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The IAA Reference: A Missed Opportunity for Guidance on Important Issues Pertaining to Indigenous Peoples

By: Robert Hamilton

Case Commented on: *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII)

In the *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII) (*IAA Ref*), the Supreme Court of Canada considered the constitutionality of the federal environmental impact assessment regime. For analysis of what precise aspects of the *Impact Assessment Act*, SC 2019, c 28, s 1 (*IAA*) the majority found unconstitutional (and which it held were unproblematic), see the post by my colleagues Martin Olszynski, Nigel Bankes, and David V. Wright here.

In this post, I address what I see as a missed opportunity to provide clarity and guidance on three important issues: the scope of federal powers over Indigenous peoples and lands under s 91(24) of the *Constitution Act, 1867*, the relationship between s 91(24) and Aboriginal rights under s 35 of the *Constitution Act, 1982*, and how the United Nations Declaration on the Rights of Indigenous Peoples ought to impact statutory interpretation in Canada. The Court may have preferred to consider these issues in the upcoming reference concerning the constitutionality of the *Act respecting First Nations, Inuit and Métis children, youth and families* (see *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 (CanLII) (*QCCA Ref*), which raises the issue more directly. In my view however, the two references raise similar issues relating to the scope of federal authority to protect s 35 rights from provincial intrusion, include Indigenous peoples in decision-making regimes, give effect to Indigenous law and decision-making processes, and implement the *United Nations Declaration on the Rights of Indigenous Peoples.* These two reference cases should have been put into conversation in order to articulate a coherent account of s 91(24) and provide clarity about arguments made by courts below.

Scope of s 91(24) and its Relationship to s 35

Section 91(24) recognizes exclusive federal jurisdiction in relation to "Indians, and Land reserved for the Indians." Federal jurisdiction under s 91(24) "is very broad": the federal government has "virtually occupied the field by legislating in just about every area of Aboriginal life" (*QCCA Ref* at paras 322, 325). The provision concerns "the federal government's relationship with Canada's Aboriginal peoples" (*Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 (CanLII) at para 49). A non-exhaustive list of matters that fall within the scope of 91(24) include: Indian reserve land, treaty-making, the division of family property on reserve land, relationships between Indigenous peoples such as adoptions, Indian status, band registration and membership, Aboriginal rights and title, and the well-being of Indigenous children and families. The provision also has a protective function and places jurisdiction (and responsibility) for

ensuring the welfare of Indigenous peoples with the federal government (*Delgamuukw v British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010; *IAA Ref* at para 347 (dissenting, but not on this point)).

This background is relevant to the *IAA Reference*, and any prospective federal impact assessment regime, because a federal constitutional head of power must underpin assessment and decision-making with respect to a proposed project; s 91(24) in relation to "Indians, and Lands reserved for the Indians" is one of the four heads of federal jurisdiction that Parliament relied on to "trigger" federal authority to review projects in the *IAA* (*IAA Ref* at para 133).

The majority dealt with this issue narrowly. While holding that s 91(24) has a "focus on protection of and concern for the welfare of Indigenous peoples" (*IAA Ref* at para 200), the Court held that the attempt in the *IAA* to trigger federal jurisdiction on the basis of "trivial or non-adverse impacts" to matters falling within s 91(24) was unconstitutional (at para 200). The majority concluded that: "the scheme's indefinite prohibitions, following a negative decision statement, on any act or thing that may have 'an impact' on or cause 'any change' to these areas overshoot Parliament's legislative authority under s. 91(24)" (*IAA Ref* at para 196). This is consistent with how the Court approached the analysis of the other federal heads of power and may well have been all that was required to dispose of the immediate question before the Court. It also leaves considerable scope for the federal government to rely on s 91(24) to conduct impact assessments under an amended federal regime (e.g. *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, also relied on s 91(24) and would likely be consistent with the majority's reasoning). But in choosing to not say more about s 91(24), the Court missed an opportunity to provide much needed guidance on important issues.

First, while the Court did clarify that trivial impacts to the subject matter of s 91(24) could not, in themselves, ground federal jurisdiction to conduct an impact assessment of the type proposed in the *IAA*, it did not discuss the scope of federal authority under s 91(24). This is particularly important, as the current federal government has taken significant steps to give effect to Indigenous jurisdiction and involve Indigenous peoples in decision-making through the exercise of s 91(24) powers (for example through several factors to be considered in the assessment phase under *IAA* s 22 and its substitutions provisions and through the mechanisms giving effect to Indigenous laws at issue in the *QCCA Reference*). These steps have been taken federally as a means of implementing the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It may be that the Court preferred to deal with this issue in the *QCCA Reference*. But deferring comes at a cost: the federal government must now amend the *IAA* without helpful clarification on the scope of s 91(24), and after the *QCCA Reference*, all parties (federal and provincial governments, Indigenous peoples, and industry) will have to guess at what that decision means in the natural resource and environmental law contexts. Viewed in a broader way, the s 91(24) head of power could ground an amended *IAA* that remains very comprehensive in all phases, including decision-making that takes into account climate change and sustainability considerations.

