

United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021 c.14
Yukon First Nation Modern Treaty Context: A road to reconciliation

Discussion Paper



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Assembly of First Nations (Yukon Region)

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Disclaimer. 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 discussions in the context of Yukon First Nation modern treaties for the development of a federal action plan to realize the objectives of the United Nations Declaration of the Rights of Indigenous Peoples (September 13, 2007) (the “Declaration”) as contemplated in section 6 of the federal statute titled “*United Nations Declaration on the Rights of Indigenous Peoples Act*”, S.C. 2021 c.14 (“UNDRIPA”).



“We will never achieve reconciliation when one party views its action as an act of benevolence and the other views its action as an act of rights. UNDRIP establishes a relationship based on the foundation of rights”.
Former Senator Murray Sinclair, December 2020

1. Introduction

On June 21, 2021 the federal statute titled “United Nations Declaration on the Rights of Indigenous Peoples Act” received Royal Assent and came into force and effect (the “Act”).

The Act represents Canada’s efforts to respond to specific Calls to Action set out in the Truth and Reconciliation Report (2015) (“the TRC”) and the Call for Justice expressed in the National Inquiry into Missing and Murdered Indigenous Women and Girls Report (2019)¹. In particular the TRC Calls to Action call on all governments to fully adopt and implement the Declaration as a framework for reconciliation and calls on the Government of Canada to establish a national action plan to realize the goals of the Declaration.²

The Declaration, attached to the Act, is an international human rights instrument that contains 46 articles that affirms the minimum human rights standards for the survival, dignity and well-being of Indigenous peoples throughout the world, and includes the recognition of rights specific to Indigenous self-determination and self-government; Indigenous rights to culture, language and identity; Indigenous rights not to be forcibly removed from lands or territories; Indigenous rights not to be relocated from lands without free, prior and informed consent and fair and just compensation upon agreement; and the recognition that Indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.

The Federal Department of Justice sets out that the purpose of the Act is to affirm the Declaration as an international human rights instrument to interpret and apply to Canadian law with an interest to ensure the laws of Canada are consistent with the Declaration.

The Act is viewed by many First Nation leaders throughout the Country as an opportunity for Canada and Canadians to raise, promote, protect and uphold the human rights of Indigenous Peoples; and to forge a more meaningful relationship with Indigenous Peoples working together to achieve reconciliation.

2. What is reconciliation?

Reconciliation for Indigenous Peoples is complex. There is no single concept that could clearly capture all that is required to achieve reconciliation. What we know is that reconciliation requires action. It requires a real effort by Canada and Canadian society to work with Indigenous Peoples to do better in the treatment of Indigenous Peoples in this Country. Reconciliation requires Canadian society to make amends for historical injustices that continue to hinder the wellbeing of

¹ MMIWG Calls for Justice 1.2v provides “ We call upon all governments with the full participation of Indigenous women, girls and 2SSLGBTQQIA people to immediately implement and fully comply with all relevant rights instruments, including but not limited to: UNDRIPP including recognition, protection and support of Indigenous self-governance and self-determination as defined by UNDRIP and by Indigenous Peoples including these rights are guaranteed equally to women and men as rights protected under section 35 of the Constitution. This requires respecting and making space for Indigenous self-determination and self-governance, and the free, prior and informed consent of Indigenous Peoples to all decision-making processes that affect them, eliminating gender discrimination in the Indian Act and amending the Constitution to bring it into conformity with UNDRIP”.

² TRC Calls to Action #43 and #44.

Indigenous Peoples. Reconciliation requires the right for Indigenous Peoples to live in safety and be governed in accordance with their own Indigenous principles, values, customs and traditions without discrimination and that their Indigenous customs, laws and institutions not be constrained or diluted to conform to Canadian legal norms. Reconciliation requires a commitment by Canada and Canadian society to continue to work with Indigenous Peoples to improve a quality of life for Indigenous communities, families and our most vulnerable and that we become a world leader that respects the human rights of Indigenous Peoples.

