

United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The Long Road to Implementation

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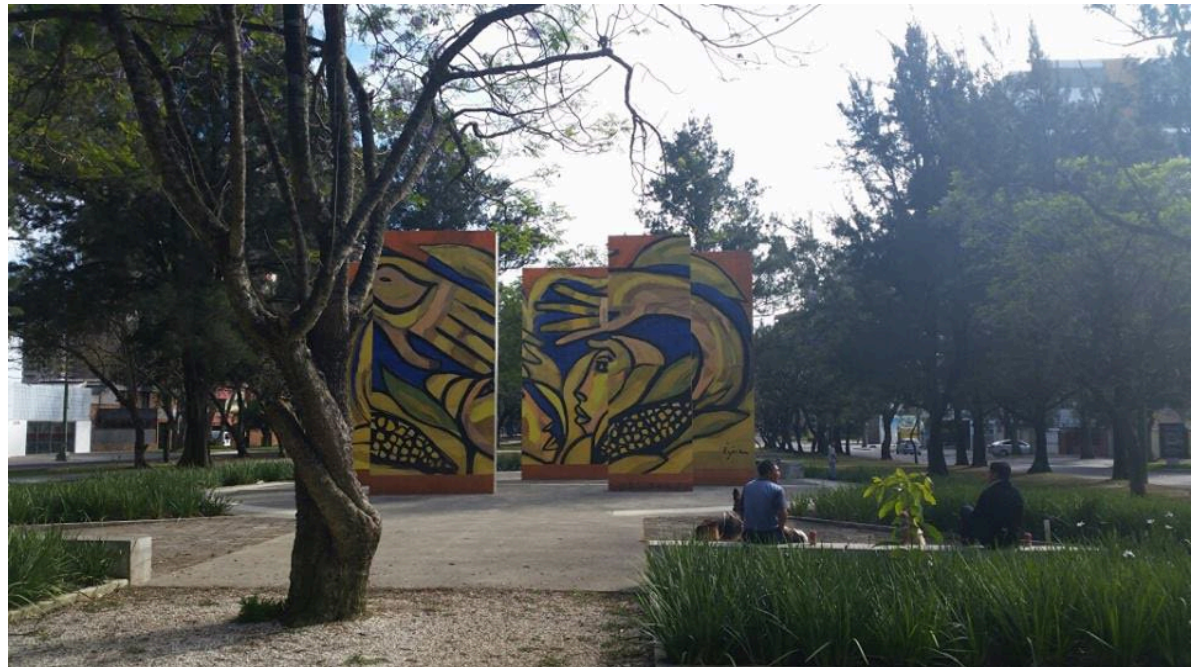
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Presentation

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- A. History and content
- B. UNDRIP and Canadian law
- C. Implementation
- D. Questions



A. History and Content

Historical Background

- Only Indigenous specific international instrument
- Adopted by the UN General Assembly on 13 September 2007
- Negotiated for two decades by Member states and Indigenous peoples
- International willingness to counter discrimination against Indigenous people and to promote their participation in issues that concern them
- Canada was one of the four (4) countries who refused to endorse its adoption



A. Content

- Self-determination : **s. 3, 4, 5 and s. 14**
- Participation in decision making, laws : **s. 18, 19.**
- Right to development: **s. 23, 29.**
- Free, prior and informed consent : **s. 10, 19, 28 and s. 32**
- Culture, languages, traditional knowledge, medicines : **s. 11-14, 24 and s. 31**
- Spirituality: **s. 12, 25, 36.**
- Lands : **s. 26-28.**
- Customary law: **s.9, 11, 12, 26, 27, 33, 34, 40.**
- Rights of cross-borders nations: **s.36.**



A. Content

- Respect for treaties : **s. 37**
- Obligation to implement: **s. 38.**
- Right to have access to financial assistance for enjoyment of rights: **s. 39.**
- Conflict resolution including customary law: **s. 40.**
- Equality of women and men: **s. 44.**
- Cannot affect territorial integrity of States: **s. 46**
- Limitation on rights : by law and required for respect for others and just requirements of democratic society: **s. 46.**

A. Canada's late unqualified support of UNDRIP

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- Support in 2010
- “Aspirational” document according to Harper
- Full support given by Caroline Bennett, Minister of Indigenous affairs
- Implementation through s. 35
- Trudeau government is in favor of implementing UNDRIP



B. UNDRIP and Canadian law

Is it mandatory for states to respect UNDRIP?

