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**Re: Laws, legislation, policies, constitutions, judicial decisions and other mechanisms in which States had taken measures to achieve the ends of the United Nations Declaration on the Rights of Indigenous Peoples, in accordance with article 38 of the Declaration.**

**This statement is for publication.**

January 21, 2024.

The Standing Water People are an Indigenous People. Most of us currently live within the region of space and time claimed by Canada, a United Nations member state, but our cosmology is very different from the United Nations: it is based on light, not land. We live in the Light, and we are guided by our Ancestral Oral Law, which is our Sovereign and our Inheritance.

 Canada pays lip service to the rights of Indigenous Peoples, but the reality is that Canada, while it has adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in domestic legislation, for example, in the Province of British Columbia’s Declaration on the Rights of Indigenous Peoples Act (DRIPA), and in a similar federal Act, there is a coordinated effort to deny the Indigenous Rights of all the Indigenous peoples of the world.

 One way that Canada does this by adopting a narrow, statutory definition of “Indigenous peoples” that restricts the definition to “Indigenous peoples” to mean “aboriginal peoples of Canada” as defined in Canada’s Constitution, *viz.* “Indians, Métis and Inuit.” This means that Indigenous peoples and individuals who exercise their inherent right to migrate to the area of North America claimed by Canada are denied their rights.

 We consider ourselves to be under military occupation by Canada, on the same basis that the Law of England defines a state of war: “[not]e that there is said to be a war in this realm when the exercise of justice in the king’s courts and places is impeded. Note well this manner of trial of war in this realm.”[[1]](#footnote-1) As our exercise of our own system of justice and execution of our Ancient Oral Law are impeded, we consider ourselves to be under military occupation. W recognize the value of peace, and we in no way consider military or violent resistance to the occupation: military occupation by UN member states is, for a variety of reasons, a fact of life for Indigenous peoples.

 We advocate for an international view of Indigenous rights: part of this is due to our unique cosmology. Our Ancestral Oral Law says that we live in the light, and that we are called Standing Water because we are Water that has evolved a capacity to stand, to build, to climb and to explore the world. The Light is what gives us our power. We have never been confined, voluntarily, to a box, physical or conceptual, and one of our Great Old Sayings is that *only dead people live in boxes*. We conceive of the world as endless.

 We feel very strongly that to be required to identify with a conceptual box within the Canadian Constitution, as a condition of securing recognition of our international Indigenous juridical personality, and the rights appurtenant to that personality, is a form of forced assimilation: we must assimilate to the categories of Canadian positive law, rather than having a truly nation-to-nation relationship with Canada.

 We are mindful that the UNDRIP recognizes

“the urgent need to respect and promote the inherent rights of Indigenous Peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”[[2]](#footnote-2)

 This is, perhaps, the clearest statement in the UNDRIP on the source of the international juridical personality of Indigenous peoples, and the individuals who form those peoples: juridicial personality must be an inherent right which is “derived from” the sources listed in the UNDRIP. We also recognize that Article 43 of the UNDRIP says

“[the] rights recognized herein constitute the minimum standards for the survival, dignity and well being of the Indigenous Peoples of the world.”[[3]](#footnote-3)

Canada has not meaningfully implemented the UNDRIP in its positive law, because it acknowledges only a subset of Indigenous peoples, viz. “Indigenous peoples of Canada.” We are hard-pressed to see why Indigenous peoples of the world should not enjoy their rights “in Canada,” unless they are one of the groups acknowledged as “aboriginal peoples of Canada.” The UNDRIP uses the phrase “Indigenous Peoples of the world,” and we see this as a meaningful recognition that Indigenous rights exist for all Indigenous Peoples of the world, everywhere.

Now, this does not mean that every Indigenous people will have a traditional territory, or res traditional resource-extraction rights in every part of the world, but we should note that the UNDRIP says that

“Indigenous Peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise acquired.”[[4]](#footnote-4)

The phrase “otherwise acquired” acknowledges international right for Indigenous Peoples to acquire “land, territories and resources” throughout the world. This, we understand, is a bold interpretation, and it may be contentious, but it is certainly in line with our Ancient Oral Law. Our history stretches back further than the peopling of the Americas. The conception of rights developed by UN member states is, in our view, dominated by a sedentary conception of permanent land bases, rather than the nomadic, exploratory way of life of our people.

One of the great tensions involved with Indigenous rights is the notion of the primacy of writing over speech. We are a people with an oral law. The UNDRIP is a written declaration. In some sense, the primacy of writing over orality already settles the question of assimilation: to even make use of the UNDRIP is to assimilate the written word and the category “Indigenous people.” This is a necessary consequence of the structure of UN member states. If we consider them as corporations, or artificial persons, at least in the English legal tradition, we find an old case that sheds some light on why this is so:

“Brooke, JCP. Corps politique ne put parler sans escript...Corporacion temporele est agregacion de divers persones que 'conjunctim' sont le Corps politique, & chescun chose que le Corps politique fait, est l' acte del' Maistre & de touts”
“Brooke, JCP. Corporations cannot speak without writing...A Temporal Corporation is an aggregation of many persons who together are the political body (corporation) and everything that the corporation does, is the act of the Master and of all.”[[5]](#footnote-5)

If this is good law, corporations, including UN member states, “cannot speak without writing.” There is some controversy over whether the State is a “sole person” or an aggregation of the citizens, but if we leave that aside, the State is undoubtedly a corporation, and, at least according to Brooke, a Justice of the Common Pleas of England, *corps politique ne peut parler sans escript* – *corporations are unable to speak without writing*.

