

THE DEVELOPMENT OF AN INDIGENOUS LANGUAGES ACT (CANADA):

YUKON FIRST NATION KEY CONSIDERATIONS



PREPARED FOR:

Assembly of First Nations (Yukon Region)

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The contents contained in this document do not reflect the position of Yukon First Nations, or any individual First Nation, and should therefore not be considered a consultation document. This document was developed for information purposes, and to support discussion on the proposed Indigenous Languages Act (Canada).

1. Introduction

Language is integral to the cultural knowledge, kinship, customs, heritage and histories of Yukon First Nations. There is no dispute that First Nation languages in the Yukon are at risk of becoming extinct. Representatives attending the Assembly of First Nations (Yukon Region) pre-engagement forum on August 22, 2018 (the “forum”) repeatedly stated the urgency for all governments to be proactive in the revitalization, protection and advancement of Yukon First Nation languages. Yukon First Nations do not have the luxury of time.

The messages brought forward at the forum are clear. There needs to be an immediate financial investment to ensure the revitalization and protection of Yukon First Nation languages. Yukon First Nation children are key and should be provided the opportunities and supports to work with Yukon First Nation language carriers (“language carriers”) immediately. Language immersion is key for Yukon First Nations to achieve fluency. Canada’s efforts to achieve reconciliation with Yukon First Nations and move beyond the devastating impacts of the federal residential school policies requires the federal government to publicly fund Yukon First Nation languages. The investment in Yukon First Nation languages should be at a minimum comparable to monies provided to promote and advance the English and French languages in Canada.

2. Purpose

This paper is a supplementary document to the Assembly Of First Nations (Yukon Region) Language Discussion Paper (September 3, 2018) prepared by Marilyn Jensen and Thomas Shepherd.

The focus of the paper is to identify key considerations to inform the development, drafting and application of Canada’s proposed Indigenous Languages Act (“ILA”) specific to self-governing Yukon First Nations’ treaty rights and self-government interests confirmed by Yukon First Nation final and self-government agreements.

Aspects of this paper could address the interests of those Yukon First Nations without final and self-government agreements.

3. Background

On December 6, 2016 Prime Minister Justin Trudeau announced his government’s commitment to enact legislation in an effort to achieve reconciliation with Indigenous Peoples in Canada. In his address to the Assembly of First Nation Chiefs (Special Assembly) Prime Minister Trudeau stated

“So today, I commit to you that our government will enact an Indigenous Languages Act, co-developed with Indigenous Peoples, with the goal of ensuring the preservation, protection, and revitalization of First Nations, Métis and Inuit languages in this country”.

In June 2017 Canada launched a process with the Assembly of First Nations, Inuit Tapiriit Kanatami and the Métis Nation to engage Indigenous language specialists and experts to inform the development of the ILA.

On May 29, 2018 Canada published a discussion paper titled “Creating First Nations, Inuit and Métis Language Legislation (2018 Discussion Guide). The document provides a

summary of initial recommendations collected over a series of engagement sessions held with First Nations, Métis and Inuit throughout Canada from August 2017 to February 2018.

The federal discussion paper highlights (a) Canada's acknowledgement that Indigenous languages are endangered (b) current federal language policies, programs and supports are limited and uncertain (c) legislation could provide for the creation of dedicated institutions; and (d) legislation could provide for the recognition of the constitutional status and regional significance of Indigenous languages.

Of particular note the federal discussion paper confirms Canada's recognition of Indigenous rights holders with land claims and self-government agreements and that any resulting law would need to be compatible with, and respectful of, the rights and law making powers described in the particular land claims and self-government agreements.¹

The federal discussion paper identifies five key points and 12 principles. The key points identified that an ILA could

1. provide common elements that would affect First Nation, Inuit and Métis in the same manner and distinctive elements to respond to the particular interests and priorities of various language groups;
2. recognize Indigenous languages as a right;
3. provide a legal framework and periodic reviews;
4. provide oversight measures (articulating specific language rights and appropriate means and remedies for implementing the rights); and
5. provide for adequate predictable and sustainable and long term financial support.

