

UN Declaration on the Rights of Indigenous Peoples

and

Bill 262: An Act to ensure that the laws of Canada are in harmony with the Declaration

Nigel Bankes

ndbankes@ucalgary.ca

Outline

- Background and Context for the Declaration
- Content of the Declaration
- Legal status of the Declaration
 - International law
 - Domestic law
- Bill C-262

Background and context

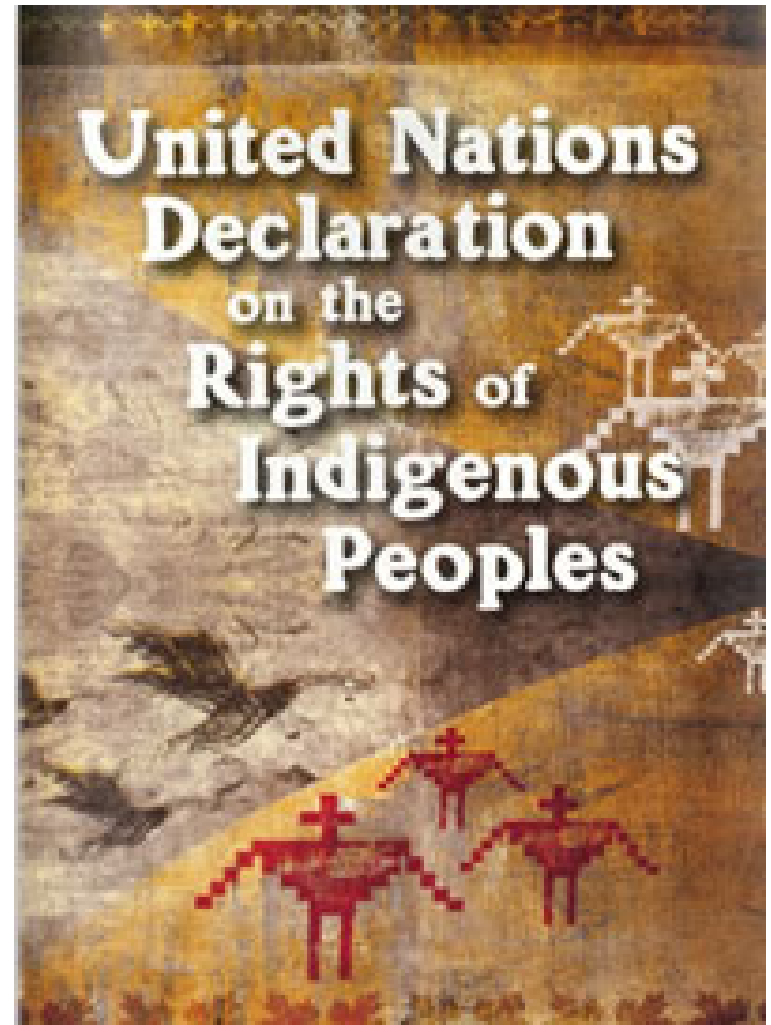
- Text of the Declaration developed in multiple stages
 - 1985 to 1993, 5 person working group on indigenous populations (expert process)
 - 1993 to 2005, Intergovernmental Working Group on the Draft Declaration; compromise text submitted to Human Rights Council 2005
 - HRC adopts 2006 47:2 (Canada and Russia)
 - UNGA adopts 2007 144:4 Can, US, Aus, NZ (+11)

Context

- Consider in the context of global developments in human rights since WWII
 - Universal Declaration on Human Rights & Genocide Convention (1948)
 - CERDS (1963)
 - ICCPR and ICESR (1966)
 - Decolonization, NIEO, UNGA Declaration on PSNR (1960s)
- Developments specific to minorities and Indigenous peoples
 - Jurisprudence on Article 27 of the ICCPR
 - UNGA Minorities Declaration (1992)
 - ILO Convention 169 on Indigenous and Tribal Peoples
 - Jurisprudence of the Inter American Commission and Court
 - Inter-American Declaration
- National developments
 - Australia – *Mabo*
 - NZ – Waitangi Tribunal
 - Norway, Sami rights
 - Canada, *Constitution Act 1982* etc

Content

- Preamble 23 paragraphs
- 46 Articles
- In general I think that Declaration translates and applies general principles of IHR to IPs
- Some very declaratory & concerned with equality
- Article 1: 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 UN, the UHDR and international human rights law.



Content

- Some provisions draw directly on other instruments eg Art 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.
- But then apply it to the indigenous context eg Art 4
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.
- Article 7
 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Content

- Provisions frequently structured as a combination of indigenous right & correlative state duty: eg Article 14 Education
 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.

Content

- A good number of the provisions emphasise consent (FPIC)

Article 10, Forcible removal

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11(2) restoration of cultural property

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 19 legislative and admin measures

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.

Note 2 different formulations: (1) FPIC, & (2) consult in order to obtain FPIC.

Content (consent II)

Article 28 restoration of lands

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.

Article 29(2) environment and hazardous material

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

Article 32(2) lands and territories

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.

Other provisions

- Art 8 assimilation
- Art 11 culture
- Art 12 religion/spiritual
- Art 15 public curriculum
- Art 16 media
- Art 17 labour laws
- Art 21 improved social conditions
- Art 22 children, elders
- Art 25 trad medicines
- Art 26 relationship to territories
- Art 25 – 28 lands
- Art 29 environment
- Art 30 military activities
- Art 31 cultural heritage
- Art 36 transborder
- Art 37 treaties
- Art 38 implementation

Interpreting the declaration

- How should we interpret the consent provisions? A veto?

