

Making Modern Treaties Work – LCAC
BREAKOUT 4E: The UNDRIP and National Implications for Modern Treaty
Implementation

Moderated by Brian Tait, Executive Chairperson, Nisga'a Lisims Government.

- This session will explore UNDRIP and implications for modern treaty implementation.

PANELIST 1: Margaret Rosling, Aldridge + Rosling LLP

(Reflections from BC context: overview of the development of the law, modern treaty implications)

- Bio: practice law at Aldridge and Rosling, and we do a lot of work with Indigenous people and advising modern treaty holders around implementation of their treaties. I'll provide commentary around the impact that UNDRIP might have on their modern treaties
- UNDRIP is incredibly important in Canada and it's coming to a jurisdiction near you
- There appears to be an increasing tendency to equate un-constituted rights with treaty rights. It's been exacerbated to the point that it seems if you say you have a right, you have it.
- Now we have UNDRIP being applied in the Canadian context and it has provided uncertainty as to whether it will provide clarity or more confusion.
- The UN says UNDRIP is a universal framework of minimum standards for the wellbeing of Indigenous peoples, but how will this be applied in Canada?
- BC, through Bill C-41, which passed in November as DRIPA, was the first province in Canada to implement UNDRIP into provincial law. It was introduced, passed, and brought into force quite quickly (which doesn't happen very often), and it had lots of celebration
- DRIPA is a very short piece of legislation
 - Starts with Section 2 (purpose) about affirming UNDRIP, supporting the affirmation of and developing relationships with indigenous governments
 - Section 3: In consultation and cooperation with Indigenous peoples in BC, BC must make sure laws of BC are aligned with UNDRIP
 - The legislation is reflective of Bill C-262 (which died last summer), but two sections are different – 6 and 7 – and they give the province authority to enter into agreements with Indigenous Governments, which has implications for modern treaty holders.
- It has quite broad opportunities as well, especially as modern treaty holders meet the definition of "Indigenous governing body" outlined in DRIPA
- The experience of modern treaty holders in BC before DRIPA: they worked closely with the leadership council to develop legislation and took an unprecedented step to co-develop the legislation (which is obviously a very positive thing). The only problem with that is that modern treaty holders were kept in the dark. They weren't consulted, they were only provided with the opportunity to review the legislation right before it was introduced, and they also weren't invited to the celebrations after. This is obviously not acceptable.
- Unclear how that could've happened, but can say that Premier Horgan gave a full apology when it was brought up.

- Many of us here don't live in jurisdictions where UNDRIP has been implemented, and I want to raise a caution so that everyone is aware of the issues and can further its implementation better than in BC (especially to make sure that Indigenous groups are included in discussions and celebrations).
- The current argument with DRIPA is whether it actually implemented UNDRIP in BC.
- The act doesn't actually give UNDRIP legal force and it's not a veto over development. It's a step towards reconciliation in BC, and allows BC to align its laws with UNDRIP legislation. Basically, it's a work in progress
- DRIPA is ambiguous, but it wasn't drafted in clear and un-ambiguous language.
- There is much attention being paid to Free, Prior and Informed Consent (FPIC). Of course, it raises a number of issues, including:
 - Who is entitled to FPIC? Does it give a veto to Indigenous bodies?
 - Seems right now like a catch-all to all who are opposed to a project
- Article 37 of UNDRIP: Right of Indigenous people to recognition, observance of treaties and have states honour treaties. Encourage you to remind treaty partners of that provision
- UNDRIP has raised more questions than anything else.
- Modern treaty holders have done the heavy-lifting required to help implement modern treaties which cannot be undermined by international law.

