Saturday Morning at the Law School
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An Update on Consultation with Alberta's First Nations?

UNIVERSITY OF CALGARY

Canadian Institute of Resources Law
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Topics

1. Potential impacts of the United Nations Declaration on the Rights on Indigenous People, 2007 as implemented in Canada *by United Nations Declaration on the Rights of Indigenous Peoples Act,* SC 2021, c 14.

2. Developments in the honour of the Crown doctrine at the Albert Court of Appeal for the Alberta Energy Regulator and Alberta Utilities Commission.

3. *Yahey v British Columbia*, 2021 BCSC 1287 the first successful aboriginal rights decision regarding the cumulative impacts of development on aboriginal rights.

This workshop will conclude with a Q and A session for registered participants.

Relevant Language

- **Aboriginal Law:** On April 17, 1982, Canada re-patriated its constitution in the *Constitution Act, 1982* and defined "aboriginal peoples" as including “the Indian, Inuit and Métis peoples of Canada” – *aboriginal law* is the mechanism that Canadian law uses to regulate relations with Indigenous people

- **Indigenous Law :** Indigenous Law is the mechanism to regulate relations within and among Indigenous people and is occasionally recognized by Canadian Courts

Relevant Language

- **Indigenous People living in Canada** prefer the name for themselves in their language and are mostly indifferent to the Canadian name accorded to them in English or French, although they may describe themselves as a First Nation to emphasize their political status and priority.

- **Canadian** residents have inherited the territories, resources and obligations of Britain arising from historical encounters with Indigenous Peoples, as well as incurring new obligations. They may not have participated in the history of Indigenous Peoples suppression and dispossession *but they live in a Canadian society that has prospered on that history.*

UNDRIP International Law: Interpretation

1. In *Canada (Human Rights Commission) v Canada (Attorney General)* (2012), the Federal Court said at para 351:

The [Supreme] Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.

[352] While these presumptions are rebuttable, clear legislative intent to the contrary is required: see *R. v. Hape* , 2007 SCC 26, [2007] 2 S.C.R. 292 at para. 53; Sullivan, above at 548

UNDRIP : Interpretation

2. However, in *Nunatukavut Community Council Inc v Canada (Attorney General)* (2015), the Federal Court agreed with the premise that UNDRIP may inform the interpretation of domestic law and judicial review, however:

> …in *Hupacasath*, Chief Justice Crampton of this Court [at para 51] stated that the question of whether the alleged duty to consult is owed must be determined solely by application of the test set out in *Haida* and *Rio Tinto*. I understand this to **mean that UNDRIP cannot be used to displace Canadian jurisprudence or laws regarding the duty to consult, which would include both whether the duty to consult is owed, and, the content of that duty.**
>
> [106] Most significantly, the NCC did not identify an issue of statutory interpretation. Rather, it submits that UNDRIP applies not only to statutory interpretation but to interpreting Canada's constitutional obligations to Aboriginal peoples. No authority for that proposition is provided. Nor does the NCC provide any analysis or application of its position in the context of its submissions.

International Law: UNDRIP

1. The United Nations Declaration on the Rights of Indigenous Peoples (2007) (UNDRIP) is a compromise document, adopted by the United Nations General Assembly on 13 September 2007 (A/RES/61/295) by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). The UNDRIP webpage has a history of this document.

2. It is not an International Convention or International Treaty but **a strong declaration as to what the minimal international standards (Art 43) are to protect Indigenous Peoples.**

UNDRIP webpage:
https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

Justice Canada's webpage:
https://www.justice.gc.ca/eng/declaration/index.html
It has UNDRIP in the official languages English and French and unofficial translations
https://www.justice.gc.ca/eng/declaration/read-lire.html

UNDRIP

3. UNDRIP consists of 24 Preambles and 46 Articles of the rights of Indigenous Peoples as individuals and collective rights which State(s) such as Canada, are charged to provide effective mechanisms for prevention, and redress.

4. In the consultation context, without the **free, prior and informed consent** of the Indigenous peoples concerned, [FPIC] through representatives chosen by themselves in accordance with their own procedures (Art 18):

- States shall consult and cooperate in good faith with the indigenous peoples concerned to obtain FPIC before adopting and implementing legislative or administrative measures that may affect them. (Art 19)

UNDRIP

- Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources, and States shall consult and cooperate in good faith with the Indigenous peoples concerned in order to obtain their FPIC **prior to the approval of any project affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (Art 32)

- Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements and nothing in this Declaration is to be interpreted to derogate from them. (Art 37 and 45)

UNDRIP

- States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration (Art 38) and shall be subject only to such limitations as are determined by law, in accordance with international human rights obligations, non-discriminatory **and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society**. (Art 46)

UNDRIP is expansive, remedial and describes the minimum international standards to protect Indigenous Peoples (Art 43).

In accordance with *Manitoba Métis* case, Court declarations may be available, which are not constrained by limitation periods, and could apply to an historical Indigenous claim.

Canada - UNDRIP

1. Canada initially voted against UNDRIP in 2007.

2. Canada endorsed UNDRIP on November 12, 2010 with a Qualified Statement of Support saying it was an aspirational document that it “does not reflect customary international law nor change Canadian laws”.

3. In May 2016 speaking at the UN Permanent Forum on Indigenous Issues, Indigenous and Northern Affairs Canada Minister Carolyn Bennett announced, "[w]e are now a full supporter of the declaration, without qualification. We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution.”

