

A RESILIENT FEDERATION? PUBLIC POLICY CHALLENGES FOR THE NEW DECADE

Unfinished Business: Implementation of the UN Declaration on the Rights of Indigenous Peoples in Canada

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INTRODUCTION

The nation-state that we call Canada was founded on the unilateral and arbitrary denial of the right of First Nations, Inuit and Métis peoples to self-government. The nineteenth-century, colonial presumption was that Indigenous peoples would either disappear or be assimilated into the larger society. That has not happened. Indigenous peoples largely remain, in the twenty-first century, trapped within this archaic framework. Any positive future for the federation requires that Canada as a state, and all Canadians as individuals, resolve this injustice. That means coming to terms with the inherent rights of Indigenous peoples in a much more meaningful and transformative way than has taken place to date.

There has been progress in some areas of self-government. Yet in most areas of our lives, Indigenous peoples in Canada remain at the mercy of decisions taken by politicians, bureaucrats and judges with little knowledge or appreciation of our laws, protocols, traditions, values and needs.¹ This inflicts a high price on our communities. It is particularly high for the growing population of Indigenous youth, who continue to be denied the opportunities and quality of life afforded to other young people in Canada.

We have seen repeatedly how the status quo leads to turmoil and conflict, as Indigenous peoples are forced to use blockades and other tools of economic disruption to defend their rights. Canada as a state can have little claim to legitimacy if it does not honour what the Supreme Court of Canada has referred to as the “pre-existing sovereignty” of First Nations, Inuit and Métis peoples.²

Polls suggest the overwhelming majority of Canadians want a future that includes genuine reconciliation with Indigenous peoples.³ But what does reconciliation mean?

THE FRAMEWORK FOR RECONCILIATION

The Truth and Reconciliation Commission of Canada took a long, hard look at some of the most horrific crimes committed under Canada’s colonial laws and policies. It concluded in its 2015 report that reconciliation is possible, provided Canada is prepared to transform its political, economic and legal relationship with Indigenous peoples.⁴ The commissioners pointed out there is already a framework at hand for this “work of generations.”

¹ The author speaks in the first person about Indigenous peoples because she is Anishinaabe from the Lake Superior Band of Ojibwe.

² See, for example, *Delgamuukw v. British Columbia*, [1997] 3 SCR No. 1010, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>.

³ Reconciliation Canada, *The Canadian Reconciliation Landscape: Current Perspectives of Indigenous Peoples and Non-Indigenous Canadians* (North Vancouver: Reconciliation Canada, 2017), https://reconciliationcanada.ca/staging/wp-content/uploads/2017/05/NationalNarrativeReport-ReconciliationCanada-ReleasedMay2017_3.pdf.

⁴ Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: National Centre for Truth and Reconciliation, University of Manitoba, 2015), http://nctr.ca/assets/reports/Final%20Reports/Executive_Summary_English_Web.pdf.

In its first principle of reconciliation, the commission stated that “the framework for reconciliation at all levels and across all sectors of society” is the United Nations Declaration on the Rights of Indigenous Peoples. The declaration is a global human rights standard adopted by the UN General Assembly in September 2007, after more than 20 years of intensive deliberations between states and Indigenous peoples. It affirms that Indigenous peoples, like all nations, have the inherent right of self-determination. It also explicitly repudiates the doctrines of racial superiority used to justify and give cover to the denial of this right.

The declaration calls on states to work collaboratively with Indigenous peoples to undo the profound harm caused by generations of forcibly imposed policies, like residential schools, and prevent such harms being inflicted again. To this end, it sets out a wide range of necessary rights protections and obligations in areas such as education, land management, social services and economic development. Taken together, these protections and obligations constitute a program of action for Indigenous peoples to reassume control over our lives and futures.

Indigenous advocates around the world dedicated decades of hard work to advance this international human rights instrument.⁵ They sacrificed time with their families and communities to press for their rights in the halls of the United Nations. They did so because the standards set out in the declaration’s lengthy preamble and 46 articles are what we need to rebuild our communities and ensure that future generations can grow up secure and prosperous in their own cultures and identities.

Our elders and other leaders recognized that it was crucial to have these standards affirmed as international human rights. This would create pressure on states like Canada to finally engage with Indigenous peoples on the kind of fundamental change that is so urgently needed.

The process of negotiation and adoption of the declaration was a rocky one. Canada played a critical role in building state support for it and then voted against its adoption. In 2010, the Conservative government led by Stephen Harper endorsed the declaration it had previously denounced, expressing confidence “that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.”⁶ In 2016, Justin Trudeau’s Liberal government went a step further, announcing that it was a “full supporter of the UN Declaration, without qualification.”⁷ In the December 2019 Speech from the Throne, the government promised to “co-develop and introduce legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples in the first year of the new mandate.”⁸

⁵ S. Lightfoot, *Global Indigenous Politics: A Subtle Revolution* (Abingdon, UK: Routledge 2016).

