Centre for International Governance Innovation

“Making Space” in International Law and Treaty Making

Presentation to the 7th National Land Claims Agreements Coalition Conference

November 14, 2017

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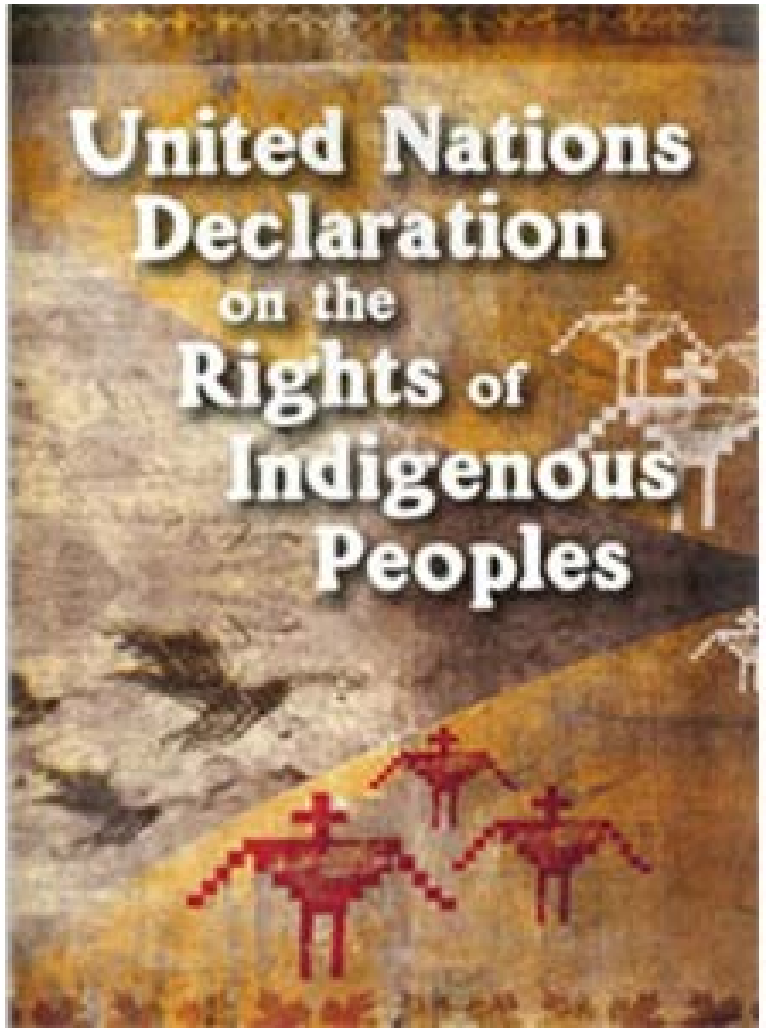
RISA SCHWARTZ INTERNATIONAL LAW

Indigenous peoples have always been international

Sákéj Henderson



[W]e must find ways to achieve reconciliation by finding space for the Canadian legal order within the pre-existing legal landscape... not only that of making space within the known landscape...it is a matter of attempting, in good faith, and as respectfully as possible, to enter new landscapes: legal, ethical, and cultural.

The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice

The Honourable Lance Finch, Former Chief Justice of British Columbia

Overview

- Relevant domestic law, Treaties and international law supporting increased participation in International relations
- Policy and legal changes supporting increased participation in decision-making
- Indigenous Peoples Chapter in NAFTA 2.0
- Moving beyond NAFTA

Duty to consult and accommodate

- 35(1) Constitution Act, 1982: The existing aboriginal and treaty rights of the aboriginal people in Canada are hereby recognized and affirmed.
- Most s. 35 consultations mainly focus on statutory decisions which may infringe on Aboriginal and/or treaty rights.
- Federal Court of Appeal decisions in *Hupacasath First Nation* v *Canada* (*Minister of Foreign Affairs)* and in *Canada(Governor General in Council*) v *Courtoreille* found against First Nation appellants seeking consultation prior to the ratification of a bilateral investment treaty with China (Hupacasath) or prior to the introduction of omnibus environmental legislation to Parliament (Courtoreille).
- Courtoreille will be heard by SCC - scheduled for January 2018