PANELIST 2: Brian Crane, Gowling WLG

(Overview of legal perspective; political perspective, negotiations perspective)

- Every day that we read the news, UNDRIP comes up, it's sinking into the consciousness of ALL Canadians and is part of the political scene.
- What is UNDRIP? What is it not?
 - It is a political tool of great force, something that all Indigenous peoples can utilize in their political struggle to have their rights recognized.
 - It is a tool that governments will use and that will be taught in our schools and accepted as an instrument of change.
 - It's there to recognize individual and collective rights, but you have to do something with it – it doesn't act on its own
 - It's not legally binding, in other words the UNDRIP principles do not create legal obligations. The present government has given UNDRIP its full support, agrees with its principles and seeks its implementation, but has gone no further
- Canada says it's committed to re-introduce Saganash's Bill
 - That Bill endorses the rights and freedoms specified, but it does not implement them. It sets up a process under which UNDRIP is studied and legislation can be developed or amended in accordance with the UNDRIP principles.
- BC has enacted a similar law; NWT has committed to enact a similar law; Alberta has committed to endorse the principles; Ontario has (kind of) done that also.
- UNDRIP doesn't actually implement anything. What it does is solemnly proclaim, in a UN General Assembly Resolution, the principles of UNDRIP as a standard of achievement to be pursued in partnership and mutual respect.
- UNDRIP describes its principles as "minimum standards for the well-being of all Indigenous people of the world".
- UNDRIP was many years in the making, with the involvement of Indigenous peoples and it does demand respect. But it's not something you can go to court with.

- The courts, in fact, have stated that UNDRIP does not create legal obligations, and there has been nothing done in legislation to implement UNDRIP
- But it can be looked at when courts interpret Canadian law.
- The Minister of Justice Jody Wilson-Raybould said that UNDRIP is not a law or legally binding, it's a standard of achievement.
- The UNDRIP principles are important, for example:
 - the right to have non-discriminatory laws
 - the right to self-determination
 - not to be forcibly removed from your territory
 - protect culture
 - improve economic and social conditions on traditional lands
 - no military activities without free, prior and informed consent (FPIC)
 - consultation on projects on traditional lands
 - recognition and enforcement of treaties, etc. These are all rights that permeate UNDRIP
- It's very powerful but not a legally binding instrument.
- Governments say they're going to implement the principles of UNDRIP in Canadian law, but it'll be a long process and might not survive the next election.
- Try, in your dealings with government, to build on the momentum that's being created. But bear in mind that UNDRIP is important and will one day be recognized like the UN Declaration of Human Rights (internationally understood and accepted as both law and norm).
- True change will only come if you embrace the UNDRIP principles and take them to the negotiating table.
- The new Recognition of Rights Policy (a collaborative all party approach to treaty reform in BC which calls for co-development of mandates), will also lead to change.
- Recognize UNDRIP as something you can advocate with governments and move forward on, but not to take to court.
- Take it to the table collaboratively, as at the fiscal tables, and use UNDRIP as the foundation, not as the entire answer. It is part of a political process.

PANELIST 3: Peter Hutchins, Hutchins Legal Inc.

(International perspectives)

- Bio: practiced law in Montreal and across the country, and has seen just about everything in terms of denial from the crown.
- We can take inspiration from Bernie Sanders, one of the things we can admire is his tenacity (never gives up with universal Medicare). Sanders' tenacity reminds me of the determination of Indigenous peoples to change things for the better, and to not agree with government/courts/anyone else that their treaties didn't mean anything
- Remembers the elders and chiefs who didn't give up
- Doesn't entirely agree with Brian. Brian contends that UNDRIP is wonderful but not legally binding. Certainly, the political classes and courts share Brian's view, but UNDRIP is part of international law, and there is the question: what is the relationship between international law and Canadian national law?
- One thing is clear, over the last 20-30 years, the courts have agreed to look at international law from various points of view.

