Congress of Aboriginal Peoples

United Nations Declaration of the Rights of Indigenous Peoples Implementation Off Reserve in Canada

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Executive Summary

This report discusses the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in Canada. It situates the Congress of Aboriginal Peoples' role within the context of international advocacy and unpacks the relationship between off reserve Indigenous peoples and UNDRIP. CAP's ten provincial and territorial organizations have voiced the importance of UNDRIP, so it is crucial that CAP understand its options for engaging with government and other stakeholders as UNDRIP is implemented.

UNDRIP has the potential to affect all policy at the federal, provincial, and territorial levels. UNDRIP also addresses all key priority areas of CAP's advocacy and its momentum will only grow in the coming years.

The key findings of this report are as follows.

- UNDRIP recognizes that Indigenous peoples' rights are rooted in Indigenous peoples' own legal traditions, rather than a colonially imposed legal regime that defines Indigenous rights according to European understanding of law.[1]
- If fully implemented, UNDRIP could empower Indigenous peoples in ways that the Canadian Constitution hasn't: by recognizing ongoing systemic injustice and the Indigenous right to self-determination.
- As the details of UNDRIP implementation are negotiated, CAP has a significant opportunity, as well as a tremendous responsibility, to ensure that the rights of off reserve Indigenous peoples are protected and strengthened.

This March 2020 CAP report, "United Nations Declaration on the Rights of Indigenous Peoples Implementation Off Reserve in Canada," will inform the organization's ongoing advocacy work to improve the lives of off-reserve Indigenous peoples. It represents the results of in-depth research on international advocacy and includes analyses of emerging challenges to the meaningful implementation of UNDRIP. For more information on the relationships between health, housing, child welfare, criminal justice, the environment, international advocacy, and language and culture, please see the other March 2020 CAP policy research reports.

[1] Hannah Askew, *UNDRIP Implementation, More Reflections on the Braiding of International, Domestic and Indigenous Laws Special Report,* Centre for International Governance Innovation 2018 Special Report at page 85.

Key Articles of UNDRIP for CAP's Advocacy Work

As Canada begins to implement UNDRIP after becoming a signatory in 2016, certain articles may provide a useful framework for CAP's advocacy and engagement:

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 6: Every indigenous individual has the right to a nationality.

Article 14:

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 18: Indigenous peoples have the 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.

Article 23: Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 33:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 38: States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39: Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Introduction

When Prime Minister Justin Trudeau was elected in 2019, his mandate letter to Minister of Justice and Attorney General of Canada[2] introduced co-developed legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) by the end of 2020. It is critically important for the Congress of Aboriginal Peoples (CAP) to be prepared, to be proactive, and to co-develop the implementation process. The BC government passed legislation to implement UNDRIP in November in 2019[3] and the newly elected NWT government plans to draft an implementation plan by 2022.[4]

UNDRIP has the potential to affect every facet of advocacy that CAP currently conducts. UNDRIP can and should be used to decolonize the colonial languages and concepts that underly Canadian policy. UNDRIP is a political and linguistic tool, and its language is much more consistent with how Indigenous peoples think of themselves. It is vitally important that Indigenous legal orders & governance are reaffirmed and reconstituted before the UNDRIP implementation happens in order to offer true Nation to Nation relationships.

Joshua Nichols writes that "the standards of UNDRIP should…be used a means to expose the problems with the current framework and to change Canadian Law by removing the doctrine of discovery from Canadian Law"[5]. UNDRIP recognizes that Indigenous peoples' rights are rooted in Indigenous peoples' own legal traditions, rather than a colonially imposed legal regime that defines Indigenous rights according to European understanding of law. The Canadian government must be prepared to invest significant amounts of time and resources into substantive engagement with Indigenous legal orders[6].

> UNDRIP Article 3:
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[2] December 13, 2020, 'With support from the Minister of Crown-Indigenous Relations, introduce co-developed legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples by the end of 2020'.
[3] https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples
[4] https://www.cbc.ca/news/canada/north/colville-lake-bilateral-negotiations-1.5461512
[5] Joshua Nichols, *UNDRIP Implementation, Braiding of International, Domestic and Indigenous Laws Special Report*, Centre for International Governance Innovation 2017 Special Report at page 39.
[6] Hannah Askew, *UNDRIP Implementation, More Reflections on the Braiding of International, Domestic and Indigenous Laws Special Report*, Centre for International Governance Innovation 2018 Special Report at page 85.

