



AIAI Critical Analysis: Canada's Indigenous Rights Framework

Background Information:

1. Canada's Promise to Implement UNDRIP:

- a. On May 10, 2016, Minister of Indigenous Affairs, Carolyn Bennet, announced that, "We are a full supporter of the [UNDRIP], without qualification, including free, prior, and informed consent."
- b. On November 20, 2017, Justice Minister, Hon. Jody Wilson-Raybould announced that the Federal Government will support 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*. Bill C-262 affirms UNDRIP, provides for the creation of a national action plan to achieve the objectives of UNDRIP, and requires that government take measures to ensure that the laws of Canada are consistent with UNDRIP.
- c. Justice Minister Jody Wilson-Raybould has acknowledged that UNDRIP implementation will be achieved through legislative and policy review and will be articulated through section 35 of the Constitution Act, 1982.

2. Canada's Ten Principles and Law and Policy Review:

- a. On July 14, 2017, Minister of Justice Jody Wilson-Raybould, chair of the Working Group of Ministers, released the *10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. These principles have shaped the law and policy reviews already underway and are the basis of the Federal Government's approach to the *Recognition and Implementation of Indigenous Rights Framework*. There was no First Nation input on the 10 Principles which has been a significant point of contention (see the Analysis section for more information).
- b. Canada has determined on its own what laws and policies it will address and has taken a "piece by piece" approach on issue areas that align with federal priorities rather than First Nation priorities.
- c. Instead of requiring free, prior, and informed consent, the newly reviewed laws and policy only require that government agencies "aim to secure consent". In practice, this amounts to little more than consultation and is the verbiage used in the 10 Principles. UNDRIP was never mentioned in the reviewed laws and policies despite that being an explicit demand made by AFN and others involved in the process.

3. Recognition and Implementation of Indigenous Rights Framework:

- a. On February 14, 2018 Trudeau announced the Recognition and Implementation of Indigenous Rights Framework (the Framework) with the stated goal of "building new mechanisms to recognize Indigenous governments and ensure rigorous, full, and meaningful implementation of treaties and other agreements" and to "advance self-determination including the inherent right of self-government."
- b. A bill is expected to be introduced to Parliament in Fall 2018 and Trudeau has stated that he wants it to become law before the next federal election in 2019.
- c. The Federal Government has established Recognition of Rights and Self-Determination Negotiation Tables across Canada. The outcomes of these tables will contribute to the planned Framework.

Summary of Canada's Indigenous Rights Framework:

4. The core of the planned Framework is to transition bands currently under the Indian Act into federally recognized "Indigenous Governments" (i.e. self-governing bodies whose rights are derived from section 35 of the Constitution Act, 1982). Further, Trudeau announced that the *Comprehensive Land Claims Policy* and *Inherent Right to Self-Government Policy* will be replaced but that his administration will not consider opening the Constitution. This process will be led by Minister Bennett and Crown-Indigenous Relations and Northern Affairs Canada.
 - a. Starting in 2018-19, the Federal Government will fund Indigenous participation in modern treaty negotiations through non-repayable contributions.
 - b. Budget 2018 includes \$51.4 million over two years to continue to support federal and Indigenous participation in Discussion Tables.¹
 - c. Budget 2018 set aside \$101.5 million to support capacity development for Indigenous groups to facilitate their own path to reconstituting nations (i.e. creating bigger groupings based on ethno-linguistic/cultural lines).
 - d. Please see Appendix A for a list of jurisdictions that could potentially be under First Nations control should they go ahead with an Indigenous Self-Government arrangement. This list was developed by INAC without First Nations input.
5. Another aspect of the Framework is a new fiscal relationship between the Federal Government and the new federally recognized "Indigenous Governments". The Department of Indigenous Services, which continues to provide funding for services to bands, will cease to exist once all First Nations become part of the new system (this is the stated goal of the Framework).
 - a. Budget 2018 has set aside \$188.6 million over five years to advance a new fiscal relationship with First Nations. Funding will build capacity in First Nations communities, support Indigenous institution-building, and support continued work with First Nations to establish a new fiscal relationship.
 - b. \$189.2 million has been set aside for 2018-19 to begin the implementation of new fiscal policy reforms.

