Canadian Energy Law Foundation

UNDRIP as a Framework for Reconciliation: Challenges and Opportunities

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Sam Adkins
Lisa Jamieson
Terri-Lee Oleniuk
Sabrina Spencer

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Overview

- **Part 1 – Reconciliation and Aboriginal Law in Canada**
- Part 2 –Implementing UNDRIP
- Part 3 – Reconciliation in Administrative Law
- Part 4 – What does this mean for practitioners?

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The Starting Point on Reconciliation

The most glaring blemish on the Canadian historic record relates to our treatment of the First Nations that lived here at the time of colonization.... Early laws forbad treaty Indians from leaving allocated reservations. Starvation and disease were rampant. Indians were denied the right to vote. Religious and social traditions, like the Potlatch and the Sun Dance, were outlawed. Children were taken from their parents and sent away to residential schools, where they were forbidden to speak their native languages, forced to wear white-man's clothing, forced to observe Christian religious practices, and not infrequently subjected to sexual abuse. The objective was to "take the Indian out of the child"…The only way forward is ***acknowledgement and acceptance of the distinct values, traditions and religions of the descendants of the original inhabitants of the land we call Canada***.

–Beverley McLachlin, former Chief Justice of the Supreme Court of Canada

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Constitutional Protection of Indigenous Rights

- Section 35 of the *Constitution Act, 1982*:
  - "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed".
  - Aboriginal peoples of Canada include the Indian (First Nation), Inuit and Metis people.
  - Constitutional protection = highest law in the land.
  - "Empty box" does not define aboriginal and treaty rights
  - Section 35 protects *substantive rights* and *procedural rights*

Purpose of section 35 is reconciliation; even substantive rights are not absolute.

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Balance and Compromise under Section 35

- "…what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. …rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." (SCC in *Van der Peet*, 1996).

- "[the] duty to consult and accommodate by its very nature entails balancing of Aboriginal and other interests and thus lies closer to the aim of reconciliation at the heart of Crown-Aboriginal relations" (SCC in *Haida*, 2004).

- "The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the Constitution Act, 1982" (SCC in *Little Salmon Carmacks*, 2010).

- "The Chippewas of the Thames are not entitled to a one-sided process, but rather, a cooperative one with a view towards reconciliation. Balance and compromise are inherent in that process" (SCC in *Chippewas*, 2017).

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The UN Declaration on the Rights of Indigenous Peoples ("**UNDRIP**")

- Adopted by UN General Assembly in 2007.
- Confirms broad range of individual and collective rights of Indigenous peoples
- Rights under UNDRIP are not absolute and require balancing with other rights and the public interest
  - Article 46(2): …limitations [on exercise of 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."
- Free, prior and informed consent (FPIC) is not a veto

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Framework Legislation

- Commits government to implementing UNDRIP
- Provides legislative regime to implement UNDRIP
- Bill C-262 (Canada)
  - Affirmed UNDRIP as a "universal human rights declaration with application in Canadian law" (s. 3).
  - Canada must "take all measures necessary to ensure the laws of Canada are consistent with [UNDRIP]" (s. 4).
- *Declaration on the Rights of Indigenous Peoples Act* (British Columbia)
  - "decision-making agreements" with Indigenous groups

Targeted Legislation

- Operationalize aspects of UNDRIP
- *Environmental Assessment Act* (BC)
  - "strength of claim" is not a factor in determining participation.
  - Implements a "consensus-based approach".
  - Drafted in consultation with Indigenous working group.

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Fundamental Principles of Administrative Law

- Two fundamental principles:
  - **Natural Justice**
    - The right to know the case being made and respond to it.
    - The rule against bias.
  - **Procedural Fairness**
    - Contextual right aimed at ensuring “fair and open” procedure with opportunity for affected parties to have their views considered.

Incorporating UNDRIP into Regulatory Proceedings

- UNDRIP will alter Canada's regulatory and administrative processes, but fundamental principles of administrative law will not change.
- Recognition of tribunals as specialists
- Seeking consensus with First Nations

Incorporating UNDRIP into Regulatory Proceedings

- Incorporation of Indigenous processes into regulatory processes
- Increasing importance of weighing the “public interest” in regulatory and administrative decision

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Industry and UNDRIP

- Increasing role for commercial agreements
  - Capacity Agreements:
  - Impact Benefit Agreements:
- Frontloading Project Planning
  - Increasing Indigenous decision-making authority will mean Indigenous groups and regulators will need project details earlier in the process

Industry Challenges

- **Fairness**:
  - Indigenous nations' incentives may be inconsistent with those of the regulatory process.
- **Efficiency**:
  - Risks of duplicative processes that would extend timelines.
- **Costs and Timeliness:**
  - New processes are untested and unpredictable.
  - Factors that could lead to increased costs:
    - More participants
    - Increasing complexity of decision-making processes.
    - Scope-creep.
    - Indigenous-led assessments.
    - Increased demand for capacity funding.

Questions?

Sam Adkins
sam.adkins@blakes.com
(604) 631-3393

Lisa Jamieson
lisa.jamieson@lngcanada.ca
(587) 233-5325

Sabrina Spencer
sabrina.spencer@blakes.com
(604) 631-3364

Terri-Lee Oleniuk
terri-lee.oleniuk@blakes.com
(403) 260-9635

Blakes