The principles proposed highlight that the ILA should

1. have common overarching sections with distinct sections for language groups (First Nation, Inuit and Métis);
2. support measures currently in place to advance Indigenous languages;
3. recognize that Indigenous languages are core to Indigenous Peoples' identities;
4. acknowledge the historical harms against Indigenous languages;
5. acknowledge that Indigenous Peoples are the first peoples with the first languages in Canada;
6. acknowledge that Indigenous languages are Aboriginal and Treaty Rights to be constitutionally protected under section 35 of the Constitution Act, 1982;
7. provide a framework for periodic reviews;
8. acknowledge the rights of Indigenous Peoples and ability to establish and maintain proficient indigenous controlled systems;
9. acknowledge that lifelong learning and the education system is critical to restore fluency;

¹ At the engagement session with Yukon First Nations federal representative Stephen Gagnon commented that the proposed ILA is primarily for non-self-governing First Nations; however Canada wanted to use the engagement process to ensure that Canada does not interfere with self-governing Yukon First Nations' jurisdiction specific to languages.

10. provide policies and funding to support various institutional approaches to support national, regional and local efforts;
11. recognize that a single entity may not be sufficient to support the rights affirmed by the legislation; and
12. provide adequate long term ongoing funding that is accessible by the appropriate recipient.

4. Federal engagement with Yukon First Nations

On September 5, 2018, a number of Yukon First Nation Chiefs, language carriers and Yukon First Nation representatives attended a federal engagement session (“engagement session”). Self-governing Yukon First Nations (“SGYFN”) presented five key messages to Canada.

1. The engagement session is not consultation for the purpose of fulfilling Canada’s obligation to Yukon First Nations.
2. Yukon First Nations have the inherent right to their languages. Yukon First Nation languages are aboriginal rights. Yukon First Nations seek to have their language rights constitutionally recognized and protected as existing aboriginal rights under section 35 of the Constitution Act, 1982.
3. The ILA should expressly recognize the Treaty Rights and law-making jurisdiction of SGYFN specific to Yukon First Nation languages confirmed by Yukon First Nation final and self-government agreements.
4. The residential school system robbed Yukon First Nation children of their languages and contributed to the devastation of their cultural identities. Canada has a moral obligation to Yukon First Nations to make restitution.
5. Yukon First Nation languages are at a critical state. Yukon First Nations require financial resources as an immediate investment to revitalize Yukon First Nation languages.

5. Key considerations in a self-governing Yukon First Nation context

The development, enactment and application of the ILA in a self-governing Yukon First Nation context should recognize and safeguard the treaty rights and jurisdiction of SGYFN.

5.1 Development of the ILA

Recognition of Yukon First Nation Treaty Rights and Self-Government jurisdiction

SGYFN have treaty rights specific to Yukon First Nation languages confirmed by Chapter 13, set out in section 13.1.1.2 of the Yukon First Nation final agreements. Section 13.1.1.2 states

13.1.1 The objectives of this chapter are as follows:

- 13.1.1.2 to promote the recording and preservation of traditional languages, beliefs, oral histories including legends, and cultural knowledge of Yukon Indian People for the benefit of future generations.

SGYFN jurisdiction to enact laws specific to Yukon First Nation languages is recognized pursuant to Yukon First Nation self-government agreements.

Sections 13.1.1 and 13.2.2 of the Teslin Tlingit Council Self-Government Agreement, for example, states

- 13.1 The Teslin Tlingit Council shall have exclusive powers to enact laws in relation to the following matters:
 - 13.1.1 administration of Teslin Tlingit Council affairs and operation and internal management of the Teslin Tlingit Council;
- 13.2 The Teslin Tlingit Council shall have the power to enact laws in relation to the following matters in the Yukon:
 - 13.2.2 provision of programs and services for Citizens in relation to their aboriginal languages;

SGYFN 13.1 authority could support the legislative objective to provide First Nation government services in Tlingit. The jurisdiction is exclusive because the services are internal to the Teslin Tlingit Council.

SGYFN 13.2 authority, which is considered concurrent with Yukon's authorities, could provide for the recognition of Tlingit as an official language, signage in Tlingit, immersion programs and services, etc.

Recognition of Yukon First Nation Languages as aboriginal rights under section 35 of the Constitution Act, 1982

SGYFN maintain that Yukon First Nation languages are aboriginal rights for the purposes of section 35 of the Constitution Act, 1982.

