brighter than our past”, *The Hill Times* (28 June 2017), online: <www.hilltimes.com/2017/06/28/emphasis-indigenous-law-help-shape-future-thats-brighter-past/111748>.

9 Michael Coyle, “Indigenous Legal Orders in Canada: A literature review” (2017) *Western University Law Publications*.

10 *Ibid* at iv.

11 Val Napoleon & Hadley Friedland, “The Inside Job: Engaging with Indigenous Legal Traditions through Stories” in Tony Lucero & Dale Turner, eds, *Oxford Handbook of Indigenous Peoples’ Politics* (Oxford, UK: Oxford University Press, 2014).

As UNDRIP is implemented in Canada, with the accompanying requirements for the Canadian state to recognize Indigenous law, decision makers, legal institutions and process, the need for shared frameworks for engaging with Indigenous legal orders will become more acute.

The Dynamic and Evolving Nature of Indigenous Law

In Canadian case law, courts have taken a “frozen in time” approach to Aboriginal rights, recognizing only those aspects of the culture that evidence supports existing at the time of contact with early European settlers.¹² This line of reasoning in the jurisprudence has been heavily criticized for denying Indigenous peoples the inherent rights to grow, evolve and adapt over time, as all human societies necessarily do.¹³

Like Canadian law, Indigenous legal orders are dynamic and change over time to adapt to new circumstances and needs. As Borrows states: “Indigenous law as practised today may have connections to ancient history — or it may not. Law is fluid; it changes over time....Indigenous legal traditions exist to address current and future needs.”¹⁴ This implies that the legal principles applicable to a conflict, and interpretation and application of those principles, must be open to community debate and capable of evolving through deliberative processes that are themselves integral to the legal order.¹⁵

For settlers seeking to understand and learn from contemporary applications of Indigenous law to vital current issues, Indigenous peoples’ use of social media, in particular Twitter, has become a rich forum of discussion that is frequently public. A powerful recent example of this is a Twitter exchange that occurred on February 10, 2018, between Peter Sankoff, a University of Alberta law professor and criminal lawyer, and Kris Statnyk, a Gwich’in lawyer, over a point of Cree law following the killing of Cree youth Colten Boushie and the subsequent acquittal of Boushie’s killer by the Canadian criminal justice system. In the exchange, Sankoff misinterpreted a statement delivered by Bobby Cameron, chief of the Federation of Sovereign Indigenous Nations, as a threat of revenge and was corrected by Statnyk over a series of tweets. The statement Sankoff misinterpreted as an “outright threat of revenge” was as follows: “Gerald Stanley, you’ve not got away with this yet. Don’t think for a second that you’ve got away with this, because somewhere down the line you’re going to pay. Your children will pay or your grandchildren will pay.”¹⁶

The Twitter exchange between Sankoff and Statnyk then proceeded as follows:

@PeterSankoff: This article shows a range of reaction to Stanley/Boushie case. Emotions are high in Saskatchewan.

@PeterSankoff: And when I say “a range” I mean, ranging from “sad, but hoping this brings needed legislative change” to outright “threats of revenge”.

@gwichinkris: Hi Peter. Not one Indigenous person in this article makes “outright ‘threats of revenge’”. It does not help anyone to perpetuate the violent savage mythology that continues to kill us.

@gwichinkris: This is not a threat of revenge. It’s a statement truly rooted in Nehiyaw law (not that you would know). See for example the Principle of Natural

¹² See *R v Van der Peet*, [1996] 2 SCR 507.

¹³ See e.g. Brenda L Gunn, “Beyond *Van der Peet*: Bringing Together International, Indigenous and Constitutional Law”, in Fitzgerald & Schwartz, *supra* note 2, 29; Borrows, *Canada’s Indigenous Constitution*, *supra* note 6 at 8; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 60.

¹⁴ John Borrows, “Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education” (2016) 61:4 McGill LJ 795.

¹⁵ Coyle, *supra* note 9.

¹⁶ Joe Friesen, “‘Unacceptable’: Boushie family vows to seek justice after jury acquits Stanley”, *The Globe and Mail* (10 February 2018), online: <www.theglobeandmail.com/news/national/unacceptable-boushie-family-vows-to-seek-justice-after-jury-acquits-stanley/article37931731/>.

and Spiritual Consequences to harm discussed here (at p. 27): http://indigenousbar.ca/indigenouslaw/wp-content/uploads/2012/12/cree_summary.pdf ...

@gwichinkris: I'm not a Cree person so won't pretend to speak with authority but it is understood as a spiritual or natural consequence (i.e. it is enacted by natural or spiritual forces). It can serve a deterrence function. Don't harm someone or it will come back on your family.

@PeterSankoff: OK - I think that is a different way to look at it. You're absolutely right - I wouldn't know. Neither would others without the context explained. Thanks for that, but it would help to have it in the article, for it sure sounds like a threat. But I stand corrected.

@gwichinkris: But why is it that this is just a different way to look at it? Why are you unfamiliar with Nehiyaw law while living and working in Treaty 6? Why does this *sound* threatening to you? I think this is what this case [ought] to prompt from the white legal community.

Other Cree people following this exchange on Twitter then entered the conversation to share examples of how the spiritual debt that accrues from taking a life can play out in a person's life. I include this as one example of the powerful Indigenous legal debates occurring in public places, such as Twitter, that are accessible to settlers who wish to follow and learn from Indigenous thinkers who are reflecting on, debating and applying Indigenous legal principles to contemporary conflicts and issues as they arise.

Rebuilding Work

As settler people and governments begin to do the work of learning about and engaging with Indigenous legal orders, many Indigenous nations are engaged in the labour-intensive process of rebuilding and revitalizing their Indigenous legal orders and governance systems.

Napoleon and Friedland caution that mere readiness on behalf of settler society to recognize Indigenous law is insufficient, as the violence that has been wrought against Indigenous peoples by colonialism has caused damage and loss that must be acknowledged, as a precondition to the healing and rebuilding work that must occur:

[T]he ground of Indigenous law is uneven — Indigenous law exists, it has not gone anywhere — and we saw this, but there are also serious gaps where some Indigenous laws have been undermined, distorted, or lost. Given this, simply arguing for the recognition of Indigenous law is inadequate because we cannot just assume that there are complete and intact legal orders that can spring to life through recognition. This means that engagement with Indigenous law must move to thoughtful rebuilding, and this generates two questions: (1) What are the terms for this thoughtful rebuilding process with communities? and (2) What are the intellectual processes in each Indigenous society that historically enabled people to deal with and account for change?¹⁷

The late Anishinaabe linguist and storyteller Basil Johnston argued, in an essay entitled “One Generation from Extinction,” that the federal government, which is directly responsible for Indigenous language loss due to its explicit past policies of cultural assimilation, should be responsible for providing funding to Indigenous community-led language revitalization efforts.¹⁸ The same logic extends to funding revitalization efforts around Indigenous law. The residential school system, with its notorious agenda

¹⁷ Napoleon & Friedland, *supra* note 11.

¹⁸ Basil H Johnston, “One Generation from Extinction” (1990), online: <[canlitweb.arts.ubc.ca/canlitmedia/pdfs/articles/canlit124-Generation\(Johnston\).pdf](http://canlitweb.arts.ubc.ca/canlitmedia/pdfs/articles/canlit124-Generation(Johnston).pdf)>.

to “kill the Indian in the child,” and colonial laws banning potlatches, sun dances and other important Indigenous legal institutions caused damage to Indigenous legal orders. It is therefore unjust that the entire burden of revitalizing Indigenous legal orders should be borne by Indigenous peoples who bear no responsibility for causing the violence that led to the loss in the first place. Indigenous peoples must lead the work of rebuilding if it is to happen, but the federal government should provide financial support to ensure that Indigenous communities can enlist, educate and compensate people to do the labour-intensive work of revitalization.¹⁹

Proceeding with Caution

The current unacceptable state of Crown-Indigenous relations demands urgent action. At the same time, 150 years of harm and violence against Indigenous peoples and their governance systems cannot be undone overnight, and actions undertaken too quickly and without sufficient reflection could easily result in more harm than good. Valine Crist, a member of the Haida Nation, counsels that the work of settler engagement with Indigenous law should “move at the speed of trust.”²⁰ This means listening to and abiding by the pace and terms of rebuilding set by Indigenous communities according to their own decision-making processes. In many communities, where trauma caused by settler violence continues to cause intense pain, the work of rebuilding trust between settlers and Indigenous peoples must proceed slowly. As Nenqayni writer Linda Smith states:

Among Tsilhqot’in, historic experiences overshadow present relationships with midugh.²¹ Unfamiliar midugh are seen through the lens of previous encounters, many of whom have harmed the people. Practically everyone is known in Tsilhqot’in communities. When a stranger arrives, everyone hears of it. Midugh immediately “step into the spaces” left by previous midugh, in a sense, not to be trusted until they prove themselves to be trustworthy. They are closely watched. There is extreme poverty, oppression, physical and emotional suffering, grief, and intense anger. The stranger is seen as having an advantage. Midugh become heirs to the legacy of past murder, greed, exploitation, injustices, and racism left by others.”²²

As settlers step into the work of UNDRIP implementation, alongside Indigenous peoples, they must be cognizant of the continued pain caused by colonization and respect the pace determined to be appropriate by Indigenous communities for rebuilding and healing.

Increased Recognition of Indigenous Legal Orders Is Not a Zero-sum Game

A harmful belief that should be addressed as part of the national conversation on UNDRIP implementation is the notion that the growing recognition of Indigenous legal orders is a zero-sum game that can result only in diminished well-being for non-Indigenous peoples. Chief Roger William of Xení Gwet’in, whose community won the landmark title case at the Supreme Court of Canada in 2014,²³ has stated on a

¹⁹ As a starting point, publicly available examples include: Dean Billy et al, *Revitalizing Indigenous Law for Land, Air and Water: St’át’imc Legal Traditions Report* (2018), online: <www.wcel.org/publication/revitalizing-indigenous-law-land-air-and-water-static-legal-traditions-report>; Accessing Justice and Reconciliation Project, *Cree Legal Summary* (2012), online: <www.indigenousbar.ca/indigenoulaw/wp-content/uploads/2017/10/cree_legal_summary.pdf>; Hannah Askew & Lindsay Borrows, *Anishinabek Legal Summary*, online: <http://indigenousbar.ca/indigenoulaw/wp-content/uploads/2012/12/anishinabek_summary.pdf>; Indigenous Law Research Unit, University of Victoria & Shuswap Nation Tribal Council, *Secwépemc Lands and Resources Law Analysis Project Summary* (2016), online: <<http://shuswapnation.org/wp-content/blogs.dir/124/files/2017/08/Secwepemc-Lands-and-Resources-Law-Analysis-Summary.pdf>>. For a literature review on the topic, see Coyle, *supra* note 9.

²⁰ Personal conversation with Valine Crist, September 2017.

²¹ Meaning “whiteman”; see FirstVoices, “midugh”, online: <[www.firstvoices.com/explore/FV/sections/Data/Athabasca/Tsilhqot’in%20\(Xeni%20Gwet’in\)/Tsilhqot’in%20\(Xeni%20Gwet’in\)/learn/words/80251](http://www.firstvoices.com/explore/FV/sections/Data/Athabasca/Tsilhqot’in%20(Xeni%20Gwet’in)/Tsilhqot’in%20(Xeni%20Gwet’in)/learn/words/80251)>.

²² Linda Smith, unpublished paper, shared with the author, 11 February 2018.

²³ *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44.

number of occasions that it is his goal that non-Tsilhqot'in people living on Tsilhqot'in title land will have a better experience living under Tsilhqot'in governance than they did under Crown governance.²⁴ This stated intention is as kind and generous as it is politically astute. With increased exposure to Indigenous law and governance, settlers may be able to better understand that they also may have the opportunity to flourish in an inter-societal political context where Indigenous legal orders are strong and respected.

Settlers stand to be transformed by the profound gift of learning about specific Indigenous legal orders. The continued generosity and willingness of many Indigenous peoples to share knowledge of their legal orders, in spite of the acute violence and disrespect that settler society has inflicted on them, should be met by settlers with gratitude and good-faith efforts to learn.

Conclusion

The violence that has been perpetrated against Indigenous systems of law and governance by the colonial state has not only caused grievous harm to Indigenous peoples but has also impoverished settlers by denying them access to rich and diverse Indigenous traditions of governance that could nourish a healthier, more just and more generative society. It is commonplace today for Canadian politicians to speak of a nation-to-nation relationship, but the meaning of this statement typically remains vague and ill-defined. UNDRIP provides insight into how this concept might be put into living practice, as many of the rights it articulates explicitly refer to Indigenous governance institutions, laws and legal processes. As Inuit law professor Gordon Christie suggests, UNDRIP provides a framework for addressing the disconnect between Canadian law and Indigenous legal orders, and moving from ongoing colonial dynamics toward a nation-to-nation relationship.²⁵ Serious, substantive engagement between the settler state and Indigenous legal orders will require hard and sustained work by both parties. The great difficulty of this work promises to be surpassed only by its rewards.

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²⁴ Personal conversation with then chief Roger William, June 2016.

²⁵ Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP", in Fitzgerald & Schwartz, *supra* note 2, 48.

Part III

Domestic Law Perspectives



UNDRIP and the Move to the Nation-to-Nation Relationship



Joshua Nichols

On May 10, 2016, Indigenous and Northern Affairs Canada Minister Carolyn Bennett addressed the Permanent Forum on Indigenous Issues at the United Nations and officially endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),¹ without the qualifications attached by the previous government. She further stated that Canada intends “nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.”² This is a distinct shift away from the approach to UNDRIP of the previous government, which held UNDRIP to be aspirational. On September 21, 2017, Prime Minister Justin Trudeau addressed the United Nations General Assembly and reiterated this commitment. He took this opportunity to point to the many legacies of colonialism in Canada. As Trudeau put it, “The good news is that Canadians get it. They see the inequities. They’re fed up with the excuses. And that impatience gives us a rare and precious opportunity to act. We now have before us an opportunity to deliver true, meaningful and lasting reconciliation.”³

While we could dismiss this statement on its own as a continuation of the status quo of the current judicially mediated process of reconciliation, this is not necessarily the

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007).

2 Minister of Indigenous and Northern Affairs Carolyn Bennett, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016).

3 “Prime Minister Justin Trudeau’s Address to the 72nd Session of the United Nations General Assembly” (21 September 2017), online: <<https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeaus-address-72th-session-united-nations-general-assembly>>.

case. In fact, this status quo interpretation is distinctly countered by the prime minister's insistence that the basic norms of UNDRIP are not aspirations, but rather will be used to guide the process of reconciliation. The basic norms of UNDRIP provide, in Trudeau's words, "a way forward."⁴ As the prime minister noted in his speech, "There is no blueprint for this kind of change. There is no road map we can follow. But neither can we wait. The time has come to forge new paths together. To move beyond the limitations of old and outdated colonial structures, and to create in their place something new, something that respects the inherent right of Indigenous Peoples to self-govern, and to determine their own future."⁵

What this should clearly signal is that the language of law and policy relating to reconciliation in Canada is entering a period of sudden and dramatic change. The actual meaning of this apparent change in policy hinges on the question of what implementation in accordance with the Canadian Constitution looks like. At this point it seems that there are two possible approaches to implementation. My aim here will be to outline these two possible approaches, examine their underlying assumptions and suggest that the way forward is to stop seeing section 35 of the Constitution Act, 1982 as a set of Charter-like rights and start seeing it as jurisdictional in nature. I will then conclude by pointing to how this nation-to-nation approach to Canadian federalism is a more adequate reflection of the last 250 years of Indigenous-Crown relations.

Status Quo or Reconciliation via the Sparrow Framework

In the same 2016 speech, Minister Bennett also stated that section 35 provides a "robust framework" and a "full box of rights."⁶ This could be read as a signal that the current *R v Sparrow*⁷ framework (with all of its unilateral principles and doctrines) of section 35 and section 91(24) of the Constitution Act, 1867 will be used to restrict the application of the content of UNDRIP. If this is the case, it seems that, from the perspective of the federal government, the box of rights is already full and the change of policy is little more than a slight shift of emphasis. This approach is grounded on the Supreme Court of Canada's existing interpretation of the relationship between section 35(1) and section 91(24). What are the underlying assumptions of the court's current approach? In order to get a clear view of this, we will need to turn our attention to the first case to interpret the meaning of section 35(1), *Sparrow*.