Analysis:

6. Indigenous Self-Government:
 - a. The most important right recognized in UNDRIP is the right to self-determination. It is an overarching umbrella right that is further developed in UNDRIP articles related to land rights, economic rights, governance, and free, prior, and informed consent. Self-determination, in the true sense of the term, would be impossible to accommodate within the confines of the Constitution Act, 1982. Further, government officials have yet to explain how self-government rights, newly negotiated through the Discussion Tables, will inform section 35 of the Constitution despite being asked on numerous occasions. That Trudeau has explicitly stated the Liberal government will not consider opening the Constitution complicates things further.

¹ Formerly called exploratory tables, the new official name is "Recognition of Indigenous Rights and Self-Determination Discussion Tables". Joe Wild, Senior Assistant Deputy Minister for Treaties and Aboriginal Government in Crown-Indigenous Relations, stated that **these new tables would inform the direction of national policy reforms on land claims and self-government rights**. They are also expected to somehow "breath life" into section 35 of the Constitution.

- b. Canada continues to avoid discussing substantive forms of First Nations jurisdiction and has purposely kept the conversation focused on their priorities. Jurisdiction over membership, programs and services, and leadership selection is necessary but not sufficient for First Nations to heal and rebuild. The Framework does not address treaty obligations, title lands, or the expansion of governing authority in any meaningful way. Once again, Canadian decision-makers are refusing to provide restitution for the theft of our lands, the destruction of our communities, and the ongoing use of our resources.
- c. Demanding non-assertion of rights (through certainty clauses or by any other means) in return for funding and delegated authority cannot continue.² It is surrender by a different name.
- d. The Pre-Confederation and Numbered Treaties are international land-sharing agreements between nations that recognize First Nations territorial authority. The Framework process seeks to domesticate treaty relationships and pave the way for sectoral agreements that facilitate resource extraction. These agreements directly undermine the spirit and intent of our treaties.

7. The New Fiscal Relationship:

- a. The Framework and associated processes are an attempt to limit the fiduciary responsibility of the Crown while at the same time undermine First Nations control over their traditional territory.
- b. The financial institutions created to manage the new fiscal relationship are run by Trudeau's cabinet and maintain highly conservative positions on First Nations' economic rights. They reflect INAC positions on privatization, financial independence, and own source revenue.
- c. The purpose of the new fiscal relationship is to prepare First Nations to introduce taxation of their citizens as a major source of funding and ultimately reduce the obligations the Crown owes First Nations. There is a significant amount of funding allocated by the federal government to ease the transition to the new relationship, but their draft policy reports show the eventual neglect of Canada's fiduciary responsibilities.³
- d. While some authority is delegated to First Nations, there is no mention of expanding First Nations' land base. As stated in Volume II of the Royal Commission on Aboriginal Peoples: "A critical element of fiscal autonomy is a fair and just redistribution of lands and resources for Aboriginal peoples. Without such redistribution, Aboriginal governments, and the communities they govern, will continue to lack a viable and sustaining economic base, which is integral to self-government."

² Certainty clauses have become mandatory in agreements related to title and prevent First Nations from exercising jurisdiction over their lands and resources. First Nations suspend claims in exchange for financial compensation and/or a co-management regime.

³ The draft policy report, *Self-Government Fiscal Policy Proposal for Federal Review*, demonstrates a slow transition to "fiscal independence". The arrangement involves a combination of funding generated by the Indigenous Governments from own sources, with supplemental funding from federal transfer payments and increasingly support from the provinces. **Indigenous fundraising, the draft policy states, will rely heavily on tax and own source revenues.**