- Louis LeBel (puisse justice on the Supreme Court of Canada) - said we're not against using international law, but we insist that if you're going to do it, you have to be clear as to why and what you're hoping to accomplish. Something that we should remember.
- "Rise of International Law in Canadian Constitution: Feud or Fusion" by LeBel. Fusion is the joining of two disparate musical disciplines, where they come together but stand alone with their independence.
- He probably isn't averse to thinking of it as a feud, but whatever it is, the message is that the role for international law in Canadian constitutional law is ambiguous, and it's not okay to just write UNDRIP off as non-binding.
- Chiefs weren't ready to be told that their treaties weren't real instruments with enforceable rights, and they refused to listen, fought back, and the law is very understanding of that now.
- If you look at historical treaties, even back then there were slivers of UNDRIP in there already. In terms of the bad stuff, with historic and modern treaties, there is the issue of extinguishment. This lies heavily on the treaty-process in Canada, which is counter to UNDRIP (UNDRIP is the antithesis of that – denying attachment to territory, taking away lands and rights).
- Modern treaties are interesting (in experience with James Bay), but very complex, and the problem with them is that the entire agreement is that treaty holders think they have no rights beyond that (which is not true).
- You can't just say that if you can't convince us to put something in your agreement, it doesn't exist. Which is what UNDRIP is saying.
- Mitchell vs. MNR – Mohawk border crossing case
 - Point is that although they went to trial and the court of appeals, the position is that it was about people using their historic territory – so what if something was separating it which had nothing to do with them?
- Two papers to commend on this topic:
 - "Towards New development paradigms, the UNDRIP as a tool to develop self-determined development" Lennox (in international journal of HR)
 - Talk about UNDRIP and what it's doing for Indigenous people.
 - Come up with idea of self-determined development. Canada is all for self-determination, but it hasn't really done much in terms of development and who is in charge of development.
 - Indigenous peoples should be in charge of their own development, as that's the only way that you can build into development the things that are important to them.
 - The spirit of UNDRIP is there, and it should be informing us in Canada and around the world to open up our minds.
 - International Law Association paper on UNDRIP: UNDRIP and national implications for modern treaty implications. This never used to be on the agenda, but now it is – it's a real phenomenon, and there are links with obligations to consult, cooperate, and certainly FPIC
- Suggests that UNDRIP is very helpful for Indigenous perspectives, which courts are saying is important, and is always important when dealing with the Crown.
- UNDRIP sets high expectations, particularly among Indigenous peoples, who note that the adoption of UNDRIP is advancing rights of Indigenous peoples around the world.

- A lot has happened in 40 years, this has only been 10, and this is something we should bear in mind. In the context of human history, 10 years are less than the blink of an eye.
- Bernie is an inspiration, especially how he hangs in. We need this kind of determination in this area. You can't be told there aren't rights, or that international law doesn't apply to this area.

PANELIST 4: Paul Bachand, Pape Salter Teillet LLP

(Implications for modern treaty implementation. Is there an interpretation that can be used to assist implementation?)

- One of the dangers of going last, is all the people before you have covered many of the points you were going to make.
- Some people call it implementation/engagement of UNDRIP, but I call it onboarding. We don't know what will happen with it in the coming years federally, nationally, provincially, etc.
- There are some concerns out there about the impacts of onboarding UNDRIP. What would be the impact on jurisprudence on the duty to consult? How would provinces do this? Could the way it is enshrined become an obstruction to the pursuit of reconciliation?
- In adopting UNDRIP, the statute should make its intent explicitly clear.
- Part of what I will say today is a reflection on my time as a public servant with GNWT in its legal division.
- I think there is an opportunity for a whole-of-government approach to implementing the rights of UNDRIP and under the modern treaty processes as well.
- There are well-intentioned and sometimes quite progressive and effective joint policy review committees made up of right-thinking people and representatives who talk to each other, but not the rest of the line bureaucracy implementing the statutes. The onboarding of UNDRIP can help us go further. There needs to be a structural implementation of UNDRIP down into the operational level – shouldn't every public servant be an expert in the obligations of UNDRIP in relation to their job? I think we have an opportunity here in this onboarding process.
- Take the example of the new NWT government – 22 priorities established in the life of this government's term:
 - Implementing UNDRIP is a general reference.
- But they just remain vague priorities of government until something structural happens. What would it take to onboard UNDRIP in action in NWT?
- As Premier of GNWT trying to implement UNDRIP, how could that work? A series of instructions to the Cabinet Secretariat to amend departmental establishment policies to refer to and implement obligations in UNDRIP and land claims, self-government achievement. This would change the "constitution" of the department, and require specific departmental changes and mandates. This would require all departments in GNWT to know the specific treaty-rights of the Indigenous groups in their Agreements that deal with departmental people. Only then can they make sure to meet the obligations.
- What if there was a requirement that all public servant orientation sessions involved an engagement of modern-treaty implementation obligations that they will have to meet in their roles?
- What if Department of Justice had to give training to all departments about what Section 35 actually means in terms of their obligations?

