
Indigenous Rights and Canadian Wrongs

British Columbia's Bill 41 and the United Nations Declaration on the Rights of Indigenous Peoples

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Abstract: British Columbia's Bill 41 — 2019: Declaration on the Rights of Indigenous Peoples Act represents the first provincial attempt at implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). While a laudable legislative achievement, the passage of Bill 41 is juxtaposed against past and present settler-colonialism in Canada. This essay explores Bill 41 by looking at Canada's historical relationship to UNDRIP, the potential for implementation at the provincial level, and the roadblocks that may lay ahead.

Acknowledgements:

Many thanks to Dorothy Hodgins, Michael John Lo, and the On Politics team for their collaboration and support throughout the editing process, to Dr. Jamie Lawson for lending his keen eye and expertise, and to Dr. Kelly Aguirre for sharing so much knowledge in POLI 263: The Politics of Indigenous Peoples.

On November 26, 2019, British Columbia (BC) became the first Canadian province to formally commit to implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP or the Declaration). With the support and approval of Indigenous leaders like Grand Chief Ed John and First Nations Summit's Cheryl Casimer, the BC government passed Bill 41 - 2019: *Declaration on the Rights of Indigenous Peoples Act*.¹ Less than three months later, the BC division of the Royal Canadian Mounted Police (RCMP) raided a checkpoint on Wet'suwet'en territory, arresting six Indigenous land defenders while enforcing an injunction pertaining to the Coastal GasLink extraction project.² Despite the ostensible separation between the legislative branch of government and the BC RCMP, the temporal proximity of the bill's passage and the raids represent an inauspicious foundation for UNDRIP in BC. This paper examines Bill 41 and the prospect of implementing UNDRIP on the provincial level. Despite the legal and legislative difficulties of implementation and Canada's settler-colonial history, Bill 41/UNDRIP holds immense potential if the BC government respects the Declaration's foundational tenets vis-à-vis Indigenous peoples' inherent rights.

A Brief History of UNDRIP

Canada's ratification of UNDRIP in 2015 was the culmination of a decades-long diplomatic battle by Indigenous leaders, scholars, and activists. Since the early 1900s, Indigenous leaders have engaged with the international community seeking formal recognition of their rights.³ Indigenous leaders gained traction in international fora through the "politics of embarrassment,"⁴ shaming Canada by showcasing to the global community its settler-colonial practices. Indigenous leaders in Canada

¹ Kung, Eugene. 2019. "Bill 41: A New Law to Uphold Indigenous Rights in BC." *West Coast Environmental Law*.

² Bellrichard, Chantelle, and Yvonne Brand. 2020. "6 Arrested at Wet'suwet'en Anti-Pipeline Camp." *CBC News*, February 6.

³ Lackenbauer, Whitney P., and Andrew F. Cooper. 2007. "The Achilles Heel of Canadian International Citizenship: Indigenous Diplomacies and State Responses." *Canadian Foreign Policy Journal* 13 (3): 99–119.

⁴ *ibid*, 107.

were instrumental in uniting “the common experience” of Indigenous Peoples around the world,⁵ contributing to notions of “Indigenous Globalism” and the “Fourth World.” The latter two concepts pertained to a shared but differentiated experience of Indigeneity.⁶

With the creation of the World Council of Indigenous People in 1975, there was finally a “forum both for the collective Indigenous voice and a site for the assertion of Canadian leadership.”⁷ The establishment of the Working Group on Indigenous Populations at the United Nations Economic and Social Council in 1982, followed thereafter by the International Year of Indigenous Peoples, laid the foundation for future international cooperation.⁸ However, Canada’s oppositional behaviour towards the Declaration was continuous from drafting until ratification.

Contention emerged during the 1992 Vienna conference over the term “‘peoples’ rather than ‘people’ or ‘populations’,” as the use of peoples, “opened up the prospect of unqualified acceptance of self-determination” in accordance with the Universal Declaration of Human Rights.⁹ Fear mongering over territorial secession and Indigenous self-determination was a standard tactic for Canadian representatives, and efforts to undermine the legal liability of the agreement were common.¹⁰ Despite Canada’s obstinacy, collective Indigenous diplomacy would ultimately prevail. However, it would still require years of negotiation, a change in government, and the publication of the Truth and Reconciliation Commission report before Canada officially adopted the Declaration without qualification at the international level.¹¹

UNDRIP and Bill 41

UNDRIP recognizes “the urgent need to respect and promote the inherent rights of indigenous peoples...especially their rights to

⁵ *ibid*, 103.