3. Yukon First Nations - establishing a pathway towards reconciliation

“We are not here looking for a handout. We are here with a plan”.
Together Today for Our Children Tomorrow, Elijah Smith, 1973

February 14, 2023 will mark the 50th anniversary date of when Yukon First Nations tabled the document titled *“Together Today for Our Children Tomorrow”* with the Government of Canada, which became the basis to the negotiations of the Yukon First Nation Umbrella Final Agreement and resulting 11 Yukon First Nation Final Agreements protected under section 35 of the *Constitution Act, 1982* (“Yukon First Nation modern treaties”) and corresponding Yukon First Nation self-government agreements.

Together Today for Our Children Tomorrow (“Together Today”) continues to be viewed by many Yukon First Nations as a foundational document that provides an honest description of the oppressive realities of First Nation families and communities who were struggling with the intergenerational impacts of the Gold Rush, the construction of the Alaska Highway, the *Indian Act* and residential schools.

Together Today has also been described as a cornerstone in our history that demonstrates the political will of Yukon First Nation leadership to restore the social and economic health and wellbeing of Yukon First Nation families and communities; to retain Yukon First Nation distinctive cultures, customs, and subsistence life styles; to contribute and benefit from the Yukon economy; and to exercise the inherent right of self-government.

“Hello Self-Government – Goodbye Indian Affairs”.
Signing of the First Four Yukon First Nation Final and Self Government Agreements
Robert Hager, 1993

The Yukon First Nation modern treaties and self-government agreements (the “agreements”) provide a recognition of Yukon First Nation rights and powers. Ultimately the agreements were negotiated to equip Yukon First Nations citizens to be self-reliant; live with pride in accordance with their culture, customs and values; and exercise their inherent right to self-government.

For self-governing Yukon First Nations, echoed by the Supreme Court of Canada decision in *Beckman v. Little Salmon/Carmacks First Nation* the implementation of the Yukon First Nation modern treaties is key to achieve meaningful reconciliation. The court stated:

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. The modern treaties including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the

legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities.³

Over the course of the last three decades Yukon First Nations have seen and experienced positive changes in their communities through the implementation of the agreements as demonstrated in the increase of Yukon First Nation students completing their post-secondary education in a variety of fields; the increasing number of Yukon First Nation businesses; the revitalization of Yukon First Nation languages through the delivery of First Nation program supports and First Nation laws; and the re-establishment of Yukon First Nation customary governance structures. However, there remains an undercurrent of paternalistic attitudes and assimilation-based approaches to the implementation of the agreements and the full realization of self-government, which continues to restrain the potential of the agreements and undermines the fulfilment of reconciliation for self-governing Yukon First Nations.

4. The potential of the Act and a national action plan

What does the Act mean for Yukon First Nations, particularly those self-governing Yukon First Nations who see their agreements as the framework for reconciliation? For those self-governing Yukon First Nations engaged in the action plan dialogue, some are seeking a better understanding of how the Act impacts their agreements and how an action plan could make a difference for Yukon First Nation citizens.

Generally speaking, the Act and the current Government's efforts are seen as a progressive step towards recognizing and holding up the distinctive human rights of Indigenous Peoples in Canada. The Act and aligning Canadian laws with the Declaration is viewed as an opportunity to improve societal attitudes and perspectives towards Indigenous People.

The three substantive obligations set out in the Act requires the Government of Canada to firstly in consultation and cooperation with Indigenous peoples take all measures necessary to ensure that laws of Canada are consistent with the Declaration (see section 5); secondly, the Minister in consultation and cooperation with Indigenous peoples and with other federal ministers prepare and implement an action plan within 2 years of the Act coming into effect to achieve the objectives of the Declaration (see section 6) to which the plan is to address issues of justice, racism and discrimination; and thirdly, prepare regular reporting to Parliament to account for government actions in relation to sections 5 and 6 (see section 7).

The Act and an action plan can positively impact the implementation of Yukon First Nation agreements and outcomes. An action plan that takes into account the underlying purpose and potential of the Yukon agreements can be an effective tool. It stands to reason that the meaningful implementation of the Yukon First Nation agreements can have a direct benefit to the First Nation citizens.

