



IMPLEMENTING THE UN DECLARATION

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Why a declaration on the rights of Indigenous peoples?

- 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,
- concerned that indigenous peoples have suffered from historic injustices as a result of their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests
- convinced that the recognition of the rights of indigenous peoples in this declaration 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
- Solemnly proclaims the following UN Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect

Thematic clusters of rights

- Right to equality & non-discrimination & Indigenous women's, children's & elders' rights
- Self-determination / self-government and Indigenous institutions
- Life, integrity & security
- Right to culture, religious & linguistic identity
- Right to education, public information, media
- Right to participate in decision making & FPIC
- Economic, social rights – including employment, health
- Right to lands, territories and resources
- Treaties, agreements and other constructive arrangements

Understanding the rights

- Build on existing human rights treaty obligations (FPIC is recognized in CERD, ICCPR)
- Ground in Indigenous laws (rights to lands, territories and resources can only be understood by looking how Indigenous peoples own laws say on the where, the what, the how)
- The rights apply equally to men & women (article 44),
 - need to ensure that a gendered approach to implementing all provisions,
 - specific reference to Indigenous women's participation in decision making
 - need to address violence against Indigenous women.

Canada's obligations

- As a human rights instrument, Canada is obligated to implement the UN Declaration
- UN Declaration sets out the basic, minimum standards
- Human rights are indivisible and interdependent: one set of rights cannot be enjoyed fully without the other
- UN Declaration has a non-derogation clause (article 45): Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

How international law applies in Canada

- **Human Rights Treaties (Convention on the Rights of the Child):** must be implemented through domestic legislation either implicitly or explicitly.
 - *Unimplemented treaties may still have legal effect*
- **Customary international law:** generally applies directly, unless law expressly states otherwise
 - *Where the rights contained in UN Declaration express rules of customary international law, these protections are binding on Canada and are directly enforceable in courts even without any legislation implementing the UN Declaration*
- **Presumption of conformity:** courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result
 - Applies to interpreting the Charter, statutes, common law
 - Includes obligations in soft law like the UN Declaration
 - legislature is expected to respect values & principles enshrined in international law

Options to implement the UNDRIP

- Legislation
 - Expanding the interpretation of s. 35 (reconsidering *Van der Peet & Sparrow*)
 - Litigation
 - Negotiation
 - Nation action plan
 - Indigenous government implementation
- → *it is important that implementation (or domestication) upholds the international standards – as grounded & understood in accord with Indigenous law*

Court decisions

- Canadian courts have applied the UN *Declaration* often through the presumption of conformity in a range of applications including interpreting ministerial powers and legislation
 - *R v Francis-Simms*, the Ontario Court of Justice cited the UN *Declaration* to interpret the idea of harmony that was discussed in *Gladue* and the requirements to use alternatives to incarcerations
 - There seems to be growing consensus that the UN *Declaration* can be used to interpret domestic law. For example, in *Nunatukavut Community Council Inc. v. Canada (Attorney General)*, Justice Strickland recognized that the UN *Declaration* “may be used to inform the interpretation of domestic law
- BUT....
 - Continue to find basic errors of international law in some decisions where the UN *Declaration* is cited but not applied by the Court
- OR....
 - Court notes that the UN *Declaration* was pleaded by the one of the parties, but where the court does not proceed to apply it in its decision
 - → this is the most frequent result

Legislation

- Recent federal legislation refers to UN *Declaration* in the preamble
 - *Indigenous Languages Act* preamble states “Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples, which affirms rights related to Indigenous languages
 - *Act respecting First Nations, Inuit and Metis children, youth and families* also includes a reference to the UN Declaration, s 8(c) purpose of the Act is to “contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.”
- Provincial legislation
 - *Manitoba Path to Reconciliation Act*
 - *BC DRIPA*

Why Bill C-15

- clarifies that the UN *Declaration* applies in Canada.
- requires the government to take action to ensure all laws in Canada are consistent with the UN *Declaration*.
- requires the government to develop and implement a national action plan to achieve the ends of the UN *Declaration*.
- requires Canada to report annually to Parliament on the implementation of the national action plan and the measures taken to ensure consistency of Canadian laws with the UN *Declaration*.
- clarifies that the Act does not diminish or extinguish any rights recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*.

steps to implementation

- Learn what the standards are –
- See which rights fall within the jurisdiction of NWT
- Review existing laws & policies & practices
- Work with Indigenous peoples to make a plan to address areas where standards are not

Opportunities of Implementation

- Move beyond us & them mentality
- Indigenous peoples are Canada's partners in confederation, this is a benefit not a burden
 - *Move beyond viewing Indigenous peoples as “problems” to contend with; “issues” to be resolved, and “risks” to be managed*
- Recognize Indigenous peoples are founding partners – decision makers (not stakeholders) over their lands, territories and resources
- Bringing together Canadian, international and Indigenous law
- Legislative framework: Bill C15 (BC legislation)
- Address gendered aspects of colonialism
- Achieve reconciliation by shifting / renewing the relationship including Treaties and the treaty relationship

Implementation Challenges

- Understanding UN Declaration in context of intl human rights law
- Understanding international legal character of UN GA resolutions
- Many lawyers and judges do not understand the relevance of international law domestically in Canada
- Moving beyond rhetoric of supporting principles to changing how government operates
 - *Will Canadian governments take necessary steps to ensure that Indigenous peoples are involved in decision making where their rights are specifically & especially impacted?*
- Government employees need training & clear direction from Ministers, ADMs, etc
- Ensure Indigenous women are involved in the process, including their perspectives & issues
- Moving beyond dichotomy of civil & political rights versus economic, social and cultural rights.

Resources

- Implementing the UN Declaration on the Rights of Indigenous Peoples Handbook for Parliamentarians:
<https://www.un.org/esa/socdev/publications/Indigenous/Handbook/EN.pdf>.
- Independent Monitoring Mechanism for the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/New Zealand:
<https://www.ngatikahu.iwi.nz/sites/default/files/2019%20Monitoring%20Report%2016Jul19.pdf>.
- Indigenous Navigator: <https://indigenousnavigator.org/>.
- Handbook on Understanding and Implementing the UN Declaration:
https://www.indigenousbar.ca/pdf/undrip_handbook.pdf.
- EMRIP studies (FPIC, lands, participation, culture):
<https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/AnnualReports.aspx>.