Consultation on International Agreements in Modern Treaties

- Requirement to consult on International Treaties spelt out in some Modern Treaties:
- For example, see article 24 of Tla'amin Final Agreement, Spring 2014
  - After the Effective Date, before consenting to be bound by a new International Treaty that would give rise to a new International Legal Obligation that may adversely affect a right of the Tla'amin Nation under this Agreement, Canada will Consult with the Tla'amin Nation in relation to the International Treaty either separately or through a forum that Canada determines is appropriate.
- Requirement also found in: Maa-nulth First Nation Final Agreement, Tsawwassen First Nation Final Agreement, Yale First Nation Final Agreement, Sioux Valley Dakota Nation Governance Agreement and Tripartite Governance Agreement, Labrador Inuit Land Claims Agreement, Déline Final Self-Government Agreement, Tlicho Final Agreement

Consultation on International Agreements in Modern Treaties

- Some Modern Treaties have specific (and more limited) international consultation requirements.
- Nisga’a Final Agreement requires consultation on Migratory Birds and requires consultation when international discussions or negotiations that may significantly affect fisheries resources
- Gwich'in Comprehensive Land Claim Agreement Government shall consult with the Gwich'in Tribal Council with respect to the formulation of government positions in relation to international agreements which may affect wildlife or wildlife habitat in the settlement area, including negotiations with respect to methods of harvesting and amendments to the Migratory Birds Convention(1916), prior to adopting positions.

Participation requirements in some Modern Treaties

- Labrador Inuit Land Claims Agreement, Nunavut Land Claims Agreement and Nunavik Inuit Land Claims Agreement have the following requirement:
- Canada shall include Inuit representation, [nominated by the Nunatsiavut Government], in discussions leading to the formulation of Canada's position in relation to any International Agreement or an amendment thereto relating [to Inuit rights referred to in this chapter] [to Inuit wildlife harvesting rights Settlement Area], and the discussions shall extend beyond those generally available to non-governmental organizations.
- There is a similar requirement for Cree participation on the formulation of government positions in relation to an International Agreement Concerning Wildlife relating to the Eeyou Marine Region Land Claims Agreement.

Participation in decision making: United Nations Declaration on the Rights of Indigenous Peoples

Specific articles in UNDRIP support participation of Indigenous peoples in international agreements – specifically see Articles 3 (self determination) 19 (consult and cooperate on administrative decisions) 26 (lands and resources rights) and 36 (right to maintain and develop contacts, relations and cooperation, including…economic and social purposes across international borders)

Policy & Legal changes in Canada and internationally

- Truth and Reconciliation Commission (TRC) of Canada 94 Calls to Action
- 2016 United Nations Permanent Forum for Indigenous Issues, Canada announced that it was supporting the Declaration “without qualification UNDRIP would be implemented in accordance with Canada’s Constitution as “…through Section 35, Canada has a robust framework for the protection of Indigenous Rights.”
- 2017: establishment of a Working Group of Ministers, New principles released, including supporting participation as required by Article 19 UNDRIP

Policy & Legal changes in Canada and internationally

- Federal environmental assessment process being overhauled – promises to enhance the role of Indigenous peoples in resource development. NEB process also looking for enhanced participation.
- April 2017, Canada was back at UNPFII to support a new status at the United Nations for Indigenous peoples to participate in decision making that affected them at the General Assembly.
- Declaration of Aboriginal Title in Canada Tsilhquot'in Nation
- Engagement on a Trade and Indigenous Peoples Chapter in NAFTA 2.0