⁶ Canada, Indigenous and Northern Affairs Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (Ottawa: Indigenous and Northern Affairs Canada, 2010), <https://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

⁷ Canada, Indigenous and Northern Affairs Canada, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples” (Ottawa: Indigenous and Northern Affairs Canada, 2016), <https://www.canada.ca/en/indigenous-northern-affairs/news/2016/05/canada-becomes-a-full-supporter-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples.html>.

⁸ Canada, Privy Council Office, “Speech from the Throne” (Ottawa: Privy Council Office, 2019), <https://www.canada.ca/en/privy-council/campaigns/speech-throne/speech-from-the-throne.html>.

Canada is now part of a global consensus, demonstrated in unanimous resolutions of the UN General Assembly, that the declaration must be upheld not only in principle but in practice. Implementation, however, remains a challenge. The Truth and Reconciliation Commission called the declaration the framework for reconciliation. Measures to implement it are a litmus test of whether talk about reconciliation is meaningful or empty virtue-signalling.

In late 2019, I had the privilege of being in the British Columbia legislature when the province introduced a law to implement the declaration. The legislation is modest in scope. It does not make sweeping changes to provincial law and policy. It simply requires the province to start working with Indigenous peoples to create a shared implementation plan, including new laws and reforms to existing laws. These will be brought back to the legislature at a future date. This process began in early 2020, but details of the review and action plan are unclear.⁹

Although the BC legislation was a small step, it nonetheless felt like a rare and genuine moment of reconciliation in action. This was underlined by the fact that the act was passed with the support of all the parties in the provincial legislature, and it met with a chorus of support that included not only Indigenous peoples but also industry leaders.¹⁰

Unfortunately, it is not hard to find less optimistic examples.

The BC implementation act was modelled on Bill C-262, a private member's Bill brought forward by Romeo Saganash, an MP for the New Democratic Party. It was passed in the House of Commons in 2018, and one might reasonably expect it would now be part of Canadian law.¹¹

Like the BC legislation that it inspired, the federal legislation was modest in scope. All it required was that the government begin the process of working with Indigenous peoples to identify laws and policies that should be changed and implementation measures that should be prioritized. The Bill might have been called "The Least We Can Do and Still Claim to Support the UN Declaration." Even that was demonstrably too much for some. When the Bill was passed, Conservative MPs in the House of Commons were caught on camera high-fiving each other after voting against it. The Bill died in June 2019 after Conservatives in the Senate used stalling tactics to successfully prevent the final vote needed to bring it into law.

⁹ M. Hudson, *New Tools for Reconciliation: Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples* (Montreal: Institute for Research on Public Policy, 2020), <https://irpp.org/research-studies/new-tools-for-reconciliation-legislation-to-implement-the-un-declaration-on-the-rights-of-indige-nous-peoples/>.

¹⁰ Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th session, 41st parliament, 2019, <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>.

¹¹ Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st session, 42nd Parliament, 2018, <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/third-reading>.

DEFENDING THE STATUS QUO

Self-determination, the equality of all individuals and peoples, the right to learn and express one's own culture and traditions, the right to be free from discrimination and forced assimilation: these are universal human rights that the global community has committed to uphold. The Indigenous rights movement has engaged at the cutting edge of some of the most critical issues facing liberal democracies. They include how to interpret and apply universal human rights standards to meet the needs, often collective, of those who have been excluded, and heal the profound harms that have resulted.

The Indigenous rights agenda is both conservative and radical. It is conservative because its core demand is for the recognition of rights recognized, at least in name, by nearly all countries in the world. It is radical because recognizing that these rights have been denied, and that a debt of remedy is owed, challenges the legitimacy of liberal democracies like Canada that are otherwise known for abiding by global human rights and the rule of law.

Efforts to advance the UN declaration inevitably confront the same systemic racism that has maintained Canada's power over Indigenous peoples all along. Those who enjoy the privileges of colonial society dominate public discourse. They can define, according to their own values, the urgency of the problems and the acceptability of solutions. While denying the urgency of confronting systemic racism and discrimination, politicians and pundits have often proven adept at weaponizing racism to obstruct the efforts of Indigenous peoples to achieve transformative change. Examples abound, including fearmongering with claims that Indigenous peoples are seeking "special rights and privileges," or that Indigenous peoples "are asking for too much, which will bankrupt the country," when in fact Indigenous peoples are merely seeking an end to discriminatory policies and equal rights to other peoples in Canada.

Some politicians, notably those in BC, and academics take a positive stance on implementation of the declaration.¹² Opponents, whether politicians or commentators, tend to follow the same script. They acknowledge that Indigenous peoples have been treated unjustly. They may express support for the declaration's principles, but some claim that Canada does not need to implement it. After all, they say, Indigenous rights are already recognized in the Constitution, and Canada is on the right track to implementing those rights through government policy and court jurisprudence. Some go on to claim that implementation of the declaration would be harmful, because it would violate the appropriate balance of rights already established in Canadian legal tradition.

