UNIVERSITY OF THE ARCTIC

Module 2
Indigenous Rights, Governance, and Self-Determination

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Key Terms and Concepts

- rights
- defeasible
- moral rights
- legal rights
- polyethnic rights
- special representation rights
- self-government rights
- treaty federalism

Learning Objectives

Upon completion of this module, students will be able to:

1. Identify and explain the differences among the different legal and moral rights arguments as they relate to Aboriginal rights
2. Identify, explain, and give examples of Aboriginal rights as polyethnic rights
3. Identify, explain, and give examples of Aboriginal rights as special representation rights
4. Identify, explain, and give examples of Aboriginal rights as self-government rights

Module Readings

Read the Overview and Lecture for Module 2, then read the assigned readings from the *Reading File* given below.

Reading 4: Fae Korsmo, “Claiming Territory: The Saami Assemblies as Ethno-Political Institutions”

Reading 5: Fae Korsmo, “Native Sovereignty: An Insoluble Issue?”

Reading 6: Gail Fondahl, Olga Lazebnik, Greg Poelzer, and Vasily Robbek, “Native ‘Land Claims’ Russian Style”

Overview

This module expands on the concept of ethnopolitical rights that was introduced in *BCS 100*. The module begins with a discussion of rights and considers the different types of arguments used to expand and limit Aboriginal rights, including both legal and moral rights. It then examines how these different Aboriginal rights are realized as polyethnic, special representation, and self-government rights in existing institutional arrangements.

Lecture

Since the end of the Second World War, Aboriginal rights have assumed a higher profile on the political agendas of many Circumpolar countries. Because of the importance of Aboriginal rights debates in the quest of Indigenous peoples for greater self-determination, it is essential that we have a clear understanding of what we mean by rights. Sometimes commentators in the media, for instance, conflate moral and legal rights, as if they were interchangeable. Moreover, different thinkers argue for or against Aboriginal rights for very different reasons. Finally, Aboriginal rights fulfill different aspirations for self-determination, the most important of which can be characterized as polyethnic rights, special representation rights, and self-government rights. All of these concepts and issues are discussed below.

Rights

Introduction

Before we begin any discussion of types of rights, we need to clarify first what we mean by rights. A right is an *entitlement*. It is an entitlement to do something (e.g., to vote), the choice not to do something (e.g., move to another city), or not to have something done to a person (e.g., freedom from cruel and unusual punishment). A right may also be an entitlement to have something (e.g., public education) or an entitlement to relinquish something (e.g., selling property). A right is a claim others must respect.

Rights Are Defeasible

An important point about rights—whether they are moral or legal—is that almost invariably they are *defeasible*. To say that a right is defeasible means that it can be defeated for important justifications. Political theorists Don Carmichael, Tom Pocklington, and Greg Pyrcz (2000) give the example of person A, who does not show up to meet a friend B for coffee because A has stopped on the way to the meeting to save the life of a person who has had a heart attack. Even though A promised to meet B at 10:00, and even though B has a rights claim that A has an obligation to respect—that is, to keep his promise—that right can be overridden, in this case by the moral imperative to save the life of another person.

The notion that rights are defeasible is important in the discussion of politics in democracies. It is often wrongly assumed that because a person or group possesses a right, the entitlement is absolute. Rights often come into conflict with one another and in certain cases courts decide which right is more powerful and can defeat another right. Sometimes considerations other than rights can also defeat a legal right.

One example is the case of the Aboriginal right to fish for sustenance. The Supreme Court of Canada has argued that if there is such a limited number of salmon, for example, that there are not sufficient numbers for all fishers, Aboriginal and non-Aboriginal, to harvest, then Aboriginal fishers have first priority for sustenance purposes. The non-Aboriginal right to harvest salmon commercially would be defeated by the Aboriginal right to subsistence fishing. However, should the salmon numbers be so low that even sustenance fishing could threaten the species with extinction, then principles of conservation of the fish species take precedence over the Aboriginal right to subsistence fishing and that right can be defeated.

Courts are not the only bodies which make decisions over competing rights and other considerations. Legislators frequently have to balance out competing claims and interests before drafting legislation that determine legal entitlements. In these instances, moral rights arguments and well-being considerations often play important roles in the consideration of what legal rights ought to be enacted in legislation.