Canada - UNDRIP

4. The *Truth and Reconciliation Commission* (2015) investigating Residential Schools called for the implementation of UNDRIP as a framework for reconciliation (Calls to Action 43 and 44).

5. The *National Inquiry Into Missing and Murdered Indigenous Women and Girls* (2019) [MMIWG] Calls For Justice included implementing UNDRIP (1.2 (v))

6. *Principles respecting the Government of Canada's relationship with Indigenous peoples* (2017) refer to UNDRIP and Mandate Letters to the Minister of Crown-Indigenous Relations (2019 and 2021) and the Minister of Justice and Attorney General of Canada (2019 and 2021) direct: “to ensure passage of the co-developed legislation to implement [UNDRIP]”

Bill C-15

Second Session, Forty-third Parliament,
69-70 Elizabeth II, 2020-2021

HOUSE OF COMMONS OF CANADA

BILL C-15

An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples

AS PASSED

BY THE HOUSE OF COMMONS

MAY 25, 2021

1. Bill C-15 passed the House of Commons on May 25, 2021, the Senate on June 16, 2021 and received Royal Assent on June 21, 2021 becoming law as the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [UNDRIPA]

2. It is arguable limited to areas of Federal jurisdiction under the *Constitution Act, 1867* in section 91.

3. It is a short act consisting of 7 sections, 23 Preambles and UNDRIP as a Schedule (the French version is the original).

UNDRIPA - Preambles

1. In *Québec (Attorney General) v Moses*, [2010] 1 SCR 557 [*Moses*], the SCC noted that section 13 of the federal *Interpretation Act*, RSC 1985, c. I-21 provides "[t]he preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object," and "a legislative preamble will never be determinative of the issue of legislative intent since the statute must always be interpreted holistically, it can nevertheless assist in the interpretation of the legislature's intention " (at para 101).

2. Notable Preambles include, (numbers are for reference):

    1. **Whereas the United Nations Declaration on the Rights of Indigenous Peoples provides a framework for reconciliation**, healing and peace, as well as harmonious and cooperative relations based on the principles of justice, democracy, respect for human rights, non-discrimination and good faith;

UNDRIPA - Preambles

7. Whereas Indigenous peoples have suffered historic injustices as a result of, among other things, colonization and dispossession of their lands, territories and resources;

9. Whereas all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and terra nullius, are racist, scientifically false, legally invalid, morally condemnable and socially unjust;

16. Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority;

18. Whereas the Declaration **is affirmed as a source for the interpretation of Canadian law**;

UNDRIPA - Provisions

1. Section 1 provides the short title as "*United Nations Declaration on the Rights of Indigenous Peoples Act*."

2. Section 2 (1) provides the following definitions:

   Declaration means [UNDRIP] as set out in the Schedule

   Indigenous peoples has the meaning assigned by the definition aboriginal peoples of Canada in subsection 35(2) of the *Constitution Act, 1982*.

   Minister, for the purposes of any provision of this Act, means the federal minister designated as the Minister for the purposes of that provision under section 3. [Justice Minister]

3. Section 2 (2) provides that:

   This Act is to be construed as upholding the rights of Indigenous peoples recognized and affirmed by section 35 of the *Constitution Act, 1982*, and not as abrogating or derogating from them.

UNDRIPA - Provisions

4. This is an unusual aboriginal non-derogation clause, in the phrasing "as upholding the rights of Indigenous peoples", although identical languages is used in recent federal legislation 2020+.

   The traditional phrasing (1982 to 2020) is in the fashion of:

   > Nothing in this [Act] shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*.

5. Section 2 (3) says that "Nothing in this Act is to be construed as **delaying the application of the Declaration in Canadian law**."

UNDRIPA - Provisions

6. Section 3 says “The Governor in Council may, by order, designate any federal minister to be the Minister for the purposes of any provision of this Act.” - Justice Minister

7. Section 4 says “The purposes of this Act are to

   (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and

   (b) provide a framework for the Government of Canada’s implementation of the Declaration.”

8. Section 5 directs “The Government of Canada must, in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration.” [Current Laws]

UNDRIPA - Provisions

9. Section 6 (1) directs "The Minister must, in consultation and cooperation with Indigenous peoples and with other federal ministers, prepare and implement an action plan to achieve the objectives of the Declaration.” [Action Plan]

10. The Action Plan must include:

6 (2)(a) measures to

(i) address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons, and

(ii) promote mutual respect and understanding as well as good relations, including through human rights education;

UNDRIPA - Provisions

6 (2) (b) measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the Declaration; and

6 (3) measures related to monitoring the implementation, reviewing and amending the Action Plan.

11. That Action Plan must be completed as soon as practicable, but no later than two years after the day on which this section comes into force (subsections 6(4)); must be tabled in each House of Parliament (subsection 6(5)); and then be made it public (subsection 6(6)).

UNDRIPA - Provisions

12. Section 7 directs Annual Reports as to measures under section 5 to ensure that the laws of Canada are consistent with the Declaration, and progress on the Action Plan, be tabled with both Houses of Parliament, be referred to the relevant Standing Committees and made public.

    • *Annual progress report on implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (2022) at: https://www.justice.gc.ca/eng/declaration/report-rapport/2022/pdf/UNDA_AnnualReport_2022.pdf

UNDRIPA Interpretation

1. UNDRIPA section 4, on its face is a purpose section, which according to *Moses* is "[t]he most direct and authoritative evidence of legislative purpose" and

   - 4(a) "affirm the Declaration as a universal international human rights instrument with application in Canadian law" appears to be directed at the Courts and in particular given the directions in section 2(3) that "[n]othing in UNDRIPA is to be construed as delaying the application of the Declaration in Canadian law"; and

   - 4(b) appears to be directed at the Canadian Government given sections 5 [Current Laws are consistent]; section 6 [Action Plan] and section 7 on Annual Progress Reports.