In *Sparrow*, Chief Justice Brian Dickson and Justice Gérard La Forest acknowledge that section 35(1) is not a part of the Canadian Charter of Rights and Freedoms (Charter),⁸ and so there is "no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights."⁹ It is easy to read over this as simply an acknowledgement of the basic structure of the Constitution Act, 1982, but had their analysis stopped there, Aboriginal and treaty rights would not be subject to unilateral infringement. In other words, Aboriginal and treaty rights would not have been interpreted as being a set of contingent rights within a sovereign-to-subjects relationship. Rather, Aboriginal and treaty rights would not be subject to unilateral infringement, and, thus, section 35 rights could be reimagined as a set of jurisdictional powers in a nation-to-nation relationship.

However, Chief Justice Dickson and Justice La Forest continued by stating that section 35(1) rights are "not absolute" (they are not jurisdictional in nature) because the federal legislative powers with respect

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Bennett, *supra* note 2.

⁷ *R v Sparrow*, [1990] 1 SCR 1075 [*Sparrow*].

⁸ *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.*

⁹ *Sparrow*, *supra* note 7 at 1109.

to Indians pursuant to section 91(24) of the Constitution Act, 1867 “must...now be read together with s. 35(1).”¹⁰ Chief Justice Dickson and Justice La Forest go on to state that “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.”¹¹ The reasoning here seems to suggest that the court is protecting Aboriginal and treaty rights from government infringement by interpreting section 35(1) as a Charter-like limitation on the power of section 91(24). But that is simply not the case. In reality, the court is changing section 35(1) from being a jurisdictional provision that relates to the division of powers and Canadian federalism to being a set of Charter-like provisional rights. In other words, the court is moving away from the possibility of a nation-to-nation model of federalism and preserving the sovereign-to-subject model of rights whose sordid history extends back to early pre-Confederation colonial legislation such as the 1857 Gradual Civilization Act,¹² through to the Gradual Enfranchisement Act in 1869,¹³ the Indian Act¹⁴ in 1876 and Lord Watson’s infamous characterization of Aboriginal rights as being a “mere burden” in *St Catharine’s Milling*¹⁵ in 1888.

The actual structure of the reasoning in *Sparrow* is thoroughly colonial. Let us reconsider it carefully: the court acknowledges that section 35(1) is outside of the Charter and thus not subject to the limitations of either section 1 or section 33, but this jurisdictional character can be negated by the court’s absolute reading of section 91(24). The problem is that this reconciliation of constitutional terms is reliant on the notion that section 91(24) is an unlimited federal power over Indians and their lands. The court does not subject section 91(24) to any form of judicial inquiry. Rather, the court simply states that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.”¹⁶ And, in support of this absence of doubt, the court cites *Johnson v M’Intosh*,¹⁷ the Royal Proclamation of 1763¹⁸ and *Calder v Attorney-General of British Columbia*.¹⁹ The citation of Chief Justice John Marshall’s 1823 decision is particularly telling, as that decision is a *locus classicus* for the doctrine of discovery.²⁰ The court’s reliance on the doctrine of discovery is made all the more obvious by the failure to cite Chief Justice Marshall’s repudiation of it just a few years later in 1832 in *Worcester v Georgia*, where he characterized the doctrine as being an “extravagant and absurd idea.”²¹

The court’s unquestioning assumption of Crown sovereignty, legislative power and underlying title necessarily entails that the court is holding Indigenous peoples in a sovereign-to-subjects relationship on the basis of nothing more than unilateral proclamation. By interpreting section 91(24) as a “federal power” over Indians and their lands, the court magically transforms Indigenous peoples into subjects to a provision that they played no role whatsoever in legislating. The only possible basis for this reading is a pernicious and racist set of nineteenth-century European legal fictions (i.e., the doctrine of discovery, *terra nullius*, adverse possession, divine right and so on). We would do well to remember that the *Sparrow* court introduced the term “reconciliation” into the case law. What are they reconciling? They take two

10 *Ibid.*

11 *Ibid.*

12 *An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws respecting Indians* (UK), 1857, 20 Vict, c 26.

13 *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act*, SC 1869 (31 Vict, c 42) c 6.

14 *An Act to amend and consolidate the laws respecting Indians*, SC 1876, c 18.

15 *St Catherine’s Milling and Lumber Co v R*, [1888] UKPC 70, 14 App Cas 46 [*St Catherine’s Milling*].

16 *Sparrow*, *supra* note 7 at 1103.

17 *Johnson v M’Intosh*, 21 US (8 Wheat) 543 (1823)

18 *Royal Proclamation, 1763* (3 Geo III), reprinted in RSC 1985, Appendix II, No 1.

19 *Calder v Attorney-General of British Columbia*, [1973] SCR 313.

20 *Ibid* at 320, 335, 346, 380–83, 387, 391–93, 416, 423.

21 *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) at 544.

provisions of two constitutional documents separated by 115 years and, with the magical words “never any doubt,” they manage to maintain section 91(24) as a federal power and convert section 35(1) into a paternalistic federal duty to be managed and mediated by the Crown itself.²² This reasoning is a model that I imagine Lord Watson would immediately recognize as the one under which he characterized Aboriginal rights as a “mere burden.”²³ This is the foundation of the so-called full box of rights.

Given these unstable foundations, what would occur if UNDRIP implementation was used as a way of maintaining the status quo? Naturally, any answer to this question at this time will be speculative, as we do not know the specific legislative approach that the government will take. Some scholars have already begun to raise questions about the compatibility of the basic principles of UNDRIP with the existing jurisprudence, and their conclusions point to significant problems. The example I have in mind here is Dwight Newman and Ken Coates’s recent observations regarding the compatibility (or lack thereof) between the existing duty to consult and accommodate (DCA) case law and the principle of free, prior and informed consent (FPIC).²⁴ Their basic concern is that the duty to consult is well adapted to dealing with asserted rights (i.e., rights that are not yet proven via *Van der Peet*²⁵ litigation), whereas, if FPIC were introduced as the standard, the DCA could be restricted to dealing only with proven rights.

The only thing that we could say for certain is that if the government elects to take the status quo approach, the recondite complexity of the current section 35(1) jurisprudence will only increase. At the moment the so-called full box of rights subdivides roughly into rights, title, treaties and the duty to consult and accommodate. Each one of these areas is beset by thorny jurisprudential questions, ranging from the question of the possibility of commercial or unlimited rights (*Ahousaht*²⁶), the problem of provincial jurisdiction (*Tsilhqot’in Nation*²⁷), and the interpretation of treaties (*Grassy Narrows*²⁸ and *Chief Mountain*²⁹) to cumulative effects and delegation (*Clyde River*³⁰ and *Chippewas of the Thames*³¹). The process of litigating claims via section 35(1) is costly, procedurally complex and uncertain. Even in cases in which the court seems to offer a clear decision, the actual on-the-ground results of that decision may well be marginal (*Gladstone*³²) or so delayed that the actual value of the process itself is undermined (*Ktunaxa*³³). It is difficult to see exactly who benefits from a process of litigation that takes decades to resolve any given conflict and then results in decisions whose jurisprudence is so dense and convoluted that the only certainty it can deliver is the promise of further litigation to work on the new legal knots it has tied.

22 Ryan Beaton has recently written about the jurisprudential ambiguities that have grown out of the court’s use of fiduciary law in this area. As he insightfully notes, “There is ambiguity and tension running through this judicial doctrine, revolving around the question: is the goal reconciliation across legal systems and the distinct societies in which they are grounded, or within a constitutional system grounded fundamentally in the Crown’s assertion of sovereignty? The case law developed over the past three decades does not provide any clear or consistent answer.” See Ryan Beaton, “The Crown Fiduciary Duty at the Supreme Court of Canada: Reaching Across Nations, or Held within the Grip of the Crown?” in Oonagh E Fitzgerald, Valerie Hughes & Mark Jewett, eds, *Reflections on Canada’s Past, Present and Future in International Law* (Waterloo, ON: CIGI, 2018) at 161.

23 *St Catherine’s Milling*, *supra* note 15.

24 Dwight Newman & Ken Coates, “Bill on implementing UNDRIP ‘simplistic and laden with circular tension’”, *The Hill Times* (14 December 2017), online: <www.hilltimes.com/2017/12/14/bill-implementing-undrip-simplistic-laden-circular-tensions/128903>.

25 *R v Van der Peet*, [1996] 2 SCR 507.

26 *Ahousaht Indian Band and Nation v Canada (AG)*, 2009 BCSC 1494.

27 *Tsilhqot’in Nation v British Columbia*, [2014] 2 SCR 257.

28 *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014] 2 SCR 447.

29 *Sga’nism Sim’augit (Chief Mountain) v Canada (AG)*, 2013 BCCA 49.

30 *Clyde River (Hamlet) v Petroleum GeoServices Inc*, [2017] 1 SCR 1069.

31 *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, [2017] 1 SCR 1099.

32 *R v Gladstone*, [1996] 2 SCR 723.

33 *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, [2017] 2 SCR 386.

This full box of rights does not offer the kind of procedural clarity and legal certainty that the government promises to third party proponents, nor does it serve the Indigenous peoples who struggle with dreadful environmental and socio-economic problems. The only real beneficiary of the existing byzantine system of multi-layered consultative processes, secretive memoranda of understanding and the production of voluminous expert reports are the experts, consultants and lawyers who operate it. I am not suggesting that these various professionals are unnecessary to the solution to the problem of the Indigenous-Crown relationship. I am, after all, included in their number. Rather, if the process itself is demonstrably failing to deliver on even its most basic aims (procedural clarity, legal certainty and the improvement of the everyday reality of Indigenous peoples), it is about as productive as an expedition guided by a blank map. As I see it, there is no need to bother asking whether this box is full or empty; it is simply the wrong kind of box altogether. The real path to reconciliation — the one that is not circular — is the one that leads to a nation-to-nation relationship. This is more than a change in language; it is a change in the legal-political paradigm from rights to jurisdiction, and this is precisely where UNDRIP implementation can offer a real way forward.

Nation-to-Nation Federalism

The first point that we need to be cognizant of is that UNDRIP does not introduce the possibility of a shift to an inherent jurisdictional approach to Indigenous-Crown relations. The roots of this approach extend back over 250 years to the Peace and Friendship Treaties in the early eighteenth century, the Royal Proclamation of 1763 and the Treaty of Niagara 1764³⁴ (we can refer to this model as treaty federalism or, following John Borrows,³⁵ as Canada's Indigenous Constitution) and continue past Confederation even as the rights-based approach becomes the dominant model in the mid-nineteenth century. The practices of treaty federalism persist to this day in the practices of treaty making and negotiated settlements. The jurisdictional approach also surfaces in a number of key government reports. Immediately following the repatriation of the Constitution in 1982, the Penner Report recommended that the proper approach to section 35 was for the federal government to “occupy and vacate” section 91(24) to clear jurisdictional space for Indigenous self-government.³⁶ The report also clearly indicated that the rights-based solution of devolving powers to municipal-like Indigenous governments “fails to take account of the origins and rights of Indian First Nations in Canada,” and the report presciently warned that litigation in the Supreme Court of Canada was not the best possible solution, as the procedure is “difficult to execute and uncertain in its outcome.”³⁷

This inherent-rights jurisdictional approach was also slated to be resolved in the constitutional conferences following 1982, but the failures of the Meech Lake and Charlottetown accords have left this as the unfinished business of the Canadian Constitution. This point is forcefully driven home by the recommendations in the Report of the Royal Commission on Aboriginal Peoples in 1996 and again in the Final Report and Calls to Action of the Truth and Reconciliation Commission (TRC) in 2015.³⁸ The point of this summary is that UNDRIP does not introduce the possibility of an inherent-rights-based

34 *Treaty of Niagara* (1 August 1764).

35 There is a wealth of excellent historical and constitutional scholarship in this area; see John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016); Colin G Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006); Brian Slattery, “The Royal Proclamation of 1763 and the Aboriginal Constitution” in Terry Fenge & Jim Aldridge, eds, *Keeping Promises: The Royal Proclamation of 1763, Aboriginal Rights, and Treaties in Canada* (Montreal, QC: McGill-Queen's University Press, 2015).

36 Parliament of Canada, Special Committee on Indian Self-Government, *Indian Self-Government in Canada* (Ottawa: Ministry of Supply and Services, 1983) at 3, 46.

37 *Ibid* at 45–47.

38 TRC, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: TRC, 2015) [TRC, *Honouring the Truth*]; Report of the Royal Commission on Aboriginal Peoples, *Volume 1: Looking Forward Looking Back: Part Two: False Assumptions and a Failed Relationship* (Ottawa: Public Works and Government Services Canada, 1996)

jurisdictional approach; rather, it offers a set of tools that help us to see what has been taking place within Canada over the last 250 years.

This point is clearly emphasized by the TRC in the Final Report. The TRC recommended that Canada move beyond the old sovereign-to-subjects framework and adopt the current international norms expressed in UNDRIP. The TRC forcefully reminds us that “[t]he Doctrine of Discovery and the related concept of *terra nullius* underpin the requirement for Aboriginal peoples to prove their pre-existing occupation of the land in court cases in order to avoid having their land and resource rights extinguished in contemporary Treaty and land claims processes. Such a requirement does not conform to international law or contribute to reconciliation. Such concepts are a current manifestation of historical wrongs and should be formally repudiated by all levels of Canadian government.”³⁹

This is a clear and direct rejection of the absolute interpretation of section 91(24) and the framework of reconciliation that has been built upon it. It is a rejection of the racist fictions of international law that continue to inform the interpretation of Canada’s constitutional order. The TRC continues,

We are not suggesting that the repudiation of the Doctrine of Discovery necessarily gives rise to the invalidation of Crown sovereignty. The Commission accepts that there are other means to establish the validity of Crown sovereignty without undermining the important principle established in the Royal Proclamation of 1763, which is that the sovereignty of the Crown requires that it recognize and deal with Aboriginal title in order to become perfected. It must not be forgotten that the terms of the Royal Proclamation were explained to, and accepted by, Indigenous leaders during the negotiation of the Treaty of Niagara of 1764.⁴⁰

This constitutes a repositioning of the basis for the legitimacy of Crown sovereignty from the racist fictions of discovery and *terra nullius* to the processes of mutual agreement and consent that are found in the histories of treaty making. This also necessarily shifts Indigenous peoples from being wards who are subject to unlimited sovereign power to being *peoples* in a nation-to-nation relationship with the Crown. We can think of this as being a change from conceiving of Canada as a unitary nation-state with a rigid unilateral version of sovereignty to being a nation-to-nation federal state whose concept of sovereignty is, and has always been, *flexible and shared* (even if only honoured in the breach). The current Canadian government is making clear steps toward realizing this shift from a sovereign-to-subjects rights-based approach to a nation-to-nation inherent jurisdictional approach.⁴¹

³⁹ TRC, *Honouring the Truth*, supra note 38 at vol 6, 32–33.

⁴⁰ *Ibid.*

⁴¹ The interpretation of the related concepts of “nation-to-nation” and “reconciliation” that I put forward here is indebted to John Borrows’s work on Indigenous constitutionalism, Charles Taylor’s work on deep diversity, James Tully’s work on diverse constitutionalism and Sa’ke’j Henderson’s work on treaty federalism (among others). For a small sample of the literature that I have found helpful in developing my own view of these concepts and the relationship between them, see Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal, QC: McGill-Queen’s University Press, 1993); James Tully, “Consent, Hegemony, and Dissent in Treaty Negotiations” in Jeremy Webber & Colin M Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010); John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 2000); Russel Lawrence Barsh & James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, CA: University of California Press, 1980); Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014).

About the Author

Joshua Nichols is a fellow with CIGI's International Law Research Program. In this role, Joshua explores the potential implications of UNDRIP's implementation for constitutional law, and consults with Indigenous peoples in workshops and other fora as part of his research. He has researched wise practices in Indigenous community-based economies at the University of Victoria, and is the author of *The End(s) of Community: History, Sovereignty, and the Question of Law* (Wilfrid Laurier University Press, 2013). He is also the author of a forthcoming University of Toronto Press publication investigating the foundations of Aboriginal law. Joshua has a bachelor of political science and an M.A. in sociology from the University of Alberta, a Ph.D. in philosophy from the University of Toronto, a J.D. from the University of British Columbia, and a Ph.D. in law from the University of Victoria. He is a member of the Law Society of British Columbia and the Indigenous Bar Association. He teaches in the Faculty of Law, University of Alberta.



Asserted vs. Established Rights and the Promise of UNDRIP



Robert Hamilton

There is considerable debate about what implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹ will look like in Canada and how the norms articulated in UNDRIP — notably self-determination and free, prior and informed consent (FPIC) — fit with existing state law in Canada. Statements from the federal government suggest a belief that UNDRIP can be implemented through the existing section 35 of the Constitution Act, 1982 Aboriginal rights framework.² However, incongruities between UNDRIP and the current Aboriginal rights regime present many challenges in this regard.³ This paper addresses one reason why the reliance on section 35 may in fact stall the process of implementation, arguing that the Aboriginal rights framework's reliance on categories of asserted and established rights is not compatible with UNDRIP implementation. The Supreme Court of Canada's (SCC's) assumed authority to unilaterally determine the rights of Indigenous peoples, while acceding to asserted state authority, entrenches a power imbalance that undermines the meaningful implementation of UNDRIP's norms. Those norms support a model of legal pluralism

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

2 "Fully Adopting UNDRIP: Minister Bennett's Speech at the United Nations", *Northern Public Affairs* (11 May 2016), online: <www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>.