Legal Rights

It is often assumed that all rights are legal rights. In other words, the only rights that exist are those defined in law. However other rights, most importantly moral rights, exist. The basis of legal rights "is simply valid legal rules that specify who has entitlements and who must respect them." (Carmichael, Pocklington, and Pyrcz 2000: 5). That the law specifies in many countries that only citizens over the age of 18 are entitled to vote is an example of a legal right. If a citizen over the age of 18 was denied his or her

right to vote, he or she could appeal to the law that his or her right has been violated.

The Aboriginal legal theorist James [Sakej] Youngblood Henderson argues that, at least in North America and arguably, by extension, in other parts of the Circumpolar North, Aboriginal peoples do possess *legal* rights to self-determination. Moreover, this legal right to self-determination, he argues, should take the expression of treaty federalism. Youngblood Henderson argues that the legal rights basis for treaty federalism is embedded in the first treaties signed between Great Britain and First Nations (and carried forward subsequently by the Dominion of Canada) and in documents such as the Royal Proclamation of 1763. Aboriginal rights to self-determination are also based on court decisions. In 1831, in *Cherokee Nation* v. *Georgia* (30 U.S. 1 at 16), Chief Justice Marshall of the United States Supreme Court gave North American expression to this concept when he declared that Indians were “domestic dependent nations.” Under this ruling, and continuing through to the present, the United States federal and state governments have formally recognized American Indians as possessing internal sovereignty, thereby protecting their legal right to attend to their affairs separate from non-Indian administrations. Although the early treaties in Canada dealt primarily with land and resource rights, nowhere did Indigenous peoples explicitly surrender their internal sovereignty (the rights to govern their affairs), therefore preserving the inherent right to self-government. Today, Indigenous peoples, Youngblood Henderson argues, possess the right of internal sovereignty and can cede areas of jurisdiction to the federal or provincial governments as part of treaty agreements. The legal right of self-government, accordingly, rests with Indigenous peoples and is not a set of authorities that are delegated from federal or provincial/state governments to Aboriginal peoples.

Other theorists have made similar rights-based arguments in Fennoscandia regarding the rights of Saami. For the Saami of Fennoscandia, struggles for self-determination have focused around land rights and traditional land use rights, such as reindeer herding. Some observers trace legal rights to Saami land ownership back to the 1660s and note that Saami property rights paralleled those of other taxpayers in Sweden-Finland. “The official 1695 tax reform collectivized the Saami tax based on the number of households per village, but courts continued to recognize individual property rights after the 1695 reform” (Korsmo 1993: 38). Other observers place great emphasis on the Saami Codicil of 1751, which is often referred to as the Saami Magna Carta. In part a response to resolving the international border dispute between Russia, Sweden, and Norway, the Saami Codicil effectively recognized the right of Saami to internal self-determination and recognized land use rights, including free mobility across borders. Like treaties, the Marshall decision, and the Royal Proclamation of 1763, appeals to Aboriginal rights based on the Saami Codicil and tax laws are appeals to entitlements defined in law. It is important to understand that this line of argument is different from assertions to Aboriginal rights based on moral rights principles that may or may not exist in law.

From theoretical considerations to practical ones, it is increasingly the case that Aboriginal peoples are using the court systems in Canada, the United States, Russia, and Fennoscandia to assert and to establish Aboriginal rights. Sometimes Aboriginal peoples are successful; other times they are not. Several examples below outline these points.

First, as late as the 1980s, the provincial government of British Columbia in Canada denied that Aboriginal peoples had a *legal* right to ownership of traditional lands. The provincial government argued that if such a right existed before, this right was extinguished lawfully when British Columbia became part of Canada. After a series of court cases, culminating in the 1997 Delgamuukw decision of the Supreme Court of Canada, it was established in law that the Wet'suwet'en and Gitksan people's of northern British Columbia land rights were not extinguished, and that they survived to this day. However, the Supreme Court ruled that these rights were not absolute. Whereas the governments of Canada and British Columbia, for example, have a duty to consult First Nations before any resource development can occur on traditional lands, these government can override Aboriginal opposition to the expropriation of traditional lands under certain circumstances. The recognition of Aboriginal land title in this case, however, was an important victory for Aboriginal peoples in Canada.