⁶ Beier, J. Marshall. 2007. “Inter-National Affairs: Indigeneity, Globality and the Canadian State.” *Canadian Foreign Policy Journal* 13 (3): 121–31. Page 121

⁷ Lackenbauer & Cooper 2007, 103.

⁸ Lackenbauer & Cooper 2007, 107.

⁹ *ibid*, 108.

¹⁰ *ibid*, 110.

¹¹ Lightfoot, Sheryl. 2019. “Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples.” Essay. In *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, 151–169. Page 21

their lands, territories and resources.”¹² The Declaration addresses, *inter alia*, self-determination and self-governance (articles 3 and 4), resource conservation (article 29), and title and land dispossession (articles 8, 10, 26). Underwriting many other articles is the notion of “free, prior and informed consent” which argues for Indigenous consultation on matters relating to individual and collective wellbeing. But UNDRIP is a non-binding international agreement requiring signatories to uphold their commitment through domestic law.

BC’s Bill 41 represents the first effort at implementation on the provincial level. Its purpose is to “ensure the laws of British Columbia are consistent with [UNDRIP]”¹³ and to “implement an action plan to achieve the objectives of the Declaration.”¹⁴ Bill 41 affirms that “all measures necessary” must be taken “in consultation and cooperation with the Indigenous peoples in British Columbia,”¹⁵ to ensure that the articles of the Declaration are met; however, the definition of “all measures” is not explicitly stated. The bill prioritizes transparency through a recurring reporting process undertaken annually in “consultation and cooperation with the Indigenous peoples in British Columbia,”¹⁶ and broadens the definition of Indigenous governing bodies to include, for example, hereditary governments and collectives comprised of multiple Nations that may form agreements with the province.¹⁷

Implementation at the Provincial Level

Implementation of UNDRIP on the provincial level in Canada is complex, yet promising. Article 91(24) of the Constitution Act, 1867, covers federal legislative authority regarding “Indians, and Lands reserved for the Indians.”¹⁸ The legislative relationship between the federal government and Indigenous peoples can be an impasse to negotiation

¹² UN General Assembly. 2007. *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295. Page 3.

¹³ *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44. s 3.

¹⁴ *ibid*, s 4(1).

¹⁵ *ibid*, s 4(2).

¹⁶ *ibid*, s 5(2).

¹⁷ Tansowny, Corrine. 2020. “An UNDRIP in the Bucket? The Potential Impact of BC’s Adoption of the United Nations Declaration on the Rights of Indigenous People.” *McGill Journal of Sustainable Development Law*.

¹⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

at the provincial level; however, Bill 41 may close this legislative gap, as many articles of UNDRIP relate specifically to provincial purview in the Canadian context — e.g. labour laws (article 17), education (article 14), health programmes (article 23). This implies responsibility at the provincial level.¹⁹

Furthermore, Bill 41 stands to bolster and perhaps improve existing legislation and judicial precedent. Section 35(1) of the Constitution Act, 1982 states, “the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”²⁰ As ruled in *Delgamuukw v. Attorney General of British Columbia* (1997) and later affirmed in *Tsilhqot’in Nation v. British Columbia* (2014), Aboriginal title in much of BC has never been extinguished.²¹ According to Anishinaabe/Ojibwe scholar John Borrows, this implies that BC land title leans “in the favour of First Nations.”²² In practice, the tendency to view Indigenous rights through an “originalist” lens—focusing on “the moment of contact and not at the later moment of the Crown’s assertion of sovereignty”²³—often disregards the contemporary relationship Indigenous peoples have with their land. UNDRIP instead emphasizes a “living” jurisprudence, making clear that “Indigenous rights need not be rooted in historic claims.”²⁴

The Declaration also challenges the Canadian conception of Aboriginal rights. According to legal scholar Ryan Beaton, current legislation grants rights *to* Indigenous people *from* the Canadian constitution.²⁵ Section 35 of the Constitution Act, 1982, places the burden on “rights holders to seek redress in the courts when the Crown infringes their rights in a manner that...cannot be justified.”²⁶ The Crown has an

¹⁹ Wilkins, Kerry. 2019. “Strategizing UNDRIP Implementations.” Essay. In *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, 151–169. Page 128.