Second, the Court did not directly engage with questionable reasoning from the Alberta Court of Appeal (ABCA) on the scope of s 91(24) and the related question of the relationship between s 91(24) and s 35. In doing so, it missed an opportunity to bring much needed clarity to this issue. By way of background, a pair of Supreme Court decisions in 2014 (*Tsilhqot'in Nation v British*

Columbia, 2014 SCC 44 (CanLII), and *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 (CanLII)) held that provinces may infringe s 35 rights provided they are able to satisfy a court that doing so was "justifiable" (for analysis, see Kerry Wilkins, "Life Among the Ruins: Section 91(24) After *Tsilhqot'in* and *Grassy Narrows*"). Prior to these decisions, it was believed by many that s 35 rights were part of the "core" of s 91(24) and therefore protected from provincial intrusion by the doctrine of interjurisdictional immunity (IJI). In *Tsilhqot'in*, the Court changed course (or clarified, depending on one's view), holding that s 35 rights are not part of the core of s 91(24), that the doctrine of IJI has "no role" in s 35 analysis and that, consequently, provinces may infringe s 35 rights (*Tsilhqot'in* at para 140).

This jurisprudence led to uncertainty and confusion around the scope of federal and provincial powers in relation to Indigenous peoples, including the scope of s 91(24) and the impact, if any, that the introduction of s 35 in 1982 had on federal authority under s 91(24). In the *IAA Reference*, the Alberta Court of Appeal held that the fact that provinces can justifiably infringe s 35 rights after *Tsilhqot'in/Grassy Narrows* means that the federal government cannot legislate under s 91(24) in a manner that would preclude the provinces from infringing rights where doing so would otherwise be justifiable (*Reference re Impact Assessment Act*, 2022 ABCA 165 (CanLII) at paras 158-163 (*IAA Ref ABCA*)).

This, in my opinion, is plainly wrong. That a province acting within its sphere of jurisdiction may infringe a right if it can justify doing so says nothing about the scope of federal authority, including the authority to enact laws under s 91(24) that would prevent such an infringement if the federal government chose to legislate, via the doctrine of federal paramountcy. In concluding otherwise, the ABCA confused the *core* of s 91(24) with its *scope*. While *Tsilhqot'in* held that the doctrine of interjurisdictional immunity cannot preclude a province from legislating in a manner that impacts s 35 rights, it said nothing about limiting the scope of s 91(24) or whether the federal government may legislate under s 91(24) so as to effectively shield some aspects of s 35 from provincial intrusion. Sheila Greckol J.A. made this point clearly in dissent at the ABCA:

> …no one has offered a serious articulation as to why the interests protected in ss 7(1)(c) and (d) of the *IAA* somehow fall outside the scope of "Indians, and Lands reserved for the Indians". It may be true that these interests fall outside the "core" of s 91(24) such that interjurisdictional immunity does not prevent provincial legislation of general application from authorizing projects which impact upon them and ultimately infringe Aboriginal and treaty rights under s 35 of the *Constitution Act, 1982*. However, the applicability of provincial legislation to Indigenous peoples says nothing about the validity of federal legislation like the *IAA*. A local project authorized by a provincial legislative regime can nonetheless have adverse effects on Indigenous interests, where those effects are understood as effects within federal jurisdiction" (*IAA Ref ABCA* at para 651).

Well-reasoned submissions were also made to the Supreme Court on these points. The Intervener, First Nations Major Projects Coalition, for example, argued:

> In *Tsilhqot'in*, this Court explained that the justifiability of provincial incursions on s 35 rights is to be assessed, as in the case of federal incursions, according to the framework

> developed in *Sparrow* and elaborated in subsequent cases, rather than by asking whether such provincial incursions impair core federal power under s 91(24). In this context, then, the *Sparrow* framework "displaces the doctrine of interjurisdictional immunity. *Tsilhqot'in* thus simply clarified that s 91(24) does not by its very core pre-empt or render inoperative provincial incursions on s 35 rights. Yet that does not mean that *Tsilhqot'in* somehow restricted the scope f Parliament's s 91(24) power. Indeed, this Court in *Tsilhqot'in* specifically highlighted concurrent federal and provincial jurisdiction with respect to s 35 rights. (First Nations Major Projects Coalition Intervener factum at para 22).

