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Advancing Reconciliation and Implementing the *United Nations Declaration on the Rights of Indigenous Peoples* in the Northwest Territories

Presentation to the Special Committee on Reconciliation and Indigenous
Affairs of the Northwest Territories Legislative Assembly

Nuri Frame, April 14, 2021

Outline of Presentation

- Overview of the *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”)
- Implementing UNDRIP in the Northwest Territories (“NWT”)
- UNDRIP and the NWT Modern Treaties
- Moving Towards Models of Consent
- Conclusions and Key Takeaways
- Questions



Overview of UNDRIP

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- “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.”
 - UN 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)
- UNDRIP is grounded in a broader context of Indigenous self-determination.
- UNDRIP builds from other human rights treaties but is significantly different in explicitly drawing on Indigenous peoples’ own legal traditions, customs, and institutions.

Aspirational Does Not Mean Unattainable

- UNDRIP is often characterized as an “aspirational” declaration.
- Implicit in this terminology is the suggestion that the commitments and objectives of UNDRIP are “pie-in-the-sky” or are unrealistic, feel-good statements and platitudes.
- Aspirational documents may articulate aims and objectives that are not immediately and unequivocally achievable today, but they serve an essential purpose in helping to guide future decision-making and provide a lens through which to begin making transformational change.
- The fact that a destination cannot be immediately reached—or may never be entirely reached—does not delegitimize the importance of being on the right path and headed in the right direction.



Implementing UNDRIP in the NWT

Models of Governance and Legislative Co-Development

- At the core of UNDRIP are concepts of Indigenous self-determination and agency with respect to their own governance and decision-making processes, as well as agency with respect to decisions that materially impact them.
- The NWT is at the forefront of developing innovative and consensual modes of collaborative governance, where Indigenous governments and public governments operate cooperatively and in a spirit of consensus in order to confront shared problems and address shared interests.
- Recent developments, including the development of legislation during the prior Legislative Assembly and the signing of the Intergovernmental Council (“IGC”) Legislative Development Protocol in December 2020, are models for effective ways to attain the objectives of UNDRIP in a nuanced, “made-in-the-North” way that respects the unique political realities of the NWT.

Building on Current Successes: If It Ain't Broke, Don't Fix It

- The NWT is currently set on a path towards a more fulsome respect for Indigenous governance and Indigenous self-determination—both for Indigenous communities themselves and as active participants in spaces previously reserved for “public government.”
- Don't start by focusing what is being done “wrong” and trying to fix it—focus on what is being done “right” and identify ways to build on it. And in the NWT, a lot is being done right.
- UNDRIP creates a risk of abandoning nascent efforts towards a collaborative model of governance in the NWT in favour of a more “dramatic” legislated approach. This is to be avoided.
- While UNDRIP's significance cannot and should not be understated or minimized, efforts to implement UNDRIP in the NWT should find their foundation in current successes and should identify ways to build on those successes.

Actions Speak Louder Than Laws

- Prioritizing a legislative approach to UNDRIP, and the principles and aspirations therein, risks drawing focus and energy away from the essential work of making operational and policy shifts throughout government and throughout society that accord with UNDRIP's overall aims.
- Implementing UNDRIP in the NWT should focus on developing more collaborative solutions and creating more consensus-based spaces in which policy and regulatory areas of shared interest and concern can be developed between Indigenous and public governments.
- Don't legislate an action plan. Start taking action—and that will help to plan for future legislation.



UNDRIP and the NWT Modern Treaties

The Modern Treaty Relationship and the Path to Reconciliation

- The objective of modern treaties is to advance reconciliation and foster a positive long-term relationship between Indigenous and non-Indigenous peoples.
- Treaties provide the foundation for a relationship based on partnership, collaboration, and co-management.
- The Supreme Court of Canada has been clear that good faith negotiations and honouring the treaty relationship is the preferred way for the Crown to achieve lasting reconciliation with Indigenous peoples.

UNDRIP and the Modern Treaty Relationship

Key Provisions of UNDRIP, Preamble:

- *Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States, [...]
- *Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,
- *Considering also* that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States, [...]

UNDRIP and Modern Treaty Implementation

UNDRIP, Article 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.
- 2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Modern Treaties in the NWT

- The four completed modern treaties—Inuvialuit, Gwich'in, Sahtu and Tlicho—together form one of the central pillars of Crown-Indigenous relations in the NWT. These are augmented by self-government agreements in Déline (and soon elsewhere) and other modern treaties that are nearing the end of negotiations.
- Fully realizing the promise, the spirit and intent of these modern treaties, along with the treaties and self-government agreements that are being negotiated now, needs to be a main thrust of any effort to implement UNDRIP and to make the commitments set forth therein more than aspirational “motherhood statements.”