For First Nations, Inuit and Metis peoples living off a recognized land base and in more populous places in Southern Canada, there is not any significant space in which governments allow flourishing Indigenous governance systems. The Indigenous governance systems that are recognized by the government have a defined and exclusive land base. Off reserve, Indigenous peoples have created important services to fill the gap created by federal, provincial, territorial and municipal governments' chronic underfunding with examples like Friendship Centres and Native Court Worker. These movements have been in existence over the last five decades.[7] If First Nations, Inuit and Metis peoples request to self-govern themselves outside of an exclusive land base, or simply to exercise more direct control of their lives through more inclusive and a greater variety of institutions of governance they must act now.

> UNDRIP Article 6:
> Every indigenous individual has the right to a nationality.

Off-Reserve Indigenous Peoples

The Congress of Aboriginal Peoples (CAP) is one of the five officially recognized National Indigenous Organizations (NIOs) that represents the status and non-status First Nations living off-reserve, Métis and southern Inuit of Labrador at the national level. CAP is supported by its ten affiliates, namely: NunatuKavut, Native Council of Nova Scotia, Native Council of Prince Edward Island, New Brunswick Aboriginal Peoples Council, Alliance Autochtone du Quebec, Ontario Coalition of Indigenous People, Coalition of Aboriginal Peoples of Saskatchewan, Indigenous Peoples Alliance of Manitoba, Aboriginal Congress of Alberta Association and North West Indigenous Council.

The mandate of CAP, founded in 1971, is to be the national voice for the people it serves. It is governed by a board of directors as appointed by the aforementioned provincial/territorial organizations (PTOs). A national chief and a vice-chief are elected for a four-year term by general vote at an Annual General Assembly (AGA) as is a national youth for a two-year term and members of the board for a one-year term. The delegates from the local/regional level bring forward issues that affect their membership and set policy direction for the ensuing year. Between AGAs, the board of directors convene on a regular basis to ensure that the mandate and policy direction, as given by the AGA delegation, are being followed.

[7] Bradford Morse, "Developing Legal Frameworks for Urban Aboriginal Governance" Volume 8: Exploring the Urban Landscape, Aboriginal Policy Research Series, 2013, p3-4.

CAP represents Indigenous peoples that live off reserve. In Canada in 2016, this was 79.7% of Indigenous peoples.[8]

> UNDRIP Article 14:
> 1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
> 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
> 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Daniels Decision

> UNDRIP Article 18:
> Indigenous peoples have the 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.

Legislation & Indigenous Rights

As UNDRIP is implemented in Canada with the accompanying requirements for the Canadian state to recognize Indigenous law, decision makers, legal institutions and processes must understand that there is a need for shared frameworks for engaging with Indigenous legal orders.

CAP's role is to ensure that Indigenous peoples off reserve are not excluded in the implementation of UNDRIP and ensuring that those rights are defined and established. CAP must advocate the fact that Indigenous peoples off-reserve deserve equally the rights to their inherent dignity of their respective traditional knowledge systems even though they live outside their territory.

> UNDRIP Article 23:
> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the

[8] https://www12.statcan.gc.ca/census-recensement/2016/dp-pd/abpopprof/details/page.cfm?Lang=E&Geo1=PR&Code1=01&Data=Count&SearchText=Canada&SearchType=Begins&B1=All&C1=All&SEX_ID=1&AGE_ID=1&RESGEO_ID=1

> right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

In Kerry Wilkins' discussion paper in the Special Report of UNDRIP fall 2018, Wilkins argues the cost of not pursuing the implementation of UNDRIP. If CAP fails to actively engage in the implementation of UNDRIP, it could result in reducing the entitled benefits and rights of Indigenous Peoples off-reserve while other Indigenous organizations who represent Inuit, Métis and First Nations gain substantive changes in the national/territorial provincial legislation. Wilkins' paper provides the basis for the following recommendations:

- CAP must advocate that Indigenous peoples off-reserve benefit from the implementation of UNDRIP in Canada. Therefore CAP should have a seat at the negotiating table with Canada during the co-development of legislation for the process of the implementation of UNDRIP.
- While the definition of territorial spaces upon which UNDRIP will be applied is still being negotiated, CAP has the opportunity to focus on discussions on a nation-to-nation level without the burden of federal, provincial and/or territorial legislation and Law.
- Whereas the Crown's role has not been defined explicitly, CAP should ensure that post-implementation of UNDRIP does not fall into the hands of federal provincial/territorial legislators with excessive amount of time and bureaucratic costs.