Significance of the Trade and Indigenous Peoples Chapter

- August 14, 2017, Canada's Minister of Foreign Affairs Chrystia Freeland announced Canada's negotiating priorities, which included the addition of an Indigenous chapter to a modernized NAFTA.
- **Process:** Instead of engagement after the trade deal was complete or nearly competed (process for CETA and TPP), Federal Government engaging with National Indigenous Organizations, Modern Treaty holders and Indigenous Economic and Development and business stakeholders on the what should be included in an Indigenous Peoples Chapter.
- How deep will this engagement go? Too soon to tell. Arguably a step towards implementation of the principles Article 19 of the UN Declaration
- **Substance:** NAFTA is Canada's primary trade and economic development agreement Formal inclusion of Indigenous chapter and recognition of Treaty and Aboriginal rights is significant for economic self determination

FTA CONSIDERATIONS

- Indigenous peoples included in exceptions and carve outs which allows Canada to preserve rights and preferences that benefit Aboriginal people – but what about promoting Indigenous trade?
- Do the carve outs adequately protect? Canada previously claimed that consultation is not required as there have been no adverse effect on Aboriginal rights. Newer language such as CETA procurement carve out seems much more comprehensive as direct reference to s. 35 of Canada's Constitution
- No references to *United Nations Declaration on the Rights of Indigenous Peoples* in any trade agreement.
- Canada is now proposing an Indigenous peoples' chapter. But will it include protections AND promotion of trade (i.e. no tariffs, recognition of title, consistency with UNDRIP).
- One (partial) precedent: Taiwan and New Zealand FTA (ANZTEC) 2013 has a chapter on co-operation on Indigenous Issues. The focus is on cultural exchange, and exchange of people – with some mention of promoting trade. No focus on Indigenous rights.

Potential Elements of an Indigenous Peoples Chapter

- **Rights Recognition:** An Indigenous Peoples Chapter should recognize the importance of the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples.*
- **Participation of Indigenous Peoples**: This chapter should also include a Committee, with Indigenous representation from all three NAFTA parties.
- **Promotion of Economic Opportunities, trade, investment and intellectual property**
  - discussion of protection of traditional knowledge of Indigenous peoples and the equitable sharing of benefits;
  - developing Geographic Indicators for the authentication of Indigenous artistic and cultural property;
  - facilitating the movement of Indigenous peoples and Indigenous peoples' goods and services within traditional territories, especially when that movement has been restricted by international borders;
  - promoting the establishment of Foreign Trade zones on Indigenous lands and traditional territories,
  - focus on promoting of economic opportunities for Indigenous women (link to gender chapter)

Other Chapters of NAFTA important to Indigenous Rights

- Preferences for Aboriginal businesses via procurement and State owned enterprises ;
- Links to Labour and Gender Chapters;
- Protective language in the Environment chapter of the impacts of Climate Change on Indigenous peoples;
- Greater protection for Indigenous Traditional Knowledge
- General exception to protect First Nation rights is required to clarify that nothing in NAFTA would prevent Canada from fulfilling any constitutional obligations to Indigenous peoples – similar to Canada FTA.

Canadian Free Trade Agreement (FPT agreement)

Chapter Eight - General Exceptions Article 800: Aboriginal Peoples

1. This Agreement does not apply to any measure adopted or maintained by a Party with respect to Aboriginal peoples. It does not affect existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982.
2. For greater certainty, nothing in this Agreement shall prevent a Party from fulfilling its obligations under its treaties with Aboriginal peoples, including land claims agreements.

Not Just NAFTA…

- Possible (likely?) that US administration may terminate the NAFTA talks.
- Debate about whether President can terminate NAFTA alone, or does he need Congressional support?
- If talks are halted, perhaps the focus could shift to other trade agreements? TPP11 (now known as CPTPP)? China?
- Active participation in other international agreements based on the UN Declaration, such as Climate Change negotiations that ongoing in Bonn.
- WIPO discussions on as new treaty to protect traditional knowledge. Essential that Indigenous peoples are active in this negotiation
- Process for NAFTA Indigenous Peoples' Chapter can serve as a precedent for making space for Indigenous peoples in international law and treaty-making from engagement to seat at the table.