Accommodating UNDRIP: Bill C-262 and the future of Duty to Consult

Introduction

In May 2018, 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*, passed in the House of Commons and moved on to be considered by the Senate.

The Bill, only 4 pages in length, requires the Government of Canada to take "all measures necessary to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples," and to develop and implement, in cooperation with Indigenous peoples, a national action plan.[1]

The United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP) was adopted by the United Nations (UN) General Assembly in 2007 with a vote of 144 in favour, 11 abstentions, and 4 votes against. Along with Australia, New Zealand, and the United States, Canada voted against, citing concerns over the compatibility of UNDRIP with Canadian law, in particular the language of "free, prior, and informed consent".[2] The government feared that the language of UNDRIP would give Indigenous groups a "veto" power and would endanger already settled land claims.[3]

The government has since reversed its course. In 2016, the Minister of Indigenous and Northern Affairs, Carolyn Bennett, announced that Canada fully accepted, without qualification, UNDRIP. She stated that "We (Canada) intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution."[4]

Canadian law recognizes that the Crown has a duty to consult and accommodate Indigenous groups when its actions may affect the rights of that Indigenous group. The duty exists on a spectrum. According to the Supreme Court of Canada, gaining the consent of the Indigenous group affected is only required for "very serious issues".[5]

What (if any) effect would Bill C-262, particularly the language of "free, prior and informed consent" in UNDRIP, have on the laws of Canada in relation to duty to consult?

The Duty to Consult in Canadian Law

The Crown has a duty to consult and accommodate Indigenous groups when a group's Aboriginal (existing or potential) or treaty rights may be affected.[6] The duty to consult is triggered where the Crown has actual or constructive knowledge of a potential or existing right that may be affected by its conduct or decision making.[7]

The duty to consult exists on a spectrum, depending on the circumstances of the claim.[8] The Court said in the case *Haida Nation v British Columbia (Minister of Forests)* (2004) that the government may be required to do as little as give notice to the group affected where the claim is weak, or the infringements on rights are minimal.[9] The Court said that consent would be required only for very serious issues. In a case decided later in the same year as *Haida*, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, the Court clarified that the Crown is able to fulfill its duty to consult and accommodate even when no agreement has been reached with the Indigenous group, so long as it consults and accommodates in accordance with its fiduciary duty.[10]

The fiduciary obligation of the Crown is to give priority to the claims of Indigenous groups and to take a group's existing and potential Aboriginal and treaty rights seriously.[11]

UNDRIP

UNDRIP is a list of rights created by the Working Group on Indigenous Populations at the UN and adopted by the United Nations General Assembly (the assembly in which all member states of the UN have one seat and one vote).[12] The UN describes UNDRIP as "minimum standards for the survival, dignity and well-being of the indigenous peoples."[13]

UNDRIP is a declaration. Unlike a treaty or a covenant, declarations are not signed or ratified by states. Declarations are aspirational and do not legally bind those who support them.[14]

UNDRIP indicates that the state must obtain "free, prior, and informed consent" before adopting legislative or administrative measures that may affect the rights of Indigenous people.[15] It also addresses compensation and redress for land acquisitions by the Crown; forced removals; and the taking of cultural, intellectual, religious, and spiritual property without free, prior, and informed consent.[16]

The term "free, prior, and informed consent," does not have a settled definition. In particular, whether "free, prior, and informed consent" is equal to a veto power has been a point of contention.[17]

Article 46 of UNDRIP states that nothing in UNDRIP authorizes or encourages, "any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."[18] Hence, the right to self-determination contained in UNDRIP does not imply a right to separate from the state in which the Indigenous group exists to establish an independent nation-state.

Further, Article 46 states that the human rights and fundamental freedoms of all shall be respected, and that limitations on rights "shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[19] This means that the rights contained in UNDRIP may be infringed upon in circumstances where they must be balanced against society's needs as a whole.

Impact

The approval of Bill C 262 by the Senate itself will not automatically impact the Crown's existing obligations to consult and accommodate Indigenous people. If the legislation is passed, an Indigenous group would need to bring a new case to the court dealing with the duty to consult. The court will then determine what the Crown's obligations are considering the new legislation and whether 'free, prior and informed consent' displaces, or changes, or even makes no change to the duty to consult.

Assembly of First Nations Chief Perry Bellegarde has said that the right to give consent implies the corresponding right to withhold consent.[20] NDP MP Romeo Saganash who introduced the Bill, however, says that the language of free, prior, and informed consent in UNDRIP does not mean that there is a veto for Indigenous groups.[21] He points out that, "the need to balance the specific collective and inherent rights of Indigenous Peoples with the human rights of all people," is specifically addressed in Article 46 of UNDRIP.[22] When read in its totality, Saganash argues, it is clear that there is no veto.[23] Saganash maintains that the purpose of the Bill is to make reconciliation a priority for the ruling government and to repudiate colonialism.[24]

There are a variety of ways to interpret international laws in the domestic context.[25] In case of international human rights law, the Canadian courts generally use the values in the human rights document in question to aid them in their contextual approach to interpreting laws.[26] This may push the required consultation and accommodation down the spectrum in favour of Indigenous groups. However, chances are that the duty to consult will not be displaced, should Bill-262 become law. The tradition of balancing the rights of the Indigenous group with the well-being of all of society is present in both current Canadian law and the language of article 46 of UNDRIP.

