UNDRIP Ten Years After: Canada Moves to Adopt The United Nations Declaration on the Rights of Indigenous Peoples

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On November 20, 2017 Justice Minister Jody Wilson-Raybould announced at a public event that the federal government will support Bill C-262, an NDP Private Member's Bill requiring the Government of Canada to implement all provisions of The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Full implementation of UNDRIP could result in significant implications for resource developers.

UNDRIP is a United Nations declaration that describes and calls nations around the world to recognize the individual and collective rights of indigenous peoples. It was adopted by the United Nations General Assembly on September 13, 2007 and directs governments to live up to principles of the Charter of United Nations in relation to indigenous peoples in their respective jurisdictions.

At a fundamental level, UNDRIP contains protections for equality and freedom from discrimination, self-determination, the right to a nationality, rights to life, physical and mental integrity, liberty and security of person, and freedom from genocide, violence and forced assimilation and other basic civil rights.

Several Articles of UNDRIP relate to the use of land by indigenous peoples. In particular, Article 32 provides:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Bill C-262, the *United Nations Declaration on the Right of Indigenous Peoples Act* is only six sections long. Section 3 of the Bill provides that UNDRIP is "hereby affirmed as a universal international human rights instrument with application in Canadian law".

The Bill, if passed into law, will require the Government of Canada, in consultation and cooperation with indigenous peoples in Canada, to take all measures necessary to ensure that the laws of Canada are consistent with UNDRIP. It further requires the Government of Canada, in consultation with indigenous peoples, to develop and implement a national action plan to achieve the objectives of UNDRIP. Under the Bill, the Minister of Indigenous and Northern Affairs must report annually to Parliament on the implementation of the action plan.

The adoption of UNDRIP in Canada has been a gradual and graduated process. On November 12, 2010 the Harper government issued a "statement of support", which described UNDRIP as "a non-legally binding document that does not reflect customary international law nor change Canadian laws". With the election of the Trudeau government, the ministerial mandate letter issued by the Prime Minister to the Minister of Indigenous and Northern Affairs and other ministers specifically called for the implementation of UNDRIP. In May 2016, Carolyn Bennett, Minister of Indigenous and Northern Affairs, announced that Canada would now be a full supporter of UNDRIP, without qualification.

The INAC website still describes the effect of United Nations General Assembly declarations as expressions of political commitment on matters of global significance that are not legally binding upon the states that vote in favour of adoption. When and if Bill C-262 is passed by Parliament, the question will then be whether UNDRIP gains additional legal significance in Canada, or whether its adoption only represents the formalization of a government policy objective.

In the natural resource sector considerable focus has been paid to the Article 32 concept of "free, prior and informed consent" on the part of indigenous peoples in relation to resource development within traditional territories. Federal government pronouncements have so far consistently taken the position that UNDRIP does not grant a veto right in relation to development on Crown land. Instead, the Government of Canada has pointed to the decisions of the Supreme Court of Canada as setting out the rules for consultation and accommodation.

It remains to be seen whether this approach will be maintained by the federal government, particularly in relation to treaty lands. Historical legal thought describes aboriginal rights as having been extinguished in those lands, except as otherwise specifically provided in those treaties, or in constitutional instruments such as the *Natural Resources Transfer Acts* of 1930, which assured rights of certain indigenous groups for "…hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."

Indigenous groups in Canada, not surprisingly, have advocated for a more directive reading of UNDRIP. Some advocates maintain that UNDRIP has or should be given full legislative effect. At the very least, one can reasonably expect that this view will be advanced in the courts and in the political arena.

Where does this leave the Provinces, which control most Crown land and which make the majority of natural resource allocation and permitting decisions? Time (and probably a lot of negotiation and litigation) will tell.

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