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The Legal Status of UNDRIP in British Columbia: *Gitxaala v British Columbia (Chief Gold Commissioner)*

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Case Commented on: *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 (CanLII)

This is the first of what we anticipate will be a series of posts on this important decision which involved a challenge to the implementation and/or constitutional validity of British Columbia's hard rock mineral regime under the terms of the *Mineral Tenure Act*, RSBC 1996, c 292 [*MTA*]. Other posts will address the substance of the duty to consult and accommodate argument in the context of free entry regimes, as well as the sacred site issues discussed in the decision.

This post addresses aspects of the decision concerning the legal status of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP or UN Declaration) and British Columbia's "implementing" legislation the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [*DRIPA*]. The decision also offers important commentary on the related s 8.1 of the *Interpretation Act*, RSBC 1996, c 238, which provides as follows:

> **Section 35 of *Constitution Act, 1982* and Declaration**
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> 8.1 (1) In this section:
>
> "Declaration" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> "Indigenous peoples" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
>
> "regulation" has the same meaning as in the *Regulations Act*.
>
> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.
>
> (3) Every Act and regulation must be construed as being consistent with the Declaration.

Justice Alan Ross took the view that it was only necessary to consider the validity of the *MTA* if the *MTA* precluded consideration of the duty to consult and accommodate in the implementation of that legislation. If the *MTA*, as interpreted in light of UNDRIP, *DRIPA*, and the *Interpretation Act*, required or at least allowed for consultation prior to the registration of new mineral claims, then the legislation itself was not, according to Justice Ross, invalid. However, its mode of

implementation might be invalid to the extent that current implementation approaches did not require consultation and accommodation prior to the registration of claims. I will refer to this as the UNDRIP interpretive approach. Justice Ross decided this argument in favour of the petitioner First Nations (the case came on as an application for judicial review rather than as an action.)

The petitioner First Nations also sought a declaration that the current process for granting mineral titles under the *MTA* was inconsistent with the rights recognized in both *DRIPA* and UNDRIP, and in particular argued that the province was in breach of its obligations under s 3 of *DRIPA*. Section 3 provides as follows:

> 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.

I will refer to this as the UNDRIP consistency argument. Justice Ross concluded that he could not deal with the merits of this argument on the grounds that s 3 was largely non-justiciable. In dealing with this argument Justice Ross also concluded that s 2(a) of *DRIPA* did not implement UNDRIP into the domestic law of Canada. Section 2 of *DRIPA* provides that:

> 2 The purposes of this Act are as follows:
>
> (a) to affirm the application of the Declaration to the laws of British Columbia;
>
> (b) to contribute to the implementation of the Declaration;
>
> (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

I have previously commented on some of these issues in a post on an earlier version of what became the federal UNDRIP implementation legislation and in a law review article on the BC legislation: "Implementing UNDRIP: An Analysis of British Columbia's *Declaration on the Rights of Indigenous Peoples Act"* (2020) 53 *UBC Law Review* 971.

The UNDRIP Interpretive Approach

As noted above, it was necessary to assess the lawfulness of the current application of the free entry system in British Columbia on two grounds. The first possibility was that the *MTA* allowed the Chief Gold Commissioner (CGC) to put in place a pre-registration consultation scheme that would fulfil the Crown's constitutional obligations, but that the CGC had failed to do so and that therefore the implementation of the existing scheme was unlawful. The second possibility was that the relevant provisions of the *MTA* would be constitutionally invalid if the *MTA* could not be interpreted to afford the CGC the discretion to put in place such a consultation scheme.

The first branch of this argument is effectively an interpretive argument and as such it necessarily triggered the application of s 8.1 of the *Interpretation Act* which, according to

Justice Ross, must be treated as a "statutory overlay" (at para 409) which supplements the guiding rule found in *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837, [1998] 1 SCR 27 at para 21 [Rizzo Shoes]. Both parties accepted the relevance of s 8.1 but disagreed as to what that might mean in practice.