To fulfil a meaningful implementation of the Yukon agreements the action plan will require efforts that move beyond the legislative review of federal laws. An action plan will require a change in federal policies and mandates and the reconsideration of common law decisions, which individually and collectively have handcuffed the full and meaningful realization of Yukon First Nation aboriginal rights and the inherent right to self-government.

³ *Beckman v. Little Salmon/Carmacks First Nation* [2010] 3 S.C.R. 103 at para.10.

Federal Policies and Mandates

As noted by Matt Mahaffey, a negotiator and lawyer with a long-standing relationship with Yukon First Nations, highlights that the Act creates a real opportunity for Canada to support the realization of self-government through its fiscal policy. Mahaffey provides that historically Canada's fiscal policies and mandates have served to impede and have compromised the implementation of Yukon First Nation agreements due to: lengthy delays in funding negotiations; Canada restricting the funding of Yukon First Nation governments subjecting Yukon First Nation criteria to Canadian government criteria; and continuing to apply *Indian Act* concepts whereby federal monies for Yukon First Nation governments are limited to status Indians not Yukon First Nation defined citizens.⁴ In Mahaffey's view to realize the objective of self-government as recognized by the Declaration would require Canada to change its federal policies and mandates to become more proactive and ensure that First Nations governments can participate in the financial framework within Canada, similar to the participation of provincial and territorial governments.⁵

Common law reconsiderations

While some Indigenous People may take the view that the advancement of aboriginal rights fare better in the courts than at treaty or implementation negotiations, the success of Yukon First Nation self-determination has succeeded on both fronts; although there is always room for improvement. History demonstrates that Yukon First Nations' preference is at the negotiation table to work with the Government of Canada to address grievances; to strengthen relationships built on understanding and respect; and chart out how Yukon First Nation governments can coexist within the constitutional fabric of the Country. Yukon First Nations notably are not reluctant to take their matters to the courts and have benefitted from some favorable decisions. However, the recent decisions in *Dickson v. Vuntut Gwitchin* have raised the need to ensure that Canadian courts be more alive to the objectives of the Declaration to support the efforts to achieve reconciliation through the meaningful realization of self-government.

A review of the recent court decision of *Dickson v. Vuntut Gwitchin*⁶ scheduled to be heard by the Supreme Court of Canada in 2023 by Indigenous Associate Professor of Law, Naomi Metallic⁷, provides an important analysis of the lower courts' swift application of the *Canadian Charter of Rights and Freedoms* against the Vuntut Gwitchin's Constitution resulting in a decision that in effect serves to assimilate the Vuntut Gwitchin, although unintentionally, and fails to realize the objectives of reconciliation.⁸

Professor Metallic sets out her analysis recognizing that "the Charter is viewed by Canadians as a notion of justice and fairness and inherently good which can and has led to dismissing objections in its application to Indigenous laws and institutions".⁹

⁴ In 2019 the Yukon Supreme Court found in favor of the Teslin Tlingit Council that the Government of Canada has a legal obligation to negotiate a self-government financial transfer agreement pursuant to the Final Agreement and the self-government agreement to take in account funding for TTC citizens. *Teslin Tlingit Council v. Canada (Attorney General)* 2019 YKSC 3.

⁵ UNDRIP and Modern Treaty Implementation titled *Gonèk'e: Our Land* (December 16, 2021).

⁶ *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22; *Dickson v Vuntut Gwitchin First Nation*, 2021 YKCA 5.

⁷ Naomi Metallic from the Listuguj Mi'gmaq First Nation in Quebec and an Associate Professor of Dalhousie University who also serves as a Chancellors Chair in Aboriginal Law.

⁸ "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A framework for Charter applications to Indigenous Governments". *Constitutional Forum*, Vol.31 No.2 (2022) (pp.3-16).

⁹ *Ibid* at p.3.



