

Canada's Emerging Indigenous Rights Framework: A Critical Analysis



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JUSTIN TRUDEAU RAN ON AN ELECTION platform of changing the relationship between the Crown and Indigenous peoples in Canada. Trudeau promised a new nation-to-nation relationship based on respect, cooperation, partnership, and the recognition of Indigenous rights. Over halfway into his mandate as Prime Minister, some clarity is emerging on the scope of that nation-to-nation relationship. In February 2018, Trudeau announced the development of a new and transformational **Indigenous Rights, Recognition and Implementation Framework**.

Since then, a suite of legislation and policy has been rapidly deployed. It includes fiscal policy, omnibus legislation, changes in negotiations for land and self-government, and splitting Indigenous and Northern Affairs Canada (INAC) into two ministries. There is the establishment of the National Reconciliation Council, a Working Group of Ministers to Review Laws and Policies Related to Indigenous Peoples (also known as the Cabinet Committee to “Decolonizing” Canada’s Laws), and the *Principles respecting the Government of Canada’s relationship with Indigenous peoples*.

Yet, comprehensive analysis on the meaning and trajectory of Canada’s approach is scarce.

Any efforts at long-term fundamental change and improvement to the living conditions of Indigenous peoples in Canada are commendable and welcome. But the deeper institutional changes proposed merit caution.

In this report, we analyze the Liberal government’s impending changes to First Nation policy and legislation in relation to one another: as a set of pieces that together, comprise the background picture of Canada’s notion of “decolonization.”

In order to assess these changes, we have created a baseline to determine the degree of change, for better or worse.

Specifically, we ask a number of related questions about the proposed Framework:

Will the Rights Framework replace the Indian Act or simply offer an opt-out process?

How are self-determination, self-government, and “reconstitution of nations” expressed in the Rights Framework?

Will the Rights Framework lead to higher quality of life and alleviation of socio-economic challenges for First Nations?

Has there been genuine engagement with the concept of free, prior and informed consent?

How will the new Rights Framework affect pre-confederation, Numbered, and Modern Treaties?

How does the new Rights Framework address lands and resources off-reserve (i.e. traditional territories or title lands)?

Will the Rights Framework shift the burden of proof for proving title from Indigenous communities to Canada?

Our analysis reveals that the Rights Framework expresses a clear and coherent set of goals, which aim to suppress Indigenous self-determination within Canadian Confederation. These goals have been ordered into legislation and policy in a manner that guides First Nations towards a narrow model of “self-government” outside of the *Indian Act*. And remarkably, though labelled as new and transformational, the model reflects older and largely discredited approaches.

This report describes these apparent changes and offers analysis in three parts:

Part One: Relationship Reform

THE FIRST PART OF THIS REPORT analyzes the Rights Framework from a relational perspective, that is, how the machinery of government is changing to facilitate the new relationship.

We find the foundational *Principles respecting the Government of Canada's relationship with Indigenous peoples* emphasize the supremacy of the Canadian constitutional framework and significantly constrain the possibilities for self-determination to move beyond the current circumstances. An analysis of the "Ten Principles" reveals that we can expect very little structural change in the existing relationship. If they form the basis for future negotiations, the Principles are a potential threat to Indigenous rights and title.

The nation-to-nation memorandum of understanding (MOU) between the Crown and the Assembly of First Nations (AFN) has resulted in significant confusion regarding the AFN's role in nation-to-nation processes. Though the AFN insists this bilateral mechanism is not for "decision-making," surveying the work completed after a year reveals decisions are being made, for example on the impending Languages Act, child welfare reform, fiscal relations and housing. This process largely excludes the individual First Nations, treaty organizations, and Indigenous nations from exercising political authority over their own people and lands. It seems that to Canada, the AFN is the other *de facto* "nation" in this new relationship.

Crucial issues must be addressed regarding the splitting of INAC into two discrete Ministries as well. These include problems that arise from attempting to extract issues of program and service delivery from issues of land. For First Nations to have a healthy economic base to be able to exercise full self-determination, the delivery of services must be linked to land rights. Further, what are the legal and political implications of this new division? What fiduciary obligations is Canada bound by, and which ministry will dispense them, whether to Indian Act bands or self-governing First Nations?