UNDRIPA Interpretation

1. The first Court reference to the UNDRIPA is the January 7, 2022, BC Trial decision in *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, currently under appeal, which said:

> [209] Both the provincial and federal legislation was passed after the start of the trial in this case. It is therefore not surprising that the legislation does not appear in the pleadings. It did, however, feature in the parties' final submissions at the end of the trial.
>
> [210] The [First Nation] plaintiffs say that **the extent to which UNDRIP creates substantive rights is not an issue that needs to be resolved in this case**. However, they also say that UNDRIP can and should be used as an interpretive tool in support of robust recognition and accommodation of Aboriginal rights enjoying recognition under s. 35(1) of the *Constitution Act, 1982*. They emphasize that s. 1(4) of [*Declaration on the Rights of Indigenous Peoples Act*, S.B.C. 2019, c. 44 ("DRIPA")] expressly states that "Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia".

UNDRIPA Interpretation

[211] The [**Corporate and BC & Canadian government**] defendants say that UNDRIP is merely an international declaration of a sort that has never been implemented as law in Canada. They point out that, on the other hand, international treaties and conventions can obtain the force of law in Canada but only when they are expressly implemented by statute. **They say the recent UNDRIP legislation has no immediate impact on existing law and is simply "a forward-looking" statement of intent that contemplates an "action plan" yet to be prepared and implemented by either level of government**

[212] It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title. Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights. Nonetheless, as noted above, I am still bound by precedent to apply the principles enunciated by the Supreme Court of Canada to the facts of this particular case **and I will leave it to [the Supreme] Court to determine what effect, if any, UNDRIP legislation has on the common law.**

UNDRIPA Interpretation

1. Justice Canada's website on *Implementing UNDRIP* says "the purpose of this [UNDRIPA] is to affirm the Declaration as an international human rights instrument that can help interpret and apply Canadian law. It also provides a framework to advance implementation of the Declaration at the federal level." Further,

> [t]his legislation and Canadian law recognize that international human rights instruments, like the Declaration, **can be used to interpret the Constitution, which is a "living tree" that evolves over time.** The Act, like other international human rights instruments or federal legislation, cannot amend or supersede the Canadian Constitution. However**, *they can inform how the Constitution* and the law are interpreted and developed.**

UNDRIPA Interpretation: Honour of the Crown

1. We would argue that the UNDRIPA engages the honour of the Crown, as the *Manitoba Métis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 said at para 73 :

The honour of the Crown "is not a mere incantation, but rather a core precept that finds its application in concrete practices" and "gives rise to different duties in different circumstances": *Haida Nation*, at paras. 16 and 18. It is not a cause of action itself; rather, it speaks to how obligations that attract it must be fulfilled. Thus far, the honour of the Crown has been applied in at least four situations:

....

(4) The honour of the Crown requires the Crown to act in a way that accomplishes **the intended purposes of treaty and statutory grants to Aboriginal peoples** (*R. v. Marshall*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, at para. 43, referring to *The Case of The Churchwardens of St. Saviour in Southwark* (1613), 10 Co. Rep. 66b, 77 E.R. 1025, and *Roger Earl of Rutland's Case* (1608), 8 Co. Rep. 55a, 77 E.R. 555; *Mikisew Cree First Nation*, at para. 51; Badger, at para. 47).

UNDRIPA Interpretation: Honour of the Crown

1. We suggest that interpreting the UNDRIP Act provides effectively two mechanisms, potentially complementary, for implementing UNDRIP:
   - 4(a) Court driven, under section 2 (3) with limited remedial powers;
   - 4(b) Government driven, in consultation with Indigenous Peoples in:
     i. section 5 by ensuring consistency of current laws; or
     ii. section 6 by way of an Action Plan for new measures, or at the very least a plan to review current laws

2. As noted in *Thomas and Saik'uz First Nation,* Justice Canada does not agree and it will be up to the Courts whether UNDRIPA is "simply vacuous political bromide."

Provincial UNDRIP

1. Canada is one of ~25 federated states and as noted, in the UDRIPA Preambles:

   Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority;

2 British Columbia has done so in the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, on identical terms as UNDRIPA, save the addition of BC Government to enter agreements with Indigenous Governments for joint-decision making agreements or consent to the use of statutory powers. Only one legislative provision has been changed in 2 years history of that Act.

Provincial UNDRIP

3. Manitoba has *The Path to Reconciliation Act*, C.C.S.M. C. R30.5, in section 4 for "The minister responsible for reconciliation must guide the development of a strategy for reconciliation that (a) is to be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in UNDRIP."

4. Other Provinces have promised to incorporate UNDRIP into their laws, but have yet to do so (see below).

5. The Courts may determine that UNDRIP principal applies to the interpretation of provincial laws, in accordance with *Canada (Human Rights Commission) v Canada (Attorney General)* (2012) line of decisions.

Provincial UNDRIP

1. UNDRIP has several articles that engage provincial jurisdiction in the *Constitution Act, 1867,* which Robert Hamilton has argued, see below, may encourage diversity of Provincial approaches, if they do so, at the cost of consistency.

