

TRANSCRIPT | A PODCAST BY THE YELLOWHEAD INSTITUTE

Is it Dead Tho? An Update on the Rights Framework

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Shiri: Welcome to the first audio podcast coming out of the Yellowhead Institute. I'm Shiri Pasternak, Research Director.

Hayden: And I'm Hayden King, the Executive Director of Yellowhead Institute. We are the first Indigenous-focused think tank in Canada; Indigenous-led think tank. We launched back in June as some of our listeners may know, and have been rolling ever since. When are we recording this podcast? What month is it here... It's March, so we're almost a year into the life of Yellowhead Institute and this is our first podcast. We launched back in June with a report on the Liberal government's Indigenous Rights, Recognition Framework, Rights and Recognition Framework. And for those of you paying attention, that legislation binding the Rights Recognition died back in November but we're going to ask questions about whether or not it still lives; if there's a zombie Rights and Recognition framework. But in the meantime, you can check out the report that we produced on the Liberal government's policies at yellowheadinstitute.org.

Shiri: That's right, we've been so busy we can't even remember what month it is *[laughs]*. The informal title for this podcast is called "Is it dead though?" So today we're going to be talking about what the framework is, where it stands and what it means to First Nations in this country and really to ask the question, you know, given that the legislation has been, wasn't introduced, even though there was a big roll out for this Rights and Recognition Framework, what parts of it are still intact.

Hayden: Does it still live? *[laughs]* Is it dead. Yeah, so we know that the legislation has died but it does seem like many of the pieces of the Liberal government's approach still live on. So, we know that there are changes to the fiscal regime. We know that there's Language legislation and Child Welfare legislation, and new policies for education funding at the elementary level. There was supposed to be a policy for the post-secondary level but it doesn't seem like its going to make it to the end of this mandate. There's Impact Assessment legislation, Fisheries Act legislation, a Reconciliation

Council. So, there's all these disparate parts that, while the legislation itself was going to bind them, they, it seems to a great extent, are still proceeding without much delay, heading into another election. So, we thought it would be a good opportunity for us to speak on this podcast about the Liberal approach generally, and, I guess, assess where they're at headed into an election. You know, it's not our role to say "We should go out and vote for the Liberals," which I know you did Shiri, or the Conservatives, but...

Shiri: Wait, wait, did you just say that I went out...

Hayden: Didn't you vote for the Liberals?

Shiri: What?!

Hayden: You weren't persuaded by Justin Trudeau's...

Shiri: What?!

Hayden: ... promises?

Shiri: Do I look like I'm wearing red? I'm wearing the team colours over here. Black...
[both laughing]

(5:00) – Shiri: I did not vote for the Liberals...

Hayden: Ugh, yeah... Ok, thank you for clarifying that, but we are heading into an election and I think it's important to take stock of where we're at. So that's where we pick up this podcast from.

Shiri: So, what we're going to be doing is we're going to try and answer some of the many excellent questions that we crowd sourced on social media from our networks and define the Rights Framework in a way that helps us to understand all the different pieces of the Liberal agenda around Indigenous rights. So, Hayden went through some of the stuff that's on the table that is affecting Indigenous people, legislation and policy, but just to take it back a little bit further, a little bit of a wider view of all the things that have rolled out that are framing the so-called new relationship between the Federal government and Indigenous Peoples, the way that we analyzed the Rights Framework in our report, which you can find at the yellowheadinstitute.org, is that we looked at a whole broad suite of legislation and policy that sometimes was developed in cooperation with the Assembly of First Nations, or the AFN, and really often, maybe even more often, just unilaterally by the Liberal government. So that includes fiscal policy, omnibus legislation on environmental and other issues, there was the two new Ministries of Indigenous

Affairs that were created, the set of 10 principles to guide the relationship, and then again, the increasing integration with the Assembly of First Nations.