A key consideration that the lower courts failed to raise and apply was “should the Charter apply” when the Vuntut Gwitchin’s Constitution provided for individual rights protection. Instead, the courts focused on the assumption that the Charter applied in order to exist within the Canadian constitutional order regardless that Vuntut Gwitchin identified that they did not consent to the Charter’s application. Further the courts ignored the fact that the Vuntut Gwitchin Final and Self-Government Agreements did not expressly apply the Charter to their laws or institutions, in comparison to other modern treaties, such as Tlicho or Nisga’a and interpreted the silence as “tacit acceptance” that the Charter apply.¹⁰

Professor Metallic provides additional insight for future court consideration and treatment of Indigenous laws and institutions in order not to repeat the mistakes of our past, that includes applying the interpretive principle known as “comity” to provide deference and respect to Indigenous governments (viewed as sui generis governments) in the exercise of their jurisdictions; to view the application of the Charter as an infringement on the inherent right to self-government and if an unreasonable limit that justification by the Crown is necessary; that while section 52 states that the Constitution is the Supreme law of Canada it does not “prescribe” that the Charter must apply in full force; and that the formal equality argument that the Charter apply to everyone equally be discarded in favor of the principle of substantive equality that celebrates our differences.¹¹

How does this apply to Canada’s relationship to Yukon First Nations in an effort to achieve reconciliation? In the case of *Dickson* Canada chose to intervene and made the argument that the Charter applies to all governments in Canada. This is noteworthy considering that there is no case law that has examined the application of the Charter to a self-governing First Nation. Further the application on the Vuntut Gwitchin imposes obligations of the Charter without any of the benefits afforded to other provincial governments. For these reasons Yukon First Nations, such as the Teslin Tlingit Council who intervened in this case have been calling on the Government of Canada to negotiate the application of the Charter. An alignment with the objectives of the Declaration and the recognition of the inherent right to self-government should require Canada to come to the negotiations table.

5. Meaningful Reconciliation

Meaningful reconciliation requires more than a review of federal statutes. Meaningful reconciliation and achievement of the principle objectives of the Declaration to ensure justice requires a comprehensive approach to transform societal perspectives and measurements informed and reflected in federal statutes, policies, mandates and court decisions to ensure that the application of the Constitution, Canadian laws and Charter is exercised in a manner that acknowledges and respects and provides deference to Indigenous laws and institutions and allows for the distinctive exercise of self-government while co-existing within the constitutional fabric of Canada.

For self-governing Yukon First Nations meaningful reconciliation requires creating space within the constitutional fabric of Canada and moving away from government statutes, policies and mandates that in effect continue to assimilate Indigenous peoples within Canada; subject Indigenous legal institutions and processes to suit Canadian standards and expectations; and dilute Indigenous values and customs to conform with Canadian legal norms.

¹⁰ *Ibid* at p.5.

¹¹ *Ibid* at p. 6.

To realize the objectives of the Declaration requires revisiting and reversing court decisions that have handcuffed and further restrict the recognition, revitalization and advancement of aboriginal rights as expressed in the case of *Vander Peet* (which in effect freeze aboriginal rights to pre contact) and self-government in the case of *Dickson* and continue the work towards the recognition of the inherent right of self-government as an aboriginal right protected by section 35 of the Constitution.¹²

6. Recommendations

- 6.1 A resulting federal action plan should provide for ongoing annual engagements with Yukon First Nations to identify and review particular federal laws (both statutory and common law) to inform federal legislative amendments that upholds the inherent right to self-government as recognized by section 35 of the Constitution Act, 1982 and Yukon First Nation self-government agreements; to ensure the recognition and protection of Yukon First Nation laws (customary and statutory) to not be diluted or discarded to conform to Canadian legal norms.
- 6.2 A resulting federal action plan should provide for ongoing reviews, with Yukon First Nations, of federal mandates (negotiations), policies (treaty implementation) and strategies (litigation that affects aboriginal rights, title and interests) to improve the meaningful implementation of Yukon First Nation Final and Self-Government Agreements.
- 6.3 Annual engagements with Yukon First Nations should provide for dedicated consultations with Indigenous women, girls and two spirit people coupled with financial resources to ensure meaningful consultations.

¹² See section 18(1) of the *Act respecting First Nations, Inuit and Métis children, youth and families* SC 2019 c.24. What is also noteworthy is Canada's recognition, in accordance with section 21(1) that an Indigenous law is equivalent to a federal law. These developments are consistent with Yukon First Nation historical views.