This creates a need to assimilate the written word and specific categories in order to interface with UN member states, and with Canada. This, of course, is partly for practical reasons: the written word is in some ways more durable than “slippery memory.” But there is a great loss when peoples such as us are required to submit to a system of written law, even if declaratory, like the UNDRIP. Assimilation is the price we must pay to secure our international juridical personality and rights.

 This is a fundamental problem and tension that exists in terms of implementation of Article 38, both in terms of deciding who is an Indigenous people with which a UN member state must consult, and in terms of the method of consultation. States, in some sense, *require* a written definition of “Indigenous peoples” --- a form to fill out, a box to check in Canada: “Indians, Métis or Inuit.” The British Columbia, DRIPA, says

“3. In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.”[[6]](#footnote-6)

The DRIPA is not the UNDRIP: the UNDRIP does not define the term “Indigenous peoples,” but our interpretation is that the rights declared therein as “the minimum standards for the survival, dignity and well being of the Indigenous Peoples of the world” are the rights of every Indigenous people *of the world* *in the world.* The DRIPA, therefore, by reducing the applicability of the UNDRIP from “Indigenous peoples of the world” to the subset “Indigenous peoples of Canada” is inconsistent with the UNDRIP. This glaring inconsistency is, of course, a political football in Canada, and it was produced in consultation with many Indigenous groups, but we were not consulted. If we were, we would have strenuously advocated for what we call “global portability of Indigenous rights,” along with self-identification as the standard: our rights go with us, they are in our soul. They are not appurtenant to land. According to our Ancient Oral Law, we have a portable right to acquire land, and to develop it, throughout the world.

If there is a standard, it is to be found in the “social, economic and political structures, history, culture, philosophy and spiritual traditions” (SEPSCHPST) of the Indigenous people concerned. And even with this as the standard, are Indigenous Peoples to be objectified and put under a microscope, treated as objects of sociological, anthropological, legal, and other *testing* as a precondition of being recognized as Indigenous? We do not propose to definitively answer this question, but our firm understanding is that self-identification is the fundamental criterion. But is this self-identification *oral* or *written?* Must we fill in a form to be recognized as Indigenous? Must we write letters?

Any regime of testing will also infringe the right to privacy and data sovereignty of Indigenous Peoples concerning the aforesaid SEPSCHPST ---it would require Indigenous Peoples to submit their private cultural property and data to a UN member state for adjudication. How much of a people’s history must be shared with the State to secure recognition? Certainly, Canada’s positive test is made simpler, because Canada has had a system of registration of what are called Indians in Canada’s positive law since the late 19th century.

 We have never been registered, nor made any treaty or agreement with the Crown, which is taken in Canada to be the personification of the Canadian state. Should this prejudice us in securing our rights, because we were able to evade the system of reservations, of residential schooling and of many other indignities? This is not to say we have not suffered, as is common to all Indigenous peoples of the world. One of the common experiences of Indigenous peoples is that of compulsory assimilative State education.

 Compulsory assimilative State education is, in some sense, the method of mechanical reproduction by which the State reproduces itself. We say mechanical because compulsory education is clearly a mechanism intended to assimilate. Here is a quotation from one of our members concerning his first days at compulsory day school:

“The classroom seemed to me like a prison. It was nothing like the traditional environment I enjoyed while at home with my people. At home, I was allowed to ask questions and to speak my mind. At school, this wasn’t allowed. I worked hard at it for a week, then, one morning, I stood out in the rain, refusing to go in. [Mom] told me I had to go in, because if I didn’t the Government would take me away from her, because it’s their law that I had to go to school.”

Our people have dropped out at various stages---some made it part way through high school, and a few partway through university. Only a very few have obtained academical degrees. We have no law degrees, no engineering degrees, and no medical degrees among our people. This means we are, by force of the law of the State, dependent upon the engineers, doctors, and lawyers that the State licenses.

This system of compulsory education, at least primary education, one of the universal “human rights” contained in the UN Declaration of Human Rights. We are not suggesting that education is a bad thing, only that it is a hard thing, to be required to assimilate to a system of education, to learn to read and to write, to be considered an Indigenous People.