3 These incongruities have been raised both by those arguing for UNDRIP implementation (see e.g. Brenda L Gunn, "Beyond Van der Peet: Bringing Together International, Indigenous and Constitutional Law" in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, CIGI, Special Report, 31 May 2017, 29 at 29–38) and those arguing against it (see e.g. Harry Swain & Jim Baillie, "The Trudeau government signs on to give Aboriginals veto rights nobody else has", *National Post* (26 January 2018)).

and negotiated jurisdictional sharing that the domestic Aboriginal rights framework has difficulty accommodating.

This paper first illustrates why the distinction between asserted and established rights must be rethought in light of prospective UNDRIP implementation. It then argues that UNDRIP's provisions regarding FPIC are defined in relation to Indigenous powers of governance and that this fact requires that UNDRIP be understood through a lens of legal pluralism. The paper concludes by offering examples of what Indigenous-Crown relations may look like with that distinction removed from the rights framework.

Asserted vs. Established Rights

Until such point as an Aboriginal right is proven in a domestic court, on the standards established by those courts, the rights remain merely asserted, thus receiving only the procedural protection — consultation — afforded at domestic law. This power asymmetry, cemented in the current section 35 framework, runs counter to the substantive norms articulated in UNDRIP. Dwight Newman has outlined the complications that the distinction between asserted and established rights causes for UNDRIP implementation when viewed from the perspective of domestic law. Newman has urged caution regarding UNDRIP implementation on the basis that UNDRIP does not necessarily exceed domestic Canadian law. He argues that consent already exists in Canadian law where Aboriginal rights have been established, and that the consultation and accommodation framework also applies to asserted rights.⁴ Further, as Newman points out, the legal definition of consent is distinct from the colloquial definition, and the federal government has sought to define consent narrowly as an attempt to achieve consent.⁵ The implication of Newman's first point is that UNDRIP's consent standard would not apply in relation to asserted rights, but only to those already established at Canadian law.⁶ Accepting that the FPIC standard in UNDRIP applies only in relation to established rights, the twofold argument for why FPIC may not expand on Canadian law follows: first, consent already exists where rights are established; and, second, the duty to consult applies not only to established rights, but also to asserted rights. This argument can be addressed on its own terms and also by interrogating the presuppositions on which it relies.

What of consent in Canadian law? In *Tsilhqot'in Nation*, the SCC held that, where Aboriginal title is established, state incursions are permitted “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.”⁷ In *Haida Nation*, the court held that “Aboriginal ‘consent’...is appropriate only in cases of established rights, and then by no means in every case.”⁸ The qualifications attached to consent are important. Consent is required only where established rights are concerned. Rights must be established in court before the consent standard arises. Further, consent may not be required “in every case” of established rights, which may, for example, still be infringed pursuant to the justificatory standard.⁹

4 Dwight Newman, *Political Rhetoric Meets Legal Reality: How to Move Forward on Free, Prior, and Informed Consent in Canada* (Ottawa: Macdonald-Laurier Institute, 2017) at 14.

5 *Ibid.*

6 Here I am speaking of rights at domestic law. FPIC indisputably applies to Indigenous rights recognized at international law: see James Anaya, *Report of the Special Rapporteur on the rights of indigenous peoples James Anaya: Extractive industries and indigenous peoples*, UNHRC, 24th Sess, UN Doc A/HRC/24/41 (2013) at 9, online: <<http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>>.

7 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 2 [*Tsilhqot'in Nation*].

8 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 48, [2004] 3 SCR 511 [*Haida Nation*].

9 *Tsilhqot'in Nation*, *supra* note 7 at para 2.

These qualifications must be taken into account when assessing where consent under section 35 sits in relation to FPIC. On its face, FPIC seems to sit well beyond current Canadian legal standards. Indeed, Canada's initial objection to UNDRIP concerned what Canada described as the veto power included in UNDRIP.¹⁰ This concern has continued to animate opposition to the adoption of UNDRIP.¹¹ In an analysis of article 32 of UNDRIP, the Inter-American Court of Human Rights held that FPIC provided a basis for Indigenous peoples to reject large-scale intrusions into their traditional territories (large hydroelectric dams or mines, for instance).¹² Reporting on the relationship between Indigenous peoples and extractive industries, James Anaya wrote that there is a "general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior, and informed consent."¹³ Yet, Anaya also discusses "certain exceptions" to the general rule "within narrowly defined parameters."¹⁴ That is, FPIC may not be an absolute requirement for all types of intrusion.¹⁵ The exception applies when it "can be conclusively established" that the extractive activities in question "will not substantially affect indigenous peoples in the exercise of any of their substantive rights in relation to the lands and resources within their territories."¹⁶ Where a limitation on a right is permitted absent Indigenous consent, Anaya argues that "standards of necessity and proportionality" must be met to justify such incursions.¹⁷

Even with these qualifications, however, the FPIC standard surpasses the consent standard in Canadian law for two reasons. First, even if FPIC incorporates a balancing standard that does not provide Indigenous peoples with a final say over all developments in their territories, this qualification would not seem to apply to serious incursions.¹⁸ In domestic law, the inverse is true: serious incursions are precisely those the courts have identified as grounding justifiable infringement.¹⁹ Second, section 35 rights are exceedingly difficult to prove in court. Litigation carries immense financial and human costs and considerable uncertainty as to outcome. This was recognized by the Inter-American Commission on Human Rights, when it held that there is no effective remedy for Indigenous peoples seeking to resolve land rights disputes in Canada.²⁰ Both litigation and treaty negotiation are costly, lengthy and uncertain processes. Thus, consent exists as a standard at Canadian law largely at the conceptual level.

10 Brenda L Gunn, "Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada" (2013) 31:1 Windsor YB Access Just 147 at 151.

11 See Swain & Baillie, *supra* note 3.

12 *Case of the Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 82 at para 134 as cited in Michael Coyle, "From Consultation to Consent: Squaring the Circle?" (2016) 67 UNB LJ 235 at 242.

13 Anaya, *supra* note 6 at 9.

14 *Ibid* at 10-11.

15 Coyle, *supra* note 12 at 238. See also Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties" in Michael Coyle & John Borrows, eds, *The Right(s) Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) at 370-408.

16 Anaya, *supra* note 6 at 10.

17 *Ibid*.

18 Imai, *supra* note 15 at 384.

19 In *Delgamuukw*, for example, the SCC identified "the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia" as compelling legislative objectives that may support a justifiable infringement: *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 165 [*Delgamuukw*].

20 *Admissibility: Hul'qumi'num Treaty Group – Canada* (2009) Inter-Am Comm HR, No 105/09, online: <www.sfu.ca/~palys/HulQumiNumPetitiontoACHR.pdf>. Although this decision predated the SCC's recognition of title in *Tsilhqot'in Nation*, its reasoning would still seem applicable, given the enormous time and financial costs of that litigation.

Where rights are asserted but not yet proven, the consultation framework applies.²¹ To date, the courts have been clear that the duty to consult does not require Indigenous consent.²² Consultation “guarantees a process, not a particular result.”²³ The procedural requirements of the consultation framework do not ask whether Indigenous peoples want a development to occur, but rather for information about the impact of the proposed project on their asserted rights.²⁴ This has practical implications. As Michael Coyle writes, “If, in good faith, [the parties] seriously disagree about the strength of the community’s rights claim or about the severity of a project’s impacts, in a real sense the consultation process will fail. It will fail as a mechanism for consensus-building, it will fail as a reliable vehicle for facilitating decisions about resources on traditional lands, and it will fail as a process aimed at helping to achieve reconciliation between Indigenous peoples and the state.”²⁵ That is, the duty to consult is limited in its ability to reconcile state and Indigenous interests because it ultimately permits unilateral action in the face of disagreement. The remaining question is whether the duty to consult provides greater protection of rights than UNDRIP does by virtue of the protection the duty gives to asserted as well as established rights. Answering this question in the affirmative requires accepting the proposition that FPIC would apply only in relation to established rights.

As can be seen, there are reasons to question the proposition that the current Aboriginal rights and duty to consult frameworks provide protections equal to those that may be available under the FPIC regime envisioned in UNDRIP. Yet, it is a tenable argument. If UNDRIP implementation is pursued through section 35, as currently interpreted by the courts, Newman’s analysis may well prove prescient. The problem with this framing is that it is based on foundational assumptions that must be challenged if UNDRIP is to be implemented. It is an interpretation that *prima facie* excludes implementation by maintaining the power of the state to unilaterally assess the validity of asserted Indigenous rights and decide what level of protection they should be afforded on the basis of that determination. It cannot be assumed that FPIC applies only in relation to established rights.

Overlapping Legal Regimes and *Sui Generis* Implementation

The distinction between asserted and established rights, as currently employed in Canadian law to determine the level of protection afforded Indigenous rights, is not tenable in light of UNDRIP. UNDRIP requires that the power of the state — and its courts — to unilaterally determine which rights are owed protection and which are merely asserted must no longer be assumed. The domestic Aboriginal rights framework as developed under section 35 accepts the Crown as holding a superior legal position to Indigenous peoples, a position that permits unilateral Crown action in the face of Indigenous opposition. A crucial tool in this regard is the ability to define rights as merely asserted and, therefore, as attracting only the lower standard of consultation. To implement UNDRIP means to understand that in important respects both Indigenous and Crown rights are asserted.²⁶ Drawing this equivalence puts Indigenous peoples on an even footing with the state when it comes to defining their respective rights and calls into question the assumption of unilateral Crown authority upon which the section 35 framework has been developed.

²¹ *Haida Nation*, *supra* note 8.

²² *Ibid* at para 48; *Chippewas of the Thames First Nation v Enbridge Pipelines*, 2017 SCC 41 at para 59; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at paras 80, 83, 119 [*Ktunaxa*].

²³ *Ktunaxa*, *supra* note 22 at para 79.

²⁴ Newman, *supra* note 4 at 9.

²⁵ Coyle, *supra* note 12 at 238.

²⁶ This is not meant to question the inherent nature of Indigenous rights, but only to point out that, from the Crown perspective, those inherent rights are asserted rights until such point as they have been established.

The relationship between FPIC and Indigenous governance is central in this regard. UNDRIP's provisions regarding FPIC are defined in relation to Indigenous powers of governance. The relationship between consent and governance is outlined in article 32.1, which provides that "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," and article 32.2, which reads: "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."²⁷ Further, article 4 states: "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."²⁸ Through the recognition of Indigenous "representative institutions," the ability of those institutions to determine priorities in relation to development and the Indigenous nature of those institutions, these clauses not only require consent, but also protect Indigenous rights of governance and recognize Indigenous jurisdiction.²⁹ Self-determining peoples with representative institutions have legal orders. UNDRIP therefore envisions states as legally pluralistic, multi-juridical spheres. In this, UNDRIP recognizes "the fact of legal pluralism"³⁰ in a more robust manner than domestic law has been able or willing to do. FPIC should not be understood in the abstract, but rather as a manifestation of the right of self-determination.³¹ What these articles on self-determination and FPIC envision is Indigenous jurisdiction in relation to Indigenous lands and resources, where Indigenous political and legal institutions are intimately involved in decision making about matters that impact Indigenous peoples. This is not consonant with a state of affairs where rights must be proven in domestic courts before UNDRIP standards apply.

What would it look like to reject a unilateral determination of asserted and established rights? To hold that Indigenous peoples should be able to establish rights that bind the Canadian state and impact citizens by merely asserting them would only invert the current problems. If unilateralism is the problem, it can hardly be the answer. But, if neither party can unilaterally define its rights and obligations vis-à-vis the other, where do the parties stand? In the context of jurisdictional uncertainty created by competing claims to constitutional authority, negotiated settlements are required.³² Where assertions of rights are made, those rights must be negotiated by the parties without one party having a cudgel of infringement or a judicial mandate to act unilaterally after satisfying judicially designed procedural requirements. FPIC is implemented not by requiring consent in relation to rights that colonial courts have recognized, but by requiring the negotiated settlement of contested terrain. When multiple forms of legal authority are functioning in the same space, pluralism requires that authority be negotiated through dialogue.³³

Unless section 35 can be reimagined in a manner that excises its doctrinal unilateralism, it must be de-emphasized.³⁴ This is not to say it may not have strategic uses in its current iteration. The current logic of section 35, however, may not be amenable or helpful to the implementation of UNDRIP. Despite its emphasis on encouraging negotiation and its successes in compelling recalcitrant governments to give

27 UNDRIP, *supra* note 1.

28 *Ibid*, art 4.

29 Walter R Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Golden, CO: Fulcrum, 2013) at 43–45.

30 Gordon Christie, "Indigenous Legal Orders, Canadian Law and UNDRIP" in Fitzgerald & Schwartz, *supra* note 3, 48 at 49. Christie uses the phrase "fact of strong legal pluralism."

31 Gunn, *supra* note 10 at 153.

32 Christie, *supra* note 30.

33 *Ibid* at 49.

34 As Jeffery G. Hewitt writes, "implementing UNDRIP through section 35 allows Canada new ways to limit the rights of Indigenous peoples" in Fitzgerald & Schwartz, *supra* note 3, 56 at 58.

Indigenous peoples a voice at the table, it has not distributed the bargaining power of the parties evenly enough to ensure that negotiations can be a vehicle for consensus building and reconciliation. Thus, while the claim that implementation would “dismantle our courts’ carefully constructed approach to reconciliation”³⁵ is true in one respect, it fails on another. Under its current judicial interpretation, section 35 proffers an impoverished conception of reconciliation — reconciling Aboriginal interest with underlying Crown sovereignty — which promotes unilateralism and fails to adequately balance the interests of the parties. UNDRIP undoubtedly challenges this approach to reconciliation. Seen another way, however, UNDRIP is a tool more suited than section 35 to achieving the SCC’s often-stated aim of encouraging the negotiation of outstanding claims. The SCC has sought to encourage negotiation and has attempted to set conceptual and practical bounds on the exercise of Crown sovereign authority.³⁶ It has undoubtedly done much to advance Aboriginal rights in the process. Yet, the SCC’s own doctrine now seems to prevent it from laying the groundwork for a nation-to-nation relationship based on negotiated rights and jurisdiction. Until such time as section 35 doctrine can be divested of its reliance on unilateral Crown sovereign authority, the meaningful reconciliation the SCC gestures toward will not be achieved through section 35. UNDRIP offers the grounds for a more robust balancing of interests. Contrary to the concern of those who worry that UNDRIP gives Indigenous peoples a veto, UNDRIP does not seek to replace one unilateralism with another. As the preamble states, UNDRIP “will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.”³⁷

Thus, section 35 must be sidelined from this process. There are, fortunately, many examples of nations working outside the section 35 context to draw on. I will mention only two. While the Haida have used the judicial system, they have also taken other approaches. The Reconciliation Protocol signed between the Haida Nation and the Province of British Columbia acknowledges in its preamble that the parties hold different understandings of their rights, obligations and sovereign authority in the relation to Haida Gwaii.³⁸ Such agreements represent one model for developing shared jurisdictions in relation to matters such as cultural heritage and co-management of wildlife, lands and resources.

A second example is tribal parks. Tribal parks are a *sui generis* form of property ownership and jurisdiction asserted by Indigenous peoples. They are not parks in the conventional sense or in the legal sense in Canadian law, but areas where Indigenous peoples assert authority and jurisdiction to manage the land.³⁹ While some of these parks are not recognized at Canadian law, provincial governments have entered into co-jurisdiction types of arrangements that recognize the status of some parks as protected areas under Indigenous law.⁴⁰

What is pertinent about these examples in the context of UNDRIP implementation is that Indigenous peoples are involved in the processes through which the relative rights and obligations of the parties are negotiated. Unlike in the current section 35 framework, in which the rules of the game are crafted by the state’s courts, in these examples, the terms through which the rights and obligations will be

35 Swain & Baillie, *supra* note 3.

36 See e.g. *Delgamuukw*, *supra* note 19 at para 186; *Haida Nation*, *supra* note 8 at para 14.

37 UNDRIP, *supra* note 1, Preamble.

38 See “Kunst’aa Guu – Kunst’aayah Reconciliation Protocol” (2009), online: British Columbia <www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/haida-nation-council-of>.

39 Grant Murray & Leslie King, “First Nations Values in Protected Area Governance: Tla-o-qui-aht Tribal Parks and Pacific Rim National Park Reserve” (2012) 40:3 *Human Ecology* 385 at 389.

