



AFN POLICY FORUM: AFFIRMING FIRST NATIONS RIGHTS, TITLE AND JURISDICTION

SEPTEMBER 11 AND 12, 2018

Canada's Proposed Recognition and Implementation of Indigenous Rights Framework: Issues Summary

Overview

For decades First Nations have advocated for the recognition, affirmation, implementation and enforcement of Treaty rights and inherent rights, title and jurisdiction. In response, the Prime Minister announced on February 14, 2018 that the Government of Canada intended to develop, “in full partnership with Indigenous Peoples”, a new Recognition and Implementation of Indigenous Rights Framework (RIIRF). This framework would include both legislative and policy instruments. Canada states that the framework is intended to provide new measures to support the rebuilding of “Indigenous Nations and Collectives” and advance self-determination.

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The government completed a series of nation-wide engagement sessions and produced an *Engagement Document* with some specifics on what a new rights framework might contain. First Nations have had little time to consider Canada's proposal and approach to recognizing Indigenous rights. However, some regions, treaty areas and individual First Nations have formulated detailed responses to the proposed framework and to Canada's engagement process. Below are some of the issues identified that arise from Canada's proposal.

Timeline of the Recognition and Implementation of Indigenous Rights Framework (RIIRF)

- Exploratory Tables process begins – Spring 2016
- PM's announcement – February 2018
- Engagement sessions – March to June 2018
- AFN Resolutions 8/2018 and 39/2018 – May and July 2018
- Policy Forum – September 2018

Analysis

Canada's proposal / Components of the Frameworks	Canada's Explanation	Challenges	Analysis
<p>Framework Engagement:</p> <p>After the Prime Minister's announcement, the Department of Crown-Indigenous Relations Canada (CIRC) began a series of engagement sessions that ran between February and June, 2018. The government has reported that, in total, 89 engagement sessions were conducted from coast to coast to coast that gathered input from over 1,300 participants.</p>	<p>Canada states that the framework is intended to accelerate work to renew the nation-to-nation, Inuit-Crown, and government-to-government relationship between Canada and Indigenous Peoples based on the recognition of rights, respect, co-operation, and partnership.</p>	<p>The process did not allow sufficient time to facilitate meaningful engagement.</p>	<p>Many rights-holders have expressed frustration about the short timelines associated with the engagement process. The schedule that Canada set for itself to undertake meaningful engagement, produce a comprehensive and substantive vision for rights recognition, obtain feedback and produce legislation was far too compressed. A number of rights-holders voiced concern that they were not provided with the materials or support in a timely manner and that the materials did not lead to informed discussions on Canada's intentions.</p>
		<p>The process was not transparent and did not have First Nations input on the design.</p>	<p>The process was planned and carried out by Canada alone. Input on design was not incorporated and it was not delivered in a transparent manner. The dates, locations and participants were not released by CIRC and many First Nations were not made aware of the purpose or details of the engagement with any advance notice. This left participants with very different levels of understanding of Canada's proposal.</p>
		<p>The right participants were not included in the discussions.</p>	<p>A number of First Nations' rights-holders expressed further dissatisfaction about whether</p>

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			<p>the right participants were included in the process. In one instance, a First Nation abstained from the discussion because of Canada's refusal to recognize them as a rights-holder.</p>
		<p>We are not speaking the same language and do not have the same content.</p>	<p>Some rights-holders expressed the notion that what they said and what was heard was not the same thing. There is concern that the language and understanding of the key concepts differed between Canada and participants. This led to a process where the true intent of rights-holders may not have been properly captured.</p>
		<p>Feedback was not well incorporated into the document and some rights-holders felt unheard. It is uncertain if the "What We Heard so Far" document reflected what was said.</p>	<p>Canada invited input on the Engagement Document. Although a number of First Nations undertook this effort, no significant changes were made.</p>
		<p>Feedback from other participants was not included in the Engagement Document.</p>	<p>Canada has reported only on "What Was Heard so Far" from Indigenous participants and did not publicize what was heard from industry or provincial representatives.</p>
<p>New legislation:</p> <p>To ensure the recognition and implementation of rights is the basis for</p>	<p>The recognition and implementation of rights is the basis for all relations between the Canada and Indigenous</p>	<p>New legislation needs to be developed <i>in agreement</i> with First Nations. Section 35 of the</p>	<p>It is unclear how the recognition of rights in this legislation adds to the protections already afforded to Indigenous Peoples in section 35 of</p>