To close, let us consider how British Columbia’s Supreme Court has interpreted DRIPA:

[433]   I set out my analysis on the proper interpretation of [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) below. In the end, I find that [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) does not implement *UNDRIP* into the domestic law of the province. Further, I find that, properly interpreted, [s. 3](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html#sec3_smooth) of [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) does not create justiciable rights as proposed by the petitioners.
…
[466]   On the basis of the analysis above, I find that a correct, purposive interpretation of [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) does not lead to the conclusion that [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) “implemented*”* *UNDRIP* into domestic law. Instead, [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) contemplates a process wherein the province, “in consultation and cooperation with the Indigenous Peoples in British Columbia” will prepare, and then carry out, an action plan to address the objectives of *UNDRIP*.
…
[470]   In sum, [s. 2](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html#sec2_smooth)(a) of [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) does not implement *UNDRIP* into the domestic law of British Columbia. This interpretation is consistent with the characterization of s. 2(a) as a purpose statement as well as the legislation’s purpose and context. As such, *UNDRIP* remains a non-binding international instrument.
…
[484]   The province submits that these conclusions support the province’s overall submission that the text of [s. 3](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html#sec3_smooth) of [*DRIPA*](https://www.canlii.org/en/bc/laws/stat/sbc-2019-c-44/latest/sbc-2019-c-44.html) indicates the legislative intention that government and Indigenous Peoples should work together in consultation and cooperation to implement *UNDRIP*. That work should be done through the framework set out in the Act. Notably, that framework provides for accountability to the legislature, not enforcement through the courts.
…
[490]   Therefore, I find that s. 3 does not call upon the courts to adjudicate the issue of consistency. I do note, however, that s. 3 obligates the province to consult and cooperate with the Indigenous Peoples of British Columbia. It may be the case that failure to do so would constitute a justiciable breach of the government’s obligations. However, that question does not arise on this hearing and will be for a future court to decide. [[7]](#footnote-7)

It is still early days, but British Columbia could have implemented the UNDRIP in statute such that it creates justiciable and enforceable rights. Instead, it elected to enact the DRIPA which, as Justice A. Ross indicates, gives rise to, at most, a right to be consulted about legislation, not the bundle of substantive rights listed in the UNDRIP. British Columbia also asserts that there is no retrospective application to prior legislation, such as statutory mineral tenures:

[542]   The province submits that the duty to consult is forward-looking. It implicates contemplated conduct. The province cites *Upper Nicola Indian Band v. British Columbia (Environment),*[2011 BCSC 388](https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc388/2011bcsc388.html) at paras. [119–120](https://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc388/2011bcsc388.html#par119), where Justice Savage (as he then was) wrote:

[119]           In my opinion *Carrier Sekani*explains *Haida Nation SCC*. It does not support the position that consultation must go beyond *contemplated conduct* and address the ongoing impacts of past decisions. *Carrier Sekani*confirms that consultation is to be directed at the potential effects of contemplated conduct, not the past, existing, ongoing or future impacts of past decisions or actions.

[120]        … The purpose of the duty to consult is to protect unproven or established rights from the effects of proposed conduct pending claims resolution.

This decision of British Columbia’s Supreme Court shows a complete lack of respect for the inherent rights of Indigenous Peoples and individuals. They, essentially, do not exist, other than a “right to be consulted,” which is not a right to any outcome of that consultation, only a right to say something like “this infringes our Ancestral Oral Law,” without any necessary change of conduct by the State on the basis of that infringement. There is also no transparent procedure for requesting consultation. It is a political process and, therefore, subject to the political will of the Government of the day.

That said, we are cautiously optimistic that this situation may change: it is possible that a higher court will find that Justice Ross erred in finding that the UNDRIP does not create enforceable rights. Our position is that our inherent rights are enforceable as a matter of customary international law, and, if a UN member state elects to deny us our ancestral oral right, we are at the very least owed monetary compensation for the ongoing obstruction of our ancient way of life and our right to direct our own development and evolution.

Finally, we have signed this letter “STANDING WATER.” We have signed this as a mark of our collective international juridical personality, and our collective right to speak in our own name. This is, perhaps, the primary Indigenous right from which all others flow. It is to this personality, not to land, that our rights are annexed. *Thank you. Merci.*

**STANDING WATER
January 21, 2024.**

Annexes: Gitxaala v. British Columbia; Declaration on the Rights of Indigenous Peoples Act (British Columbia); United Nations Declaration on the Rights of Indigenous Peoples Act (Canada).

1. Reports from the Notebooks of Edward Coke. Baker, Sir John, ed. Selden Society vol. 140, 2023, p. 1042. [↑](#footnote-ref-1)
2. The UNDRIP, Preamble. [↑](#footnote-ref-2)
3. The UNDRIP, Article 43. [↑](#footnote-ref-3)
4. The UNDRIP, Article 26(1). [↑](#footnote-ref-4)
5. Pasch.14 Hen. 8 plea 9, https://www.bu.edu/phpbin/lawyearbooks/display.php?id=22121 [↑](#footnote-ref-5)
6. Declaration on the Rights of Indigenous Peoples Act, s. 3 [↑](#footnote-ref-6)
7. A. Ross, Justice. Gitxaala v British Columbia (Chief Gold Commissioner), 2023 BCSC 1680 (CanLII), <<https://canlii.ca/t/k0cbd>> [↑](#footnote-ref-7)