2. In *Interlake Reserves Tribal Council Inc et al, v The Government of Manitoba*, 2020 MBCA 126 (CanLII), the AFN applied for intervenor status on consideration of an interim injunction for floodway construction by invoking UNDRIP, which was a novel argument, but that raises the larger problem raises the complex issue of reception of public international law into Canadian domestic law.

Provincial UNDRIP

3. Three reception issues flow from the submissions of the AFN:

[36]The first is the doctrine of adoption, the question being whether aspects of the UNDRIP are already part of Canadian common law because the aspect(s) reflect(s) customary international law and there is no conflicting domestic legislation (*see R v Hape*, 2007 SCC 26 at paras 35-39; and *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 86-95).

- It should be noted that the doctrine of common law aboriginal rights arose at the intersection of British Imperial practices as a reflection of *customary* imperial practices with respect to early encounters between indigenous people and Canadians. These customary practices were fleshed out in directives to colonial governors, and in the ordinary course of the common law, courts upheld these *common practices* as *Imperial (now Canadian) common law* that pre-dates Confederation.

Provincial UNDRIP

[37] The second is the interpretive effects of the UNDRIP in relation to domestic law. International human rights law can be an interpretative aid for Canadian courts both as a contextual tool and for providing support or confirmation for the result of a purposeful interpretation of the Constitution (see *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at para 70; and *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at paras 22-47).

- This is a constitutional variant of the *Canada (Human Rights Commission) v Canada (Attorney General*) (2012) line of cases.

Provincial UNDRIP

[38] The third is the question regarding implementing the UNDRIP and the division of powers under *the Constitution Act*, 1867. While the UNDRIP is not a treaty, the discussion *in A-G Can v A-G Ont et al*, 1937 CanLII 362 (UK JCPC), [1937] 1 DLR 673 (PC), as to how an international instrument is implemented into Canadian domestic law is important. Legislative implementation of international law is subject to the division of powers (see pp 679, 681-82; and *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 66).

- A possibility may include *Tsilhqot'in Nation v British Columbia* (2014), and *Grassy Narrows First Nation v Ontario (Natural Resources)*(2014) where the doctrines of aboriginal rights applied to both provincial and federal governments forming an exception to the established doctrines of interjurisdictional immunity.

UNDRIP Issues:
FPIC Consultation v Consultation

1. The Crowns' constitutional duty to consult and accommodate aboriginal peoples arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates *new* conduct that might adversely affect it in a non-trivial fashion.

2. The Crown is required to consult with affected Indigenous Nations and negotiate in good faith in order to accommodate their concerns but only, a good faith effort is required on both parties **but there is no requirement to agree**.

3. UNDRIP Article 32.2 requires the affected Indigenous Peoples **free and informed consent** [FPIC] prior to *the approval of any project affecting their lands or territories and other resources.*

UNDRIP Issues: FPIC Consultation v Consultation

4. This may be difficult to resolve by Government negotiations.

5. Justice Canada says the duty to consult will *strive* to provide FPIC.

6. One approach the Courts may use is by modifying *Tsilhqot'in Nation* (2014) by assuming claims to traditional territories valid, and assessing developments as infringements on aboriginal rights on the basis of the *Sparrow* (1990) two part justificatory test (as modified by *Delgamuukw* (1997) expansion of compelling purposes to include development) in association with UNDRIP Article 46(2) which says UNDRIP rights,

> …shall be subject only to such limitations as are determined by law, in accordance with international human rights obligations, non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others *and for meeting the just and most compelling requirements of a democratic society*. [*Oakes/Sparrow*]"

UNDRIP Issues: Historical Treaties v Constructive Arrangements

1. UNDRIP Article 37 provides:

   1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
   2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

2. Do all of Canada's Treaties, particularly the land surrender ones, as supplemented by the doctrines of honour of the Crown and fiduciary duties of the Crown doctrines, qualify as UNDRIPA's "constructive arrangements"?

UNDRIP Issues: Traditional Territories

1. UNDRIP Article 28 provides:

    1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their [FPIC].
    2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status [e.g. Land Back Movement] or of monetary compensation or other appropriate redress.

2. Do Canada's lengthy Land Claim processes under the *Specific Claims Tribunal Act*, SC 2008, c 22 or Comprehensive Claims Policy satisfy these provisions?

Alberta's Approach to Consultation

1. Alberta's approach to aboriginal consultation is outlined in:

   - David K. Laidlaw and Monique M. Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook*, CIRL Occasional Paper #44 (Calgary: Canadian Institute of Resources Law, 2014)
   - David K. Laidlaw, *Alberta First Nations Consultation & Accommodation Handbook – Updated to 2016*, CIRL Occasional Paper #53 (Calgary: Canadian Institute of Resources Law, 2016)
   - David K. Laidlaw, *Alberta Energy Projects and Indigenous Accommodation?*, CIRL Occasional Paper #60 (Canadian Institute of Resource Law, Calgary, 2021)

2. The Alberta Energy Regulator [AER] legislated ban, under the section 21 of the *Responsible Energy Development Act*, SA 2012, c R-17.3 on assessing the adequacy of Crown aboriginal consultation continues to apply.

Honour of the Crown and Alberta Regulators

1. However, there are recent developments as to the impact of the honour of the Crown and the public interest in the regulatory context.