Modern Treaty Implementation

- Signing the treaty is only one step towards reconciliation.
- The Crown has a duty to act honourably in implementing its promises and must work to build its relationship with its Indigenous treaty partners.
- “The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.”

–*Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 52, [2010] 3 SCR 103 at para 62.

Enforcing and Implementing Treaty Promises

- Implementation is where the rubber meets the road in the modern treaty context.
- Historically, negotiation of modern treaties has received significantly more attention—and resourcing—than implementation of modern treaties.
- There is an urgent need for a whole-of-government approach to proactively implementing the spirit and intent of modern treaties.
- The analysis needs to shift from “what do we have to do?” to “what more can we do?”
- The need for this shift is particularly acute with respect to treaty promises and self-government powers that have associated costs or otherwise have fiscal implications.

Operationalising and Financing Social Programs Pursuant to Self-Government Agreements

- 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. – UNDRIP, Article 4
- Supporting Indigenous governments in effectively drawing down self-government powers with respect to “social envelope” jurisdictions in a daunting task.
- Fiscal realities in the NWT create countervailing pressures that discourage proactive steps towards fulfilling economic commitments and realizing Indigenous jurisdiction over social envelope jurisdictions.
- Shifts in fiscal relations between the Federal, Territorial and Indigenous Governments are essential to ensure self-government is meaningfully funded and does not end up as the “empty shell of a treaty promise.”

Overcoming Obstacles to Treaty-Making

- Principles of self-determination and self-government necessarily require acknowledging that the interests and aspirations of Indigenous Nations vary from one to the next.
- Accordingly, effective modes of treaty negotiation and treaty-making need to be flexible, context specific and, to the extent necessary, iterative.
- Successful modern treaty-making will require moving to adopt new perspectives on what “certainty” means and if it is even required.
- Treaty-making should be based on consensual, overlapping spheres of jurisdiction and collaborative modes of governance.
- There is a need to shift away from pre-determined mandates and into significantly more interest-based models of negotiation.



Moving Towards Models of Consent

UNDRIP and Free, Prior and Informed Consent (“FPIC”)

Key FPIC Provisions in UNDRIP, Article 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 mineral, water or other resources.”

Article 19:

- “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their **free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.”

FPIC Is Not a Dirty Word

- Much of the critical discourse around UNDRIP has focused on the principle of FPIC.
- FPIC is (mis)characterized as being unrealistic, impossible, and at odds with prevailing legal and constitutional norms in Canada. These fears are misplaced.
- Indigenous consent is not a “yes or no” question or a decision made at a single point in time, nor is implementing consent a one-time process.
- “Veto rights” are not embedded in UNDRIP. And developing processes that allow parties to reach consent—and consensus—is a mechanism for de-risking industrial development and mitigating, rather than amplifying, conflict.

Moving Towards Models of Consent

- Working towards Indigenous consent requires developing legitimate, good faith processes of decision-making that have a meaningful role for Indigenous communities.
- Consent needs to be understood as consent “not to be unreasonably withheld.” Moving towards models of consent, particular with respect to resource development, should not be understood as opening the door to capricious or arbitrary decision-making by Indigenous governments.
- New approaches toward regulatory approvals are needed. Opportunities to engage with Indigenous governments earlier in the process—through legislative co-development, land use planning, and other mechanisms—will facilitate the development of an environment that is amenable to seeking consent (and getting consent).

Moving Towards Models of Consent

- Consent in UNDRIP is about:

“establishing, maintaining, and revising good processes over the longer term and building trust in a complex and diverse Canada. Developing an appropriate consultation process, with buy-in from all levels of government, including Indigenous communities, could transform profoundly the prospects for economic growth for Indigenous and non-Indigenous Canadians alike. It matters immensely to Canada’s efforts at reconciliation. Good policy in this area must be built on sound understandings, careful legal work, and meaningful engagement and relationship-building.”

–Newman (2017)

FPIC: The NWT is Already Getting There

- Despite the apprehension that the notion of FPIC creates, we are already partway there in the NWT.
- The various collaborative mechanisms discussed earlier, both through modern treaty negotiations and implementation and through collaborative modes of governance and legislative development like the IGC, are manifestations of this principle in action.
- As discussed throughout, the NWT is already drawing the map, the work to be done from here is simply maintaining the course towards the destination.



Conclusion

Questions

- Questions and discussion