Hayden Yeah, I think when we wrote the report we divided the changes that we saw coming into three broad sections which were first, the changes to the machinery of government, which were really relational, how the Federal government, you know these 10 principles, really sought to change the way civil servants related to Native people, the splitting of the two ministries was a change to the bureaucracy again, to better deliver services and negotiate these MOUs with each of the national Indigenous organizations meant to solidify a venue to have discussions over shared concerns. So, there were those, the first set of changes that we saw were relational and then the second, which I think we've talked about a little already were on the policy side of things. So, that's a new policy for the fiscal relations, and the education and self-government and land claims, all of which we sort of talked a little bit about, and then there are the legislative changes. And again, we talked about the omnibus legislation, which included Fisheries Act, Impact Assessment. There's a Corrections Act that's going to affect Native people, and of course, right now we're preoccupied with Languages and Child Welfare. Now we concluded, taking these three types of change together, that... what did we conclude Shiri? That First Nations were being pushed into a particular model of self-government.

Shiri: Sectoral self-government agreements. So, the positive spin put on this is that these off-ramps are being created from the Indian Act into something better for First Nations. So, we looked at what is the trajectory? What is the horizon that the government sees First Nations moving towards that will get them out of the Indian Act? Well it looks like a lot of self-government in the form of the official inherent right policy but also self-government through a number of other kinds of off-ramps that would encourage First Nations towards self-administration you could say, rather than just self-government. So, policies like the First Nations Land Management Act got a huge boost in the budget in terms of funding and that would create new land codes for communities to self-regulate their reserve lands and gain some taxation powers and other market-friendly jurisdictions. And then a whole other slew of sectoral self-government agreements look like they're being developed under the Rights and Recognition tables which Joe Wild and Carolyn Bennett, under the Crown Indigenous Relations, branch I guess, of Indian Affairs, were managing. So, there's 60 tables across the country, more than that I think, that were slowly rolled out and these tables were told by Joe Wild and Carolyn Bennett, the Minister Carolyn Bennett, that, basically, to dream big. What do you want to see protected? Are you concerned about fisheries? Are you concerned about child welfare? Whatever the particular priorities of that community were, the government ensured that they could start a process that would expedite those processes so that communities could gain control and jurisdiction over those issues. So we looked at that as well and looked at what was actually on the table and whether or not there was an expansion of

jurisdiction for First Nations that could help them or could realize land return or enhance jurisdiction over broader land base than reserves.

(10:22) – Hayden: So, you know I think that term “off-ramp” actually belongs to Tom Flanagan.

Shiri: I think so too, actually, I just, I didn’t really realize that until I was rereading some stuff about him and I think off-ramp is a really positive term for him but, you know, we can also think about it in a more critical way: that an off-ramp is kind of like you’re on the main highway and then suddenly you get off and there’s nothing but a gas station and a McDonalds or something. Like it can also be going off into a place where you didn’t anticipate being.

(11:00) – Hayden: So, yeah, I think it’s important for us to say that all of these changes are not without some positive elements. I think that a lot of communities especially the regional organizations and certainly the national organizations were happy to meet once a year, meet three times a year to talk about issues. The Harper government never did that before. I think communities are eager to reassess the financing regime and certainly we cannot continue to exist on these one-year planning horizons that we’ve been subsisting on for so long. I think the increase in funding, I think that even open-ended negotiation tables, people, at least I think, in the beginning were really open to that conversation. So despite some positive elements that this government has introduced we did find, ultimately, that they were ushering communities, really, into a post-Indian Act world that resembled, to a really great extent, an Indian Act world, where there was no transfer of wealth and resources, no jurisdiction for lands and territories outside of the reserve and really no fundamental change to the Chief and Council system, for example, though they do say that you can reconstitute your Nations however you chose. So, we haven’t yet seen any reconstituted Nations under this governments mandate but ultimately, despite the dramatic changes we found that not really much changes at all.

Shiri: Of course, certainly, as you say communities take advantage of an increase in funding and new envelopes and are using that funding to develop all kinds of important community programs and so on. But just looking back, pulling back at the big picture and asking whether or not there was a fundamental change in the relationship I think the answer is pretty grim.

Hayden: So, we’ve been talking at length about what we’ve already done but we have all these questions that we asked people to submit via social media about the state of the Rights Framework and we should probably get to those.

[music playing]

(13:20) - Shiri: Yeah, we've got some really great questions. The first one comes from Vicki Monague, Beausoleil First Nation's own. Can I say that *[laughter]*? So, let's reach into the mail bag and pull out the first question here. So, she asks, "You probably can't answer this but I want to know why Justin Trudeau did not repeal all of Harper's laws that he imposed on First Nations. Maybe the Liberals are just friendly Conservatives?"