A second case is the Taxed Mountains case of the Saami of Sweden. A group of Saami living near the Norwegian border in northern Sweden attempted to establish ownership rights based largely on the fact that, for centuries, they had paid taxes to the Swedish state in a manner similar to conventionally recognized land owners. In 1981, the Supreme Court ruled that the Saami did not have ownership rights to the traditional lands in question, but they did establish that the Saami possessed "firm right of use" to lands owned by the Crown. As in the case of northern British Columbia, the recognition of Aboriginal rights is both a victory and a setback for Saami in Sweden. The recognition, as legal rights, of land use rights (or usufructory rights) of an Indigenous cultural and political community clearly strengthens the claims of Saami people to greater self-determination. However, the courts have placed clear limits on the extent of those rights by denying an Aboriginal land ownership rights (or proprietary rights).

A third case is that of the Native Alaskans of Venetie. In 1998, in *Alaska* v. *Native Village of Venetie Tribal Government* (96–1577), the Supreme Court of the United States ruled that the lands owned by the Native Village of Venetie were not "Indian Country." The case is an important setback for legal rights claims of Native Alaskans for self-government. It is important to understand this legal rights case both within the context of the Alaska Native Claims Settlement Act (ANCSA) of 1971 and within the context of the situation of Native Americans in the 48 southern states. In 1971, ANCSA was heralded as a major breakthrough in the recognition of Aboriginal rights. There was great interest in the development of the oil and gas reserves in Alaska; however, the United States Congress precluded development of these reserves without first settling outstanding Native land claims. As part of the ANCSA, Native village and regional corporations were

established that granted proprietary rights to corporation lands. However, the ANCSA did not address the question of tribal self-government. In the other 48 states of continental United States, the courts and Congress have established, over the decades, that Indian tribes possess a legal right of self-government in Indian Country, in other words, on reserve lands. Native Alaskans of Venetie Village attempted to establish similar rights, but the Supreme Court did not recognize corporation lands as Indian Country and, therefore, did not extend the same legal rights of self-government.

Finally, the international forum is becoming increasingly prominent in the recognition of the legal rights of Indigenous peoples. Perhaps the most important example is the *Indigenous and Tribal Peoples Convention, 1989 (169)* adopted on 27 June 1989 by the General Conference of the International Labour Organization. This convention formally recognizes a wide range of rights of Indigenous peoples in order to ensure their self-determination within existing national states, including cultural and land rights. Although, as a legal international convention, it does not carry the same force as domestic law, it is nevertheless an important tool for Aboriginal peoples to use to persuade national governments to adopt domestic laws that conform to the convention.

Legal rights are but one way to argue for Aboriginal rights. As we have seen above, this can both help and hinder claims for greater self-determination by Indigenous peoples. Another way to argue for Aboriginal self-government is by appealing to moral rights arguments. We examine these arguments below.

Moral Rights

Moral rights are entitlements that others have an obligation to respect based on moral principles. Many moral rights are enshrined in law; others are not. Whether or not moral rights are defined in law, moral rights exist. Most people in democracies accept the moral right to freedom of speech, for instance. This right is often protected in law, typically in constitutions. However, in liberal democracies, whether or not such a right is defined in law, most would argue that individuals ought to be entitled to speak freely. Moral rights considerations are often the basis for enacting legal rights, including Aboriginal rights. Below, we look at two basic schools of thought regarding moral rights considerations: Aboriginal rights as group rights based on "the politics of recognition," and Aboriginal rights as collective rights of individuals belonging to cultural minorities.

Moral Rights and the Politics of Recognition

One school of thought, led by scholars such as Charles Taylor (1992) and James Tully (1995), argues that Aboriginal peoples possess moral rights to self-determination by virtue of the fact that they constitute distinct cultural and political communities. These communities, they argue, are more than

the sum of the individuals who constitute them and have meaning and have social value in and of themselves. Justice can only be achieved for Aboriginal peoples if the value and dignity of their communities were accorded equal worth to other communities. Recognizing the equal worth of all political and cultural communities is the basis of the notion of the "politics of recognition." According to this view, Aboriginal communities ought to have rights that can protect their cultural integrity and autonomy. This may mean, as a consequence, that individual rights could sometimes be overridden to protect a cultural community, including Aboriginal communities. Critics of this approach are uncomfortable with the notion that group rights could override individual rights.