2. In *Fort McKay First Nation v Prosper Petroleum Ltd* (2020) the majority of the Alberta Court of Appeal interpreted the incorporating statute, the *Responsible Energy Development Act* and concluded that the AER was obliged to take into account the honour of the Crown as part of *reconciliation* into the "public interest" in deciding whether to recommend Cabinet approval of a oil sands project, as this was different from assessing the adequacy of consultation.

Honour of the Crown and Alberta Regulators

3. Justice Greckol's concurring judgement canvassed the relevant jurisprudence and said the honour of the Crown applies to treaty interpretation and implementation and the proposed buffer zone, the negotiations of which had yet to be completed, was an effort in this regard – particularly given First Nations concerns over cumulative impacts of development.

4. Subsequently, the *Oil Sands Conservation Act*, RSA 2000, c O-7 [OSCA] section 10(4) and 10(5) were amended to remove the requirement for Cabinet approval in the *Red Tape Reduction Implementation Act*, 2020, SA 2020, c 25

Honour of the Crown and Alberta Regulators

5. Similarly, the Alberta Court of Appeal in *AltaLink Management Ltd v Alberta (Utilities Commission)* (2021) overruled the Alberta Utilities Commission [AUC] on a statutory basis.

6. The Piikanki First Nation and Kainai First Nation agreed to allow high voltage powerlines to transit their Reserves subject to their options to assume partial control. This was through a limited partnership with the operator AltaLink as the general partner and when they did so it prompted an application for tariff approvals to the AUC.

Honour of the Crown and Alberta Regulators

7. The AUC granted approval based on the “no-harms test” on condition that that the new First Nation controlled corporation could not deduct the additional incremental costs of annual audits of $50,000.

8. AltaLink appealed. The Court of Appeal said the AUC erred in saying the no-harms test was forward looking, as there was no legislative basis for this and the public interest requires wider consideration especially with Indigenous controlled applicants.

9. A direct routing benefits included reduced costs of construction and ongoing maintenance, estimated at $32 M, but also included all of the other benefits such as economic activity and employment on the Reserves that would follow.

Honour of the Crown and Alberta Regulators

10. Justice Feehan, in a concurring judgment, noting the much of the argument was focussed on the honour of the Crown and the necessity of reconciliation wrote judgement to clarify when the AUC need consider this.

11. He cited the relevant jurisprudence, including *Fort McKay v Prospe*r and noted that the Crown in all of its emanations must act honourably with Indigenous peoples and their collectives, and in terms of *reconciliation*, while it was a foundational objective of aboriginal rights*, it is a separate concept* and part of the broader public interest with guidance that may be obtained from UNDRIP.

Yahey v British Columbia

1. *Yahey v British Columbia,* 2021 BCSC 1287 [Yahey] a recent British Columbia Trial decision that resulted in a settlement. In it the Blueberry First Nation succeeded in getting declarations, that *the cumulative effects of development* in its Traditional Territories breached the Treaty 8 promises because of British Columbia's authorizations for development.

2. The Court said Treaty 8 "guarantees the Indigenous signatories and adherents the right to continue a way of life based on hunting, fishing and trapping, and promises that this way of life will not be forcibly interfered with. Inherent in the promise that there will be no forced interference with this way of life is that the Crown will not significantly affect or destroy the basic elements or features needed for that way of life to continue."

Yahey v British Columbia

3. The test for infringement of Treaty 8 rights was not the *Mikisew* test requiring extinction of meaningful exercise of Treaty rights for all of Blueberry's Traditional territories, it remained the *Sparrow/Badger* test, while *Mikisew* was important, the duty to consult it expressed was an effort to avoid infringement of Treaty 8 rights and consultation cases were marred by procedural and substantive defects, as they did not account for the cumulative effects of development.

4. Justice Burke concluded the test for infringement is: whether Blueberry's treaty rights have been significantly or meaningfully diminished when viewed within the way of life from which they arise and are grounded.

Yahey v British Columbia

5. She noted the impact of a single authorization may not have infringed Treaty 8 rights, but the cumulative effects of development authorizations may, and did in this case breach those rights when over 90% of Blueberry's Traditional Territories was within 500 metres of a disturbance.

6. In the course of Yahey she made several evidentiary rulings, firstly, the lands taken up would not be measured by area but those converted to zones of influence that discourage the exercise of Treaty rights. Secondly, the Plaintiff was not required to provide proof to a scientific certainty that industrial development was the sole cause of interference but only, on the balance of probabilities, that the Provinces actions or inaction, have caused, contributed to or resulted in an infringement.

Yahey v British Columbia

7. Thirdly, Mikisew did not set the scale at which infringement claims could be made, nor does it require a First Nation to include all of its territories and

   [i]t may be that an area within its traditional territory (for example a particular watershed) is an important location for the exercise of certain rights, and that development activities planned for that location risk infringing those rights. The First Nation would be entitled to bring an infringement claim, in relation to that portion of its traditional territories.

8. Justice Burke made several other declarations:

   a) British Columbia did not uphold the honour of the crown in diligently implementing Treaty 8 promises, as evidence by the failure of Provincial regimes it put in place to manage: oil and gas development; wildlife management of crucial species essential to Treaty 8 harvesting rights, forestry regimes and the nascent unenforceable guidance on cumulative impacts of development.

Yahey v British Columbia

b) The Province had breached its *fiduciary duty* in respect of Treaty 8 rights with its discretionary control: of the power to take up lands; developing and implementing natural resource decision making structures and individual natural resource decisions given Blueberry's corresponding vulnerability, although she was careful to note this *fiduciary duty* did not compel outcomes but it did require good faith efforts to address Blueberry's concerns over the cumulative impacts of development.