Hayden: I like how she tagged Justin Trudeau in her question to us via Twitter. I'm not sure he answered that question so we'll try to tackle it.

Shiri: I like how she thought we probably couldn't answer this.

Hayden: So little faith, Vicki. *[laughter]*

Shiri: So, the short answer to the question is actually that there is a process in place to reform all the legislation in place affecting Indigenous people. So, as we discuss in our report, during the 2015 campaign, Trudeau promised to review all the laws and policies that violated Aboriginal rights, and nearly a year later a cabinet committee to decolonize, quote, unquote, "decolonize," Canada's laws was announced and the committee includes the Minister of Justice, both INAC ministers, Natural Resources, Environment and Climate, Transportation, Fisheries and Oceans, and Families, Children and Social Development. And the work also extends beyond this committee. So, many of the cabinet ministerial mandate letters, which were made public, a process of reform was instructed to each Minister. So, the Minister of Environment and Climate Change was directed to review the Environmental Assessment Act, which obviously sparked a lot of the initial outrage around the Omnibus legislation that Harper introduced, sparking the Idle No More movement. The Minister of Natural Resources was directed to review the Natural Energy Board and its enabling statutes. The Minister of Fisheries was directed to review the Fisheries Act. Then, finally, the Minister of Transport was directed to review the Federal Navigation legislation. So, a number of pieces of legislation, as Hayden mentioned, are being reformed through this process, including the Environmental Assessment Act, that's now called the Impact Assessment Act, that's Bill C-69. It's currently in the Senate. This is, as I mentioned, one of the most controversial changes in Harper's Omnibus legislation.

Right now it's being talked about a lot in the media. Industry is really howling that the legislation went too far because it builds in all of these Indigenous Knowledge components that need to be considered in the process. But from an Indigenous perspective there are many who think that it didn't go far enough. So, for example, the government agreed to adopt the United Nations Declaration on the Rights of Indigenous People and this would be a really good place to implement it. This is the place where the rubber really hits the road between Nations and governments and Third Parties and Industry around resource extraction and the Impact Assessment Act often plays a really

central role. So, building in free prior and informed consent clauses would have really ensured that UNDRIP was recognized and implemented by the Federal government and yet there's no mention of UNDRIP in the legislation. The only mention of consent is around pipelines that go through reserves. That's the only place where Indigenous consent is enshrined in the legislation.

(18:00) - Hayden: Yeah, so that was very expansive Shiri. I think that the mechanism that Trudeau, you know when Trudeau was campaigning three and a half years ago, he said he was going to go and review all of Harper's laws. So, the mechanism that he's employed is really this cabinet committee. But if you look at all of Harper's legislation that affected First Nations, there are those few examples. So, the Fisheries Act, the Environmental Assessment Act that Shiri mentioned, those are being revised and then I think one of the most controversial ones that Stephen Harper produced was the First Nation Transparency Act and this government has, actually very early in their mandate, said that they were going to repeal that act, and what they have done instead is just not enforce it and I think that's sort of an irony that a lot of First Nations are, you know, Harper passed this legislation and then a lot of First Nations were suddenly seeing for the first time what their Chief and Councils were making and now they're not enforcing it and Chief and Councils, while some of them are still voluntarily providing that information, a lot aren't and so First Nations are kind of like, "Wait, we kind of want the First Nation Transparency Act back!", but it is interesting, I think, just the principle that any law that a Federal government passes, the next government can decide just not to implement it. And I think that that's important when we think about things like the *Declaration on the Rights of Indigenous People*. You know, we have this legislation coming - I know there's a question on this later so I don't want to get too much into it but - you know, governments come and go and unless it's in the constitution they really have a lot of latitude to interpret or not interpret, or implement, rather, or not implement. And so, with the Liberals, there has been relatively few of those examples but a few, actually.

(20:00) - Shiri: I wonder if you could say that the way that the legislation of the previous government was reviewed is actually constitutionally in line with Aboriginal rights because the reason that Trudeau gave for reviewing all this legislation was that it had passed without Indigenous consultation, and Indigenous consultation is, you know, that was defined through the Haida decision in 2004, as an Aboriginal right enshrined in the constitution. So, maybe that's the ground we should really push on is the fact that, you know, obviously constitutional protection for Aboriginal rights would be stronger than just policies and legislation that can be repealed the next year, but if legislation passes without consultation then there is a constitutional issue at stake I think.