SGYFN treaty rights specific to section 13.1.1.2 of the Yukon First Nation final agreements are constitutionally protected under section 35(1) and (3) of the Constitution Act, 1982.

Section 35(1) of the Constitution Act, 1982 states

- 35(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Section 35(3) of the Constitution Act, 1982 states

- 35(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

In a paper written for the Assembly of First Nations by constitutional lawyer David Leitch, titled, "What's Canada's New Indigenous Languages Law Needs to Say and Say Urgently (September 2017)" Leitch recommends that the ILA preamble provide an expressed recognition of Indigenous Languages as Aboriginal Rights protected by section 35 of the Constitution Act, 1982, citing R. v. Van der Peet [1996] 2 SCR. In Leitch's view section 35 has recognized and affirmed Indigenous language rights since 1996 when the Supreme Court of Canada clarified that Aboriginal rights included "practices, traditions and customs central to the Aboriginal societies that existed in North America prior to contact with the Europeans".

Funding the revitalization and advancement of Yukon First Nation languages

SGYFN have emphasized that Canada's commitment to recognize Indigenous languages and achieve reconciliation with Yukon First Nations cannot be symbolic. SGYFN have advanced the views that the federal government should provide public funds to Yukon First Nations that are equitable and equivalent to the levels of monies invested to advance the French and English languages in Canada.

SGYFN identified that federal funding for Yukon First Nation languages can be provided through financial transfer agreements ("FTAs") negotiated pursuant to section 16 of the Yukon First Nation self-government agreements.

Section 16.1 of the self-government agreements states

16.1 Canada and the Teslin Tlingit Council shall negotiate a self-government financial transfer agreement in accordance with 16.3 with the objective of providing the Teslin Tlingit Council with resources to enable the Teslin Tlingit Council to provide public services at levels reasonably comparable to those generally prevailing in Yukon, at reasonably comparable levels of taxation.

SGYFN fiscal negotiators have made tremendous strides to advance the FTA talks to include a language, culture and heritage strategy. The proposed strategy presents the opportunity to fund the revitalization of Yukon First Nation languages and implement Chapter 13 of the final agreements.² However it is unclear whether these resources will be made available to Yukon First Nations to be responsive to support the revitalization of Yukon First Nation languages in a timely manner.

Considering the current state of Yukon First Nation languages and FTA negotiations the ILA may provide an opportunity for alternative funding.³

5.2 Drafting and Enactment of the ILA

Duty to Consult under the final agreements

Section 13.4.5 of the Yukon First Nation final agreements provides that

Government shall Consult Yukon First Nations in the formulation of Legislation and related Government policies on Heritage Resources in the Yukon.

Should SGYFN interpret Heritage Resources to include Yukon First Nation languages then Canada has a treaty obligation to Consult with the Yukon First Nations before the enactment of the ILA.

Under common law the duty to consult and accommodate arises when Canada contemplates actions or decisions that may affect aboriginal or treaty rights. The duty flows from the honor of the Crown and its fiduciary duty to Indigenous Peoples. The obligation to provide

² Federal representatives at the engagement session indicated that monies for languages under the agreements would be accessible to self-governing First Nations through the current fiscal tools.

³ Under key point five (adequate, predictable, sustainable and long term support) on page 12 of the federal discussion paper includes "other considerations" that may provide for "transitional measures". A question is could the transitional measures provide monies to Yukon First Nations where the FTAs may be unable to immediately respond.

consultation and a decision-making process that is compatible with the honor of the Crown is embedded in section 35 of the Constitution Act, 1982.⁴

Duty to Consult under the self-government agreements

Sections 13.5.4 and 13.5.5 of the Yukon First Nation self-government agreements identifies that where either a SGYFN or the Yukon government reasonably foresees that a law that it intends to enact may have an impact on either a Yukon First Nation Law or Yukon law the party enacting the law has a duty to Consult.

13.5.4 Where the Yukon reasonably foresees that a Yukon Law of General Application which it intends to enact, may have an impact on a law enacted by the Teslin Tlingit Council, the Yukon shall Consult with the Teslin Tlingit Council before introducing the Legislation in the Legislative Assembly.

13.5.5 Where the Teslin Tlingit Council reasonably foresees that a law which it intends to enact may have an impact on a Yukon Law of General Application, the Teslin Tlingit Council shall Consult with the Yukon before enacting the law.