Part Two: Policy Reform

THE SECOND PART OF THIS REPORT analyzes the Indigenous Rights Framework from a policy perspective. Here, we consider existing government literature and statements on "reconstituting nations." With the new Rights Framework legislation, we can expect to see a certain model of "aggregation" framed as a movement away from the *Indian Act*. But this model of self-government is focused on entrenching a largely reserve-based, administrative governance model with improvements in service delivery, transparency and accountability. It includes nothing of the "transformational" change the government has promised and certainly no indications of jurisdiction over traditional territory.

This is reflected in the new fiscal relationship, which is focused on capacity-building and new ten year funding grants, but does not restructure the existing fiscal relationship to develop a strong economic base for First Nations. Within the new process, lands, territories, and resources outside the reserve are delinked from fiscal relations, except for any own-source-revenue (OSR) from resource extraction on traditional territories. This approach is premised on training First Nations to integrate into the market economy and further erodes federal fiduciary responsibility to First Nations.

Finally, the federal government has committed to "replacing" the land claims policy in Canada and moving towards a flexible approach. A range of options are now being tested at over 60 "Rights and Recognition Tables," and will likely set the preconditions for future negotiation and legislation. Since it has historically been the case, the government's negotiating mandate will likely be narrower than the court's interpretation of Aboriginal rights and title. For treaty bands, the "Rights and Recognition Tables" may be leading towards a domestication of their international treaties.

Part Three: Legislative Reform

THE LAST SECTION OF OUR REPORT is focused on the pending legislative reform introduced by the Liberal government. With nine pieces of legislation working through first or second reading and four more to come, this is one of the most active legislatures on Indigenous issues in 100 years.

These legislative changes are being informed by the Cabinet Committee to 'Decolonize' Canada's Laws. Though the process has been taking place behind closed doors, two draft bills have been vetted, so we can partially discern the direction of "decolonization."

In the section, *Consent and the New Regulatory Regime*, we examine Bill C-69, which reforms the environmental assessment legislation, and affects how First Nations consent, jurisdiction, and governance will be considered in this critical decision-making process. We have serious concerns about Bill C-69, and specifically, the lack of attention to First Nation demands for free, prior and informed consent on land and resource decisions in their territories. The draft legislation offers very limited recognition of Indigenous jurisdiction.

While there is also no mention of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in the draft version of Bill C-69, it is the focus of Bill C-262, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, introduced as a private member's bill by NDP MP Romeo Saganash. If Bill C-262 becomes law, it may force governments and courts to address UNDRIP's Articles, though the legislation does leave space for mal-interpretation. At the least, it could offer a powerful tool to hold government accountable on efforts to harmonize federal law and policy with UNDRIP.

While all of the above can be considered “reconciliatory,” there are some discrete changes focused explicitly on reconciliation, such as a new National Council for Reconciliation. And while the Truth and Reconciliation Commission (TRC) defined reconciliation broadly as restitution and the transformation of Canadian institutions, so we might have a future defined by dignity and respect, we have to strain to see those commitments from this government.

Conclusion

CONSIDERING THESE PARTS OF OUR REPORT collectively, we can say the following:

The *Indian Act* is on its way out; the land claims regime and self-government policies are being broken down and re-packaged; and changes to fiscal relations ultimately focus on accountability and avoid addressing questions of land and resources. Indeed, we find that nearly all of Canada’s proposed changes to its relationship with First Nation peoples neglect issues of land restitution and treaty obligations.

Instead, whether relational, policy or legislative reform, they focus on the creation of self-governing First Nations with administrative responsibility for service delivery on limited land bases. Decision-making powers are constrained to the local (including any notion of free, prior and informed consent). Provincial, territorial and federal governments will continue to patronize and intervene in the lives and lands of First Nation peoples.

All of this, despite Trudeau’s rhetoric on reconciliation, UNDRIP, the nation-to-nation relationship, or the commitment to “breathing life” into Section 35 of the Constitution. And while there are some welcome changes including resources for program and service delivery, there is also a clear attempt to maintain a modified version of the status quo, and as such, an effort to mislead First Nations on the the transformational nature of these changes.

The danger of accepting government messaging, and the Rights Framework as currently articulated, is settling for a very narrow vision of Indigenous jurisdiction over lands, resources and self-determination generally.