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all relations between Canada and Indigenous Peoples	<p>Peoples. It will establish processes and a legislative basis for the recognition of Indigenous Nations and Collectives.</p> <p>Canada would be obligated to implement Indigenous rights in a manner that upholds the spirit and intent of past agreements. The proposed legislation would specifically recognize that the manner of implementation is critical to advancing reconciliation and renewing the relationship between the Crown and Indigenous peoples.</p> <p>Canada states that it would recognize "Indigenous Peoples have inherent rights to land and, in some cases, title within traditional territories which may encompass federal Crown lands."</p>	<p><i>Constitution Act, 1982</i> recognizes "Aboriginal and treaty rights" which cannot be dealt with unilaterally without infringing those rights.</p> <p>Only a portion of the land and title in traditional territories is federal Crown land. Canada cannot give effect to this intent without Provincial and territorial cooperation.</p>	<p>the <i>Constitution Act, 1982</i>. Any new legislation, policy or procedure that recognizes or affirms First Nations rights needs to be done with the consent of affected First Nations.</p> <p>About 89% of Canada's land area (8,886,356 km²) is Crown Land, of which 41% is federal Crown land and 48% is provincial Crown land. Canada's proposal states that recognition of Indigenous rights includes the rights to land and title encompassed by federal Crown land. It does not make mention of the large portion of territory under provincial authority and raises the practical question of how Canada will enact legislation when there is a need for provincial involvement.</p>
<p>New legislation:</p> <p>To support the self-determination of Indigenous Peoples</p>	<p>Canada would recognize Nations and Collectives as "legal entities within federal legislation." This would replace the governance provisions in the <i>Indian Act</i>, and offer First Nations the ability to determine:</p> <ul style="list-style-type: none"> • Who is part of the Nation or Collective • The nature, structure, composition, and functions of the 	<p>Recognition of "core governance" functions does not appear to include inherent jurisdictions such as health, education, child and family services, and housing and infrastructure.</p>	<p>This could require any First Nation seeking to implement its jurisdiction in these matters to join the "exploratory tables" currently being run by CIRC, or a treaty table under the Treaty Commission in BC.</p> <p>RCAP vol. 2 states that new legislation should recognize that for Indigenous governments to exercise jurisdiction. To enable the federal government to vacate its legislative authority</p>

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	<p>governing body</p> <ul style="list-style-type: none"> • Rules and procedures for the selection of members of a governing body • Conflict of interest rules and procedures for a governing body • Rules and procedures for enacting laws • System of financial management and accountability • Rules and procedures for holding meetings of the governing body • Process for amending of a Constitution • Ability to delegate powers or responsibilities of the governing body to another entity • Law-making authority respecting areas integral to the Nation or Collective's identity, culture and language 	<p>The proposal has same problem as the current Inherent Right Policy. It makes self-government subject to negotiations and assumes that sovereignty and jurisdiction are held by Canada, to be devolved when legislation is passed and a negotiated agreement is achieved.</p> <p>First Nations would become domestic legal entities and potentially lose any force they have as nations under UNDRIP or in international law.</p> <p>Putting off recognition of rights to future negotiation leaves unanswered concerns regarding inherent jurisdiction.</p>	<p>under section 91(24), Canada needs to acknowledge the inherent jurisdiction of First Nation governments.</p> <p>In RCAP, vol.2 it is stated that, "Although we are proposing recognition legislation, Aboriginal nations do not require federal (or provincial) legislation to have the constitutional authority to function as governments. That authority, it will be recalled, has its source outside the Canadian constitution, although it is recognized and affirmed in it."</p> <p>The language in this part of the proposal should reflect that sovereignty and jurisdiction are not Canada's to hand over.</p> <p>UNDRIP does not appear to put a restriction on Indigenous Peoples being recognized within their domestic jurisdiction in order to be afforded the protections in the Declaration. However this does raise the important question of who are the rights-holders.</p> <p>The <i>Indian Act</i> currently does not define service levels or delivery mechanisms. This remains in the domain of policy or is a discretionary power of federal departments.</p> <p>Under section 88 of the Act, the federal government incorporates provincial laws of</p>