The province argued that "the provisions of *UNDRIP* should be considered at the end of the interpretive exercise, simply as a means to support or confirm a particular interpretive result" (at para 412). By contrast, the petitioner First Nations contended that the section:

> … provides the court with an additional interpretive tool in circumstances where more than one interpretation may be possible. Section 8.1 provides that the court must interpret provincial laws in a manner that is consistent with s. 35 and *UNDRIP*. In other words, s. 8.1 acts as an interpretive aid during the entirety of the interpretive process, and not a mere "confirmatory" role at the end. (at para 413)

Justice Ross evidently agreed with the petitioners. He noted that what he had to assess was "the effect of a specific statutory provision which requires consideration of a specific international instrument in interpreting provincial legislation" (at para 415). He went on to say:

> In my opinion, the purpose of s. 8.1 is clear and evident in the text of the section. That is: when I consider the proper interpretation of the *MTA*, I should apply the *Rizzo Shoes* analysis. However, within that analysis, I am required to construe the *MTA* in a manner that upholds (as opposed to abrogating) the Indigenous rights of the petitioners. In other words, if there are two (or more) possibly valid interpretations of the *MTA*, then I am to construe the Act in a manner that is consistent with *UNDRIP* (*i.e.*, that protects Indigenous rights).
>
> It follows that I do not accept the province's submission that the process outlined in s. 8.1 should be undertaken after the *Rizzo Shoes* analysis. In this regard, s. 8.1 is best described as overlaying the interpretive process. In my opinion, that is the proper description, and it denotes the proper approach. Section 8.1 is not a trailer that is attached to the back-end of the process. Instead, it is an umbrella that covers the entirety of the process.
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> … I find that where there is a question in the interpretation of the *MTA* regarding the breadth of the CGC's authority, I construe that issue liberally, such that the legislation upholds Indigenous rights. The logical end-point of that analysis (when combined with the text, context, and purpose) is that the CGC has been improperly implementing the *MTA* by not providing for pre-registration consultation. (at paras 416 – 418, emphasis in original)

These are important observations, but I worry that Justice Ross seems to have conflated the interpretation and application of subsections (2) and (3) of s 8.1. The section as whole (as its title suggests) has two subjects: s 35 of the *Constitution Act, 1982* and the UN Declaration. And it deals with the two subjects differently. Subsection (2) is a 'for greater certainty' clause (and with good reason) since it is dealing with the interpretation of enactments so that those enactments do not abrogate or derogate from constitutionally protected rights – namely Aboriginal and treaty rights. But the subsection also instructs more positively that such enactments should be construed so as to uphold those rights. Subsection 3 is more limited since it simply instructs that "(3) Every Act and regulation must be construed as being consistent with the Declaration." There is no reference to upholding UNDRIP rights in subsection (3). Justice Ross did not provide a separate analysis of the two subsections but spoke more generally to the purpose of s 8.1 and seemingly conflated the rights referred to in UNDRIP with Aboriginal and treaty rights (especially at para 416). That said, Justice Ross was surely correct when he said that s 8.1 should infuse the entire interpretive process and should not simply be employed at the end to confirm an interpretation.

Having offered these general observations on the interpretive process, Justice Ross provided detailed reasons supporting the conclusion that the *MTA* was flexible enough to authorize the CGC to put in place a pre-registration consultation process. It is, after all, a rare statute that prescribes a duty to consult. It is far more common for the courts to read-in such a duty based on the tests articulated in cases like *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) and *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 (CanLII). And in the case of the MTA, the CGC had chosen to require consultation as part of the leasing process even though the statute provided no particular authority for doing so. The MTA also provided the CGC with several specific powers that could support a consultation process, including the power to establish information requirements, the power to create mineral reserves, and the power to ban mineral exploration in areas containing cultural heritage resources. In sum, the MTA itself does not impose an automatic registration process for claims, the scheme is only automatic at present "because it was designed that way by the CGC" (at para 426). Justice Ross concluded as follows:

> In interpreting the *MTA* in accordance with the *Rizzo Shoes* test, including the overlay of s. 8.1 of the *Interpretation Act*, I find that the *MTA* does provide the CGC with the necessary discretion to institute some form of consultation prior to registration of mineral claims. In particular:
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> a) s. 6.2 provides discretion on the information required for filing;
>
> b) s. 17 provides for restrictions on surface rights in areas that are culturally significant to an Aboriginal people; and
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> c) s. 22 provides discretion to set aside reserve areas. (at para 428)

I think that Justice Ross has adequately supported this conclusion, but it is hard to assess whether UNDRIP and s 8.1(3) of the *Interpretation Act* really contributed anything to his conclusion or whether his conclusion was primarily informed by s 35 of the *Constitution Act, 1982* and the "upholding" language of s 8.1(2). After all, if Justice Ross was really relying on UNDRIP one would expect to see references to particular provisions of UNDRIP. And there are none in this decision.