Hayden: Yeah, like the Haida case and Mikisew and Taku as well, they established this principle of the duty to consult on anything that effects an asserted or established treaty

right but there was just a court case recently that said it didn't apply to laws that didn't affect Aboriginal Title.

Shiri: That's the Mikisew case and it was about the Harper omnibus legislation, finally made it to the Supreme Court of Canada, that's true.

Hayden: And the Supreme Court of Canada said "No, you don't have the constitutional duty, or the constitutional duty to consult doesn't actually apply to all legislation. So...

Shiri: Maybe that's the point here, to push on, that that would be an important right to enshrine, is consultation on Federal legislation that effects Indigenous people.

Hayden: Yeah. Now there are differences between the Liberals, I think. Could you say the Liberals are just friendly Conservatives? Um... You know what I think? I think as we're ending this parliamentary session one of the things that I really did appreciate from this Liberal government was sort of releasing senators and senators don't have a tremendous amount of power. They are expected to pass the same sort of bill that is passed in the House of Commons for it to receive Royal Assent but they have pushed back on a few things. Like, they pushed back on Status rules, um, I think its Bill S-2 or S-3 that came out of the *Descheneaux* decision. And you have a bunch of these independent senators that are really pushing back on Liberal legislation and right now in the senate the Conservative senators are holding up all of the Indigenous bills, holding up debate and discussion on all the Indigenous bills so they get their way on Impact Assessment, really, to support industry. *[Music fades in]*

(22:40) - Hayden: For our second question we're going back to Vicki Monague and she is wondering, "If Romeo Saganash's bill receives Royal Assent, how is Justin Trudeau going to harmonize the Indian Act with the declaration? Is Justin Trudeau continuing the work of previous governments in attacking free, prior and informed consent on Indigenous people?"

So, there's a few things to address with this question. The first is on free, prior and informed consent. The second is the Indian Act and then the third is the *Declaration on the Rights of Indigenous People* and maybe we'll go backwards. So, Romeo Saganash's Private Member's Bill is an important piece of law. It's nearing Royal Assent. The senate is considering it now. But, all it really does is demand that the government of the day account on an annual basis it's progress for implementing the Declaration on the Rights on Indigenous People. So, that's a good thing and that's going to allow First Nations a tool to hold governments accountable for progress on this. What's not so good about the bill is that it doesn't tackle the interpretive issues we have with the *Declaration on the Rights of Indigenous People*. The reason that UNDRIP has been so difficult to find any parsimony between First Nations and the government is there are differing

interpretations. The government thinks that UNDRIP can be brought in line with Section 35 of the constitution; that free, prior and informed consent is something that can be done through consultation and First Nations, of course, have a differing opinion on that. Now, nothing in Saganash's bill allows, or requires the government to accept or adopt Indigenous perspectives. So they can report every year on *their interpretation* of the Declaration on the Rights of Indigenous People and I think that's one of the big flaws in the bill.

(24:39) - Hayden: Nothing to add there? Now, when it comes to the *Indian Act*, we've started to talk a little bit about that I think. I mean, my belief is that the Indian Act is on its way out. I think that people make a lot of, people raise a lot of concerns about the Indian Act. You know, how can we as a country still have this racist draconian piece of legislation but the off-ramping that we talked about earlier has already been happening for a long time to the point where many First Nations, a lot of First Nations in Ontario for instance, the Indian Act doesn't really even apply to them. They're in the First Nations Land Management Act, they're in the Elections Act, they've got their own membership code and so they're going to enter into this new financing regime. So, I think that it's actually possible for you to have this UNDRIP bill and the Indian Act still in place without any contradiction, at least from the government's perspective. And then, when we're talking about free, prior and informed consent, yeah, I think that Trudeau is definitely continuing the work of previous governments in attacking free, prior and informed consent. This is a best practice that I believe Canada and every other Settler State should apply and adopt. It will mean a lot of development doesn't proceed but it also means that First Nations have jurisdiction over their territories and the ability to decide what happens in those territories. So, we could have a process in place that was negotiated even between the Federal government, provinces and First Nations to implement free, prior and informed consent but we have not seen from this government, any movement in that direction.