- What if departmental managers/directors' performance reviews were partly based on the success of implementation of UNDRIP and treaty rights?
- A number of the UNDRIP articles deal with specific aspects of duty. They're specific and realizable in the context of a government that's serious about meeting treaty obligations and implementing/onboarding UNDRIP fully.
- There's an opportunity here for real change, but we all have to keep reminding governments that statements of principle are great, but we need to see real actions addressing obligations.

Moderator

- Minister Bennett used to say modern treaties trump asserted rights (really strong message), but now it's gotten really quiet since UNDRIP.

Questions:

1. The brand of reconciliation that is very Christian in nature and indicates that problems can be solved by referencing the bible. It's the same with UNDRIP: all Indigenous problems can be solved by referencing UNDRIP/reconciliation. Is there a political will for UNDRIP? What is the taste for it? I feel like it's a band-aid approach and fairy-tale on behalf of CIRNA.

Crane:

- I was just negotiating, and one of the councillors (without prodding or suggestion from legal council) referred to principles of UNDRIP. That's just one example of how it's seeped into minds of grassroots leaders.
- It is also seeped into minds of general public. Look at Wet'suwet'en events right now. It is coming into our consciousness and it is recognized. It is very difficult for politicians to move away from this – it's part of the accepted political legislation

Hutchins:

- It comes down to the whole-of-government approach as well. UNDRIP principles are not something that actually need legislation (although that is the classic view). But that's not what is happening. It's part of the rule of law in the country
2. From NWT, worked at TRC which worked in a good and challenging way (emotional and challenging issues). Acknowledge Coon Come, who's here and has shared his wisdom. Get frustrated with names and acronyms (e.g. UNDRIP, DRIPA). Why don't we just call it The Declaration, which is what it deserves based on all of the work that went into it. Everyone should just call it THE DECLARATION.

UNDRIP is not a band-aid, and it's never been that. These are calls to action, not just recommendations or band-aid solutions.

3. Can you please elaborate on the non-binding legal nature of UNDRIP? It does contain some binding elements of customary international law.

Rosling:

- In terms of the BC context: DRIPA is a piece of legislation directed at implementing UNDRIP. In some of the commentary around the legislation, there's been debate as to whether BC legislation actually does implement UNDRIP. Many people say that it doesn't actually implement UNDRIP.
- It's a statement of international law, a declaration of international rights, which can be used as interpretive tools

Crane:

- I think the idea of "legally binding" is perhaps confusing. It may be easier to say that the specific rights in UNDRIP are not Canadian law. They have not been made Canadian law (i.e. protection of heritage rights under UNDRIP is not something you could take to Canadian courts and fight for without it existing in Canadian law).

Hutchins:

- Glad you raised customary international law (CIL) vs conventional international law. CIL is like the common law of the international community. I don't think we should be providing governments with the discretion as to whether CIL is at work in Canada or not.
- I think it deserves to be CIL, which means that it is part of the law of Canada. We could argue about how we can enforce it, but we cannot take a minimalist view with this – we need to take a max view instead, so that Indigenous rights in Canada can fully move forward.