40 On May 29, 2008, Bill 38 – 2008 (Bill 38 – 2008, *Protected Areas of British Columbia (Conservancies and Parks) Amendment Act, 2008*, 4th Sess, 38th Parl, British Columbia, 2008) established Duu Guusd park on Haida Gwaii. On December 17, 2008, the Province of British Columbia passed Order in Council No. 977/2008, which added 6,793 hectares and established revised boundaries for Duu Guusd that included Langara Island and an area of land in Rennell Sound. Online: <www.canlii.org/en/bc/laws/stat/sbc-2000-c-17/latest/part-8/sbc-2000-c-17-part-8.html#Eduuguusd>.

determined are themselves subject to negotiation. The “harmonious and cooperative relations between the State and indigenous peoples” spoken of in the preamble to UNDRIP must be worked toward on the basis of mutually agreed upon terms of engagement. Only then can self-determination and FPIC be put meaningfully into practice.

About the Author

Robert Hamilton is an assistant professor at the University of Calgary Faculty of Law. He teaches property law, Aboriginal law and legal research and writing. His research focuses on Aboriginal land rights and treaty rights in Canada’s Maritime provinces. His work engages law, legal history, Indigenous legal traditions and theoretical perspectives on law and history. Robert has worked on research projects with the National Consortium on Indigenous Economic Development, the Centre for Indigenous Conservation and Development Alternatives and the Confederation Debates Project. He has also worked with First Nations on land claims and self-government issues. Robert has published on Aboriginal land and treaty rights in the Maritime provinces and broader issues in Aboriginal law and has presented his research at numerous academic conferences. Robert holds a B.A. in philosophy from St. Thomas University, a J.D. from the University of New Brunswick Law School and an LL.M. from Osgoode Hall Law School. He is a Ph.D. candidate at the University of Victoria Faculty of Law.



Articles 27 and 46(2)

UNDRIP Signposts Pointing beyond the Justifiable-infringement Morass of Section 35



Ryan Beaton

Introduction

In May 2016, Indigenous and Northern Affairs Minister Carolyn Bennett announced at the fifteenth session of the United Nations Permanent Forum on Indigenous Issues that Canada is “now a full supporter of the [United Nations] Declaration [on the Rights of Indigenous Peoples]¹ without qualification.”² She stated that Canada intends “nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.” She also pointed to the constitutional provision that would be the focus of implementation: “By adopting and implementing the Declaration, we are excited that we are breathing life into Section 35 and recognizing it now as a full box of rights for Indigenous peoples in Canada.”³

Paul First Nation—2005
Wabamun Clean-up Site
of a 700,000-litre Oil Spill
(detail)

Tanya Harnett

1 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

2 Minister of Indigenous and Northern Affairs Carolyn Bennett, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Statement delivered at the 15th session of the United Nations Permanent Forum on Indigenous Issues, 10 May 2016).

3 *Ibid.*

The minister is referring to section 35 of the Constitution Act, 1982.⁴ Section 35(1) reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”⁵

The minister’s statements raise both hopes for a newly vitalized section 35 and concerns that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) will be interpreted as consistent with, or even redundant to, the already existing section 35 framework developed by Canadian courts. This paper notes one such major concern, raised in particular by the language of article 46(2) of UNDRIP, and points to a key component in addressing this concern, a component required by article 27.

In brief, article 46(2) allows for justified limits on the rights set out in UNDRIP. The justification analysis that currently exists in Canadian law under section 35 places the burden on section 35 rights holders to seek redress in the courts when the Crown infringes their rights in a manner that the rights holders believe cannot be justified. The fact that the Crown can act in the face of disagreement over the justifiability of infringements, subject only to subsequent review by the courts if the rights holders have the time, resources and willingness to pursue legal remedies, contributes greatly to the imbalance in bargaining power between the Crown and Indigenous peoples engaging in consultation and negotiation. It would be unfortunate, to say the least, if article 46(2) were interpreted to endorse the existing justification analysis and judicial procedure.

Indeed, such an interpretation of article 46(2) would be inconsistent with other provisions of UNDRIP (not to mention with the spirit of the declaration as a whole). In particular, article 27 requires states “in conjunction with indigenous peoples concerned” to establish “a fair, independent, impartial, open and transparent process...to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources.” At a minimum, article 27 requires Canada to justify proposed infringements to section 35 rights *before* the infringements take place and to undertake this justification through a process jointly established by Indigenous peoples and the Crown. In other words, to the extent that article 46(2) provides for the possibility of justifying limits on the rights set out in UNDRIP, that justification must be provided in accordance with, among other things, the process required by article 27.

In the sections below, I first explain in greater detail the issue raised by article 46(2) in light of the section 35 framework as it currently exists in Canadian law. I then propose steps that the courts and, in broad strokes, Parliament and provincial legislatures could take toward implementing article 27 in a way that builds on existing Canadian law, while nonetheless transforming the current approach to justifying the infringements of rights under section 35.

Article 46(2) and the Current Justification Analysis under Section 35

Article 46(2) reads in part: “The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”⁶

The language of article 46(2) echoes section 1 of the Canadian Charter of Rights and Freedoms, which allows for “reasonable limits” on Charter rights and freedoms so long as these limits are “prescribed

⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, s 35.

⁵ *Ibid*, s 35(1).

⁶ UNDRIP, *supra* note 1, art 46(2).

by law [and] can be demonstrably justified in a free and democratic society.”⁷ Section 1 does not apply directly to section 35, which is not part of the Charter. However, the Supreme Court of Canada (SCC) has held that a justification analysis, similar to that carried out under section 1, applies to section 35 and affords the Crown the opportunity to justify actions it takes that infringe section 35 rights. The court has interpreted this section 1 type analysis to impose a form of minimal impairment/proportionality test on infringements of section 35 rights, in accordance with which the Crown may justify infringements and potential adverse impacts of Crown action on section 35 rights.⁸

The concern I wish to highlight here with respect to article 46(2) of UNDRIP is that, whatever the substantive interpretation of terms such as “free, prior and informed consent” in other provisions of the declaration, article 46(2) opens the door to a line of argument that would replicate the current section 35 framework of “justified infringements.” A great deal of commentary on UNDRIP focuses on the meaning of consent; equally important, however, is the process for resolving disagreements between the state and Indigenous peoples about any purported justification for infringing their rights. These “procedural”⁹ aspects of any rights to free, prior and informed consent do not get the attention that their practical importance merits.

The most significant practical limitation on section 35 rights flowing from the court’s imposition of a section 1 style justification test is the following “procedural” reality: in any given case where section 35 rights holders and the Crown disagree as to whether the Crown has fulfilled its constitutional obligations such that it can justify any infringements/adverse impacts on the rights in question, the Crown is allowed to act in the face of this disagreement. As a consequence, the section 35 rights holders carry the burden of bringing the matter to court if they wish to challenge the legality of the Crown’s actions.

This feature of the existing section 35 framework contributes greatly to the bargaining imbalance between the Crown and Indigenous nations, and, thus, also to the vulnerability of section 35 rights. The Crown often proposes actions that may infringe or adversely impact Aboriginal or treaty rights. Very commonly, such actions involve economic development in the form of resource extraction or related activities, for example, permits related to mining, oil and gas resources, timber, hydroelectric dams, construction of roads and railways, and so forth. Often the rights holders and the Crown disagree as to whether the proposed infringements or potential adverse impacts violate the Crown’s constitutional obligations under section 35.

7 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, s 1. Section 1 of the Charter reads: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” It is worth noting that, where section 1 of the Charter requires that “reasonable limits [be] prescribed by law,” article 46(2) of UNDRIP requires that “limitations [be] determined by law and in accordance with international human rights obligations” [emphasis added]. However, the SCC has adopted the “interpretive presumption” that “the Charter be presumed to provide at least as great a level of protection as is found in Canada’s international human rights obligations”; see *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 at para 65. This suggests that section 1, like article 46(2), cannot be used to justify limits on rights if those limits are not in accordance with Canada’s international human rights obligations. While this paper will not address the issue any further, the intent is not to discount the possibility that the explicit reference to international human rights obligations in article 46(2) might prove significant in protecting Declaration rights in certain contexts, notably where section 35 rights are not engaged.

8 See e.g. *R v Sparrow*, [1990] 1 SCR 1075 at 1109; *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 256 [*Tsilhqot’in Nation*] at paras 76–88. There is a good deal of uncertainty in the case law as to what qualifies as an infringement, as opposed to a potential adverse impact, on a section 35 right. Arguably, the case law holds that an infringement triggers Crown fiduciary obligations, while a potential adverse impact triggers the Crown duty to consult. Certainly, different legal consequences may flow from a court concluding that the Crown has infringed section 35 rights, as opposed to potentially adversely impacting them. See, for instance, discussion of the different legal consequences throughout *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40. However, to repeat, the line between what constitutes an infringement and an adverse impact is not particularly clear. For the purposes of this paper, I will consider together both infringements and potential adverse impacts.

9 I place quotation marks around “procedural” here because the process for resolving disputes over the justifiability of infringements on rights plays a central role in determining the substantive scope of those rights; the substance of the rights cannot be disentangled from the process established for justifying limits on them.

Under current Canadian law, the Crown has the power to act unilaterally in the face of such disagreement, subject only to subsequent review by the courts if the rights holders (or other interested parties) have the time, resources and willingness to bring the dispute before the courts. Prior to pursuing its proposed course of action, the Crown is under no legal obligation to satisfy any person, tribunal, court, or entity other than itself that it has fulfilled the constitutional obligations it owes to the rights holders whose Aboriginal or treaty rights will be infringed or adversely affected.

To be clear, the Crown has various legal obligations under section 35 to consult, accommodate and otherwise engage Aboriginal and treaty rights holders prior to taking a course of action that may infringe or adversely impact their rights. The issue addressed here is that once the Crown satisfies *itself* that it has fulfilled these obligations, the Crown faces no legal barrier to pursuing its preferred course of action. If the rights holders (or any other interested parties) disagree with the Crown's self-assessment, the burden is on them to bring a legal challenge. As explained below, this procedural burden applies to all section 35 rights, including established Aboriginal title.

The fact that the Crown may act in the face of disagreement over fulfillment of its constitutional obligations places a heavy burden on rights holders who believe the Crown has violated constitutional obligations it owes them in respect of those rights. This is especially true in the case of Indigenous peoples who hold rights over land that the Crown has targeted for economic development. In such cases, a First Nation might receive a steady stream of "referrals" from the Crown approving various forms of industrial activity affecting its territory and section 35 rights. If the First Nation believes that the Crown is failing to live up to its constitutional obligations in approving these projects, its legal options and bargaining power are severely constrained by the fact that it, rather than the Crown, carries the burden of bringing the matter to court, case by case, if it wishes to have the issue adjudicated by a body whose authority the Crown recognizes.

In practical terms, then, even established section 35 rights may be severely eroded over time, as economic development projects chip away at the meaningful exercise of such rights.¹⁰ (At the same time, a dense body of case law has now developed that provides tools for groups that do have the time and resources to challenge project approvals to block, or significantly delay, proposed projects *subsequent* to various forms of Crown approval. Thus, in many "high-profile projects" in which parties with considerable resources take interest on all sides, costly and lengthy litigation is to be expected within the current section 35 framework. The situation in such cases is thus far from ideal for all parties involved — Indigenous nations, the Crown and industry proponents.)

The Proposal

Canada's commitment to fully implementing UNDRIP provides a chance to reconsider the power of the Crown to act unilaterally in the face of disagreement as to whether it has, in any given situation, fulfilled its constitutional obligations under section 35. This paper proposes one modest, but important, step that is already implicit, if not fully stated, in the SCC's existing case law.

The proposal is that, where the Crown wishes to pursue a course of action that may infringe or adversely impact Aboriginal or treaty rights, and the rights holders dispute the Crown's self-assessment that it has fulfilled its constitutional obligations, the Crown should not be permitted to pursue its preferred course of action prior to resolution of the disagreement.

¹⁰ To take just one example recently highlighted in the media, the Blueberry River First Nation argues that exercise of its treaty rights has been irreparably harmed by extensive economic development on its territory. According to a 2016 report, across 73 percent of the nation's territory, any given location is within 250 metres of an industrial disturbance; see Yvette Brend, "Collision between Indigenous hunting and oil development rights set for legal showdown in B.C. court", CBC News (10 June 2017), online: <www.cbc.ca/news/canada/british-columbia/bc-treaty-rights-law-blueberry-river-first-nation-oil-and-gas-development-court-1.4151779>.

This proposal does not amount to giving the rights holders a “veto” over project approval. Indeed, it likely does not even go so far as to fully implement the free, prior, and informed consent standard set in several provisions of UNDRIP. (As explained below, it would, however, be a step in that direction and might open a path toward full implementation.) Rather, this proposal would simply see the burden shift to the Crown *either* to secure the actual consent of rights holders *or* to establish — *prior* to pursuing its proposed course of action — that it has fulfilled its constitutional obligations.

This proposal fits comfortably with — indeed, would bring greater coherence to — the SCC’s landmark (and unanimous) rulings in *Haida Nation* and *Tsilhqot’in Nation*. In *Haida Nation*, the court stressed that in the case of *claimed but unproven* section 35 rights, the Crown could act in the face of disagreement as to whether it had fulfilled its duty of consultation and accommodation relating to proposed action that could adversely impact those asserted rights.¹¹ The court’s statements, arguably, implied that the Crown would *not* have this power to act unilaterally in the case of *established* section 35 rights. In *Tsilhqot’in Nation*, the court went further in stressing that the Crown’s obligations were distinct in cases of established rights from those that applied in cases of asserted but unproven rights. Yet the court refrained from explicitly prohibiting the Crown from acting unilaterally in the face of disagreement in cases of established rights. In particular, the court stated the following:

At the claims stage, prior to establishment of Aboriginal title, the Crown owes a good faith duty to consult with the group concerned and, if appropriate, accommodate its interests. As the claim strength increases, the required level of consultation and accommodation correspondingly increases. Where a claim is particularly strong — for example, shortly before a court declaration of title — appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim. *Finally, once title is established, the Crown cannot proceed with development of title land not consented to by the title-holding group unless it has discharged its duty to consult and the development is justified pursuant s. 35 of the Constitution Act, 1982.*¹²

The court’s reasons in *Tsilhqot’in Nation* leave entirely unaddressed the crucial procedural point highlighted in the present policy proposal: the Crown remains free to act in the face of disagreement as to whether it has, in fact, discharged its duty to consult and can justify its proposed course of action. In the face of disagreement, the Crown may consider its proposed course of conduct justified and, with this self-assessment in hand, choose to pursue that course of conduct. The Aboriginal title holders are left with the burden of bringing the matter to court if they have the time, resources and willingness to do so.

It is unfortunate that the court has not explicitly addressed this important procedural issue in the case of established Aboriginal title and established section 35 rights more generally. The court’s own distinctions between the nature of asserted and established rights, respectively, suggest that the Crown should not enjoy the same unilateral power to act in the case of established rights. The proposal made here would simply take the modest step of drawing out a conclusion that is, arguably, already implicit in the court’s existing case law, and place the burden on the Crown to justify proposed action that would infringe established section 35 rights *before* the Crown is allowed to pursue that action. The

¹¹ *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*] at para 45. Focusing on rights claims that had yet to be settled, the court stated: “Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns.”

¹² *Tsilhqot’in Nation*, *supra* note 8 at para 91 [emphasis added].

courts could impose this requirement today as an incremental development of the interpretation of section 35.¹³

Of course, if the courts alone were to take this incremental step, they would remain the forum in which purported justifications of infringements of section 35 rights are adjudicated. The difference would be that the Crown would bear the burden of going to court when faced with a dispute as to whether it can justify proposed infringements of section 35 rights. The Crown would have to seek court approval for the infringements it proposes, rather than leaving the burden on rights holders to seek court disapproval of such infringements. That might not sound like much. After all, if Canada is truly committed to nation-with-nation relationships with Indigenous peoples and to upholding treaties it has concluded with them, it seems absurd (if taking a step back to look at the situation) that one party to a treaty can unilaterally propose to infringe the promises it made in the treaty and to have the question of justification adjudicated in its own courts. Although an incremental and rational step, simply shifting the burden to the Crown to have the question of justification adjudicated prior to infringement might bring substantially greater balance to bargaining power in the context of consultation and negotiations between Indigenous peoples and the Crown.