Challenges to the Meaningful Implementation of UNDRIP

The Truth and Reconciliation Commission forcefully reminds us of the following point:

> "The 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, or neither respect values and principles of Aboriginal law. Such concepts are a current manifestation of historical wrongs and should be formally repudiated by all levels of Canadian government."[9]

UNDRIP Article 33:

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

> 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
> 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

In addition, some scholars argue that Indigenous rights have already been extinguished by the Canadian Government through Section 35's enactment in 1982. Under the Canadian legal system, there does not seem to be any doubt that Aboriginal Title has been and continues to be extinguishable by so-called voluntary surrender of that title to the Crown by treaties or land claims. Under the perspective of Indigenous Law, however, Section 35 does not mean that lands and resources were surrendered in the light of treaties and land claims. The Truth and Reconciliation Commission therefore refuses to explore the validity of Indigenous Law which is grounded in in the non-existence of land ownership at all.

Indigenous peoples share the lands with animals and plants, as well as other non-Indigenous peoples or other living creatures from past, present and future generations. That foundational basis of Indigenous law means that treaties and land claims were not an alienation of the land but the sharing of land. Despite this perspective of Indigenous law, the Canadian government could not understand that treaties and land claims could not be amounted to land ownership. Therefore, forcing Indigenous peoples to prove the pre-existing occupation of land is a colonial excuse to maintain the extinguishment of Indigenous rights prior to the enactment of Section 35.

Statements from the federal government suggest a belief that UNDRIP can possibly be implemented through Section 35 of the Constitution Act, 1982 Aboriginal rights framework.[10] However, incompatibilities between UNDRIP and the current Aboriginal rights regime present many challenges in this regard.[11] UNDRIP would like to serve participating countries as a universal concept with general guidance. Unlike UNDRIP, Indigenous law often refers to specific contexts according to conditions of lands, peoples, resources and wildlife. This argument

[10] "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/>.
[11] 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)).

could be discussed with all Indigenous organizations in Canada, but four other challenges might be equally important to consider.

The first challenge to meaningful implementation of UNDRIP consists of utilizing UNDRIP as a leverage to request the Canadian government acknowledge Indigenous rights in the past, present and future. In so doing, all Indigenous rights should be maintained and respected prior to the enactment of Section 35 in 1982, including the Indigenous title to surface and subsurface land on which Indigenous peoples have lived for time immemorial. This challenge requires all Indigenous peoples in Canada to rally for a universal Indigenous law that Canada ought to acknowledge on the basis of land sharing. Several treaties and land claims negotiated in the 70s and 80s would, in such case, be re-assessed and re-implemented in light of Indigenous laws, and in compliance with (not in the spirit of) UNDRIP. CAP, as one of the five NIOs, should ensure that revisiting treaties and land claims with a new fiscal relationship framework would not discard the development of a strong economic base for non-status and off-reserve Indigenous rights as well. As far as CAP is concerned, non-status and off-reserve Indigenous populations are delinked from fiscal relations. While Canada has already conceptualized an incremental funding support to capacity building, there has yet been no capacity building for off-reserve Indigenous when they have unique priorities and needs. The new fiscal policy framework so far is directed to two streams. One directs to First Nations and the other to groups under the self-government policy. [12] There is clearly no concerted fiscal policy framework for non-status and off-reserve Indigenous people.

The second challenge consists of explicitly incorporating UNDRIP by constitutional amendment. UNDRIP is currently being used as a lobbying external party that gives general guidance to participating countries but has no authority in the legislative or executive bodies in any country unless the UN proclaims punishable actions to countries who do not implement UNDRIP. Like Canada's Constitution, UNDRIP guarantees only certain human rights to Indigenous people. But, if fully implemented, UNDRIP could empower Indigenous Peoples in ways the Constitution can't by recognizing ongoing systemic injustice and the Indigenous right to self-determination. For that very reason, the Canadian government has been reluctant in opening UNDRIP dialog with Indigenous organizations due to their unwillingness (or fear) of facing a constitutional amendment.