(26:26) - Shiri: You know, we can look at what happened at Unist'ot'en recently to really drive home the point that free, prior and informed consent really has no meaning on the ground in Canada right now. Where you could have an invasion by RCMP officers on Wet'suwet'en land. Lands that we know that were recognized as Aboriginal Title lands in the *Delgamuukw* decision in 1997 and yet you can have a rinky-dink legal tool like an injunction remove people from land that's theirs that was never ceded. So, we're so far away from free, prior and informed consent. People realize this but I think that was such a dramatic and final say on whether or not that clause is actually in operation in Canada and it certainly is not.

(27:18) - Hayden: No, and you know this is even after expert panels. You know, Indigenous people can say how important free, prior and informed consent, it can be best practice, it can be recommended at the international level but even expert panels in the

Canadian context have recommended versions of free, prior and informed consent. The expert panel on Environmental Assessment said, "You know in this legislation, you should really include a collaborative consent clause" and the Federal government ignored that recommendation. So, unfortunately, yeah, it does not seem that this government anyway, is interested in free, prior and informed consent. Though, we do have an election around the corner.

(28:00) - Shiri: So, as you mentioned, there's the expert panels the government convened itself for example around reviewing the Environmental Assessment legislation but there's also the Supreme Court of Canada where in the *Tsilhqot'in* decision in 2014 the court said that Indigenous people on their unceded lands should have the right to consent to development on their territories. So, the alignment of what's happening in terms of these political processes and legal processes with the final policy decisions and executive decisions of the Federal government are quite far off. *[music fades in]*

(28:46) - Shiri: So, we have another question. This one is also for you, Hayden, from Danielle Atkinson. She asks, "What is Trudeau doing to increase accessibility of funding schemes to provincial Métis organizations and Métis community service agencies." She says, "So much inequity in funding between Status, non-Status, Inuit, Métis, on-reserve, urban, etc, etc. This needs to be addressed."

Hayden: So, this is a difficult question to answer. I think we've published a little bit of work from Métis scholars like Adam Gaudry that can be reviewed, Danielle, to have a bit of an understanding on how the Federal government is approaching Métis issues. I think that, by and large, the Métis are pretty happy with the Rights Framework. I think when the Rights Framework legislation was, when there were discussions about it being delayed it was Métis political leaders that came out in full support of it and almost every legislative or policy announcement that the Federal government has made, Métis leaders are supportive. I think part of that reason is because Métis have been engaged so much in the Federal government's process over the past three and half years. We mentioned those 60 discussion tables earlier; those negotiating tables, those open-ended negotiating tables. Whether they're about land or redress of any kind really. I think there's 75 now? Is there 75 now? Those...

Shiri: I don't know, the last I saw it was 66 but I haven't looked in a while.

Hayden: The last count that we had was 60 discussion tables, it's more than that now. It involved 320 communities. It effected, basically 700,000 Indigenous people in Canada, whether you knew your community was in one of these table or not. And nearly 265,000 Métis were represented by five Provincially organized Métis organizations. So that means that 40% of the people at these negotiation tables were Métis and so the tables were not only informing the trajectory of the Rights Framework itself but they were also

a means by which to include Indigenous Peoples in negotiation. So, in that sense, Métis are having their concerns addressed at the tables but they're also contributing to the development of Federal policy and as I said at the top of this answer, it does seem that Métis organizations and individuals are happy with what the Trudeau government is producing. So, I don't quite think that there have been negotiations over funding for Métis self-government or Métis land claims. I think that's still in negotiation but it does seem very clear that the Federal government is open to Métis organizations taking over service delivery, for instance, for Métis populations.

(31:54) - Shiri: Our next question is from Agent Indian who asks, "Is any substantive progress being made on the drinking water crisis?"