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			<p>general application into the <i>Indian Act</i> which severely limits First Nations' political power and prevents them from exercising self-determination. It subjects First Nations to provincial legislation and regulation without their consent.</p>
<p>New legislation:</p> <p>To ensure the Government of Canada remains accountable for its obligations towards Indigenous Peoples.</p>	<p>New accountability could include:</p> <ul style="list-style-type: none"> • An independent oversight body to deliver progress reports to Parliament on implementing Indigenous rights and UNDRIP, along with potential public education activities on Indigenous rights. • An independent dispute resolution mechanism to support the resolution of recognition of rights issues. 	<p>It is unclear how these mechanisms would work. Would they be independent from the Government of Canada or would they be responsible for enforcement against themselves?</p>	<p>Obligations towards First Nations include any First Nation inherent and treaty rights, title and jurisdiction, as well as those that could be identified in the future. In some cases, these rights are outlined in treaties and self-government agreements.</p>
<p>A new policy:</p> <p>To provide for the implementation of Indigenous rights through negotiated agreements</p>	<p>Includes flexibility to accommodate the distinctions between First Nations, Inuit, and Métis peoples. Those wishing to establish negotiation tables could apply to CIRC to demonstrate that they are a rights-holding Indigenous Nation or Collective. Rights-holders who are already participating in negotiation processes would not need to re-apply to establish a negotiation table under the new policy</p>	<p>There is concern that the framework will still require rights-holders to negotiate for the protection of their rights rather than being inherently recognized. It is essentially a continuation of this status quo.</p>	<p>Entering negotiations on governance and service delivery mechanisms with an adversarial approach that attempts to barter all rights-holders down to a lowest-common-denominator is not reflective of a "new relationship". There is suspicion of the divide-and-conquer approach to negotiation that Canada has employed in the past.</p>

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<p>A new policy:</p> <p>To achieve agreements that provide predictability but which allows them to evolve over time</p>	<p>Canada will continue to negotiate agreements that recognize and implement Indigenous rights. Mandates that have already been developed at exploratory tables will continue to build off of this approach and could include treaty and non-treaty agreements, incremental, sectoral, comprehensive, and governance agreements.</p>	<p>Predictability and flexibility to evolve over time have been constraints on First Nation governance and have diminished all program areas.</p>	<p>The right to self-determination is supported by First Nations-led capacity enhancement. This requires sufficient funding and the predictability, flexibility and autonomy of funding arrangements.</p>
<p>A new policy:</p> <p>To achieve flexible agreements that support nation rebuilding, self-determination, and the implementation of rights as an alternative to or in advance of a comprehensive agreement</p>	<p>Agreements would be evergreen with periodic reviews to evolve when needed and desired by Indigenous groups and funding support for negotiations would continue to be provided via contribution funding rather than loans.</p>	<p>In order to rebuild their Nations, First Nations need to have tools to ensure they are able to successfully exercise power, possess legitimacy and the resources to do so. These are identified as the three basic attributes of effective government.</p>	<p>RCAP recommends the following to support nation rebuilding:</p> <ol style="list-style-type: none"> (1) Research, develop and coordinate with other institutions, initiatives and studies to assist the transition to self-government on topics such as citizenship codes, constitutions and institutions of governments, as well as processes for nation rebuilding and citizenship participation (2) Develop and deliver training and skills development programs for community leaders, community facilitators and field workers, as well as community groups that have assumed responsibility for rebuilding Indigenous nations (3) Facilitate information sharing and exchange among community facilitators, leaders and others involved in nation rebuilding processes.

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<p>A new policy:</p> <p>To accelerate the pace of negotiations.</p>	<p>The policy could work in parallel with a dispute resolution mechanism and an independent oversight bodies to facilitate and monitor implementation of all treaties and agreements, including UNDRIP and Canada's Principle #5 which states that Canada recognizes treaties, agreements, and other arrangements between Indigenous Peoples and the Crown as acts of reconciliation based on mutual recognition and respect.</p>	<p>Achieving negotiated agreements has proven to be both costly and time-consuming for all parties.</p> <p>The requirement to negotiate rights, title and jurisdiction does not reflect recognition, but rather denial.</p>	<p>A number of studies have pointed to institutional barriers, Canada's approach, and process inefficiencies, among other things, as the main reasons why negotiated agreements tend to take decades to achieve. A new reconciliation approach should be less adversarial and accelerate the pace of negotiations.</p> <p>In an uneven power relationship, Canada would have greater control over negotiations than First Nations.</p>
<p>A new policy:</p> <p>To work towards equity in socio-economic outcomes and overall well-being between Indigenous Peoples and other Canadians</p>	<p>Fiscal relations could seek to negotiate arrangements that build Indigenous communities' capacity for self-determination and governance. Federal transfers to Indigenous Nations and Collectives should be sufficient, predictable and sustained to ensure capacity to govern effectively and provide programs and services. Future fiscal policy changes could take place through a multi-lateral negotiation process.</p>	<p>Socio-economic outcomes on First Nations have chronically been far lower than the general population.</p>	<p>First Nations and Indigenous organizations are attempting to address disparity issues with initiatives such as Closing the Gap.</p> <p>Individually negotiated arrangements deny First Nations the opportunity to develop more ambitious cooperative relationships among themselves.</p>