Read the text as a whole: Article 46

1. 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 or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. **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.
3. 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.

Legal status: international

- It's a Declaration not a treaty
- Only legally binding to the extent to which it is customary international law
 - Consistent practice of states
 - Practice based on the understanding that legally binding (or states acknowledge that legally binding)
- At least some of the provisions of the Declaration must represent custom because simply a more specific application of a general norm
 - Eg provisions dealing with self-determination, genocide, equality, non-discrimination and perhaps provisions dealing with right to culture
- Requires an article-by-article analysis

Legal status: domestic

- Changing political status
 - 2007 Canada voted against adoption
 - 2010 Harper government endorses the declaration
 - But states that aspirational, not legally binding & does not reflect custom
 - 2016 Minister Bennett, UN Permanent Forum
 - Canada “a full supporter ... without qualification”
 - 2017 announced intention to support Bill C-262
 - 2018 Principles Respecting GoC’s relationship with Indigenous peoples
 - The implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* requires transformative change in the Government’s relationship with Indigenous peoples. The UN Declaration is a statement of the collective and individual rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world, and the Government must take an active role in enabling these rights to be exercised. The Government will fulfil its commitment to implementing the UN Declaration through the review of laws and policies, as well as other collaborative initiatives and actions. This approach aligns with the UN Declaration itself, which contemplates that it may be implemented by States through various measures.
 - See also TRC Calls to Action 43 & 44

Legal status: the courts

- UNDRIP referenced by over 50 cases
- Two approaches
- Approach # 1
 - *Snuneymuxw First Nation v. Board of Education – School District #68*, [2014 BCSC 1173](#).
 - SFN sought to question the validity of a School Board order closing certain schools in a way that affected educational opportunities for First Nation students; referenced Articles 14, 18, 19 and 23 of the Declaration.
 - Justice Hinkson [59] not prepared to accept the relevance of the Declaration:
 - “I am unable to accept the reliance placed by the petitioners upon the Declaration. The Declaration has not been endorsed as having legal effect by either the Federal Government or the Courts. Canada is a signatory to the UNDRIP, but has not ratified the document. The Federal Government, in announcing its signing of the Declaration, stated that the Declaration is aspirational only and is legally a non-binding document that does not reflect customary international law nor change Canada’s domestic laws. This fact has been recognized by Canadian courts in considering the application of the Declaration, as well as the fact that the document is too general in nature to provide real guidance to courts”

Legal Status: the Courts

- Approach # 2
- *Canada (Human Rights Commission) v. Canada (Attorney General)*, [2012 FC 445](#)
- Justice MacTavish concluded that it was possible to look at the Declaration for three purposes: (1) to prefer an interpretation of a statute (in that case the *Canadian Human Rights Act*) that is more consistent with Canada's international obligations, (2) to inform the contextual approach to statutory interpretation, and (3) to identify values and principles that should inform the interpretation of the legislation.
- Overall some ambivalence

Bill C-262: background and context

- First introduced MP Tina Keeper, Churchill (liberal) as Bill C-569, June 18, 2008
- Current version introduced 2016 by Romeo Saganash, NDP MP, Northern Quebec
 - Second reading February 2018
 - Committee, February to May
 - Passed by HoC May 30, 2018, NDP and liberals voted in favour
 - Currently second reading in the Senate
- Issues
 - What does the Bill say?
 - What legal effect does it give to the Declaration?

C-262

s. 3 The Declaration ... is hereby affirmed as a universal international HR instrument with application in Canadian law.

s. 4 The GoC, in consultation and cooperation with indigenous peoples in Canada, must take all measures necessary to ensure that the laws of Canada are consistent with the Declaration

s. 5 The GoC must, in consultation and cooperation with indigenous peoples, develop and implement a national action plan to achieve the objectives of the Declaration

s. 6 The Minister ... must [annually] submit a report to each House of Parliament on the implementation of the measures referred to in s. 4 and the plan referred to in s. 5 for the relevant period.

Section 3 is qualitatively different from ss. 4-6

Effect of section 3?

- s. 3 The Declaration ... is hereby affirmed as a universal international HR instrument with application in Canadian law.
- I do not believe that s.3 servers to incorporate UNDRIP into domestic law – why?
 - Not clear enough
 - Parliament knows how to do this. See both tax treaties and land claim implementation legislation
 - “The Convention is approved and has the force of law in Canada”
- What does s.3 do?
 - Makes it impossible to maintain Justice Hinkson’s nihilist approach
 - Courts will be *obliged* to use the Declaration as an interpretive aid to interpret: statutes, constitutional conventions (*Mikisew Cree*), and constitutional doctrines (eg duty to consult & approaches to what qualifies as a s.35 protected right eg *Van der Peet*)

Sections 4 - 6

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- Process oriented
- Future oriented
- A promise of systemic and systematic change
- Some measure of political accountability
- Ss 4 – 6 likely not justiciable: *Friends of the Earth v Canada (Environment)*, [2009 FCA 297](#)
- A judicious balance between the immediate “application” of s.3 and the process of ss. 4 -6
- Overall assessment depends on allocation of resources for ss. 4 -6.

Thank you.

Presentation based in part on
Nigel Bankes, “Implementing UNDRIP: some
reflections on Bill C-262”

Available on <https://ablawg.ca/>