[12] https://yellowheadinstitute.org/wp-content/uploads/2018/06/yi-rights-report-june-2018-final-5.4.pdf

The third challenge to meaningful implementation of UNDRIP, unequivocally evident, is to force the federal government to suppress the interference of provincial/territorial legislations into UNDRIP discussions. This demands Canada to revoke provincial/territorial authority in all spheres of Indigenous social-economic conditions by opening a bona fide nation-to-nation dialog with Indigenous peoples (also reiterated in the mandate letter written by Justin Trudeau to Minister Bennett in December 2019). Many have argued that current provincial/territorial governments have been a hindrance in negotiation tables and from all perspectives, the political cost related to overwhelmed and multi-partied discussion could only result in over-spending resources to feed laborious bureaucracy. Instead, Canada should take over the lead on negotiations with Indigenous Peoples by abdicating provincial/territorial governments in all decision-making processes and from UNDRIP most of all.

The fourth challenge, in spite of intersectional working groups that carry discussions related to aforementioned challenges, is to ensure that Canada would not domesticate UNDRIP into its Constitution. Recognition of Indigenous rights under UNDRIP could possibly empower Canada to regulate treaties and land claims via rights recognition. Article 46 (1) stipulates that "Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations," while the revised Article 46(1) added " ny action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." The addition is key, as it puts the state's interests first and foremost, thus giving Canada a backdoor out of the Declaration by excusing any of the content they disagree with as a threat to "territorial integrity or political unity." While quoting free, prior and informed consent (FPIC), Canada would likely interpret Article 23 in accordance with Article 46. As part of domesticating UNDRIP into its Constitution, Canada would likely champion in interpretive rights under UNDRIP.

UNDRIP itself vests no international forum with jurisdiction to adjudicate states parties' infringements. Instead, it instructs participating states to provide for its enforcement. 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.[13]

> UNDRIP Article 38:
> States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Current Canadian Jurisprudence

UNDRIP presents such a fundamental shift in the legal paradigm for recognizing Indigenous peoples' rights that it would move past the *Van der Peet* Supreme Court ruling that ties recognition of Indigenous rights to pre-contact with Europeans and currently does not allow Indigenous rights to evolve post-contact. This creates a critical distinction between rights protected under Section 35(1) and UNDRIP in that the rights recognized in UNDRIP are defined according to Indigenous peoples' own laws, as a fundamental aspect of self-determination of peoples.

Roger Gibbins' suggested 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."[14] The Royal Commission on Aboriginal Peoples put forth the possibility of the adoption of the recommendation that it acknowledge rights of self-determination in somewhere between 50 and (not more than) 80 Indigenous nations.[15] The decision must ultimately come from Indigenous groups that must determine their own vision for self-government under provincial/territorial separation of powers from the Federal government. This will require Indigenous peoples to reconstitute their Indigenous governance systems, after generations of colonization. With funding and resources, the representatives of the Indigenous

[13] 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.
[14] 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.
[15] 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.

groups (AFN, Metis, ITK , NWAC, and CAP) will be able to what their self-government will look like in order to implement UNDRIP as nation to nation.

UNDRIP Article 27 requires an impartial process to adjudicate Indigenous claims to territory. One possible major issue is overlapping claims to Indigenous lands. Indigenous governance must revitalize to address this concern. The largest issue is how to deal with Indigenous Rights in a urban setting with plurinational nations occupying the same space, not through land, but culture, language, economic equality, self-determination and self-governance. This will require extensive engagement with CAP's Provincial and Territorial Organizations.

Federal and Provincial Indigenous Relations

There is a considerable challenge in creating federal programs under constitutional jurisdiction of provincial governments. In this context, the federal government must find willing provincial partners in which to proceed with the urban governance initiative.

In many respects, provincial governments currently hold the pivotal role in determining the future of urban Indigenous governance initiatives. Municipal governments in Canada are frequently referred to as "creatures of the province," alluding to the fact that the Constitution Act places them under a high degree of provincial control. Thus, any federal interests in the urban Indigenous situation must be mediated with provincial governments and some are more interested than others.

The stance of any province has complex roots, including: its history and current role in the high politics of Canadian federal-provincial relations; the ideological bent of the government of the day and the basis of its electoral support; the extent to which urban Indigenous issues are seen as pressing; and the financial obligation associated with seizing the initiative, especially at a time when provinces are attempting to contain expenditures, partly as a result of pressures caused by declining federal transfers.