²⁰ *Constitution Act, 1982*.

²¹ Borrows, John. 2017. “Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism.” *Canadian Historical Review* 98 (1): 114–35. doi:10.3138/chr.98.1.borrows. Page 128.

²² *ibid*, 121.

²³ *ibid*, 130.

²⁴ *ibid*, 115.

²⁵ Beaton, Ryan. 2018. “Articles 27 and 46(2): UNDRIP Signposts Pointing Beyond the Justifiable- Infringement Morass of Section 35.” In *UNDRIP Implementation: More Reflections on the Braiding of International, Domestic and Indigenous Laws (Centre for International Governance Innovation 2018)*. Page 112.

²⁶ *ibid*, 112.

obligation to engage “Aboriginal and treaty rights holders,” but no further than when the Crown “satisfies *itself*.”²⁷ This puts the legal, social, and financial burden on Indigenous communities wishing to protest a section 35 violation. UNDRIP, in both spirit and text, inverts this process by calling on the state to recognize, *a priori*, the inherent rights of Indigenous peoples.²⁸ This has led oppositional voices to claim that UNDRIP grants an Indigenous veto over any and all projects; however, this claim is disputable. According to lawyer Eugene Kung, the Declaration recognizes that “the consenting party has self-determination to make an informed decision about a matter affecting them,” not that Indigenous peoples have unilateral decision-making capabilities.²⁹

Article 46: Self-Determination and Sovereignty

There are, however, notable concerns surrounding the Declaration. Bill 41 acknowledges and affirms all articles of UNDRIP, some of which may undercut the most important facets of Indigenous self-determination including the right of title. Article 46(1) of UNDRIP states,

“Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging **any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.**”³⁰

If interpreted broadly article 46(1) could disqualify any action that is perceived to threaten Canadian sovereignty (e.g. myriad expressions of self-determination). One would be naïve not to consider this a possibility given the historical relationship between Indigenous people and the Canadian government. Anishinaabe educator Hayden King adopts this skeptical position, stating that UNDRIP’s potential for Indigenous self-

²⁷ *ibid*, 117.

²⁸ *ibid*, 114.

²⁹ Kung 2019.

³⁰ UN General Assembly 2007.

determination is “tempered by the reality that the exercise of this agency is ultimately ‘permitted’ — or not — by the states in which they reside.”³¹ Regardless of interpretation, article 46(1) is a reminder of who has the last word on sovereignty in the Westphalian tradition: the state.

There are more hopeful perspectives on UNDRIP’s implementation, predicated on the notion that “soft law cannot be simply dismissed as non-law.”³² Although UNDRIP is non-binding, a declaration is considered by the UN to relate “to matters of major and lasting importance where maximum compliance is expected.”³³ Thus Canada’s ratification of UNDRIP and BC’s commitment to implementation should not be seen as mere performance and spectacle, but a legally consequential decision.

Conclusion: Indigenous Rights or Canadian Wrongs?

The contrast of Bill 41/UNDRIP and the ongoing conflict on Wet’suwet’en territory is one example of the glaring and disheartening hypocrisy that exists within Canada; however, this is an insufficient reason for dismissing the progress being made towards redressing Canadian settler-colonialism. Change is possible if UNDRIP’s commitment to Indigenous peoples’ rights are respected and elected officials are held to account — two main principles of Bill 41. Land dispossession and resource extraction are ongoing expressions of settler-colonialism, but Bill 41 provides a roadmap to properly rectify these injustices through the recognition of title, self-determination, and treaty adherence. The legal and legislative complexities highlighted in this essay should be seen only as an impediment, not an impasse, that can be surmounted by political will and public scrutiny. The legal and political achievements of Indigenous peoples, from the earliest acts of international diplomacy to the contemporary moment, are proof of Bill 41’s potential.

³¹ King, Hayden. 2019. “UNDRIP’s Fundamental Flaw.” *OpenCanada*. <https://www.open-canada.org/features/undrips-fundamental-flaw/>.

³² Barelli quoted in Gunn, Brenda L. 2019. “Overcoming Obstacles To Implementing The Un Declaration On The Rights Of Indigenous Peoples In Canada.” Essay. In *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples*, 121–32. Page 31.

³³ *ibid*, 32.

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