It might be objected that, if the courts adopted the incremental step proposed here, the result might well be an enormous backlog in the courts. Every permit issued by the Crown for industrial activity on Aboriginal title land, and many, if not most such permits issued on treaty land, would require either Indigenous consent or adjudicating the disputed justifiability of the proposed infringement before any activity could be undertaken pursuant to the permit.¹⁴ There can be no denying or minimizing the enormity of the disputes between the Crown and Indigenous peoples over the use of, and control over, lands and natural resources. That harsh reality belongs to the legacy and ongoing nature of colonialism. As explained above, the current procedural framework for adjudicating the justifiability of infringements on section 35 rights places a tremendous burden on section 35 rights holders themselves, by allowing the Crown to act in the face of disagreements about the justifiability of proposed Crown action. To the extent the policy proposal made here would create any backlog in the courts, the result would be to make that burden visible and put pressure on federal and provincial governments to work with Indigenous peoples to develop more balanced and collaborative solutions.

The most effective path forward would be for Parliament and the provincial legislatures to develop a legislative framework (either of their own initiative, or in response to further judicial elaboration of section 35 along the lines noted above) for the resolution of Indigenous-Crown disagreements over the justifiability of proposed infringements. The legislative framework should allow for some forum or body composed of both Indigenous and Crown representation to resolve, negotiate, or, if necessary, adjudicate the justifiability of proposed infringements before the Crown is allowed to undertake any infringing action. Perhaps, as discussed below, existing co-management boards could provide an institutional foundation around which to build or design these independent bodies. Naturally, there are many details to consider; these details will matter a great deal and require a certain amount of flexibility and experimentation. The essential point of this policy proposal is that the Crown must be required to go through some such independent body *prior* to pursuing any course of action that would infringe section 35 rights against the wishes of the rights holders.

Moreover, this is a step called for in article 27 of UNDRIP: “States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent

¹³ Precisely this issue will likely be put to the British Columbia Supreme Court in the Blueberry River First Nation case on the cumulative effect of treaty infringements, if the case proceeds to trial (see Brend, *supra* note 10).

¹⁴ Disputes would surely arise as to whether certain Crown actions even engaged section 35 rights and, therefore, whether there was any infringement needing to be justified. However, those kinds of disputes already arise in the context, for instance, of determining whether a given Crown action triggers a duty to consult. The courts are already developing case law around such questions, and I do not address them any further.

process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.”

Article 27 requires the Crown to work with Indigenous peoples to establish a process, as described in that article, that could take the institutional form of co-management fora, reconciliation tables, independent tribunals or some other body, composed of both Indigenous and Crown representatives empowered to resolve cases of disagreement between section 35 rights holders and the Crown relating to proposed activity that could infringe or adversely impact section 35 rights. For ease of reference, I refer to these proposed bodies simply as “co-management fora.”

These co-management fora¹⁵ could allow for the interpretation and application of different bodies of law — Indigenous legal traditions, federal and provincial law, and international law, including UNDRIP itself. Establishing these fora within the existing Canadian constitutional framework would require some attention, notably to issues of superior court jurisdiction under section 96 of the Constitution Act, 1867. However, these issues seem inherently manageable.

These co-management fora could also begin to flesh out principles already announced in the section 35 case law, in particular decisions of the SCC, in accordance with both Indigenous legal systems and federal and provincial laws. For instance, in *Tsilhqot'in Nation*, the SCC explained that both Aboriginal title holders and the Crown have an obligation to sustainably manage land held under Aboriginal title.¹⁶ This sustainability principle ought to be developed in accordance with both Indigenous legal orders and federal and provincial law; perhaps it could help form a basis for rethinking the Indigenous-Crown fiduciary relationship along the lines of an equal partnership, rather than on the outdated and offensive model of a guardian-ward relationship.

If article 27 were implemented along the broad lines proposed here, the resulting co-management fora could also play a crucial institutional role in implementing other articles contained in UNDRIP. Most obviously, these co-management fora could be the institutional locus of discussion, negotiation, and, if necessary, adjudication of issues relating to articles 26 and 28 to 32, which spell out principal protections for Indigenous lands and resources, including, for example, that “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.”¹⁷ Clearly, such co-management fora would also provide an appropriate institutional setting to implement article 37, including “the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements.”¹⁸

Finally, implementation of article 27 along the lines proposed here would also support Indigenous involvement in decisions that affect them and their territories and resources, helping to fulfill rights of self-determination, autonomy and self-government, as provided in articles 3, 4, 18, 23, 38 and 40.

15 Note that in two recent cases, the Supreme Court of Canada held that an “independent regulatory agency” such as the National Energy Board (NEB) is empowered to carry out the Crown duty of consultation owed to Indigenous peoples under section 35, and to then make a determination as to whether the Crown has fulfilled its duty of consultation; see *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 [Clyde River]; *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, 2017 SCC 41 [Chippewas]. Unfortunately, the result of *Clyde River* and *Chippewas* is, for all practical purposes, that the Crown (in the form of the NEB) still needs only to satisfy *itself* that it has fulfilled its constitutional obligations before pursuing its proposed course of action. In this respect, *Clyde River* and *Chippewas* simply entrench the Crown’s self-assessment problem identified in this paper — a situation that is inconsistent with the letter and spirit of UNDRIP and the proposal offered here. The independent bodies, for example, co-management fora recommended in this paper, must be independent in more than name only if they are to contribute meaningfully to healthier Indigenous-Crown relations.

16 *Tsilhqot'in Nation*, *supra* note 8 at paras 86, 105, 121.

17 UNDRIP, *supra* note 1, art 32(1).

18 *Ibid*, art 37(1).

Conclusion

In sum, proper implementation of article 27 of UNDRIP has the potential to serve as a linchpin for successful implementation of a significant portion of the declaration. As explained above, the proper implementation of article 27 is particularly important in light of the concern that article 46(2) might suggest a basis for maintaining the procedural status quo in assessing the justifiability of infringements of section 35 rights. Article 27 establishes important conditions on the process that must be followed in adjudicating or otherwise resolving Crown claims that it can justify proposed infringements. These conditions are inconsistent with the current state of Canadian law, for the reasons spelled out in this paper. Thus, proper regard for article 27 should pre-empt any argument that article 46(2) renders Canada's existing section 35 framework consistent with UNDRIP as a whole.

Fortunately, Canadian law as it currently exists already offers a bridge toward implementing article 27. Incremental development of the existing section 35 framework could shift the burden to the Crown to seek judicial approval of its proposed infringements on established section 35 rights *before* it proceeds with any action that will cause such infringements. The courts could move the case law forward in this direction by drawing on existing precedent, as explained above. Building on such a step (or, preferably, without waiting for such prompting by the courts), federal and provincial governments in dialogue and partnership with Indigenous peoples could, in accordance with the requirements of article 27, establish co-management fora to resolve disputes relating to infringements of section 35 rights. It is hard to see how any path to genuine nation-with-nation treaty relationships can avoid this relatively modest, yet significant, step.

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Strategizing UNDRIP Implementation

Some Fundamentals



Kerry Wilkins

Introduction

If it is to fulfill its stated objectives, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹ must govern, in some meaningful way, relations between Indigenous peoples and Canada's federal, provincial and territorial governments. The rights and obligations it articulates need to be enforceable. This is a task for domestic Canadian law. UNDRIP itself vests no international forum with jurisdiction to adjudicate states parties' infringements of it. Instead, it instructs participating states to provide for its enforcement.²

In Canada, international instruments such as UNDRIP are not self-executing. The Government of Canada describes UNDRIP as a political commitment, not legally binding.³ And the Supreme Court of Canada (SCC) has held repeatedly that international instruments have no domestic legal effect except pursuant to competent domestic

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP], online: <www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf>.

2 *Ibid.*, arts 27, 38, 40.

3 Indigenous and Northern Affairs Canada, "United Nations Declaration on the Rights of Indigenous Peoples", online: <www.aadnc-aandc.gc.ca/eng/1309374407406/1309374458958>.

legislation⁴ (or, most probably, valid treaties made with Indigenous peoples).⁵ This means, in brief, that UNDRIP will be enforceable against the Crown in Canada only if, and only when, the Crown and/or relevant legislative bodies agree — by statute, by treaty or conceivably by constitutional amendment — to be bound by it. In the meantime, UNDRIP can, at most, influence judicial interpretation of some domestic legislation.⁶

The federal government has expressed unqualified public support for UNDRIP; it intends, it says, “nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.”⁷ This is welcome news. To date, however, the federal government’s public efforts at implementation consist entirely of government caucus support for a private member’s bill about UNDRIP,⁸ which received third reading in the House of Commons on May 30, 2018,⁹ and first reading in the Senate the next day.¹⁰ The bill, if it becomes law, will affirm UNDRIP “as a universal international human rights instrument with application in Canadian law” (section 3), will commit the federal government, “in consultation and cooperation with indigenous peoples,” to taking “all measures necessary to ensure that the laws of Canada are consistent with” UNDRIP (section 4) and to developing and implementing “a national action plan to achieve the objectives of” UNDRIP (section 5), and will require the relevant federal minister to report to Parliament annually until 2037 on the implementation of these measures (section 6). These provisions contemplate, and arguably obligate, eventual federal implementation of UNDRIP,¹¹ but even the bill’s proponents do not suggest that it would suffice alone, if enacted, to render UNDRIP’s provisions enforceable.¹²

UNDRIP, therefore, still awaits implementation in Canada. Successful implementation is by no means assured; the political risks for Crown and Indigenous leaders alike are extremely high. For the Justin Trudeau Liberals, UNDRIP implementation is a legacy initiative, undertaken not for the short-term political gain, but because it is “the right thing to do.” It is at least as likely to cost the Liberals votes and campaign contributions in forthcoming elections as to yield them.¹³ And the government knows

4 *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 69, 79 [Baker]; *Capital Cities Communications Inc v Canadian Radio-Television Commission*, [1978] 2 SCR 141 at 172–73; *Francis v The Queen*, [1956] SCR 618 at 621.

5 The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK) (1982)*, c 11, which is “the supreme law of Canada” (*ibid*, s 52(1)), recognizes and affirms the “existing...treaty rights of the aboriginal peoples of Canada” (*ibid*, s 35(1)), including such “rights that now exist by way of land claims agreements or may be so acquired” (*ibid*, s 35(3)).

6 Other things being equal, courts are to assume that domestic legislation is meant to be consistent with recognized international norms: 114957 *Canada Ltée (Spraytech, Société d’Arrosage) v Hudson (Town)*, 2001 SCC 40 at para 30, [2001] 2 SCR 241; *Baker*, *supra* note 4 at paras 70–71; *R v Hape*, 2007 SCC 26 at para 53, [2007] 2 SCR 292.

7 Minister of Indigenous and Northern Affairs Carolyn Bennett, “Fully Adopting UNDRIP: Minister Bennett’s Speech at the United Nations”, *Northern Public Affairs* (11 May 2016), online: <www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>.

8 Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Sess, 42nd Parl, 2016 (as passed by the House of Commons 30 May 2018), online: <www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

9 *House of Commons Debates*, 42nd Parl, 1st Sess, No 304 (30 May 2018) at 1555, online: <www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-304/hansard>. Liberal, NDP and Green members of Parliament supported the motion; Conservative members of Parliament opposed: *ibid*.

10 See *Debates of the Senate*, 42nd Parl, 1st Sess, No 212 (31 May 2018), online: <https://sencanada.ca/en/content/sen/chamber/421/debates/212db_2018-05-31-e?language=e#37>.

11 This said, it is far from clear to what extent these obligations would be enforceable or, if they were, what the remedy for their breach would be.

12 In the second reading debate on Bill C-262, neither its sponsor, Romeo Saganash (NDP, Abitibi–Baie-James–Nunavik–Eeyou), nor the Liberal Party respondent, Yvonne Jones (Labrador, Parliamentary Secretary to the Minister of Indigenous and Northern Affairs), characterized the bill as achieving domestic implementation of UNDRIP; see *House of Commons Debates*, 42nd Parl, 1st Sess, No 245 (5 December 2017) at 1745–1815, online: <www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-245/hansard#9866873>; *House of Commons Debates*, 42nd Parl, 1st Sess, No 245 (5 December 2017) at 1805–15, online: <www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-245/hansard#9866993>, respectively. According to Jones, in fact, the shift to full UNDRIP implementation “cannot be achieved through just one piece of legislation alone” (*ibid* at 1810).

13 In a recent Angus Reid poll, only 34 percent of Canadians surveyed said that Indigenous communities should be “[m]oving toward more independence and control of their own affairs.” Sixty-six percent said they should be “[g]overned by the same systems and rules as other Canadians.” Fifty-three percent of those surveyed said that Indigenous peoples should have no special status that other Canadians do not have: Aaron Hutchins, “First Nations: New Solitudes”, *Maclean’s* (1 July 2018) 28 at 29, 31.

that. UNDRIP implementation will entail substantial change to the conduct of mainstream governance and of business, especially in the energy and resource sectors. Change on this scale is not, as a general rule, welcome in mainstream experience. From the federal government perspective, therefore, it will seem imperative that UNDRIP implementation proceed in a smooth and orderly way, that it improve Indigenous peoples' lives without unduly inconveniencing non-Indigenous peoples, that it trigger no unpleasant surprises and, not least, that it not cost too much. The federal government will want certainty about what will happen after implementation and will want to avoid outcomes that cause alarm. There is always a risk that the government will conclude, perhaps with real regret, that UNDRIP implementation (like electoral reform?)¹⁴ is just too arduous or too expensive to achieve, at least within a foreseeable period.

For Indigenous peoples to whom UNDRIP implementation matters, the stakes are similarly high. In the best case, they will have one real chance to render UNDRIP meaningfully enforceable against the Crown. It is extremely important that implementation achieve the results Indigenous peoples require of it; they will have to live for quite some time in the world that UNDRIP implementation creates. But from a strategic standpoint, it is no less important that Indigenous peoples do what they can to deprive the federal government of excuses to delay or abandon the implementation effort.

This paper discusses, from the perspective of mainstream Canadian law, what needs to happen for UNDRIP to become an enforceable part of that law, binding on the Crown. (I have neither permission nor sufficient expertise to discuss UNDRIP from within Indigenous law.) The paper identifies four questions on whose resolution, at a minimum, successful UNDRIP implementation (as mainstream law) will depend: specifying the Indigenous peoples to whom, and the lands and waters to which, UNDRIP, once in force, would apply; choosing among imperfect available implementation mechanisms; and clarifying the Crown's post-implementation responsibilities. Fresh, constructive Indigenous engagement with these questions may very well be a prerequisite to success.¹⁵

The Who

Apart from articles 6, 22 and 43, which speak only of “indigenous individuals,” and articles 41, 42 and 46, which are institutional and procedural, every UNDRIP provision articulates rights of, or states' obligations to, “indigenous peoples.” Nowhere, though, does UNDRIP tell us what makes “indigenous peoples” Indigenous, or what makes them “peoples.”¹⁶ Answering these questions — identifying the bearers of these rights and the beneficiaries of these obligations — is a crucial early step in UNDRIP implementation. Overlooking them invites inconvenient dispute and unpleasant surprise.

14 See e.g. Laura Stone, “Trudeau abandons electoral reform, breaking key campaign promise”, *The Globe and Mail* (1 February 2017), online: <www.theglobeandmail.com/news/politics/trudeau-abandons-electoral-reform/article33855925/>.

15 It will not suffice for this purpose simply to point at the excellent work already done — by the Royal Commission on Aboriginal Peoples (RCAP) and the Truth and Reconciliation Commission (TRC), for instance — in documenting the plight of Indigenous peoples in (what is now) Canada and calling for appropriate change. Those studies were not undertaken with UNDRIP implementation in mind and do not purport to represent the views of any particular Indigenous constituencies. It would be perfectly appropriate for Indigenous peoples wishing to do so to endorse and present as their own the relevant RCAP recommendations or TRC Calls to Action, but it would not do for Canada just to assume, in the absence of some such endorsement, that the RCAP or TRC proposals, developed at a different time and for a somewhat different purpose, were definitive answers to the relevant questions. Federal assumptions about Indigenous peoples have not, as a general rule, been sound.

16 Given the diversity of Indigenous peoples throughout the world, and the variety of the circumstances in which they find themselves, (see *UNDRIP*, *supra* note 1, Preamble, recital 23), such silence is understandable.

Given Canada's recent setbacks with the Indian status rules,¹⁷ it might very well be pleased to get out of the business of deciding — or, at least, deciding unilaterally — who counts as an Indian or what makes someone Indigenous, as long as Canada is not held responsible for what happens when Indigenous peoples make those determinations themselves.¹⁸ The more difficult issue will be how — and at what level of generality — to individuate Indigenous “peoples”¹⁹: the nominate bearers of the UNDRIP rights. No sensible mainstream government would implement UNDRIP without prior identification of the entities deemed to have the right of self-determination (UNDRIP, article 3), whose “free, prior and informed consent” would have to precede “adopting and implementing legislative or administrative measures that may affect them” (article 19), placing hazardous materials on their lands or territories (article 29(2)) or approving “any project affecting their lands or territories and other resources” (article 32(2)).