Indigenous Governance

Governance is about how governments and other social organizations interact, how they relate to citizens, and how decisions get made in an increasingly complex world. Governance leads towards debate on values, cultural norms and desired social and economic outcomes and this leads into questions about the role of government, how governments relate to citizens,

relationships between legislative, executive and judicial branches of government.[16]Legal scholar John Burrows 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."[17]

The Royal Commission on Aboriginal Peoples (1996) had developed an Urban Governance Working group consisting of Indigenous people working in the urban affairs in different parts of the country and chief administrative officers of three Canadian cities: Toronto, Winnipeg and Fredericton. This constituted the most concerted effort to think about the large questions of urban Indigenous governance. Katherine Graham[18] states:

> "Specifically, the Urban Aboriginal Working Group conceived of three possible approaches to improving governance for Aboriginal people in the urban context. The first was outright self government. The group supported the establishment of self governing Aboriginal institutions in urban areas to be responsible for key services, such as education, health care, housing and so on. Some such institutions exist but their current dependency on short term conditional funding from the federal or provincial governments renders their existence precarious and reduces their capacity to be fully accountable to Aboriginal people.
>
> The second approach endorsed by the working group was co-management. In this model, an Aboriginal authority would enter into an agreement with public government – local, provincial and/or federal – to take responsibility for the essential aspects of Aboriginal culture which need to be reflected in the delivery of a particular service or in the accomplishment of other aspects of urban governance, such as planning. Co-management agreements would be embedded in enabling legislation and negotiated agreements. They were seen to be both long term and evolutionary. The group envisioned co-management models emerging, initially, for the provision of "higher order" services in fields such as education (post secondary) and health care (acute care). The co-management approach was also seen as responding to the need for some economies of scale in urban centres with populations (both Aboriginal and non-Aboriginal) too small to justify separate arrangements.
>
> The third approach was to reform municipal governments and other local public authorities to make them more representative of Aboriginal residents. The working

[16] Tim Plumptre and John Graham, "Governance and Good Governance: International and Aboriginal Perspectives" Institute On Governance, 1999, p 12.
[17] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23–24 [Borrows, *Canada's Indigenous Constitution*].
[18] Katherine A. Graham, Urban Aboriginal Governance in Canada: Paradigms and Prospects. Zeitschrift für Kanada-Studien 18:1 (1998), p7

> group advocated guaranteed Aboriginal representation on public authorities dealing with issues of particular interest or concern to Aboriginal people. Examples cited include: police boards, public health boards, housing authorities and hospital boards. The group also advocated more widespread establishment of Aboriginal urban affairs committees of local councils, replicating the City of Calgary example. The reform of public institutions was seen as an important first step. However, the working group achieved consensus that the two other approaches, co-management and self government, were the necessary foundations for fully achieving urban prosperity and civility."

Tripartie Agreements

Bradford Morse envisions tripartite agreements that serve as catalysts for generating federal or provincial legislation providing statutory frameworks for the following:[19]

> "1. Formal recognition for non-profit Aboriginal institutions exercising statutory mandates;
> 2. Formal recognition for Aboriginal institutions of governance that possess specified subject areas of law-making jurisdiction;
> 3. A legal foundation for Aboriginal institutions with the authority to settle disputes. These could be invoked on a voluntary basis by Aboriginal individuals and organizations seeking an alternative to provincial and territorial court systems;
> 4. An enabling statutory framework in which Aboriginal peoples in an urban area could choose to bring existing institutions and agencies together as the public services of their duly elected government."

UNDRIP Implementation

Kerry Wilkins sees three issues relating to the implementation of UNDRIP:[20]

> "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."

[19] Bradford Morse, "Developing Legal Frameworks for Urban Aboriginal Governance" Volume 8: Exploring the Urban Landscape, Aboriginal Policy Research Series, 2013, p3-4

[20] Kerry Wilkins, *"UNDRIP Implementation, More Reflections on the Braiding of International, Domestic and Indigenous Laws Special Report"*, Centre for International Governance Innovation 2018 Special Report at page 126.

Implementation Examples

Bolivia was the first country in the world to adopt UNDRIP into its domestic law, and later, incorporate UNDRIP's provisions into its constitution which is called plurinational constitutionalism. A plurinational state recognizes the plurality of cultural, legal and political systems that exist within a territory and places them on an equal footing.[21]

During this process the government abolished the Department of Indigenous Rights and made that priority a government wide process.[22]

IN BC, the provincial government mandated action plans for each government department and annual report on their progress toward fulfilling the rights specified in the declaration in Bill 41. More importantly the bill also gives government departments the authority to share decision-making with Indigenous governments and removes a significant roadblock to free, prior and informed consent required by UNDRIP.