I think this is a really well-framed question because most of the focus is on boil water advisories but from the reading that I've been doing it seems like there's a difference between the drinking water crisis and the boil water advisory crisis. So, for example 78 long-term drinking water advisories have been lifted since November 2015 and 62 long-term drinking water advisories remain. This is according to the government of Canada. But digging around a little bit it looks like there's another data set to look at and that's one that's maintained by Indigenous Services Canada that uses a database called the Integrated Capital Management System, ICMS, to assess the risk that water systems present to the people they serve and according to the Globe, they did an analysis of 11 years of this data, covering 14,000 individual inspections and they showed a national average risk score and its about 800 different systems that they were tracking on reserves since 2015 and they concluded that that number has barely budged. So, while the boil water advisories have been lifted it actually means something different than the ability of communities to provide consistently safe, high quality drinking water. So, this is not to minimize the severe issue of boil water advisories. We know that communities like Neskantaga have been under boil water advisories for years, since 1995 in the case of that community, and it's no small thing that the government has committed funding to lift those extreme situations, but overall it shows that there are still really substantial infrastructure deficits in communities that make it difficult for a lot of reserves to provide a consistent quality of drinking water to their citizens.

(34:10) - Shiri: We have a cluster of questions about the Assembly of First Nations.

Hayden: Yeah, these are... I don't know why I get assigned these, these are more tricky questions, but important ones I think. We have a question from Lois Apaquash who is asking, "How can Trudeau's shoddy record on Indigenous rights be reconciled without addressing the AFN as a major stumbling block in the process?" And, yeah, we had a number of questions around this so I think that it was clear that people are seeing the Assembly of First Nations as enabling a Liberal government approach that, on the ground, communities may not necessarily agree with and I think that criticism has

emerged for a long time. I don't think that the AFN has really been viewed with as much skepticism as it has in the past few years. Certainly, during Shawn Atleo's tenure there were these questions but increasingly I think that people are wondering if the Assembly of First Nations is advocating on behalf of First Nations or really just going along with what the Federal government has proposed? You know, I was talking to one of our research fellows just yesterday and he made it clear to me that the AFN proposed no amendments to the Languages Act. I mean, the Languages Act is flawed. It's deeply flawed. I mean, they've created a toothless piece of legislation with no funding and no power for this office of Indigenous Initiatives and you would think that the Assembly of First Nations would use the opportunity to step in and say "You know what? There's really significant problems and we would propose these amendments," but they didn't.

(36:00) – And with the Child Welfare legislation, when the legislation was announced, the AFN was very happy to endorse it and support it and talk about co-development. They did raise some concerns but nothing of the magnitude that I think legal scholars and communities are saying are issues and so I think it's fair to ask critical questions of the Assembly of First Nations, and whether or not they're connected to communities on these issues, it seems that that skepticism is going to grow.

Shiri: Certainly there was also a kind of antidote to the AFN's response to the Language legislation. When the ITK came out swinging against it and introduced their own legislation, that was quite strong on language protection that actually ensured and built in the kinds of funding and infrastructure that was necessary to preserve languages and to create immersion programs. So maybe we can look at that as a model for how co-development could really work to defend the interests of the people.

(37:10) - Hayden: I think as we near the end of this podcast that's a really important point. It's really difficult to assess whether or not change is really happening with this particular Federal government. I definitely want to see the sort of material change as opposed to just the symbolic change which I think has characterized this government, but despite some of the confusion that exists and I think in some ways some of the skepticism or even hopelessness that this is just, you know, another extension of the Settler Colonial state, one of the things that I'm hopeful for, or hopeful about is the increasing assertiveness of Indigenous Peoples in all quarters. Whether it's the Inuit, whether it's community members on the ground, whether it's, you know, the Yellowhead Institute, we're seeing more and more responses, Indigenous responses, to what the Federal, Provincial, Territorial even First Nation governments are doing and I think that that's a really positive thing with where we're at and I mean, I'm really excited to see how things go after the election. I think we're going to intervene in the election campaign in a big way and I expect that whoever the government is after the election, whether it's a Liberal majority or minority, or Conservative, I think that the power of First Nations is just going to continue to grow. [*music fades in*]

(38:38) – Shiri: That is a great note to leave things on. A kind of signal of what's to come with Yellowhead, the Red Paper that's going to be dropping in the Spring that will hopefully put all governments on notice in terms of questions of land restitution and strategies of land alienation that communities are fighting. We want to thank the Inspirit Foundation for making this podcast possible and the Yellowhead team for their input and support. We also want to thank Eric at Humble Man recording for technical support and we had fun and would love to do this again. So, thanks for listening!

Hayden: Bye, everybody.

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