Despite the apparently progressive tone set by acknowledging injustices against Indigenous peoples and the need for reconciliation, these arguments are revealed as defenses of the status quo in three ways. First, there is the condescending claim to know better than Indigenous peoples what they really need. Second, there is the

¹² See, for example, M. Papillon and T. Rodon, *Indigenous Consent and Natural Resource Extraction* (Montreal: Institute for Research on Public Policy, 2017), <https://irpp.org/research-studies/insight-no16/>.

undeniable complacency in the face of the gravity of harms still being experienced by Indigenous peoples. Third, there is the implicit suggestion that Indigenous peoples are asking for too much. There is a reliance on racist tropes in such arguments, although the opponents may not always be aware of it.

Take as one example an opinion piece published in the *Financial Post* while the federal implementation Bill was before the House of Commons.¹³ The authors, a prominent corporate lawyer and a former deputy minister of the Department of Indian Affairs and Northern Development, note that Indigenous peoples have suffered “historic wrongs.” They then claim that the evolution of Canadian jurisprudence and government policy “has already gone a long way” toward redress. While the UN declaration is “full of statements of hope and aspiration,” they write, its implementation “would dismantle our courts’ carefully constructed approach to reconciliation” and make the balancing of rights “impossible.” To support this extraordinary assertion, the authors rely on the claim that the UN declaration would “give Aboriginal Canadians rights not enjoyed by other Canadians.” The examples they provide are the provisions requiring the consent of Indigenous peoples for decisions impacting their lands.

“Consent” is worth unpacking. Canadians are not unfamiliar with it. Most adults have at one time or another signed a consent document. This is widely established as a right enjoyed by all Canadians. However, when the UN declaration deals with land rights, it is not talking about individual rights. It is explicitly talking about collective rights. These are rights of Indigenous nations that are exercised through our Indigenous governments and decision-making traditions in the same way that all governments make collective decisions on behalf of their citizens. All Canadians already enjoy these same rights through the federal, provincial and territorial governments, and governments are required by the Constitution and the common law to respect other governments’ jurisdictions.

However, even if the rights elaborated in the declaration are fundamentally different from the rights of all Canadians, is this an inherently bad thing? The Canadian constitutional tradition lauded in the *Financial Times* piece already recognizes the distinct rights of Indigenous peoples. The treaty rights that are entrenched in the Constitution are not the same for Indigenous and non-Indigenous treaty partners. The Supreme Court has said that the title rights of Indigenous peoples are *sui generis*, in a class by themselves: they are collective, intergenerational, and include defined jurisdictional powers that are distinct from the property rights of all Canadians.¹⁴

Such differences are part of how one builds a federation among distinct peoples. Canadian legal tradition also clearly recognizes that differences in the application of rights are essential for achieving substantive equality in a context of entrenched and systemic discrimination.

¹³ H. Swain and J. Baillie, “The Trudeau Government Signs On to Give Aboriginals Veto rights Nobody Else Has,” *Financial Post*, January 26, 2018, <https://financialpost.com/opinion/the-trudeau-government-signs-on-to-give-aboriginals-veto-rights-nobody-else-has>.

¹⁴ First established in *Guerin v. The Queen*, [1984] 2 SCR 335, <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do>.

THE LITMUS TEST OF IMPLEMENTATION

The Supreme Court has said that there is a constitutional imperative to reconcile the gulf between what it characterized as the “pre-existing sovereignty” of First Nations, Inuit and Métis peoples, and the merely “assumed” sovereignty of the Canadian state. The federation’s response to this imperative has been piecemeal and lacklustre, at best. While some Indigenous peoples have achieved significant recognition of their rights through court decisions or agreements, many still have no formal recognition of their rights over lands that were used and controlled by their ancestors long before the creation of Canada.

The UN declaration is remedial, in that it sets out measures that must be taken to rectify centuries of routine and systematic denial and violation of Indigenous peoples’ basic human rights. It is also forward thinking, in that it calls for partnership and collaboration to build harmonious and just relationships.

It can be argued that the various provisions set out in the declaration already have legal effect in Canada. Canada has a well-established legal tradition of turning to international human rights standards to interpret domestic legal obligations. The declaration is already being used in this way. It has been cited in the decisions of lower courts, tribunals and other bodies, and this process will only continue. The federal government has invited such use of the declaration in the new *Impact Assessment Act*, which explicitly refers to the government’s commitment to uphold the UN declaration.¹⁵

This means that some forms of implementation are already under way, and they will inevitably have an impact on the legal framework of Canadian federation. There are, however, numerous problems in leaving interpretation and application of Indigenous rights wholly in the hands of the courts. Engaging in long and costly litigation imposes a heavy burden on Indigenous peoples and on Canada as a whole. The courts have clearly stated that adversarial litigation is not the way to achieve reconciliation.

One of the advantages of implementation legislation like that adopted in BC is that it provides an opportunity to approach implementation in a much more coherent way than case-by-case litigation. I remain hopeful such legislation will be adopted federally. Implementation legislation is an opportunity to embody the model of cooperation and partnership called for in the UN declaration by establishing processes where the federal, provincial and territorial governments can work collaboratively with Indigenous peoples.

Legislation is far from the entire solution to reconciliation, it is a preliminary step toward implementation of Canada’s obligations under the UN declaration. It is, however, a necessary step, and it is long overdue.

¹⁵ M. Hudson, *New Tools*.



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