If free, prior and informed consent is a veto power, then that veto power is likely to be available to Indigenous groups in a situation that would be deemed by the courts to require consent. In the *Haida* case (2004), the courts recognized consent to be necessary only in the most serious cases. [27] The courts have not yet ruled in any case that the infringement of rights is so serious as to require the consent of an Indigenous group, so it is difficult to imagine what kinds of cases may meet the threshold if the bill becomes law.

Conclusions

If 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*, becomes law, there will likely be limited changes to the current Canadian law regarding the duty to consult.

Canadian law recognizes a duty to consult Indigenous groups when their rights may be affected. The duty exists on a spectrum from notifying the group, to, gaining the group's consent. If Bill C-262 becomes law, the place on the spectrum that a particular case falls may be more favourable to the Indigenous group.

The courts in Canada have not found the need for consent in any cases so far. If Bill C-262 becomes law, it is difficult to say what threshold would need to be met for consent to be required.

[1] 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 Sess, 42nd Parl, 2018, cl 4, 5 (as passed by the house of commons 30 May 2018).

[2] Gloria Galloway, "Ottawa drops objections to UN resolution on indigenous consent," The Globe and Mail (24 April 2017) online: < https://www.theglobeandmail.com/news/politics/ottawa-drops-objections-to-un-resolution-on-indigenous-consent/article34802902/>.

[3] Gloria Galloway, "Ottawa drops objections to UN resolution on indigenous consent," The Globe and Mail (24 April 2017) online: < https://www.theglobeandmail.com/news/politics/ottawa-drops-objections-to-un-resolution-on-indigenous-consent/article34802902/>; CBC News, "Canada endorses indigenous rights declaration," CBC News (12 November 2010) online: < https://www.cbc.ca/news/canada/canada-endorses-indigenous-rights-declaration-1.964779>.

[4] "Fully Adopting UNDRIP: Minister Bennett's Speech At The United Nations" *Northern Public Affairs Magazine* (11 May 2016) online: <http://www.northernpublicaffairs.ca/index/fully-adopting-undrip-minister-bennetts-speech/>.

[5] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 24, [2004] 3 SCR 511 .

[6] *Haida Nation, supra* note 2 at para 35; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 34, [2005] 3 SCR 388. See also *Beckman v Little Salmon/Carmacks First Nation [2010] 3 SCR 103*, in which the majority found that the duty to consult is an implied term in regard to all rights in modern, comprehensive treaties that specifically call for consultation with regards to particular rights and not others.

[7] *Haida*, *supra* note 2 at para 35; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* 2010 SCC 43 at para 31, [2010] 2 SCR 650.

[8] *Haida*, *supra* note 2 at para 37.

[9] *Haida*, *supra* note 2 at paras 43-45.

[10] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director*), 2004 SCC 74 at para 22, [2004] 3 SCR 550.

[11] R v *Sparrow*, [1990 1 SCR 1075 at 1119, 56 CCC (3d) 263.

[12] "United Nations Declaration on the Rights of Indigenous Peoples," *UNDESA Division For Inclusive Social Development Indigenous Peoples*, online: <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

[13] Ibid.

[14] Government of Canada Glossary of Terms – human rights, *sub verbo* "declaration".

[15] *UNDRIP, supra* note 9, art 29.

[16] *UNDRIP, supra* note 9, art 10-11, 28.

[17] For a discussion of the various interpretations of the term "Free, prior, and informed consent," see Cathal M Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (New York: Routledge, 2015).

[18]*UNDRIP, supra* note 9, art 46.

[19] *UNDRIP, supra* note 9, art 46.

[20] Jorge Barrera, "Status Indians to disappear in 50 years unless First Nations move beyond Indian Act: Perry Bellegarde," CBC News (11 June 2018) online: < https://www.cbc.ca/news/indigenous/status-indian-act-perry-bellegarde-afn-campaign-1.4701123>.

[21] Romeo Saganash, "Act on Declaration of Indigenous Rights, It's the Next Step to Reconciliation," *The Tyee* (28 May 2016), online: < https://thetyee.ca/Opinion/2016/05/28/Next-Step-Reconciliation/>.

[22] Romeo Saganash, "Act on Declaration of Indigenous Rights, It's the Next Step to Reconciliation," *The Tyee* (28 May 2016), online: < https://thetyee.ca/Opinion/2016/05/28/Next-Step-Reconciliation/>.

[23] Romeo Saganash, "Act on Declaration of Indigenous Rights, It's the Next Step to Reconciliation," *The Tyee* (28 May 2016), online: < https://thetyee.ca/Opinion/2016/05/28/Next-Step-Reconciliation/>.

[24] See Romeo Saganash, "UN Declaration on the Rights of Indigenous Peoples: Crucial Need for a Principled Legislative Framework," (18 April 2016), online: < http://romeosaganash.ndp.ca/documents>.

[25] For a discussion, see: Azeezah Kanji, "Applying International Law in Canadian Courts: A Pocket Guide for the Perplexed" *Canadian Lawyers for International Human Right*s (1 January 2015), online: <http://claihr.ca/2015/01/01/applying-international-law-in-canadian-courts-a-pocket-guide-for-the-perplexed/>.

[26] *Baker v Canada*, [1999] 2 SCR 817 at paras 69-70, 174 DLR (4th) 193.

[27] *Haida Nation, supra* note 2 at para 24.