This issue of denomination has significant operational implications. The proliferation of federally constituted “bands” that has suited Canada for decades might well not seem so suitable within a regime that assures Indigenous peoples of robust rights of informed consent and self-determination. Mainstream politicians and bureaucrats already find burdensome the transaction costs incurred in resolving issues of jurisdiction, financial transfers and essential service provision with a single federal entity and 13 provincial and territorial governments. Including more than 600 self-determining reserve communities and several more Métis and Inuit groups would increase the shared administrative inconvenience exponentially. Canada, therefore, might very well welcome, post-UNDRIP, adoption of something like the RCAP's recommendation that it acknowledge rights of self-determination in somewhere between 50 and (not more than) 80 Indigenous nations,²⁰ or even Roger Gibbins' suggestion, several years earlier, that “[a]t the very least we are talking about a province-wide Indian government, one that would have the power to enforce its decisions with respect to its constituent bands or communities.”²¹

Even so, credible instruction on this issue can come only from the Indigenous side. Such expertise as there is about the constitution, recognition and denomination of discrete Indigenous peoples resides where it always has, with Indigenous Elders and leaders. It would be both utterly inconsistent with the spirit of UNDRIP and colossally stupid for Canada now to presume once again — as it has so often — to decide unilaterally how to denominate Indigenous peoples.

This leaves Indigenous peoples with the challenging task of deciding how to reconstitute themselves after generations of unfortunate colonial fragmentation. It is a task fraught with political consequence, but there is no obvious, credible alternative. The most that mainstream governments can contribute to

17 *Mclvor v Canada (Registrar of Indian and Northern Affairs)*, 2009 BCCA 153, 91 BCLR (4th) 1 and *Descheneaux v Canada (Procureur général)*, 2015 QCCS 3555, [2016] 2 CNLR 175 each required amendments to the status and band membership rules in the *Indian Act*, RSC 1985, c 1-5, ss 6, 11 to correct for unjustified gender discrimination, contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c11 [Charter]. Those amendments — *Gender Equity in Indian Registration Act*, SC 2010, c 18, ss 2-3 and *An Act to amend the Indian Act in response to the Superior Court of Quebec decision in Descheneaux c. Canada (Procureur général)*, SC 2017, c 25, ss 1-3 [An Act to Amend the Indian Act] — have made those schemes almost impenetrably complicated, sufficiently so that the 2017 statute requires the federal government to consult First Nations and interested others about, among other things, “the continued federal government role in determining Indian status and band membership” (*An Act to Amend the Indian Act*, *ibid*, s 11(1)(f)).

18 See generally the section in this paper titled “And Then What?”.

19 In *Reference re Secession of Quebec*, [1998] 2 SCR 217, the SCC acknowledged that “the precise meaning of the term ‘people’ remains somewhat uncertain” in international law (*ibid* at para 123). It added “that ‘a people’ may include only the portion of the population of an existing state” (*ibid* at para 124): that “the reference to ‘people’ does not necessarily mean the entirety of a state’s population,” but declined to be more specific, or even to opine on whether the people of Quebec comprise a “people” (*ibid* at para 125).

20 RCAP, *Report of the Royal Commission on Aboriginal Peoples, Volume 2: Restructuring the Relationship* (Ottawa: Supply and Services, 1996) at 177-84. According to the RCAP, eligibility to exercise self-determination rights should require, first, a shared sense of collective identity; second, sufficient critical mass to assume the powers and responsibilities that self-determination entails; and, third, a territorial base on which it comprises the predominant population (*ibid*).

21 Roger Gibbins, “Citizenship, Political and Intergovernmental Problems with Indian Self-Government” in J Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) 369 at 372.

this process is sufficient financial support to sustain it and sufficient patience to await its outcome.²² One excellent way of testing Canada's seriousness about UNDRIP implementation would be to present the federal government with a carefully considered proposal (from a sufficiently representative group of First Nation, non-status, Métis and Inuit peoples) seeking sufficient funding to undertake and complete this surpassingly difficult work within a finite but reasonable time.

The Where

No fewer than nine UNDRIP articles concern rights that relate to Indigenous peoples' lands, waters, territories or resources.²³ Such rights, once fully in force, will exist throughout the whole of Canada. Their successful implementation, however, will require identification and attribution of the territories to which they pertain and those territories' locations. Prudent mainstream governments seem unlikely to agree to the rigours of the UNDRIP territorial rights regime without first knowing, or knowing how to ascertain for UNDRIP purposes, which lands, waters and resources are or were traditionally whose. These are not matters about which the Crown has any business making assumptions or guessing, let alone deciding unilaterally. The stakes, for everyone, are simply too high. Treaties, existing comprehensive and treaty land entitlement claims and even some judicial decisions may offer helpful clues in mapping traditional Indigenous territories, but they each occurred at a different time for a purpose different from that of UNDRIP implementation, and they may or may not align with the collectives demarcated for UNDRIP purposes as Indigenous peoples.

It would be sound strategy, therefore, for Indigenous peoples to take the lead on the crucial issue of territorial identification: addressing it transparently, estimating its likely duration and seeking such support with it from the Crown as they may require. Indigenous peoples are the ones best placed to identify their own traditional lands and waters. There are the stories, the oral histories and the traditional and local knowledge constitutive of their relationships with their respective ancestral territories. The proper course for non-Indigenous governments in this conversation is to begin by listening, learning and providing the time and resources required to complete this task.

The results of such activity are almost certain to be controversial. Some lands and waters may lie within the traditional territories of more than one Indigenous people,²⁴ requiring governments, under UNDRIP, to obtain required consents from each. Complications could ensue.²⁵ More frequent, and more difficult, will be contestation about the relative merits of competing non-Indigenous claims to some of those same territories and resources, including, probably, claims derived from surrender provisions in English versions of treaties.²⁶ When such disputes arise, a resolution will, of course, be necessary; UNDRIP article 27 requires that there be an impartial process for adjudicating Indigenous claims to territories.

22 The RCAP, for example, recommended that the "federal government put in place a neutral and transparent process for identifying Aboriginal groups entitled to exercise the right of self-determination as nations"; RCAP, *supra* note 20 at 184.

23 UNDRIP, *supra* note 1, arts 8(2)(b) (right to redress for dispossession), 10 (protection against involuntary relocation), 25 (right to maintain and strengthen spiritual and stewardship relationship with traditional lands and waters), 26 (right to state recognition of traditional lands, territories and resources), 27 ("fair, independent, impartial, open and transparent process" to adjudicate Indigenous territorial rights), 28 (right to restitution or compensation for lands taken, used or damaged without consent), 29 (right to environmental protection and conservation), 30 (protecting traditional lands from military activities), 32(2) (protection from development or resource exploitation without Indigenous consent).

24 In *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*], the SCC specifically left room for jointly held Aboriginal title in circumstances where more than one Indigenous community occupied particular lands at the relevant time to the exclusion of all others (*ibid* at paras 158, Lamer CJC, 196, La Forest J).

25 One recent instance concerned a development proposal for an area in southeastern British Columbia that the Shuswap and the Ktunaxa had each used traditionally. After consultations, the Shuswap agreed to the proposal for the benefits it would bring them; the Ktunaxa opposed it resolutely. See *Ktunaxa Nation v British Columbia (Forest, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386.

26 It is helpful to remember here, first, that provincial grants to settlers of fee simple interests in lands cannot suffice to extinguish Aboriginal title to those lands because the provincial Crown's own interest in those lands is subject to the pre-existing Indigenous interest (*Delgamuukw*, *supra* note 24 at para 175) and, second, that certain UNDRIP rights (those in articles 25 to 28) pertain to territories and resources that Indigenous peoples "have traditionally owned" or occupied, irrespective, apparently, of those territories' current ownership status.

But knowing early in the UNDRIP implementation effort which resources, waters and territories are going to be in play alerts the parties to the locations and the magnitude of the challenges that await and creates space in which to address those challenges thoughtfully and cooperatively. Ignoring the territorial issue is simply not an option.

The How

Since its adoption by the UN General Assembly in 2007, UNDRIP has been available to Indigenous peoples as a source of norms they might use as appropriate, in accordance with their own laws, in their relations with one another. Using UNDRIP themselves is one way Indigenous peoples can demonstrate their commitment to its principles. As discussed above,²⁷ however, UNDRIP will constrain or compel the conduct of the Crown only if mainstream lawmakers do something to bring it into domestic law. Canada could make that happen unilaterally, but unilateral federal assumptions are, again, unlikely to yield optimal results. Successful UNDRIP implementation requires, among other things, deeper understanding of what Indigenous peoples in present-day Canada require from UNDRIP and what, to them, would count as implementation that binds mainstream governments. To encourage that conversation, this section considers some options relating to the mechanics of UNDRIP implementation.

If a goal is eventual enforceability within domestic Canadian law, at least three issues need attention: the pace and scale of implementation; the means to be used to introduce UNDRIP into Canadian law; and the choice of enforcement mechanism.

Pace and Scale

There are good reasons to consider giving enforceable effect to the whole of UNDRIP throughout Canada all at once. Uniform implementation reduces the risks of inconsistency, strategic behaviour, invidious comparison and unnecessary competition that could beset a phased implementation. But Canada is notoriously diverse, as are Indigenous peoples' predicaments here; postponing domestic reception of UNDRIP until every relevant difference has been acknowledged and accommodated could, in the worst case, closely resemble stalling. In the meantime, UNDRIP would remain, for mainstream governments, at most a political commitment and an interpretive aid for courts to use in construing legislation.²⁸

Alternative approaches include: implementing across Canada the UNDRIP provisions that are easiest or most important to implement, then learning from that experience while phasing in implementation of the others; phasing in all or part of UNDRIP community by community, or willing province by willing province (again, potentially, learning as we go); or making UNDRIP's provisions, like some recent federal legislation,²⁹ available to Indigenous peoples exclusively on an opt-in basis.

Implementation Options

There are three possible ways of giving UNDRIP fully enforceable domestic legal effect: constitutional entrenchment, treaties and legislation.

Constitutional amendment proposals require, at a minimum, approval, within a three-year period, from both houses of Parliament and from the legislatures of seven provinces housing at least 50 percent of Canada's population.³⁰ Appealing though it may be to consider entrenching UNDRIP's rights and obligations in the Constitution, the likelihood today that any mainstream government would seriously

²⁷ See *supra* notes 2–6 and accompanying text.

²⁸ See *supra* notes 3, 6 and accompanying text.

²⁹ See e.g. *First Nations Land Management Act*, SC 1999, c 24; *First Nations Fiscal Management Act*, SC 2005, c 9.

³⁰ *Constitution Act, 1982*, *supra* note 5, ss 38(1), 39(2).

consider proposing such an amendment seems vanishingly small, especially without concerted support from mainstream voters.³¹

Provided that it qualified as a “land claims agreement” under section 35(3) of the Constitution Act, 1982,³² a treaty with Indigenous peoples implementing UNDRIP would give rise to treaty rights: constitutional rights for the signatory peoples protected under section 35(1)³³ against unjustified federal or provincial infringement,³⁴ irrespective of whether any province were involved in its negotiation.³⁵ Treaties could be an attractive option for piecemeal or phased UNDRIP implementation; implementation schedules could be tailored specifically to the circumstances of each party to a given agreement. This, of course, would probably be easiest to achieve in those parts of Canada not already subject to existing treaties that feature contested surrender provisions. Even there, though, modern treaties have typically required years, if not decades, of very expensive negotiations. A nationwide treaty with all Indigenous peoples in Canada is not impossible, but would be unprecedented.³⁶

Federal legislation, on the other hand, need not take so long and is typically countrywide in scope. We now know that “all Aboriginal peoples” are “Indians” within federal legislative authority;³⁷ Parliament, therefore, probably has sufficient constitutional capacity to enact laws implementing UNDRIP nationwide. Even so, there are important constraints.

First, the rights in UNDRIP, if enacted in legislation, will have the force of only statutory, not constitutional, rights. (The Charter of Rights, therefore, will almost certainly apply to the exercise of any authority deemed to derive from such legislation.) As such, they are subject to repeal at any time. And under the usual canons of statutory interpretation, federal (or provincial) legislation that is newer or more specific supersedes, other things being equal,³⁸ older, generic federal (or provincial) legislation in case of conflict. Even if left unrepealed, therefore, federal legislation incorporating UNDRIP rights could be susceptible to gradual erosion by subsequent conflicting legislation.³⁹

31 See Hutchins, *supra* note 13.

32 Section 35(1) of the *Constitution Act, 1982*, *supra* note 5, recognizes and affirms only “existing” treaty and Aboriginal rights, that is, those already in existence when section 35 took effect in 1982: *R v Sparrow*, [1990] 1 SCR 1075 at 1091. Section 35(3) creates an exception for rights that “may be so acquired” “by way of land claims agreements” (*Constitution Act, 1982*, *supra* note 5, s 35). The courts have not yet said what must be true for a post-1982 instrument to qualify as a land claims agreement.

33 Might UNDRIP itself already be a treaty whose rights are entitled, under Canadian law, to this constitutional protection? Under current standards, “what characterizes a treaty is the intention to create obligations, the presence of mutually binding obligations and a certain measure of solemnity” as among the parties to the candidate arrangement: *R v Sioui*, [1990] 1 SCR 1025 at 1044. And because the federal government gave full approval to UNDRIP only after 1982, UNDRIP would also need to qualify as a “land claims agreement” for the purposes of section 35(3): see *supra* note 32.

34 See e.g. *R v Badger*, [1996] 1 SCR 771 (justification of federal treaty right infringements); *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 53, [2014] 2 SCR 447 [*Grassy Narrows*] (justification of provincial treaty right infringements).

35 *Grassy Narrows*, *supra* note 34 at paras 32–35, 50, 51.

36 Twenty-four different Indigenous nations from several different geographic areas took part in the meetings described as comprising the Treaty of Niagara, 1764, incorporating into a consensual arrangement the relevant provisions of the Royal Proclamation, 1763 and extending the reach of the Two-Row Wampum. See e.g. John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155. According to the Ontario Court of Appeal, the Treaty of Niagara “established friendly relations with many First Nations who had supported the French in the previous war. It also gave treaty recognition to the nation-to-nation relationship between the First Nations and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered”: *Chippewas of Sarnia Band v Canada (AG)* (2000), 51 OR (3d) 641 (CA) at para 56. I am not aware of another more inclusive Crown treaty with Indigenous peoples. Treaties with smaller numbers of Indigenous communities located in geographic proximity to one another have been much more common.

37 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5, s 91(24); *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 46, [2016] 1 SCR 99.

38 It is possible to draft a statute to give it priority over subsequent conflicting coordinate legislation. According to section 47(2) of the *Ontario Human Rights Code*, RSO 1990, c H 19, for example, “Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I [of the Code], this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.”

39 If Bill C-262, *supra* note 8, becomes law, it may bind the Government of Canada to harmonize federal laws with UNDRIP (see *supra* notes 8–12 and accompanying text), but it would not bind Parliament.

Second, federal legislation does not bind the Crown unless it says it does or unless its purpose would be wholly frustrated unless the Crown were bound.⁴⁰ Domestic legislation, therefore, may not render UNDRIP's affirmative obligations⁴¹ enforceable unless it says expressly that it binds the federal Crown.

Finally, one cannot overlook the provinces. Certain matters UNDRIP addresses — labour practices,⁴² education,⁴³ health professions⁴⁴ and natural resource extraction⁴⁵ among them — are, under Canadian law, presumptively within provincial, not federal, legislative authority.⁴⁶ Valid federal legislation can bind provincial Crowns,⁴⁷ but unwilling provinces may very well challenge provisions in federal legislation that seem to encroach on exclusively provincial matters. Some provinces may even insist that UNDRIP, which makes no mention of subnational units, has nothing to do with them. Constitutional doctrines exist that could support the federal position in such disputes,⁴⁸ but the outcome of litigation is never assured.

Different implementation options, therefore, have different strengths and weaknesses. Understanding these differences will help Indigenous peoples determine and indicate which domestic mechanism would best suit their purposes.

Enforcement

Unless specified otherwise, the task of enforcing UNDRIP's rights or obligations against mainstream governments would fall to Canadian courts. It might very well be impossible (without constitutional amendment) to deprive Canadian courts of supervisory jurisdiction altogether over such enforcement decisions.⁴⁹ But there is room at least to consider appropriate alternative forms of dispute resolution, including arrangements that draw on both Indigenous and mainstream authority and expertise. UNDRIP itself expressly requires attention to Indigenous law in some circumstances,⁵⁰ so domestic enforcement mechanisms should, at a minimum, provide for its reception, proof and consideration. Indigenous peoples are uniquely well situated to offer productive options for doing so.

40 *Interpretation Act*, RSC 1985, c 1-21, s 17; *Canada (AG) v Thouin*, 2017 SCC 46 at paras 1, 19-21, [2017] 2 SCR 184.