Tully argues that the constitutionalism of democracies can and should accommodate the mutual recognition of Aboriginal and non-Aboriginal political communities. Tully eloquently employs Bill Reid's famous sculpture *The Spirit of Haida Gwaii* (the Haida are an Aboriginal people in northern British Columbia) to illustrate the importance of mutual recognition of cultural diversity.

> The sculpture is a black bronze canoe, over nineteen feet in length, eleven feet wide, and twelve feet high, containing thirteen passengers, *sghaana* (spirits or myth creatures) from Haida mythology. . . . (*Xuuwaji,* the bear mother, who is part human), and bear father sit facing each other at the bow with their two cubs between them. *Tsaang*, the beaver, is paddling menacingly amidships, *qqaaxhadajaat*, the mysterious, intercultural dogfish woman, paddles just behind him and *Qaganjaat*, the shy but beautiful mouse woman is tucked in the stern. *Ghuuts*, the ferociously playful wolf, sinks his fangs in the eagle's wing and *ghuut*, the eagle seems to be attacking the bear's paw in retaliation. *Hlkkyaan qqusttaan*, the frog, who symbolizes the ability to cross boundaries (*xhaaidla*) between worlds, is, appropriately enough, partially in and out of the boat. Further down in the canoe, the ancient conscript, brought on board from Carl Sandburg's poem, 'Old Timers', paddles stoically (up to a point). *Xuuya*, the legendary raven—the master of tricks, transformations and multiple identities—steers the canoe as her or his whim dictates. Finally, in the centre of this motley crew, holding the speaker's staff in his right hand, stands *Kilstlaai*, the chief or exemplar, whose identity, due to his kinship to the raven (often called *Nangkilstlas*, the One who gives orders), is uncertain. Bill Reid asks of the chief, "Who is he? That's the big question." So the chief has come to be called "Who is he?" or "Who is he going to be?"(1995, 17–18) [1]

Tully suggests that the journey of the paddlers mirrors our own journey as Aboriginal and non-Aboriginal peoples. There are intercultural interactions among the voyagers without any losing his or her own identity. There is change. There are contestation and negotiation. All members are recognized and accommodated.

How would these arguments affect Aboriginal peoples? This set of moral-rights theorists argue that too much attention is given to individual rights and too little attention to group rights. As a consequence, liberal

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[1] James Tully*, Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995), 17–18.

democracies, with their emphasis on universal citizenship rights, may impair the ability of minority cultural groups to survive, especially Indigenous peoples. These theorists argue that Aboriginal peoples may need to exercise group rights that could limit or override individual rights. They argue, for instance, that membership in Aboriginal communities can be based justifiably on blood quantum or ancestry. Such limitations on citizenship rights raise the criticism of racism. However, theorists who argue for a group rights approach counter that, since Aboriginal communities are too small and too powerless in the face of dominant societies, there are no better practical solutions to limiting membership. If open membership were allowed, then people who do not share Aboriginal values could easily dominate their communities and Indigenous communities would eventually disappear.

Collective Rights within a Liberal Democratic Framework

Other moral rights theorists, such as Will Kymlicka (1995), argue for Aboriginal collective rights to self-determination, but within a liberal democratic rights framework that places high value on individual rights. Kymlicka observes that all of us belong to at least one cultural community or another. Moreover, he argues, membership in a cultural community is basic to human existence and frames the choices we make in our lives. Most people belonging to a dominant culture do not even realize how much their social and political institutions reflect the particular cultural values of the dominant society. However, these values and institutions are essential in guiding their *individual* life choices—they ground them and give meaning to their social existence. On this point, theorists like Kymlicka differ from Taylor and Tully. Taylor argues in defence of community rights for the sake of the existence of the group, even at some expense of the rights of individuals; whereas Kymlicka defends collective rights only insofar as they advance the well-being of individuals who comprise the collectivity. In this regard, Kymlicka's position is compatible with the prevailing views of liberal democracy.

Within this framework, Kymlicka offers three sets of collective rights or group-differentiated rights as they are sometimes called. These include polyethnic rights, special representation rights, and self-government rights.