8. The Framework and associated processes are not supportive of a true nation-to-nation relationship between First Nations and Canada as they:
 - a. Openly reject Free, Prior, and Informed Consent (FPIC) as a guiding principle of the relationship between Canada and First Nations. This is made evident by *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples* (Ten Principles) document which states that Canada will only *aim to secure* free, prior, and informed consent. This amounts to little more than consultation.
 - b. Call for the infringement of inherent and unextinguished rights and jurisdictions of First Nations. The Ten Principles document clearly states that infringement of Aboriginal rights will continue unabated in situations where Canadian courts find it "justified" or where it is found to be in the best interest of the nation.
 - c. Advocate for the supremacy of the Canadian constitutional framework, thereby limiting the space for true self-determination and the exercise of inherent rights by First Nations. The Ten Principles document refers to "cooperative federalism" and asserts that governments should "ensure that Indigenous peoples are treated with respect and as full partners in Confederation."
9. Only First Nations can determine their path to decolonization. Canada has taken a unilateral approach to the development of the Framework and has done so on an extremely short timeline. Although they have stated that this is a voluntary process, they have limited First Nations participation by refusing to consider alternative models that focus on First Nation priorities.

Appendix A: Jurisdictional Limitations

The Federal Government has been very clear on the limits of negotiations and has stated that they see "...the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution."

1. Potential Indigenous Self-Government arrangement jurisdictions:
 - a. Establishment of governing structures, elections, and leadership selection processes
 - b. Membership, marriage, adoption, child welfare, Aboriginal language, culture, and religion
 - c. Education, health, and social services
 - d. Administration of justice issues, including matters related to the administration and enforcement of laws or other jurisdiction which might include certain criminal laws
 - e. Penitentiary and parole
 - f. Environmental protection and assessment, fisheries co-management, gaming, and emergency preparedness
2. Jurisdictions outside the scope of an Indigenous Self-Government arrangement (non-negotiable):
 - a. Powers related to Canadian sovereignty, defense and external relations
 - b. International/diplomatic relations and foreign policy
 - c. National defense and security
 - d. Security of national borders
 - e. International treaty-making

- f. Immigration and naturalization of aliens
 - g. International trade, including tariffs and import/export controls
3. Other national interest powers outside the scope of an Indigenous Self-Government arrangement (non-negotiable):
- a. Management and regulation of national economy, including regulation of: the national business framework; fiscal and monetary policy; a central bank and banking system; bankruptcy and insolvency; trade and competition policy; intellectual property; incorporation of federal corporations; and currency.
 - b. Maintenance of national law and order and substantive criminal law, including: offenses and penalties under the Criminal Code and other criminal laws as well as national emergencies and the “peace, order and good government” power
 - c. Protection of health and safety of all Canadians
 - d. Federal undertakings and other powers, including: broadcasting and telecommunications; aeronautics; navigation and shipping; maintenance of national transportation systems; postal service; census and statistics

Reference Material:

1. Carolyn Bennet announces that Canada is a full supporter of UNDRIP:
<http://www.cbc.ca/news/indigenous/canada-un-indigenous-rights-questions-1.3578074>
2. Justice Minister Jody Wilson-Raybould announces support for Bill C-262:
<https://www.fasken.com/en/knowledgehub/2017/12/indigenous-law-20171201>
3. Link to Bill C-262, *An Act to ensure that the laws of Canada are in harmony with UNDRIP*
<http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/first-reading>
4. Announcement that UNDRIP will be implemented through section 35:
<https://www.cigionline.org/articles/will-canadas-support-undrip-breathe-new-life-section-35-constitution-form-free-and-prior>
5. Trudeau announces Working Group of Ministers:
<https://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>
6. 10 Principles Respecting the Government of Canada's Relationship with Indigenous Peoples
<http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>
7. Trudeau announces the Recognition and Implementation of Indigenous Rights Framework:
<https://pm.gc.ca/eng/news/2018/02/14/government-canada-create-recognition-and-implementation-rights-framework>
8. Recognition of Indigenous Rights and Self-Determination Discussion Tables:
<http://www.aadnc-aandc.gc.ca/eng/1511969222951/1511969264945>
9. Comprehensive Land Claims Policy and Inherent-Rights Policy to be replaced + Trudeau won't consider opening the constitution:
<http://www.cbc.ca/news/indigenous/first-nations-reaction-trudeau-indigenous-rights-plan-1.4536098>
10. Budget 2018: Indigenous and Northern Investments:
<https://www.aadnc-aandc.gc.ca/eng/1520368281802/1520368298215>
11. Minister Bennet's engagement on the Framework:
<https://www.aadnc-aandc.gc.ca/eng/1522086494578/1522086520382#chp2>