9. Alberta's development approval process is substantially similar to British Columbia's.

Yahey in Alberta

1. Alberta has received it's first Blueberry case on August 29, 2022 with Duncan's First Nation (DFN) claim against Alberta as announced by Osler, Hoskin & Harcourt LLP by Maureen Killoran, KC, Sander Duncanson, Sean Sutherland, Lisa Manners, "Treaty infringement claims for cumulative effects come to Alberta".

2. My colleagues Robert Hamilton and Nick Ettinger have written extensively on this Robert Hamilton & Nick Ettinger, "Blueberry River First Nation and the Piecemeal Infringement of Treaty 8" (ABLawg: July 20, 2021) and Robert Hamilton & Nick Ettinger, "Yahey v British Columbia and the Clarification of the Standard for a Treaty Infringement" (ABLawg: September 24, 2021).

Alberta Regional Plans

1. Unlike British Columbia's nascent efforts, Alberta does have Regional Plans intended to address the cumulative effects of development on a regional scale under the *Alberta Land Stewardship Act*, SA 2009, c A-26.8 (ALSA).

2. The Lower Athabasca Regional Plan (2012) (LARP) covers part of Treaty 8 and centres on the oil-sands region of Alberta.

3. I have written extensively on LARP in AbLawg.ca, essentially:

    - Under ALSA, Regional Plans are Cabinet level directives protected by cabinet secrecy without any legislative input and immunized from legal action aside from complaints to the Stewardship Commissioner who is limited to providing non-binding advice to the Cabinet;

Alberta Regional Plans

- Regional Plans are an expression of government policy and require compliance from municipalities, regulators and provincial bodies;
- Under ALSA, project approvals or decisions could not be delayed by missing components of a Regional Plan;
- LARP was formulated in a government driven “top-down” fashion with an emphasis on prioritizing oil-sands development;
- LARP did not alter project specific regulation but was focussed on Cumulative Regional Impacts using Management Frameworks;
- Management Frameworks involve: *monitoring* substances of concern; *trigger levels* for those substances; and exceedance of those triggers requiring *management actions* in the absolute discretion of Minister of Alberta Environment and Protected Area [AEP]; and
- Management Actions involved a scaled response: investigation, selection of a regulatory response and further monitoring, all in the absolute discretion of AEP.

Alberta Regional Plans

4. LARP, as developed, has missing Management Frameworks, most notably the Bio-diversity Management Framework. The existing Management Frameworks' substantial deficiencies include:

- Re: conservation lands: the 22% conserved lands not only broke the contiguous nature required but may ultimately prove useless in preventing lasting environmental damage;

- Re: air quality: measures a limited subset of pollutants, using questionable methodology with limited monitoring stations;

- Re: water quality : measures a limited subset of pollutants that are not bio-accumulative in the aquatic environment; in a limited area; using questionable methodology and only one monitoring station – unable to triangulate sources of water pollution;

- Re: groundwater quality : measures a limited subset of pollutants that are not bio-accumulative to in the aquatic environment; in a limited area; using questionable methodology with only interim triggers and with a Quantity Framework to be developed;

Alberta Regional Plans

- Re: surface water quantity : in a limited area; using one monitoring station; with volume withdrawals that can impede navigation in low flow situation and not ratios that would encourage water conservation with ecological indicators and triggers under development;

- Re: tailings management : with applicant defined ready to reclaim measures; untested methods and inappropriate targets; with anticipated improvements in reclamation technologies – that have yet to pan out resulting in calls to discharge “treated” tailings directly into the Athabasca River.

5. In the 10 years of LARP, the mandated management responses have been, in the AEP’s final and binding discretion, investigatory in nature with no discernable connection to regulatory action.

Alberta Regional Plans

6. In the formulation of LARP, Indigenous Peoples input as to their aboriginal rights in the Planning Region were disregarded. In the *Response to Aboriginal Consultation on the Lower Athabasca Regional Plan* (2013), released after LARP was implemented, said that "taking into account and balancing the economic, environmental, and social needs of *all residents of the region and all Albertans*, it is not possible to address or accommodate all concerns in the manner proposed by a First Nation or Metis organization" (at 20).

7. LARP is a failure both environmentally and fails to protect Treaty 8 rights and other constitutional rights of Indigenous Peoples living in the Planning Region.

Questions

1) How will the UCP government respond to First Nations concerns, and what will the key issues be?

Alberta has historically, regardless of the ruling government, been indifferent to or hostile to Indigenous Peoples interests, for several reasons:

- ”Indians” were denied the right to vote, aside from Band Council elections, for Federal Elections until 1960 and in Alberta elections until 1969 (Elections Canada: A Brief History of First Nations Voting Rights at https://www.elections.ca/content.aspx?section=res&dir=rec/part/APRC/vot_rights&document=p4&lang=e). Indigenous Peoples in Alberta currently number 258,640 or only 6.5% of the population of Alberta, with a limited percentage voting – diluting their political influence;
- Alberta’s economy, jobs and government revenue has always been dependant upon resource extraction for export, initially agriculture and since the late 1940’s increasingly oil and gas production;

Questions

- As a consequence Alberta government perceive Indigenous Peoples and by extension environmental groups, as “barriers” to the continued development of petroleum resources and oil sands, that have since the 2010 comprised a greater share than conventional production - at the cost of environmental damage and infringement on aboriginal rights;

- Alberta’s hostility to the federal government has a long history, from the Canadian Wheat Board that only applied to western Canada; the CPR “Crowsnest Tariffs” and the ill-timed National Energy Plan in the 1980’s that coincided with a drop in world oil prices with the latest iteration being the UCP’s *Alberta Sovereignty Within a United Canada Act, SA 2022, c A-33.8*. The academic and Indigenous consensus is that, this Act is unconstitutional; political grand-standing and should a Cabinet Resolution be approved by the Legislature in section 3, which is by no means certain – the Courts would ultimately strike this down.