Polyethnic Rights

Following the Second World War, most countries in the Circumpolar North have witnessed greater heterogeneity in their immigration patterns. This has often led to immigrant ethnic minorities seeking group-specific measures that would allow them to retain and express their cultural values and practices. Typically, these claims do not include demands for changes in the political institutions of the dominant society per se, because immigrant

ethnic minorities chose to become members of their newly adopted political community. Aboriginal peoples differ from immigrant ethnic minorities in that they did not choose to be part of the dominant society. Through colonization, European settlers brought dominant societies to the lands of Aboriginal peoples. As a consequence, Indigenous peoples have claims to special representation and self-government rights that are viewed as stronger than claims to these rights by immigrant populations. Nevertheless, Aboriginal peoples are distinct political and cultural communities *within* the states and societies that are dominant. Accordingly, Indigenous peoples often seek polyethnic rights in addition to special representation and self-government rights.

Language and culture are critical elements in the survival of Aboriginal peoples in the Circumpolar North. Consequently, it is not surprising that in Alaska, Canada, Fennoscandia, and Russia, Indigenous peoples have sought rights to protect their languages and cultures and have sought to create institutional mechanisms to ensure their enhancement. Prior to the Second World War, states in the Circumpolar North pursued assimilationist policies: the state often educated children in boarding schools, in the language of the dominant society, and away from their parents; and the state banned cultural practices such as potlatches and shamanism. However, since the 1950s, governments in the Circumpolar North have not only increasingly allowed and encouraged Indigenous cultures and languages to co-exist with the languages and cultural practices of dominant societies, but have also supported—financially and institutionally—Indigenous education in language and culture, as well as Indigenous institutions within civil society, such as Aboriginal cultural organizations, media, and so on.

In Norway, the Saami Act of 1987 and Article 110a of the Norwegian Constitution in 1988 affirmed, in law, the polyethnic rights of Saami people. Even prior to this, however, Saami children had access to Saami language instruction in public schools. Consistent with the official policy since 1987, the Norwegian state established (in 1989) the Saami University College in Kautokeino, Norway. The college identifies language and language development, sustainable development and environmental and natural resource management, and Saami education and understanding as core elements of its teaching and research missions. These kinds of initiatives can be found around the North, such as the Institute for the Problems of the Small Numbered Peoples of the North, a research and graduate teaching institute of the Russian Academy of Sciences, located in Yakutsk Russia and staffed by Indigenous people; and the Wilp Wilxo'oskwhl Nisga'a, the post-secondary institution of the Nisga'a First Nation in northern British Columbia, which offers university education to Nisga'a students in co-operation with the University of Northern British Columbia.

Special Representation Rights

Special representation rights ensure that ethnic (or other minority) groups have guaranteed institutional participation within state decision-making bodies and in society. Outside of the Circumpolar North, the Maori of New Zealand offer one longstanding example of this principle in practice. In New Zealand, the Indigenous Maori are guaranteed four seats in the New Zealand legislature. Maori voters can choose to be enrolled on the Maori voter list and vote for Maori candidates in national elections. Such proposals have been debated across the Circumpolar North. The Saami Parliaments of Norway, Sweden, and Finland are important Northern examples of Aboriginal rights established as special representation rights.

Finland, Norway, and Sweden each have Saami Parliaments or Saami Assemblies. Although these Saami assemblies offer special representation rights, they do not afford rights of self-government. The Saami Parliaments are not orders of government per se, that is, they cannot make binding decisions over people residing in a defined territory. Rather, they advise national, regional, and municipal governments in the formation of policy and legislation. In recent years, Saami assemblies have worked with government authorities to develop hunting and fishing licensing systems, to resolve reindeer herding management issues, and so on. In this way, Saami people participate in the decision-making processes of a state in an institutionalized framework. But they do not have decision-making authority over their own people on their own lands. This distinction is of critical importance. Other countries, even where Indigenous peoples have self-government rights, look at the Saami Parliament model as a way of enhancing Aboriginal self-determination.

Political Autonomy and Self-Government Rights

Political autonomy and self-government rights have their clearest expression in land rights and self-government arrangements. The basic argument for political autonomy and self-government is that people, as individuals or collectives, have the right to determine for themselves the terms of their own lives. This includes the right to self-government of collectivities. Without empowering Aboriginal communities with the right to make decisions that affect the well-being of their communities, without outside interference from dominant societies, the well-being of those cultural communities will be diminished.