The UNDRIP Consistency Argument

As noted above, the petitioner First Nations also sought to argue that the *MTA* is inconsistent with the rights recognized in both *DRIPA* and UNDRIP and in particular that the province was in breach of its obligations under s 3 of *DRIPA*. Justice Ross answered this question in two parts. He began by addressing the question of whether *DRIPA* implemented the Declaration in the domestic laws of British Columbia and then turned to discuss the justiciability of s 3 of *DRIPA*.

Did *DRIPA* Implement the Declaration?

Both petitioners and the province agreed that *DRIPA* did not implement the Declaration. Nevertheless, the intervening Human Rights Commissioner for British Columbia (BCHRC) took a contrary position and Justice Ross evidently found it necessary to decide the issue. And as part of doing that, he usefully offered his understanding of how the BCHRC used the term "implementation".

> Implementation is the means by which an international instrument becomes part of domestic law: Ruth Sullivan, The Construction of Statutes, 7th ed. (Toronto: LexisNexis, 2022) at p. 567. Accordingly, an international instrument that has been "implemented" has the same legal effect as a provincial or federal enactment. It can create rights for citizens, impose obligations on the government, and create causes of action. In this regard, when the BCHRC argues that the Declaration has been "implemented", I understand that submission to mean that the Declaration now has the full force and effect of law in British Columbia. (at para 450)

The implementation debate turns on s 2 of *DRIPA* (quoted above) and in particular s 2(a) which provides that the "purposes of this Act are" *inter alia* "to affirm the application of the Declaration to the laws of British Columbia". As Justice Ross observes, this is a "purposes" section, and, consistent with other authorities, such provisions are not usually regarded as "substantive provisions that create rights or impose obligations" (at para 457). Such was the case here:

> *DRIPA* does not contain a preamble. Its objectives and purposes are only set out in s. 2. Furthermore, in my opinion, the enumerated purposes are stated broadly

> and lack the clear and precise language found within the other provisions of the Act.
>
> Hence, the text leads me to conclude that s. 2 was not intended to be a rights-creating, substantive provision. Instead, s. 2 simply contains statements of purpose to be used for interpreting the substantive provisions of the legislation. (at paras 460-461)

Justice Ross also noted that implementation was a serious matter and should not be left to inference (at paras 446 and 462). In other cases, the legislature adopted more specific language to achieve implementation. Furthermore paragraph (b) of s 2 and ss 4-5 of *DRIPA* all suggested that implementation of the Declaration would be an ongoing exercise that would be a process – which was inconsistent with the idea of immediate legal effect. I agree with this interpretation of s 2 but I do not concur with the concluding statement on this issue to the effect that "[a]s such, *UNDRIP* remains a non-binding international instrument" (at para 470). I would qualify that statement by noting that some parts of the Declaration are binding to the extent that those parts represent customary international law: see *Nevsun Resources Ltd v Araya*, 2020 SCC 5 (CanLII).

The Justiciability of s 3

In order for the petitioners to obtain a declaration that the province had a legal obligation to address an inconsistency between UNDRIP and the laws of British Columbia (i.e. a duty to take all necessary measures to rectify any inconsistency), it was necessary for the petitioners to show that the question of inconsistency as framed in s 3 is justiciable. At bottom, questions of justiciability are questions about the separation of powers. That is to say, justiciability asks if the question posed is a question that the judicial branch has the institutional capacity and legitimacy to resolve.

I think that Justice Ross's judgement usefully clarifies that it is important to pose and answer questions about justiciability in relation to specific questions. For example, if one takes a complex section such as s 3 of *DRIPA*, the question for the courts should not be framed in terms of the justiciability of the section as a whole but rather should be posed in terms of the discrete obligations contained within the section. Here again is the text of s 3:

> 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.

It is possible to parse this section into a set of discrete elements: (1) the government must take, (2) all measures necessary, (3) to ensure, (4) consistency of laws with the Declaration, and (5) the government must do (1) – (3) in consultation and cooperation

with Indigenous peoples in BC. Each of these questions can perhaps be separately scrutinized under the justiciability lens.