Again, the majority at the ABCA seems to have confused the *core* of s 91(24), which is relevant to an IJI analysis, with its *scope*, which would be dealt with through pith and substance and paramountcy analyses. The conclusion of the ABCA that the limitation of IJI means that "provincial authority has been enlarged with respect to Aboriginal and treaty rights" (*IAA Ref ABCA* at para 162) has to be assessed in this context. This conclusion makes sense if one understands *Tsilhqot'in* as having changed the law about whether s 35 rights are part of the core of s 91(24). To go further, however, and claim that the federal government can no longer legislate under s 91(24) in a manner that limits provincial jurisdiction is to confuse core and scope and to read *Tsilhqot'in* as not only having limited the application of IJI but of paramountcy as well. Such a reading also appears inconsistent with the reasoning of the majority of the Supreme Court in the *IAA Reference*, which left considerable room for the exercise of federal jurisdiction in reliance on s 91(24). The problem is, the Court missed an opportunity to provide a clear answer.

Further, it should be said that the federal government does not rely only on s 35 rights alone in grounding federal jurisdiction to conduct impact assessments. The ABCA rightly stated that while "*Tsilhqot'in Nation* and *Grassy Narrows* did not abolish the idea that s 91(24) has a 'core' which protects against provincial intrusion, they did remove Aboriginal and treaty rights from that 'core'" (*IAA Ref ABCA* at para 163). What the ABCA missed, however, is that the *IAA* does not ground federal jurisdiction under s 91(24) in s 35 rights alone: the *IAA* defines an "effect" for the purposes of triggering jurisdiction, for example, as including impacts on Indigenous "physical and cultural heritage", "any structure, site or thing that is of historical, archaeological, paleontological or architectural significance", and "any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada" (*IAA* at s 2). Many such issues may not have protection under s 35 yet may be within the "core" of s 91(24). If so, the ABCA's reasoning, even if correct, would seem to be only a partial answer to the exercise of federal power in the *IAA*.

The scope of s 91(24) and the impact of *Tsilhqot'in/Grassy Narrows* on the division of powers is by no means an insignificant issue. It may well be the issue that determines the outcome of the *QCCA Reference*, and the reasoning the Court adopts there will determine how far the federal government can go in carving out spaces of Indigenous jurisdiction through s 91(24) as they did clearly in the *Act respecting First Nations, Inuit and Métis children, youth and families* and somewhat more obliquely in the *IAA*. At issue are the answers to important questions, such as the extent of federal authority to protect s 35 rights and other Indigenous interests from possible incursions from provinces and, perhaps even more importantly going forward, whether the federal government has authority to protect spheres of Indigenous jurisdiction by including Indigenous peoples in decision-making regimes under impact assessment processes or, as in the *QCCA*

Reference, by giving effect to Indigenous laws. The answers to these questions have implications for Crown-Indigenous relations and will shape federal attempts to implement UNDRIP.

Even if the Supreme Court was able to resolve the constitutionality of the *IAA* without expounding on these issues, guidance would therefore have been welcome. The same reasoning adopted by the ABCA in the *IAA Reference ABCA* was put forward by several Attorneys-General in both the *QCCA Reference* and *IAA Refence*, with Manitoba going so far as to argue that the federal government does not have jurisdiction to undermine the provincial "right" to infringe s 35 rights (see Manitoba's factum in the *IAA Reference*). This clearly incorrect interpretation is being relied on to frustrate important federal initiatives aimed at ameliorating the lives of Indigenous peoples and creating space for Indigenous jurisdiction within the federal association with respect to matters central to Indigenous well-being and the continuity of Indigenous culture. It also undercuts one of the key historical reasons that the federal government (following the imperial government) had jurisdiction in relation to Indigenous peoples: to protect their interests against those governments (colonial, and later provincial) with whom they were in more direct competition for control of lands and resources. One hopes this issue will be dealt with in the *QCCA Reference*, but this was an important missed opportunity to provide much needed clarity, specifically in respect of federal and provincial assessment regimes and whether *Tsilhqot'in / Grassy Narrows* fetter federal authority as suggested by the ABCA.