Rights to Aboriginal political autonomy were first achieved in the Circumpolar North through land claims. “History has shown that the most effective way to protect indigenous communities from this external power [political and economic] is to establish reserves where the land is held in common and/or in trust, and cannot be alienated without the consent of the community as a whole” (Kymlicka 1995: 43). The first modern land claim was the Alaska Native Claims Settlement Act of 1971, already mentioned.

This was followed by the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement signed in 1975 and 1978 respectively. The Cree, Inuit and Naskapi of northern Quebec received about $230 million in compensation but, more importantly, ownership of over 14,000 square kilometers of territory, and exclusive hunting and trapping rights to over another 150,000 square kilometres. In Russia, Indigenous peoples are acquiring greater rights to land. The main form of Aboriginal land tenure rights in Russia is the *obshchina* (or clan territory). Land selection is usually based on the traditional lands of families and kin groups. However, in contrast to Canada and Alaska, ownership rights do not yet exist and use rights are limited to traditional economic activities such as hunting and reindeer herding.

In addition to land claims as a basis for increased political autonomy rights, self-government agreements are becoming increasingly important. There are four basic forms of self-government rights:

1. the delegated model of Aboriginal self-government;

2. the inherent model of Aboriginal self-government;

3. *Aboriginal* self-government; and

4. public self-government.

The first two models address the degree of constitutional protection of self-governing institutions. The latter two models speak to the question of who can be a member of a self-governing community. In the case of *delegated* self-government, higher orders of government devolve authority to Aboriginal governments, usually through legislation. These powers are not constitutionally protected (in other words, higher orders of government could take back those powers); however, this is usually not the case. Often, delegated Aboriginal self-government has powers similar to those of a municipality. *Inherent* models of self-government differ in two respects from delegated models. The inherent model is constitutionally protected (that is, no other order of government, including the national, can unilaterally dissolved the Aboriginal government) and has paramountcy in some areas of jurisdiction (in other words, should their be a conflict between an Aboriginal law and that of a regional or national government, the Aboriginal law would prevail). The best example in the Circumpolar North is the Nisga'a Final Agreement in Northern British Columbia, which came into effect in 2000.

Self-government cannot only be delegated or inherent, it can also be *Aboriginal* or public self-government. In the case of *Aboriginal* self-government, membership typically is restricted to members of that Aboriginal community, usually on the basis of ancestry. In other words, a person cannot acquire political rights (the right to run for office or vote) within a self-governing political community simply based on length of residency and citizenship in the country. Almost all self-government

agreements in Canada are *Aboriginal* self-government forms. The *public model* of self-government is best represented in the Greenlandic Home Rule model, which has been in practice since 1979. Indigenous Greenlanders make up 80 per cent of the population and are thus in a majority position. Greenland has a high degree of political autonomy from Denmark, but some notable areas of jurisdiction, such as the military, remain with Denmark. Political rights, the rights to vote and to run for political office, are based on residency, not ancestry. It is this latter aspect which makes the Greenlandic model *public* self-government, rather than *Aboriginal* self-government.

Thus, there can be four basic combinations of Indigenous self-government models: (1) delegated-*Aboriginal*; (2) inherent *Aboriginal*; (3) delegated-public; and (4) inherent-public.

Conclusion

In contrast to how Indigenous rights, governance, and self-determination are sometimes discussed in the public media, students should now be aware of the distinctions between legal and moral rights. Students should also be aware the Aboriginal rights can take different forms including polyethnic, special representation, and political autonomy and self-government rights.

Study Questions

1. What is the basis for legal rights?

2. What is the basis for moral rights?

3. In addition to the examples in the lecture, give examples of polyethnic, special representation, and political autonomy and self-government rights around the Circumpolar North.

4. Few, if any, rights are absolute. Give an example where Aboriginal collective rights should not override individual rights. Defend your answer.

5. What might be some of the reasons that Indigenous peoples have different types of legal rights across Canada, Alaska, Greenland, Russia, and Fennoscandia?

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Other Resources

Oneida Indian Nation: Culture and History. http://www.oneida-nation.net/sovdoc.html

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