  In short the UCP, while extreme, does not fundamentally change the Alberta governments’ hostility to Indigenous Peoples.

Questions

As to key issues for the UCP government, they are a combination of global issues, which are out of its control, and *legacy* issues.

In terms of global issues, they include:

- Global warming is real, see Paris Accords (2015) and reducing, green-house gases will mandate a move away from fossil fuels ("*transition*") and the consequent drop in demand lowering international oil prices;
- While fossil fuels will continue to provide a significant component of energy supplies, in the transition – *production from Alberta's oil sands is comparatively expensive and can be replaced from less expensive sources;*
- This raises the spectre of Alberta's oil sands becoming "*stranded assets*" reducing the required international investment to develop them; and
- In terms of diversification in the petroleum sector by constructing new refineries to upgrade oil sands to more lucrative products, this would involve government support – as construction and operation in Canada's weather requires insulating the miles of tanks and pipes required (this is why refineries are located in warmer climes close to the Gulf of Mexico).

Questions

Legacy issues, would include prior Alberta governments mismanagement of petroleum revenues, for example:

- Under-funding for Orphaned Petroleum Infrastructure, including sites permanently taken out of production without any party legally responsible for decommissioning and reclamation obligations, the inventory for 2023 comprise 16,137 facilities with an estimated cost by Alberta Energy Regulator (AER) of $611 million, although the total estimated costs for for all of these was as $260 Billion (AER 2013);
- The *Alberta Heritage Savings Trust Fund* (HSTF), established in 1976 with the proceeds of royalties for fossil fuels being deposited this practice was discontinued in 1987 and the current balance is $18.9 billion – in contrast with Norway's US$1.2-trillion sovereign wealth fund established in 1990 continues to devote revenues from petroleum royalties; and
- Continued hostility with Indigenous Peoples, although there are glimmers of hope in the Courts' inclusion of the honour of the Crown and UNDRIP.

Questions

2. Can the federal government stop the dumping of tar pools into the Athabasca?

Technically yes, by application of the 2019 amendments to the *Fisheries Act*, RSC 1985, c F-14 (passed in accordance with the *Constitution Act, 1867* section 91(12)) which restored the section 35 prohibition of "any work, undertaking or activity that results in the harmful alteration, disruption or destruction of *fish habitat*" or other valid federal legislation.

This would be complicated and disruptive, and the Minister of the Environment and Climate Change has chosen to develop regulations in conjunction with Alberta and affected Indigenous Peoples or other solutions, these are due sometime in 2025. See: Bob Weber, "Draining tailings into Athabasca River one solution under review in oilpatch, says Guilbeault" (August 18, 2022: CBC News from Canadian Press).

Questions

3) Comparison of Alberta and other provinces re: response to consultation and indigenous rights

A comparison of all Canadian jurisdictions aboriginal consultation instruments is included in, David K. Laidlaw and Monique M. Passelac-Ross, *Alberta First Nations Consultation & Accommodation Handbook*, CIRL Occasional Paper #44 (Calgary: Canadian Institute of Resources Law, 2014) with reasons that ranked Alberta's approach to Consultation with Indigenous Peoples in last place. This has not changed.

The only case prior to recent decisions, where the Alberta governments' conduct of consultation was found inadequate was *Cold Lake First Nations v Alberta (Tourism, Parks & Recreation),* 2013 ABCA 443; leave to appeal to SCC refused, [2014] SCCA No 62, that dealt with the promise given by Alberta to the First Nations in July 2005 "to protect the activities of gathering medicines, berry picking, sweat lodges and fishing within the Recreational Area for the First Nations."

Questions

4) Status of rights and projects in the marine/pacific/coastal areas

Indigenous Nations have claimed constitutional aboriginal title to the foreshore and coastal areas. The 1996 *Oceans Act,* SC 1996, c 31 was the first statute to claim ownership by Canada of the ocean and seabed but section 2.1 provides the Act will not be interpreted "to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada."

In, *Lax Kw'alaams Indian Band v Canada (Attorney General),* 2011 SCC 56, the Lax Kw'alaams First Nation originally claimed aboriginal title to their fishing grounds but severed that aspect in order to advance an aboriginal right to fish commercially. This was denied, despite evidence of a pre-contact trade of eulachon grease – a necessary component for commercial rights.

Questions

In *Ahousaht Indian Band and Nation v Canada (Attorney General),* 2013 BCCA 300; leave refused 2014 CanLII 3511 (SCC) [*Ahousaht*], the plaintiffs had originally claimed aboriginal title in the foreshore and submerged lands to 100 miles off the coast, but the the Trail Court declined to rule on that claim, as a lesser aboriginal right to fish for commercial purposes was found valid, excluding the modern geoduck fishery. After appeals to the Supreme Court, which directed it back to the Court of Appeal for re-consideration in light of the *Lax Kw'alaams* decision. In *Ahousaht* the BC Court of appeal, affirmed the aboriginal right to fish commercially, limited to a moderate livelihood in accordance with the *Marshall* decisions in 1998 involving Treaty interpretation, the geoduck fishery was excluded.