Role of the United Nations Declaration on the Rights of Indigenous Peoples

Some of the most pressing questions in Aboriginal law concern the legal impact of the United Nations Declaration on the Rights of Indigenous Peoples in Canada. Canada offered an unqualified endorsement of the Declaration in 2016. In 2021, the federal government enacted legislation aimed at domestic implementation (see *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 (*UNDRIP Act*). The legislation strives for *consistency* rather than *incorporation*: the Act envisions the development of processes to ensure the laws of Canada are gradually made consistent with the UNDRIP rather than incorporating it in full as law in Canada (for analysis, see articles in the UBC Law Review Special Edition on UNDRIP implementation here).

There has, to date, been sparse judicial guidance on the interpretation of UNDRIP either as an international legal instrument with effect in Canadian law or through statutory implementation (for an important recent case, see *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 (CanLII) and Nigel Bankes' blog post on the decision). There are thus at least two live issues in Canadian law that need clarification. First, what impact, if any, does the federal *UNDRIP Act* have on statutory interpretation and, second, what impact does the Declaration, as an international legal instrument, have on this interpretation. The *IAA Reference* is silent on both issues. While, again, the Court may have preferred to punt the issue to the *QCCA Reference*, this was not only an opportunity for the Court to provide helpful guidance, it is also arguably a major oversight, at least with respect to interpretation of the *IAA*. At the very least, one would have expected that the Court would acknowledge the federal *UNDRIP Act* and what it says about implementation and interpretation of the Declaration. The omission is glaring.

The *IAA* itself states in the preamble that "the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples." While preambles are, of course, non-binding, they can help courts ascertain the purpose and intent of statutory provisions. Further, the Federal *UNDRIP Act* clearly expresses the government's intention that Canadian law be made consistent with the Declaration. While lower courts have begun to wrestle with the impact of BC's similar legislation, as in *Gitxaala*, guidance from the Supreme Court of Canada is needed. There is no good reason I can see for declining to consider how UNDRIP might impact statutory interpretation, and this was an opportunity to provide clarity. I'll say a few words below about where, specifically, this may have been relevant.

Canadian courts have also been very slow to address arguments based on the domestic impact of UNDRIP as an international legal instrument. There are two facets of this issue. First, Canadian law should be interpreted as being in conformity with Canada's international obligations. As the Supreme Court recently wrote, "legislation is presumed to operate in conformity with Canada's international obligations" (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 (CanLII) at para 72). That is, when interpreting a domestic statute, courts should seek to interpret them in a manner consistent with international obligations which Canada has undertaken. Whether, or to what extent, Canada has assumed "international obligations" under UNDRIP is one of the many questions that require elaboration, and bypassing principles of statutory interpretation that would require such an inquiry only serves to delay even the outline of an answer. In pragmatic terms, this creates avoidable regulatory and legal uncertainty.

Second, and relatedly, customary international law "is automatically adopted into domestic law without any need for legislative action" (*Nevsun Resources Ltd v Araya*, 2020 SCC 5 (CanLII) at para 86). In other words, as a matter of statutory interpretation, Canadian courts must interpret laws as being consistent with its international obligations to the extent possible and, where it does not conflict with domestic statutes, customary international law is directly applicable by Canadian courts.

Canadian courts have rarely addressed these issues in relation to UNDRIP, however, and even more rarely in a comprehensive manner. In *Wesley*, for example, the Alberta Court of King's Bench held that it was not convinced that "that the Declaration is part of customary international law" (*Wesley v Alberta*, 2022 ABKB 713 (CanLII) at para 149). The proper question, however, is not whether the Declaration as a whole is customary international law. The Declaration does not create new rights. Rather, it re-articulates human rights recognized elsewhere and details how they apply in the contexts of Indigenous peoples. Many of the Declaration's provisions relate to rights that are recognized in other international instruments, including ones to which Canada is party such as the International Convention on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. UNDRIP also includes specific provisions which may be considered customary international law. According to the International Law Association, this includes:

- Indigenous peoples' right of self-determination to decide what their future should be, within the territories in which they traditionally lived;
- The right to participate in national decision-making with respect to decisions that may affect their rights or their ways of life;

- The right to be consulted with respect to any project that may affect them;
- The right that any project that may significantly impact their rights and ways of life not be carried out without their prior, free and informed consent;
- The right to regulate autonomously their internal affairs according to their customary law and to establish, maintain and develop their own legal and political institutions, in a way that is consistent with the rules on fundamental human rights;
- The right to recognition and preservation of their cultural identity;
- The right to use ancestral lands and natural resources according to their own tradition;
- The right to pursue their traditional medicines and burial traditions;
- The right to their traditional lands and natural resources;
- The right to restitution for ancestral lands from which they have been removed;
- The right to redress for any breaches of these rights;