41 UNDRIP, *supra* note 1, arts 8(2), 11(2), 12(2), 13(2), 14(3), 15(2), 16(2), 17(2), 19, 22(2), 26(3), 27, 29(2-3), 30(2), 32(2-3), 36(2), 38, 40.

42 *Ibid*, art 17.

43 *Ibid*, art 14.

44 *Ibid*, art 24.

45 *Ibid*, art 32.

46 Canada does not acquire legislative authority over a subject matter otherwise within exclusive provincial authority by ratifying an international instrument concerning that subject matter. As a result, it can implement domestically only those aspects of the international agreement that otherwise come within federal legislative authority: *Canada (AG) v Ontario (AG)*, [1937] AC 326 (PC).

47 *Alberta v Canadian Transport Commission*, [1978] 1 SCR 61 at 72, Laskin CJC for the majority; *Ontario v Board of Transport Commissioners*, [1968] SCR 118 at 124.

48 Under the so-called "ancillary powers" doctrine, a provision in federal (or provincial) legislation that, considered in isolation, would be invalid may nonetheless be valid if it is "sufficiently integrated" into a federal (or provincial) scheme that is known to be valid. The test for sufficient integration depends on the severity of the provision's encroachment on the exclusive legislative authority of the other order of government. Where the encroachment is less serious, a "rational, functional connection" with the parent scheme will suffice. When the encroachment is more severe, the impugned provisions must be "necessarily incidental" to the parent scheme as a whole. See *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 665-72; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at paras 56-58, [2002] 2 SCR 146; *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at paras 32-46, [2010] 2 SCR 453.

49 See e.g. *Crevier v Quebec (AG)*, [1981] 2 SCR 220.

50 UNDRIP, *supra* note 1, arts 11(2) (redress for property taken without Indigenous consent or in violation of Indigenous law), 27 (taking account of Indigenous laws in recognizing and adjudicating Indigenous peoples' land rights), 40 (due consideration to Indigenous peoples' customs, traditions, rules and legal systems in resolving their conflicts with states and other parties).

And Then What?

UNDRIP does subject states to some affirmative obligations,⁵¹ but it also instructs them to get out of the way to make room for Indigenous peoples' own ways of doing things. The right of self-determination (articles 3 and 4) is the clearest indication of this, although not the only one.⁵² But what if something goes wrong while Indigenous peoples are doing things their own way? Suppose, for example, that a self-determining Indigenous community suffered a serious financial loss because of an unlucky or improvident investment or that some members of such a community felt marginalized by rogue Indigenous leadership. How much authority and responsibility would the Crown retain to mitigate?

The fate of UNDRIP implementation could depend upon the answer to this question. The Crown's worst nightmare would be to retain exposure for the harm in such a circumstance, without sufficient residual control to prevent or contain the harm.⁵³ The SCC has held, for example, that the federal Crown, as fiduciary, may not transfer to First Nations property it currently manages on their behalf, surrendering both control of and responsibility for the property, unless it is "satisfied that any transfer is in the best interest of the bands."⁵⁴ The First Nations' own wishes are not sufficient warrant for the transfer. How should this law translate post-UNDRIP?

Here is a different example. UNDRIP includes a right to full enjoyment of all human rights recognized in international human rights law (article 1) and guarantees all the rights it contains "equally...to male and female indigenous individuals" (article 44). Compliance with UNDRIP requires compliance with these provisions. In the early 1990s, when there was serious talk of entrenching inherent rights of Indigenous self-government in the Constitution, several Indigenous commentators urged the federal government not to abandon Indigenous women to the authority of predominantly male community leadership.⁵⁵ The Native Women's Association of Canada famously went to court to try to ensure that the Charter would police any constitutional right of self-government,⁵⁶ fearing what might happen to Indigenous women if it did not.

How should mainstream governments respond if similar fears emerge in the course of UNDRIP implementation? According to UNDRIP article 46(2), the exercise of UNDRIP rights "shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations" and are "strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society." But who should get to decide what limitations satisfy these exacting criteria or who may impose them? And what are the consequences if mainstream governments choose not to impose them?

51 See *supra* note 41 and accompanying text.

52 See e.g. UNDRIP, *supra* note 1, arts 5, 11–14, 16, 23–25, 31–36.

53 "In circumstances where Aboriginal groups wish the Crown to have certain ongoing obligations, self-government jurisdiction or authority will, correspondingly, be limited. ... There is no justifiable basis for the Government to retain fiduciary obligations in relation to subject matters over which it has relinquished its control and over which an Aboriginal government or institution has, correspondingly, assumed control": *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* at 12, online: <www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844>.

54 *Ermieskin Nation and Band v Canada*, 2009 SCC 9 at para 152, [2009] 1 SCR 222. The court added that the Crown could require a release from future liability in respect of such property before executing any such transfer (*ibid* at paras 180–81).

55 See e.g. Thomas Isaac & Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten? Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 *Manitoba LJ* 453; Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 *Const Forum Const* 112; Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Asch, *supra* note 36 at 75–96.

56 *Native Women's Association of Canada v Canada*, [1994] 3 SCR 627.

Each of these questions has several possible answers, with different possible outcomes, in a post-UNDRIP world. Successful UNDRIP implementation is going to require reasonable certainty, and reasonable consensus between the Crown and Indigenous peoples, about which answers to these questions are most appropriate. That, in turn, is going to require clarification and discussion of the expectations Indigenous peoples will have of the Crown, in circumstances not governed by affirmative UNDRIP obligations, once UNDRIP takes effect. Anticipating and addressing the need for such clarification and being ready to offer it proactively will demonstrate Indigenous commitment to UNDRIP implementation and reduce, if not eliminate, one potential barrier to its realization.

Conclusion

UNDRIP implementation in Canada has been a hope and a dream for Indigenous peoples here since at least 2007, the year of UNDRIP's adoption. There is at last a realistic chance of making that happen. No one knows yet when or if there will be another such opportunity if the current federal implementation initiative fails.

The purpose of this paper has been to help make the most of the current opportunity. It has identified four key issues that must be resolved for UNDRIP implementation to be successful: identification and denomination in Canada of the Indigenous peoples that are to benefit from UNDRIP rights and obligations; identification of the territorial spaces traditional to each, to which UNDRIP's land regime would apply; consideration of the means by which UNDRIP might be rendered enforceable against the Crown in Canadian courts; and consideration of what powers and responsibilities mainstream governments should retain in a post-UNDRIP Canada that features robust rights of Indigenous self-determination. And it has encouraged Indigenous proponents of UNDRIP implementation to address these issues early and proactively. At least two of these issues — called here “the who” and “the where” issues — *require* Indigenous leadership to be brought to resolution. Taking the initiative has the strategic advantages of demonstrating Indigenous peoples' commitment to, and facility at, the task of UNDRIP implementation, of helping to shape the implementation agenda and of depriving Canada of some of the reasons or excuses it might otherwise have to delay or defer implementation if it were expected to drive the process unilaterally. Proactive Indigenous engagement with UNDRIP puts Canada, and other mainstream governments, to the proof of their own intentions for UNDRIP implementation. And, at an absolute minimum, it ensures that Indigenous perspectives are front and centre in UNDRIP deliberations.

About the Author

Kerry Wilkins, a recovering government lawyer, is adjunct professor at the University of Toronto Faculty of Law. He has edited a collection of essays, and written and published a treatise and several articles, on Canadian law about Indigenous peoples. He accepts speaking engagements and submits written work for publication when he thinks he has something to say. Sometimes he's guessed right.



Conflicts or Complementarity with Domestic Systems?

UNDRIP, Aboriginal Law and the Future of International Norms in Canada



Joshua Nichols and Robert Hamilton

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹ has the potential to prompt new ways of understanding both state obligations under international law and domestic frameworks governing state-Indigenous relations. Implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol),² adopted as a supplementary agreement to the 1992 Convention on Biological Diversity (CBD)³ in 2010, serves as a useful example of UNDRIP's potential in both these

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, 46 ILM 1013 (2007) [UNDRIP].

2 *2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the 1992 Convention on Biological Diversity*, 29 October 2010 (Montreal, QC: Secretariat of the Convention on Biological Diversity, 2011) (entered into force 12 October 2014) [Nagoya Protocol], online: <www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

3 *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79, 31 ILM 818 (entered into force 29 December 1993) [CBD].

arenas. While the Nagoya Protocol has not been adopted or ratified by Canada, the tensions created by its potential adoption, as well as tensions within the Nagoya Protocol itself, illustrate how the implementation of UNDRIP in settler-colonial contexts will shape the interaction between domestic regimes and international instruments concerning Indigenous peoples.

This paper focuses on the incongruities between international consent-based norms, such as those articulated in UNDRIP, and Canada's domestic consultation framework, which continues to allow the Crown to supersede Indigenous interests on the basis of unilaterally asserted sovereign claims. These incongruities are illustrated clearly in the Nagoya Protocol, which purports to meet the standards of UNDRIP while giving prominence to domestic legal standards. A consideration of the implications of implementing the Nagoya Protocol in Canada brings these complications to the fore. In our view, the ideal legal structures supporting the Nagoya Protocol come into conflict with pre-existing systems of domestic law and the legal orders of Indigenous peoples, which are themselves often in extended conflict with domestic state legal systems. Our aim in this paper is to show, first, the tension between the domestic Canadian Aboriginal law framework and the emerging international consent-based standards and, second, to argue that the implementation of UNDRIP provides an avenue to address this tension. UNDRIP offers a possible way forward to implementing an access and benefit sharing (ABS) system, such as that envisioned in the Nagoya Protocol, that balances the rights of self-determination and free, prior and informed consent (FPIC) with Canadian territorial integrity. While we recognize that a distinct body of strictly international law rules is relevant, as are the legal traditions of Indigenous peoples themselves, space requires that we constrain ourselves to a discussion of the extent to which the current domestic framework is compatible with international law and how international norms may be difficult to meet if international instruments continue to give prominence to domestic legal regimes.

Indigenous Rights in International Law

As has been covered elsewhere in this report, UNDRIP recognizes a range of Indigenous rights, including, most importantly, the right of self-determination and an FPIC regime. UNDRIP represents the most substantive and comprehensive articulation of Indigenous rights at the international level, as it builds on rights previously recognized in international law under instruments such as the International Labour Organization Convention 169.⁴ The aim of the Nagoya Protocol is to provide a transparent legal framework for the fair and equitable distribution of benefits arising from the use of genetic resources (GR) and traditional knowledge (TK) associated with GR. In other words, this is a system for ABS. This ABS mechanism was one of the three objectives of the CBD.⁵ In addition to the GR covered in the CBD, the Nagoya Protocol also protects the use of Indigenous TK associated with GR. The overarching aim of the Nagoya Protocol is to establish clear, binding rules and procedures for obtaining prior and informed consent and establishing mutually agreed terms for the use of GR and associated TK.⁶ The Nagoya Protocol recognizes the importance of Indigenous rights in these areas, stating in its preamble that “nothing in this Protocol shall be construed as diminishing or extinguishing the rights of indigenous and local communities.”⁷ The Nagoya Protocol draws on UNDRIP, specifically in seeking to ensure that “the prior informed consent or approval and involvement of indigenous and local communities”⁸ is

4 *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (27 June 1989) (ILO No 169), 72 ILO Official Bull 59, 28 ILM 1382 (entered into force 5 September 1991). See e.g. Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (New York: Transnational, 2006).

5 The other two being “the conservation of biological diversity” and “the sustainable use of its components.” CBD, *supra* note 3.

6 *Nagoya Protocol*, *supra* note 2, arts 6, 7, 12. See also Maria Yolanda Teran, “The Nagoya Protocol and Indigenous Peoples” (2016) 7:2 Intl Indigenous Pol J 1.

7 *Nagoya Protocol*, *supra* note 2, Preamble.

8 *Ibid*, art 6(2).

attained. The Nagoya Protocol also notes the importance of UNDRIP⁹ and states that the Nagoya Protocol implementation is to be done in “a mutually supportive manner with other international instruments relevant to this Protocol.”¹⁰ Thus, in addition to recognizing Indigenous ownership of GR, the Nagoya Protocol adopts UNDRIP’s consent-based standards.

There is, however, a tension in the Nagoya Protocol’s approach to Indigenous rights. The consent-based standard and recognition of Indigenous rights is qualified in two ways. First, the protocol recognizes state “sovereign rights over natural resources.” As will be discussed below, the domestic interpretation of the content of “sovereign rights” can significantly limit Indigenous rights. Second, rights are to be understood “in accordance with domestic law.” Article 6 reads: “*In accordance with domestic law*, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained”¹¹ where access to GR is concerned. Articles 7 and 12 qualify protection of TK and Indigenous laws, respectively, in the same manner.¹² This subordination to domestic law risks undermining the very principles of consent articulated in UNDRIP if domestic regimes fall short of the consent standard. This brings to the fore an inherent tension in the Nagoya Protocol, as it recognizes UNDRIP while seeming to prioritize domestic standards that are less robust. As we will argue, however, meaningful domestic implementation of UNDRIP will require domestic regimes to shift to standards that can accommodate these more robust international norms, thus providing an avenue for resolving the tension inherent in the Nagoya Protocol and the tension between domestic and international law concerning Indigenous peoples.

TK and Rights to GR in Canadian Law

In Canada, the existing written constitutional framework relating to Indigenous peoples consists of two constitutional provisions. First, section 91(24) of the Constitution Act, 1867 vests the federal government with power in relation to “Indians and lands reserved for Indians.” This has been consistently interpreted as a power *over* Indigenous peoples. Second, section 35(1) of the Constitution Act, 1982 states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” The meaning of this provision has been subjected to almost 30 years of litigation and has given rise to a complicated and contested body of jurisprudence. No constitutional right to GR or associated TK has been recognized in Canadian law.¹³

Unless a political solution could be found — more on that below — any attempt to have rights to GR or TK recognized would have to move through the litigation process that has developed around section 35(1). The existing Aboriginal rights and title frameworks, and the duty to consult and accommodate (DCA), would play an important role. An Indigenous nation could choose, for example, to attempt to

9 *Ibid*, Preamble.

10 *Ibid*, art 4(3).

11 *Ibid*, art 6 [emphasis added].

12 *Ibid*, arts 7, 12.

13 We recognize that TK is protected in some ways in Canada. What is protected, however, is the role for TK in decision-making processes. This role is found in several regulatory regimes. As David Laidlaw notes, “Statutes referencing ATK [Aboriginal TK] fall into several categories: environmental protection, environmental assessment, oceans, land and marine conservation areas, wildlife, forest conservation, species protection including migratory birds, surface and water rights in the North, land planning in Northern Ontario, Nunavut and Eastern Manitoba, nuclear waste disposal, and game conservation plans under Modern Land Claim Agreements that include the British Columbia governments as well as Canada”; David Laidlaw, “Aboriginal Traditional Knowledge in the Courtroom” in Allan E Ingleson, ed, *Environment in the Courtroom* (Calgary: University of Calgary Press, 2018). Bill C-69, with proposed amendments to a range of important environmental laws, also includes mention of TK. The preamble seeks to integrate scientific knowledge with “the traditional knowledge of Indigenous peoples”; Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2018 (as passed by the House of Commons 20 June 2018). For a detailed analysis, see David V Wright, “Indigenous Engagement and Consideration in the Newly Proposed Impact Assessment Act: The Fog Persists” (27 February 2018), *AbLawg.ca* (blog), online: <<https://ablawg.ca/2018/02/27/indigenous-engagement-and-consideration-in-the-newly-proposed-impact-assessment-act-the-fog-persists/>>.

have a novel right to GR recognized, or to lay claim to such resources through a conventional rights claim — by asserting exclusive use and occupation rights through an Aboriginal title claim, for example. In either instance, the clash between a government activity and the asserted right would raise the strong possibility of duty to consult litigation.

The existing case law makes the recognition of a new section 35 right a difficult proposition. Under the *Van der Peet* analysis, an activity must have been “integral to the distinctive culture” of the group in question at the time of first European contact in order to be protected.¹⁴ This requires the marshalling of extensive historical evidence to demonstrate not only that an activity — say, the use of a given resource — took place, but also that such a use “made the society what it was.”¹⁵ This burden is then compounded at the so-called characterization stage of the analysis. At this stage, the court characterizes the claim to determine what right, precisely, is being sought, requiring evidence of increasingly specific historic activities to be adduced. In this analysis, a GR claim would face a significant hurdle. In self-government claims, for instance, this stage of the analysis has been employed to restrict the nature of the claim by requiring proof not of governance in itself, but of governance in relation to a specific matter, such as high stakes gaming.¹⁶ This requirement creates an evidentiary burden that is almost impossible to satisfy. Such a judicial approach could foreclose the recognition of a right to GR.