In this case the parties seem to have agreed that the question of what might constitute "all measures necessary" is not a justiciable question (see para 491, although as Justice Ross noted he had not determined this issue). On the other hand, Justice Ross was clearly of the view that the issue of "consistency" (# 4) "in isolation" is justiciable:

> I agree with the petitioners that, in isolation, the question of "consistency" is justiciable. That is, I agree that the courts have the institutional capacity and legitimacy to determine whether the laws of British Columbia are "consistent" with the rights set out in *UNDRIP*. In my view, interpreting international instruments and comparing such instruments to domestic law falls within the expertise of judicial decision makers. (at para 485)

Similarly, Justice Ross seemed well disposed to the possibility that element # 5 (consult and co-operate) might be justiciable, but as he noted, that issue was not before the court:

> 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. (at para 490)

But on the issue of whether or not the court should adjudicate on the question of consistency, Justice Ross demurred. Justice Ross gave two reasons for this conclusion. His first reason was that s 3 does not impose a requirement of consistency. In his view the word "must" in s 3 is associated with "take all measures necessary" and not with the idea of consistency, and to him that indicated that "s. 3 was not intended to invoke the courts to adjudicate every instance where the laws of BC may be inconsistent with *UNDRIP*" (at para 488). While I think that parsing can be a useful analytical tool, it can't be used to decontextualize a phrase from the balance of the section, and that, I think, is the result of Justice Ross's approach here. My reading of the section is that the word "must" naturally extends to the balance of the sentence. That said, I don't think that this different reading is sufficient to make consistency justiciable because of the first part of s 3.

And that was Justice Ross's second reason:

> … s. 3 allows for the Indigenous peoples of BC, instead of the courts, to be involved in the determination of whether the province's laws are consistent with *UNDRIP*. Section 3 starts with the phrase "In consultation with the Indigenous peoples of British Columbia." I consider that placement and wording to be important. There must be cooperation and consultation in determining whether the duties imposed by s. 3 are satisfied. It is not for the court to intervene and unilaterally determine what is meant by this provision. The

> provision contemplates ongoing cooperation between the government and the Indigenous peoples of BC to determine which of our laws are inconsistent with *UNDRIP*.
>
> Therefore, I find that s. 3 does not call upon the courts to adjudicate the issue of consistency. (at paras 490 and 491)

Conclusions

This is an important decision on *DRIPA* and s 8.1 of British Columbia's *Interpretation Act*. I think that there are three key takeaways. The first is that s 8.1 can always be called in aid to inform the interpretation of a relevant enactment and that s 8.1 should inform the entire interpretive exercise from beginning to end. It should also inform the interpretation of *DRIPA* itself. But in my view, courts must be careful to recognize that s 8.1 has two components: a constitutional component and an UNDRIP component. I also think that if a court is relying on the UNDRIP component (i.e. s 8.1(3)) then it will be necessary for that court to articulate how a particular provision of UNDRIP is relevant to the interpretive exercise. The fact that Justice Ross failed to engage with any particular article of UNDRIP tells us that we can't really treat this decision as an application of UNDRIP and s 8.1(3).

The second key takeaway is that *DRIPA* does not make the Declaration part of the law of British Columbia. It does not do so because the language of the s 2 purposes clause is not specific enough to achieve that result, and because such an interpretation is inconsistent with the subsequent process-oriented provisions of the Act. That said, those provisions of the Declaration that represent customary international law are already part of the law of British Columbia.

Finally, the decision suggests that while some elements of s 3 may be justiciable, courts will not be drawn into granting declarations of consistency or inconsistency between a particular law of British Columbia and a provision or provisions of the Declaration. I suspect that this conclusion will disappoint some, but in my view, this strikes an appropriate balance between the interpretive role of s 2 of *DRIPA* (as reinforced by s 8.1 of the *Interpretation Act*) and the process-oriented provisions of *DRIPA.* These process-oriented provisions need to be read together as requiring the decolonization of the law of British Columbia through procedures that engage the Indigenous peoples of British Columbia and offer a framework that (at least in the submission of the province, it is not clear that Justice Ross endorsed this particular point) "provides for accountability to the legislature, not enforcement through the courts" (at para 484).

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