Removal of Objections to UNDRIP: Repercussions at Home and Abroad

On Tuesday, May 10, 2016 Canada removed its objections to the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[1] UNDRIP may significantly alter the legal framework of Aboriginal rights and title in Canada, but this continues to depend primarily upon the significance Canadian courts give to it and whether it is implemented by Parliament.

UNDRIP and Canada—A History of Objections

UNDRIP is a United Nations (UN) declaration. A declaration establishes a target that countries commit to aim at, but are not legally bound to achieve. For this reason, they are often referred to as 'aspirational': they do not create legally enforceable obligations.[2]

UNDRIP affirms the rights of Indigenous peoples worldwide to their ancestral land and resources, and their right to self-determination, while recognizing the historical injustices which have been inflicted upon them.

Along with the United States, New Zealand, and Australia, Canada voted against adopting UNDRIP at the UN General Council in 2007.[3]

Canada disagreed primarily with three aspects of UNDRIP:[4]

1) UNDRIP acknowledges a general right to self-government for Indigenous peoples.

> Canadian courts have only recognized this right in limited circumstances so far.[5]

2) UNDRIP emphasizes the sovereignty and right to self-determination of Indigenous peoples.

> The government was concerned that this would give nation-like rights to Indigenous groups, such as the right to control trade with the United States,[6] and possibly even the right to [secede *keyword link* to secession] from Canada.[7]

3) UNDRIP states that traditional territories and resources of Indigenous groups cannot be infringed without "free, prior, and informed consent."[8]

> This is contrary to the legal situation in Canada, where governments can

> infringe upon Aboriginal title for certain public purposes (as long as the government first meets its consultation and fiduciary obligations to the Indigenous group).[9]
>
> As well, Canada was worried that UNDRIP's guarantee of rights to a group's "traditional territory" could reinstate Aboriginal title to lands already given up in treaties.[10]

In 2010, Canada embraced UNDRIP as an "aspirational document" and an example of Canada's commitment to reconciliation.[11] Canada became a supporter of UNDRIP, but maintained "permanent objections" to several of the articles that they had disagreed with initially.[12]

The Significance of Canada's Objections

UNDRIP, as a UN declaration, is an aspirational document and is not legally binding. However, declarations and other forms of 'soft law' can eventually become legally binding customary law. A practice or idea can become customary law if many countries practice it over time, and those countries view it as a law.[13] For example, some consider aspects of the *Universal Declaration of Human Rights* – such as the right not to be subject to torture and the right against arbitrary imprisonment[14] –to be international customary law.[15] Customary law is binding between nations, although, like all international law, there is no way to compel a country to obey it, outside of war or diplomacy.

If a declaration becomes international customary law, it will not legally bind countries that had consistently and continuously objected to it.[16] If UNDRIP had become international customary law during this period of time Canada's objections would have prevented it from having any legal effect.

Effects of Removal of Objector Status

In May, 2016, Canada removed its official objections to UNDRIP at the *Permanent Forum on Indigenous Issues*. However, UNDRIP remains an aspirational document, just as it was between 2010 and 2016. As such, there are two ways that it could have an effect on the relationship between Indigenous peoples and the government within Canadian law:

> *1 – Implementation by the legislative and executive branches*
>
> The federal government could create law or policy that implements UNDRIP standards. For example, the government could create a law requiring "free, prior, and informed consent" before allowing development on lands where a group claims Aboriginal title. The government could also embrace UNDRIP in its Indigenous consultation policy. The government of Alberta declared in 2015 that it would implement the principles of UNDRIP in its relations with Indigenous peoples, implying that it will engage in greater consultation.[17]
>
> *2 – Judicial recognition of the declarations underlying values and principles*

> Canadian courts might consider UNDRIP international declarations when reviewing the appropriateness of government action on related issues.[18] After all, if the government commits to a declaration on the world stage, Canadian legislation,[19] and perhaps its own actions, should reflect the values behind the declaration. Therefore, it is possible that courts may re-interpret relevant Aboriginal legal rights, such as the right to self-governance, to be more in line with UNDRIP.

In the short term, the removal of objections to UNDRIP will not have an immediate effect on Canadian law. While it might be a sign that the government is more willing to implement UNDRIP standards than they were before, they have always been free to do so. Courts, however, will now be able to recognize the values underlying all UNDRIP articles, such as a preference for "free, prior and informed consent," as influencing government policy. Doing so may also be less controversial now that the Declaration has been fully endorsed by the government.