In NWT, the Government of NWT process to Implement UNDRIP is:

> " 1. Identify, prioritize and strengthen key actions to further implement UNDRIP
> How we will do it:
> 1.a. Work with Indigenous governments to create and implement an action plan that identifies changes required in GNWT legislation and policies to best reflect the principles set out in UNDRIP.
> 1.b. Collaborate with the federal government and Indigenous governments to support Canada's efforts to implement UNDRIP.
> How we will demonstrate progress:
> 1.a. Terms of Reference developed (Summer 2020); Working group with Indigenous governments established (Summer 2020); Implementation plan completed (Summer 2022); and Reporting on program changes provided (Ongoing)
> 1.b. Federal process informs NWT action plan and implementation, including program changes."[23]

Revitalizing Indigenous Laws & Governance

UNDRIP Article 39:

[21] Roberta Rice, "UNDRIP and the 2009 Bolivian Constitution: Lessons for Canada", T*he Internalization of Indigenous Rights: UNDRIP in the Canadian Context, Special Report,* The Centre for International Governance Innovation (2014) at 59.
[22] Roberta Rice, "UNDRIP and the 2009 Bolivian Constitution: Lessons for Canada", T*he Internalization of Indigenous Rights: UNDRIP in the Canadian Context, Special Report,* The Centre for International Governance Innovation (2014) at 59.
[23] https://www.eia.gov.nt.ca/en/gnwt-mandate-2020-2023/united-nations-declaration-rights-indigenous-peoples-undrip

> Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

LAND

The challenge with Land is that the current recognition of Indigenous Rights is tied to its use and occupancy. UNDRIP does not have this requirement and will require the Canadian Governments change how they view Indigenous Rights and constitutional law and legal customs. The examples of land being gifted or leased to Indigenous groups, like Friendship Centres and housing projects in urban centres, must be explored.

CULTURE & LANGUARE

Indigenous languages are recognized by UNDRIP as a right and not as an incentive. The federal government developed some strategies in revitalizing Indigenous languages, but there was no commitment in deploying language revitalization in current educational institutions where most teachers are non-Indigenous and have minimal knowledge of Indigenous languages. For more information, see the 2020 CAP report "Language, Culture and Indigenous Well-being."

Compiled Recommendations

- CAP must advocate that Indigenous peoples off-reserve benefit from the implementation of UNDRIP in Canada. Therefore, CAP should have a seat at the negotiating table with Canada during the co-development of legislation for the process of the implementation of UNDRIP.
- While the definition of territorial spaces upon which UNDRIP will be applied is still being negotiated, CAP has the opportunity to focus on discussions on a nation-to-nation level without the burden of federal, provincial and/or territorial legislation and Law.
- Whereas the Crown's role has not been defined explicitly, CAP should ensure that post-implementation of UNDRIP does not fall into the hands of federal provincial/territorial legislators with excessive amount of time and bureaucratic costs.
- CAP must be ready to engage in the crucial steps in the implementation process by creating a national action plan and by reviewing existing laws, policy, and annual reporting mechanisms.

- CAP should advocate for a "single window" of services to be provided for Indigenous people their territories in cooperation with governments at the local, provincial and federal levels.
- CAP must reach out to Native Friendship Centres and Indigenous Service Agencies to create relationships and to use their knowledge and understanding of urban Indigenous peoples. CAP must partner to create a framework for a tripartite relationship with Indigenous people and local, provincial/territorial and Federal agreements.
- CAP must closely monitor the implementation strategies of governments like those Bolivia, BC, and NWT to better understand its place in the conversation around UNDRIP.

Conclusion

The federal Government must repudiate the doctrine of discovery and pre- and post-contact distinctions in Canadian Constitutional Law to move towards reconciliation and a Nation to Nation Relationship. There must be reconciliation with recollection, to realize the unfinished task of decolonization.

The government must also create a process to revitalize Indigenous governance and the resources and time to accomplish the time-consuming task. This will require extensive engagement at the local, provincial and national level with all Indigenous peoples and organizations. There must be a national legislative framework co-developed with all Indigenous groups with the time and resources for those groups to speak to its own people. The government must establish a co-management forum to resolve disputes over Indigenous Laws and Federal /Provincial /Territorial laws, moving away from Canada having unilateral rights to override disputes or lengthy court cases to resolve conflict.

The full implementation of UNDRIP will not be easy, but it is essential to CAP's role as national voice for its Provincial and Territorial Organizations.

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