The right that all treaties and agreements with the state shall be honoured.
(This list of rights identified by the International Law Association is outlined in Roger Townshend, Kevin Hille, and Jaclyn McNamara, "Bill C-15 (UNDRIP Act) Commentary")

There are, in other words, convincing arguments that many specific provisions of the Declaration are customary international law, applicable by Canadian courts regardless of whether the Declaration has been implemented through statute. There are even stronger reasons why statutes, especially those that refer explicitly to the Declaration and the government's intention to implement it, ought to be interpreted as consistent with the Declaration where possible.

Canadian courts need guidance on how to approach these issues. That the Supreme Court chose instead to remain silent on the issue in a case where significant constitutional issues were raised by Indigenous peoples set an unfortunate precedent in this regard. As Justice Nigel P. Kent recently wrote in the Supreme Court of British Columbia:

> 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 that Court to determine what effect, if any, UNDRIP legislation has on the common law." (*Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 (CanLII) at para 212)

While this passage speaks directly to statutory implementation, the same can be said of the impact of UNDRIP as an instrument of international law.

The decision not to inquire into UNDRIP in the *IAA Reference* is more notable when juxtaposed against the Court's reliance on the precautionary principle. In assessing the wide scope of federal authority at the early stages of impact assessment, the Court held that "[r]equiring definitive proof that a project will have effects on areas of federal jurisdiction prior to an impact assessment would put the cart before the horse and undermine the precautionary principle" (*IAA Ref* at para 146).

The Court relied on *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 (CanLII) (*Spraytech)* for precedent on this point, which in turn drew on the Bergen Ministerial Declaration on Sustainable Development – a declaration, note – as an articulation of the principle at international law. The *Spraytech* majority noted that Canada supported this Declaration and that it is codified in several pieces of domestic legislation (at para 31).

Might the same argument be made about the rights of Indigenous peoples regarding resource development projects under UNDRIP? Indeed, many provisions of UNDRIP may well enjoy stronger status as customary international law than the precautionary principle. The Bergen Declaration, cited by the Supreme Court as the source of the precautionary principle, was signed by the environment ministers from 34 states and did not deal with universal principles of human rights law, but emerged from a conference on protection of the North Sea. UNDRIP was endorsed by 143 states at the General Assembly of the United Nations (and several additional states since). In terms of domestic law, there are no fewer than a dozen federal statutes indicating the federal government's commitment to implement UNDRIP, one of which has no purpose other than implementation and another of which was at issue in the *IAA Reference* itself. There have been countless political statements of intent and there is a developing body of *opinio juris* developing the rights of Indigenous peoples in international and domestic spheres. And, as mentioned above, several particular clauses in UNDRIP refer to human rights that are widely recognized at international law.

In any case, the goal here is not to argue against the precautionary principle as a principle of customary international law. It is only to point out that it is becoming increasingly difficult to justify the reticence of the Supreme Court to engage the subject. In the present case, through the presumption of conformity and the adoption of customary international law, UNDRIP could have informed statutory implementation on several important aspects of the *IAA.* Much of the difference between the majority and dissenting opinions rested on matters of statutory interpretation. For example, one of the main bases for the majority's finding that the *IAA* is unconstitutional was that it would capture projects with minimal impact on areas of federal jurisdiction. The dissent disagreed, arguing that "the statutory text, context and purpose, along with the applicable interpretive principles, show that Parliament did not intend to capture *de minimis* effects" (*IAA Ref* at para 280). That is, the determinative question on this point is one of statutory interpretation, specifically whether the language used demonstrated an intent to capture effects with minimal impact on areas of federal jurisdiction. UNDRIP could be relevant to statutory interpretation on an issue such as this, where the interpretation adopted has important impacts on Indigenous rights and interests.

Ultimately, a more comprehensive analysis of s 91(24) and UNDRIP may not have led to different conclusions than those reached by the majority and dissent in the *IAA Reference*. But there are important outstanding questions upon which the Court should have provided guidance. One hopes that in the *QCCA Reference* the Court takes the opportunity to provide a coherent account of the scope of s 91(24), its relationship to s 35 in the wake of *Tsilhqot'in,* and the role of UNDRIP in Canada. The *QCCA Reference* can't come soon enough for those who are seeking clarity on how to proceed, particularly the federal government, project proponents, and Indigenous nations engaged in assessment of major projects.

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