Aboriginal title to the oceans remains unresolved.

We are given to understand that proposals for indigenous offshore wind project have been advanced but BC Hydro, which have a monopoly on electricity generation, has refused permission.

Questions

5) opportunity for Indigenous collaboration on energy projects?

We are familiar with a proposed wind power project on the Blood Reserve:

In 2016, the Kainai/Blood Tribe through their Kainaiwa Resources ("KRI") development entity, partnered with Indigena Capital, LP ("Indigena"), to advance the on-Reserve Pe-na-koam wind project. This 200 to 300 megawatt ("MW") project will be the first industrial scale electricity generation wind farm of its kind on-Reserve in Alberta and will provide companies searching for power purchase agreements and/or renewable energy credits an option that also enables them to maximize their social impact. From: https://www.indigenacapital.com/news-1/the-kainaiblood-tribe-and-indigena-capital-provide-an-update-on-pe-na-koam-on-reserve-wind-project

As we understand it, the project received approval in 2018, only to be cancelled by Alberta without reasons.

Questions

The *Alberta Indigenous Opportunities Corporation Act*, SA 2019, c A-26.3, was proclaimed in force on November 19, 2019, intended to provide loan, loan guarantees and support for Indigenous Communities in Alberta on application for investments initially limited by regulation to: energy; mining; and forestry projects. This was expanded in Mar 22, 2022 by Authorized Natural Resource Sectors Regulation, Alta Reg 27/2020 to include agriculture; telecommunication and transportation.

AIOC website is: https://www.theaioc.com

References

Naming:

David K. Laidlaw “Naming with intercultural competency and respect: an Indigenous terminology primer”, January 25, 2018 at https://ucalgary.ca/news/naming-intercultural-competency-and-respect-indigenous-terminology-primer-0

Indigenous as a descriptor originated internationally in the International Labour Organization (ILO) Indigenous and Tribal Populations Convention, 1957. This term carried through in the United Nations Declaration on the Rights of Indigenous Peoples (2007).

Indigenous is capitalized and the recommended academic use is to designate “Indigenous People living in Canada” as the original inhabitants in North America pre-dated national and provincial borders.

References

Case Law:

Recent (50+) years is available on CanLII at https://www.canlii.org/en/

- *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2012 FC 445 (CanLII) at para 351 see 348 to 356; Upheld: *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, para 16.
- *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 (CanLII) at para 105 to 106.
- *Interlake Reserves Tribal Council Inc et al, v The Government of Manitoba*, 2020 MBCA 126 (CanLII) (Intervenor motion unsuccessful); *Interlake Reserves Tribal Council Inc et al v Government of Manitoba*, 2021 MBCA 17 (CanLII) overruling the unreported interim injunction.
- *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40, overruling the artificial distinction as to policy development versus legislative processes. This may contrast with Article 19 of UNDRIP.

References

International Law:

UNDRIP webpage:
https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html

- FPIC in French is expressed as “leur consentement préalable, donné librement et en connaissance de cause.”

- Article 111 of the UN Charter says: “The present Charter, of which the Chinese, French, Russian, English, and Spanish texts are equally authentic, shall remain deposited in the archives of the Government of the United States of America.” https://www.un.org/en/about-us/un-charter/full-text

- This has been expanded Arabic (per Rule 51) and as such General Assembly Instruments, such as UNDRIP are provided in the Official Languages which are equally authentic, including French.

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All Federal and Provincial legislation on CanLII at https://www.canlii.org/en/

- *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24
- *Indigenous Languages Ac*t, SC 2019, c 23
- *Department of Crown-Indigenous Relations and Northern Affairs Act,* SC 2019, c 29, s 337
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- *Department for Women and Gender Equality Act*, SC 2018, c 27, s 661
- *Canadian Energy Regulator Act*, SC 2019, c 28, s 10
- *First Nations Land Management Act*, SC 1999, c 24
- *Impact Assessment Act*, SC 2019, c 28, s 1

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Federal UNDRIP Legislation:

Bill C-15 Library of Parliamentary Briefing (2021-01-20; revd: 2021-05-18) at:

https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/432C15E

Predecessor Act (died on Order Paper and referred to in Nigel Bankes below)

Bill C-262 An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples at:

https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8160636

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Provincial Legislation & Polices UNDRIP

Alberta Statement: https://www.alberta.ca/united-nations-declaration-on-the-rights-of-indigenous-peoples.aspx

British Columbia: website: https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples

Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44

Manitoba: *The Path to Reconciliation Act*, C.C.S.M. C. R30.5

Ontario: *Bill 76, United Nations Declaration on the Rights of Indigenous Peoples Act*, 2019 in Committee: https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-76 Died on Order Paper

Northwest Territories: website: https://www.eia.gov.nt.ca/en/gnwt-mandate-2020-2023/united-nations-declaration-rights-indigenous-peoples-undrip

The balance of the Provinces and Territories have no publicly available information regarding UNDRIP.

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Nigel Bankes, *International Human Rights Law and Natural Resources Projects Within the Traditional Territories of Indigenous Peoples* (2010) 47-2 Alberta Law Review 457, 2010 CanLIIDocs 315, https://canlii.ca/t/2czb.

Nigel Bankes, Implementing UNDRIP: some reflections on Bill C-262 (Ablawg.ca post, November 27, 2018) at https://ablawg.ca/2018/11/27/implementing-undrip-some-reflections-on-bill-c-262/

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