- UNDRIP is not a treaty, but a resolution of the UN General Assembly
- However not merely “aspirational” : UNDRIP has legal effects and creates clear duties to states
- Elements of UNDRIP which are international customary law apply directly into Canadian law as law



B. International Customary Law

- Definition of Customary law: Practices accepted as being mandatory by states
- Requires:
 - Material aspect
 - Psychological aspect

R. c Hape SCC : “Prohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action. ” (par. 36)

- **Parts of UNDRIP are customary international law, therefore mandatory**

B. Also an Interpretative tool

- “Declarations [...] [are] relevant and persuasive sources for interpretation – Chief Justice Dickson (1987)
- “Aboriginal right to use their own traditional medicine and health practices fulfill article 24 of UN Declaration” – *Hamilton Health Science Corp. v. D.H.*
- “International instrument such as UNDRIP [...] may also inform the contextual approach to statutory interpretation” – *First Nations Child and Family Caring Society of Canada v. Canada* 2016



B. Interpretative tool

- Tool not used often by courts (yet)
- NO: *Ktunaxa Nation v. BC* SCC 2017
Chippewas, Clyde River
- YES: *Mitchell* SCC 2001, *Hupacasath*
FC 2013, *Sayers* O CJ 2017,
Nunatukavut FC 2015 RRDC YKSC
2017
- Lack of receptivity by judges or
disinterest of litigants for international
tools?



B. Differences with Canadian law?

What impact will implementation in Canada have? Are there differences w/ Can law?

- Respect for culture, traditional knowledge, traditional practices
- Respect for Indigenous customary law
- FPIC for legislative measures
- ***Test for Aboriginal rights**
- ***Free prior and informed consent re: projects on Aboriginal lands**

B. Differences? Aboriginal Rights

- S. 35 Constitution 1982: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”
- *Van der Peet*: a modern practice has continuity with a practice that was integral to the distinctive culture at contact with the Europeans
- Rigidity of ancestral rights

B. Differences? Aboriginal Rights

- Article 26 UNDRIP:
- Right to own, use, develop and control land and resources that ***traditionally occupied used or otherwise acquired***
- Inter-American decisions Awas Tingni : flexible
- Interpretation tool could confer *Van der Peet* test some flexibility



B. Differences?

Duty to consult

- Aboriginal rights or Aboriginal title cases are very long and costly
- Land claims negotiations are not progressing
- Hence most conflicts/ interactions re: land occur in a situation of uncertainty
- What happens when Aboriginal rights have not yet been proven or treaty is vague?
- Example: pipeline, mine, fishing regulations



B. Differences?

Duty to consult

- Crown's duty to consult and accommodate in Canadian law (*Haida, Taku River, Delgamuukw*)
 - *The source* : Honor of the Crown, s. 35
 - *When it arises* : knowledge of a potential right
 - *Scope of the Duty* : Strength of the case, seriousness of the potential impact
 - *Content of the duty*:
 - good faith and address concerns
 - May require accommodations and consent in certain cases if rights proven and serious potential impact

B. Differences?

Duty to consult

- Principle of “FPIC” in UNDRIP (Articles 10, 11(2), 19, 28(1), 29(2) and 32(2)) UNDRIP provides a veto to Indigenous peoples?
 - S. 32(2) : “States consult and cooperate in good faith in order to obtain their free and informed consent prior to the approval of any project”
 - James Anaya, UN Special reporter on Indigenous Human rights’ point of view : **generally not Veto**
- Both require good faith, accommodation with the objective of obtaining consent
- Slight difference on emphasis
- UNDRIP FPIC is consistent with Canadian law