In the long term, should UNDRIP be practiced and enforced widely enough for it to become customary international law, it will bind Canada. In that event, breaches of UNDRIP could result in other countries bringing actions against Canada at the International Court of Justice, or individuals or interest groups bringing complaints to the Human Rights Tribunal or equivalent bodies. These bodies cannot impose any sort of punishment on Canada, which would instead suffer shame and loss of face on the international stage.

The creation of customary international law is both uncommon and controversial. A complicated document like UNDRIP is unlikely to ever become customary law, at least in its entirety. This is because customary law only develops where there is a degree of consistency in the way something is practiced.[20] That consistency is very unlikely to be achieved when dealing with complicated matters such as self-governance. The removal of objector status is therefore mainly a diplomatic gesture to reiterate Canada's respect for the principles of the Declaration.

Conclusion

Canada's removal of its objector status to UNDRIP could have long-term repercussions both at home and internationally should the Declaration eventually become international customary law. Its immediate effect within Canada is more difficult to determine. Accepting UNDRIP puts pressure on the government to implement recommendations in Canada, either in government policy or by creating laws that are in line with stated aspects of the Declaration. As well, the courts will consider UNDRIP as an indication of the government's intentions when reviewing the government's interactions with Indigenous peoples. As UNDRIP is not legally enforceable, it does not change the legal status of Indigenous peoples. However, it could result in more respect for Indigenous rights, in particular rights to self-determination and governance.

[1] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Res 295, UNGAOR, 61stsession, UN Doc A/RES/61/295 (2007) (this resolution adopts the *Declaration on the Rights of Indigenous Peoples*), online: <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/61/295&Lang=E>.

[2]United Nations Permanent Forum on Indigenous Issues, *United Nations Declaration on the Rights of Indigenous Peoples, Frequently Asked Questions,* accessed May 24, 2016,online: <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf>.

[3] Alina Kaczorowska, *Public International Law,* 4th ed (New York: Routledge, 2010) at 610.

[4] Indian and Northern Affairs Canada, *Canada's Interests with respect to the Draft Declaration* (June 29, 2006), cited in Centre for Constitutional Studies, *Constitutional Quandary over UN Committee Declaration,* July 23, 2007, online: < https://www.constitutionalstudies.ca/centres/ccs/news/?id=56> .

[5] *Sawridge Band v R,* 2006 FCA 228 at para 43.

[6] *Mitchell v Minister of National Revenue,* 2001 SCC 33, Binnie J in dissent.

[7] The Globe and Mail, *Adopting UN Indigenous Rights Declaration Could Worsen Damaged Relationship,* June 19, 2015, Online: <http://www.theglobeandmail.com/opinion/editorials/adopting-un-indigenous-rights-declaration-may-only-make-damaged-relationship-worse/article25048043/>.

[8] *UNDRIP supra* note 1, article 19.

[9] *Indian and Northern Affairs, supra* note 4.

[10] *Ibid.*

[11] Canada, Indigenous and Northern Affairs, *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples,* November 12, 2010, online: <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

[12] *Ibid.*

[13] John Currie, *Public International Law,* 2nd ed (Toronto: Irwin Law, 2008) at 188-199. See also, Lachs J (dissenting) in *North Sea Continental Self Cases (Federal Republic of Germany v Denmark)* [1969]International Court of Justice Rep 3 at 229 (for a discussion of general practice requiring not just many but "the great majority of the interested States.")

[14] *Ibid,* at 324.

[15] H Hannum, “The Status of the Universal Declaration of Human Rights in National and International Law” (1995-96) 25 Ga J Intl & Comp L 287 at 317-352.

[16] Currie, *supra* note 13 at 199-201.

[17] Rachel Notley, *Letter to Cabinet Ministers,* July 7, 2015, online: <http://indigenous.alberta.ca/documents/Premier-Notley-Letter-Cabinet-Ministers.pdf>.

[18] Peter Hogg, *Constitutional Law of Canada*, 5th ed supp vol 1 (Toronto: Thomson Reuters, 2007) at 11-8.

[19] Ruth Sullivan, *Driedger on the Construction of Statutes,* 3d ed (Toronto: Butterworths, 1994) 330, cited in *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 70.

[20] Jeffrey L Dunoff, Steven R Ratner and David Wippman, *International Law Norms, Actors, Process*,3rd ed (Austin: Wolters Kluwer, 2010) at 77.