Consultation is a defined term found in the final and self-government agreements.

“Consult” or “Consultation” means to provide,

- a. to the party to be consulted, notice of a matter to be decided in sufficient form and detail to allow that party to prepare its views on the matter,
- b. a reasonable period of time in which the party to be consulted may prepare its views on the matter, and an opportunity to present such views to the party obligated to consult, and
- c. full and fair consideration by the party obliged to consult on any views presented.

5.3 Application of the ILA

Paramountcy

It is understood that Canada will enact the ILA pursuant to section 91(24) of the Constitution Act, 1867, which recognizes the federal government’s authority specific to “Indians and Lands reserved for the Indians”.

A resulting ILA would become a Law of General Application for the purposes of section 13.5.1 of the Yukon First Nation self-government agreements and would apply to respective Yukon First Nation governments, their Citizens and settlement lands. Section 13.5.1 states

13.5.1 Unless otherwise provided in this Agreement, all Laws of General Application shall continue to apply to the Teslin Tlingit Council, its Citizens and Settlement Land.

Laws of General Application⁵ generally include all laws enacted by Canada and Yukon on subject matters where self-governing Yukon First Nations have not occupied jurisdiction.

⁴ Haida Nation v. BC (Minister of Forests) 2004 SCC 73, 3 SCR 511; R v. Vander Peet [1996] 2 SCR 507; Delgamuukw v. BC [1997] 3 SCR 1010; and Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) 2005 SCR 69.

The enactment of an ILA as a Law of General Application will create concurrent jurisdiction with self-governing Yukon First Nations. Identifying if and where self-governing Yukon First Nations jurisdiction may be paramount to the federal jurisdiction will require a review of the draft language of the ILA when it becomes available.

The self-government agreements provide for a negotiation process between SGYFN and Canada to address the paramountcy of self-governing Yukon First Nation laws. Section 13.5.2 of the Teslin Tlingit Council Self-Government Agreement, for example, states

13.5.2 Canada and the Teslin Tlingit Council shall enter into negotiations with a view to concluding, as soon as practicable, a separate agreement or an amendment of this Agreement which will identify the areas in which laws of the Teslin Tlingit Council shall prevail over federal Laws of General Application to the extent of any inconsistency or conflict.

There are no 13.5.2 agreements between SGYFN and Canada to date.

Conflict of Laws

The general view is that in the event of any inconsistency between a SGYFN law and a law of Yukon, the SGYFN law would prevail to the extent of the conflict. However, in the event of a conflict of laws between a SGYFN law and federal law the self-government agreements are not clear.

In circumstances where governments have concurrent jurisdiction it is important that rules are established to address any potential conflict of laws. Section 8.4 of the self-government agreements provides that the common law principles will apply to resolve conflicts between the laws SGYFN and Yukon. Section 8.4 states

8.4 Common law conflict of laws principles shall apply where a conflict of laws issue arises unless:

8.4.2 in the case of a conflict of laws issue arising between a law of the Teslin Tlingit Council and a Law of General Application, the Teslin Tlingit Council and Government have otherwise agreed.

SGYFN could propose an express provision in the ILA similar to section 8.4.2 for the purpose of addressing any conflicts of laws between the laws of the SGYFN and Canada.

6. Other Matters

Status as an official language in Canada

SGYFN have expressed an interest to have Yukon First Nation languages recognized as an official language of Canada and within the Yukon.

⁵ Laws of General Application are defined in the self-government agreements and “means laws of general application as defined by common law, but does not include laws enacted by the Teslin Tlingit Council.”

To further advance Yukon First Nations as official languages of Canada SGYFN may consider the application of section 22 of the Charter of Rights and Freedoms, 1982. Section 22 reads

22 Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Section 22 provides for the protection of political rights specific to the use of other languages other than French or English. Constitutional scholars have commented that this section may provide opportunities for languages to become official languages in the future.

7. Recommendations

7.1 Informing the drafting of the ILA

SGYFN could establish a legal working group to draft language to inform the legislative content of the ILA.

7.2 Consultation

Canada's obligation to consult with SGYFN should be informed by the requirements set out in the Yukon First Nation final agreements and common law.