C. Implementation

- Federal Consultation and Implementation initiatives
 - Expert Panel report
 - Discussion Paper
 - Bill C-69
- Measures to increase the participation of indigenous peoples in the decision-making of projects that affect their rights

C. Implementation

- Establishment of Ministers' Working Group to Review Indigenous-Related Laws and Policies
- Release of Principles Respecting the Government of Canada's Relationship With Indigenous Peoples
 - Principle 6 addresses FPIC directly



C. What if UNDRIP was Implemented as a Statute?

- Bill C-262 by Romeo Saganash (NDP)
- Key demand of the Truth and Reconciliation Commission
- Federal government supports the Bill
- Wednesday, February 7, 2018 passed second reading 217-76
- Goes to Committee

C.Key provisions of Bill C-26

Bill requires

- UNDRIP is recognized as a universal international human rights instrument with application in Canadian law.
- The government must, in consultation and cooperation with Indigenous Peoples in Canada:
 - take all measures to ensure that the laws of Canada are consistent with UNDRIP.
 - develop and implement a national action plan to achieve the objectives set out in UNDRIP
- The Minister of Indian Affairs and Northern Development to report annually to each House of Parliament on above two points

C. Impacts of Bill C-262

- Binds only the federal government
- Laws will need to be consistent with UNDRIP
- Federal gov does not need to adopt new laws
- Will force courts to integrate UNDRIP
- Still is only a Declaration
- Will no doubt have an important impact on the recognition of UNDRIP



C. International UNDRIP Implementation

- Legal reforms since the adoption of UNDRIP: combination of constitutional recognition and specific legal instruments to **protect Indigenous rights**
- **Examples:**
 - Protection through Constitution : Ecuador (2008), Bolivia (2009), Kenya (2010), Sweden (2011) and El Salvador (2014)
 - Statutes to protect indigenous rights : Bolivia transposing UNDRIP has a national law, Congo (2011) adopting a law to protect and promote the rights of indigenous peoples
 - Sectoral laws on specific indigenous peoples : Peru, Colombia, Honduras, Costa Rica, Colombia, Honduras, Ecuador.



C. International UNDRIP Implementation

- Positive trend to use the Declaration as a source of law
 - Supreme Court of Belize relied in part on UNDRIP in a case that affirmed rights of Maya people
 - Inter-American Court of Human Rights used UNDRIP in its ruling on Samaraka people in Suriname
 - Waitangi Tribunal and courts in New Zealand used UNDRIP to reinforce the Treaty of Waitangi,
 - The African Commission Human and People's rights in *Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, *African Commission on Human and Peoples' Rights v. Republic of Kenya (the Ogiek peoples)*



C. International UNDRIP Implementation

- Effective policies consistent with UNDRIP's principles
 - National Aboriginal and Torres Strait Islander Health Plan 2013-2023, Australia
 - Whanau Ora policy in New Zealand
 - Bilingual intercultural education programme in Panama
 - Policies for the protection of indigenous peoples in isolation and recent contact in Bolivia and Ecuador
 - El Salvador adopted a national policy on indigenous peoples that considers the Declaration as its framework



C. Implementation in my practice

- First Nations mention it consistently
- Perception that it emanates from First Nations (whether s.35 decisions are still from an outside legal system)
- Used to push for legal reform (ex environmental legislation)
- Negotiations, agreements
- Litigation (should be easier with C- 262)



C. Implementation in my practice

- Protection of traditional knowledge, medical knowledge, repatriation of cultural artefacts, protection of Indigenous languages
- Customary law
- FPIC (projects – mining, Energy East, hydro)

D. Questions?