The DCA presents what at first glance seems a more favourable approach. The DCA provides a level of procedural protection not only for established claims, but also for *asserted* rights. While this has to date been applied only to asserted rights that have been recognized in other contexts (for example, hunting, fishing and title rights), there is nothing in principle to prevent Indigenous peoples from claiming consultation is owed on the basis of an asserted novel claim.¹⁷ The DCA has undoubtedly done much to further Indigenous interests. The DCA establishes a constitutional requirement that governments consult and, in some instances, accommodate Indigenous peoples not only where recognized section 35(1) rights are subject to infringement, but also where *asserted* title,¹⁸ Aboriginal rights¹⁹ or treaty rights²⁰ are potentially impacted. This has had a transformative effect, as Indigenous peoples gained a voice in development projects that, before the DCA, they could have opposed only through direct action or by litigating rights claims.

Yet, the structure of the DCA suggests this path, as well, is likely to provide protections short of those Indigenous peoples may hope for. With international norms trending toward consent, the age-old claims of Indigenous peoples to a right to determine what happens in their traditional territories have been given a new legal language — that of self-determination and FPIC. This new language sits in tension with the DCA framework. Under the DCA framework, courts determine the significance of asserted rights on a spectrum. They then determine the appropriate level of consultation, ranging from mere notice to accommodation, before determining whether consultation was adequate in the case at hand. The outcomes of this process are unpredictable and ultimately skew in favour of the Crown by ensuring that the final say rests with the Crown so long as certain procedural benchmarks are met. As the Supreme Court of Canada has repeatedly stated, consultation does not give Indigenous peoples a

14 *R v Van der Peet*, [1996] 2 SCR 507, 1996 CanLII 216 at paras 45–67.

15 *Ibid* at para 55.

16 *R v Pamajewon*, [1996] 2 SCR 821, 1996 CanLII 161 at paras 26–27.

17 See e.g. *Ka’a’Gee Tu First Nation v Canada (AG)*, 2007 FC 763, 2007 CarswellNat 2067 (“*Haida* teaches that the Aboriginal group need not prove that an asserted right exists before the obligation is triggered” at para 102).

18 *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 [*Haida Nation*].

19 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550.

20 For historic treaty rights, see *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388; for modern, see *Beckman v Little Salmon/Carmacks First Nation*, [2010] 3 SCR 103.

veto. Rather, it “is a right to a process, not to a particular outcome.”²¹ Undergirding the DCA framework is the notion that the Crown may act unilaterally in the name of the public interest despite Indigenous opposition. This raises the question of whether the current DCA framework sufficiently motivates governments to come to the negotiating table to resolve claims in the way the court seems to envision. On this point, there should be some doubt.²² Thus, while offering procedural protection for asserted claims and judicial oversight of discretionary Crown action, the DCA framework fits awkwardly with Indigenous understandings of international norms and Indigenous peoples’ own inherent jurisdiction.

This awkward fit exposes the foundational presumptions of the section 35 and DCA framework: first, Indigenous peoples exist within a sovereign-to-subjects relationship to the Crown; and, second, Indigenous peoples’ claims are only cognizable within a contingent rights/duties context. The unilateral assertion of Crown sovereignty could have vested legal powers supporting these presuppositions in the Crown only if Europeans brought to North America a system of law superior to the systems of law that already existed or if Europeans had found a legally vacant landscape.²³ In other words, while the DCA framework does open up the possibility of Indigenous participation, it relies on a foundational logic that can only be supported by the doctrines of discovery and *terra nullius*. Although attenuating some of the more damaging features of these doctrines, the DCA incorporates these notions of European legal superiority, thereby relying on a racist ideology and pernicious legal fiction that is widely considered illegitimate.

The Supreme Court of Canada seems aware of this. In *Haida Nation*, the court made the unusual decision to bring Crown sovereignty into question, labelling Crown sovereignty as *de facto*.²⁴ This labelling is evidently meant to draw a distinction between *de facto* and *de jure* (that is, factual and legal) sovereignty. The implication seems to be that the Crown lacks legal sovereignty. This could only stem from an acknowledgement that the Crown’s claims to legal sovereignty on the basis of discovery are insufficient in themselves to establish legal sovereignty. As Ryan Beaton helpfully points out, however, there seems to be a logic to the court’s move here, suggesting that the issue for the court may be one of legitimating Crown sovereignty through judicial oversight. Beaton calls this framework “judicially mediated sovereignty.”²⁵ Although this description is apt, the issue of legitimacy remains. A Canadian court upholding the unilateral authority of the state must also uphold the continuing effects of the doctrine of discovery and, in doing so, undermine the court’s own claims regarding constitutional legitimacy.

This tension highlights the cost of retaining a sovereign-to-subjects model of contingent rights. The existing process allows the courts to determine what rights are owed protections and where accommodation is required. This process, in turn, encourages the Crown to adopt a strategy of continual litigation, as governments have typically been hesitant to give away more than the courts have required them to. The problem is that the DCA framework does not provide certainty and offers the Crown little incentive to come to the negotiating table. Indigenous peoples often do not see the process to be fair and equitable and, as a result, have no motivation to accept decisions. Despite its success in some instances, in many others, this expansive system of procedural legitimation is little more than a recipe for extending conflict between the parties, thereby propagating an environment of uncertainty.

21 See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 83.

22 We have elaborated on these points elsewhere – see Robert Hamilton & Joshua Nichols, “Reassessing the Reconciliation Basket: *Ktunaxa Nation* and the Foundation of the Duty to Consult” (2019) [forthcoming].

23 See John Borrows, “The Durability of Terra Nullius: *Tsilhqot’in Nation v British Columbia*” (2015) 48:3 UBC L Rev 701.

24 *Haida Nation*, *supra* note 18.

25 Ryan Beaton, “De facto and de jure Crown sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada” [unpublished draft paper].

This resulting uncertainty has a direct bearing on any prospective ABS system, as such a system would need to offer parties procedural clarity and legal certainty in order to be seen as a legitimate way to resolve issues involving GR. As it currently stands, claims to GR could be subject to litigation through the existing DCA framework where Indigenous rights are at issue in the domestic context. As outlined above, the DCA framework is ill-suited to the task for two reasons: first, if protection for TK and GR were framed through the lens of currently recognized section 35(1) rights (for example, title, harvesting rights and so on), these rights would be subject to consultation standards that may fall short of international norms and may provide little by way of certainty; and, second, the extension of the DCA to novel rights (i.e., GR are not articulated as one of the groups of rights recognized to date) is speculative at best. The spectrum analysis would presumptively frame such novel claims as having a low likelihood of success, thereby requiring the bare minimum level of consultation (i.e., notice).

Can the domestic Aboriginal rights system be amended to resolve these problems? One response is that, yes, it can, but this requires a foundational change of the DCA framework to reflect Indigenous aspirations for greater self-determination and to create a greater motivation for state governments to negotiate jurisdiction with Indigenous peoples. The vision, then, would be one that moves away from the sovereign-to-subjects model of contingent *rights* and replaces it with a nation-to-nation model of negotiated *jurisdiction*. This, we argue, is what is required if UNDRIP is to be meaningfully implemented and if the domestic system is to align with international norms.

UNDRIP and a Nation-to-Nation Framework for Negotiation

The existing section 35 framework is predicated on the notion that Indigenous peoples are subjects of the Crown and so can only lay claim to a set of residual rights. This seems to fit into the usual narrative of consent and contract that undergirds liberal democracy, which lumps the various individuals and groups within a defined territory into the curious amalgam referred to as “*the people*.” This picture of state formation is what informs the court’s repeated concern that Indigenous peoples should not be given a veto. In other words, the fear of Indigenous peoples having a veto is a bugbear that is produced by the assumption that the nation-state is the only model of political association. The problem with this picture is, as Stephen Tierney notes, “Mistaken assumptions about the unitary nature of ‘the people’ can generate constitutional models which fail to accommodate the specific political needs of different *peoples* within the state.”²⁶ Tierney’s analysis highlights a background assumption concerning the basic structure of a state that is responsible for much of the conflict with Indigenous peoples: the only possible form of the state is the unitary nation-state. Once this proposition is set in place, it drives the compulsion to fit Indigenous peoples into a sovereign-to-subjects framework.

The problem in settler states is that the relationship between the ideal model of the liberal democratic nation-state and the historical reality of settler colonialism cannot be bridged. There is no plausible account of Indigenous peoples consenting to enter into a sovereign-to-subjects relationship. By recognizing Indigenous self-determination and the principles of FPIC, and by rewriting the role of Indigenous peoples as actors in the international arena, UNDRIP challenges these legal relationships.²⁷ But, can the domestic system be reformed so as to reflect UNDRIP’s substantive rights, thereby resolving the tension apparent in documents such as the Nagoya Protocol? Our view is that the single most important step to giving life to the legal pluralism envisioned in UNDRIP is to ensure that contested claims between the parties are subject to negotiation.²⁸ Domestic courts can facilitate this by ensuring that their doctrines effectively

26 Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford, UK: Oxford University Press, 2004) at 13.

27 See e.g. Matthew Gonnella, “If You Are Not at the Table, Then You Are Probably on the Menu: Indigenous Peoples’ Participatory Status at the United Nations” (2018) 41 *Suffolk Transnat’l L Rev* 145.

28 For legal pluralism in UNDRIP, see Gordon Christie, “Indigenous Legal Orders, Canadian Law and UNDRIP” in Oonagh Fitzgerald & Risa Schwartz, eds, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, CIGI, Special Report, 31 May 2017, at 49.

compel negotiated solutions. While the Supreme Court of Canada has often identified negotiation as the highest goal, its assumption of the sovereign legitimacy of the state and the sovereign-to-subjects model as the only possibility has undermined that possibility. If, instead, the court followed its own reasoning in the *Secession Reference*, which acknowledged the limitations of the court's jurisdiction and offered the parties a legal procedure for negotiating their dispute, negotiated solutions that reflect the self-determination of both parties would become the reality.²⁹ This would ultimately lead to legal certainty while bridging the gap between Canada's international obligations and domestic law.

A shift is necessarily required in the court's interpretation of Canada's Constitution as the court can no longer base its interpretation of section 35(1) on either a unilateral model of federal power grounded in section 91(24) or a generalized claim to the Crown (in all of its various manifestations) possessing underlying sovereignty. Rather, section 91(24) must be limited to embodying a federal power to negotiate with Indigenous peoples, which, in turn, means that section 35(1) must be read as being jurisdictional in nature. Section 35(1) is outside of the Charter and so should not be interpreted as a species of rights subject to the limitations of either section 1 or section 33. This interpretation is otherwise known as the third order of government interpretation of section 35, a model that Indigenous leaders negotiated toward in the 1992 Charlottetown Accord.³⁰ In effect, this model amounts to the removal of one set of international legal norms (i.e., discovery, *terra nullius*, divine right and so on) and its replacement with a set that is predicated on consent.

This shift in constitutional interpretation necessarily alters the DCA framework as the court can no longer determine when unilateral Crown infringements are justified. The duty is then reworked in order to compel negotiation on the basis of jurisdiction. Compelling negotiation on the basis of jurisdiction requires removing discrete rights as the basis of the claims and reframing the claims as jurisdictional issues. In effect, the duty to consult is converted into a duty to negotiate.³¹ This model takes advantage of the strengths of the previous DCA framework, as it can still respond to issues of asserted jurisdiction and so can quickly and flexibly respond to conflicts, but the remedies available are limited to retaining good faith negotiations between the parties. Bargaining power would be more evenly distributed among the parties, thereby providing more impetus toward negotiated settlements than in the current framework. While constitutional reinterpretation may seem a daunting task, we should note that negotiated jurisdictional settlements are already common in Canada. While not all of these agreements fully dispense with the harmful residues of unilateral sovereign authority, many represent the kinds of negotiated jurisdiction advocated for in this paper. Our purpose here is to suggest an avenue for judicial doctrine to support the further development of the kinds of solutions that are already being explored in some circumstances.

Conclusion

In sum, the tensions apparent in the Nagoya Protocol, which calls for a consent-based model while requiring consistency with domestic law, could undermine attempts to implement the substantive vision the protocol espouses. In contrast, the decolonized version of Canada's constitutional machinery that we outline here provides a complementary legal environment for an ABS system. It does this by clarifying the identity of the stakeholders and thereby offering the possibility of clear legal procedures and dependable legal certainty. UNDRIP implementation can guide the shifts in domestic law required to bring about these changes. Other contexts, those in settler-colonial states in particular, will face similar types of challenges. The task of re-articulating the role of Indigenous peoples in the constitutional structure of federated liberal democracies might follow a logic similar to that outlined here.

29 *Reference re Secession of Quebec*, [1998] 2 SCR 217.

30 The Charlottetown Accord was, of course, rejected by public referendum. See Philip Resnick, "The Crisis of Multi-National Federations: Post-Charlottetown Reflections" (1994) 1 *Rev Const Stud* 189.

31 We expanded on the shift to a duty to negotiate in Hamilton & Nichols, *supra* note 22.

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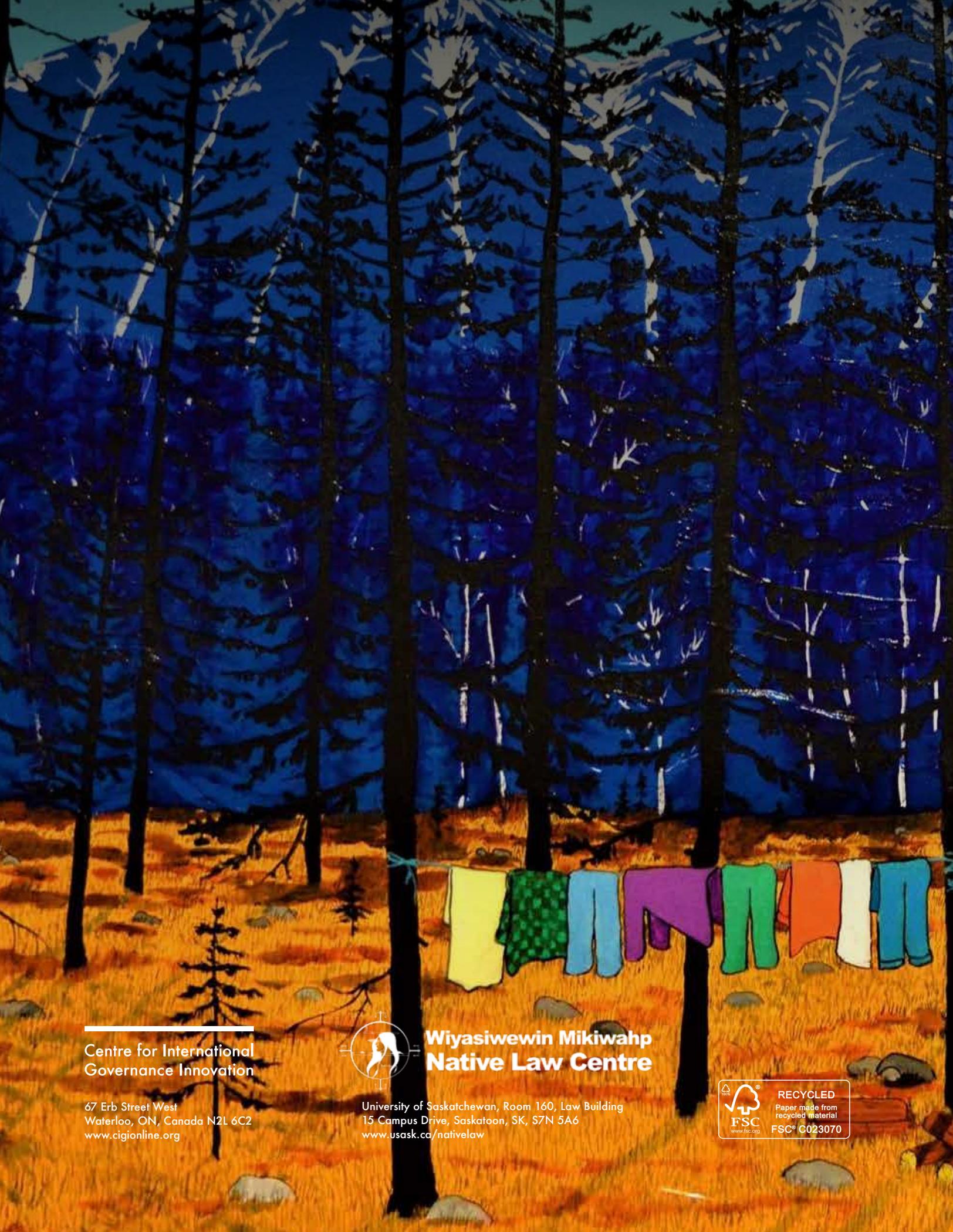
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