

February 28, 2024

## What Did the Court Mean When It Said that UNDRIP “has been incorporated into the country’s positive law”? Appellate Guidance or Rhetorical Flourish?

**By:** Nigel Bankes and Robert Hamilton

**Case commented on:** *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, [2024 SCC 5 \(CanLII\)](#).

In its recent reference opinion on the validity of an *Act respecting First Nations, Inuit and Métis children, youth and families*, [SC 2019, c 24](#) (the *FNIM Act*), the Supreme Court went out of its way to comment on the legal significance of the *United Nations Declaration on the Rights of Indigenous Peoples Act*, [SC 2021, c 14](#) (the federal *UNDRIP Act*). The Court did so notwithstanding that legal questions relating to the federal *UNDRIP Act* were not directly before it, and notwithstanding its own observations in the *Reference* to the effect that “[t]he task that falls to the Court in the context of a reference invites caution ...” (at para 111). That it chose to comment at such length is even more remarkable when one reflects on how reticent the Court seems to have been to comment on the [United Nations Declaration on the Rights of Indigenous Peoples](#) (UNDRIP or Declaration), or international human rights law more generally, in other cases over the last two decades dealing with Indigenous rights.

In one sense, the Court’s comments are welcome. Parties have relied on the Declaration in arguments before the courts with increasing frequency, and lower courts are now being called upon to interpret the effect of implementing statutes. Judicial treatment of the Declaration has been inconsistent, and guidance from the Supreme Court is sorely needed. In the present case, the decision of the Quebec Court of Appeal (QCA) considered the Declaration, but the interpretive weight and legal effect the QCA gave the Declaration was not entirely clear. We have yet to get a cogent judicial account of the relationship between the Declaration and domestic law and the proper framework for considering arguments that rely on the Declaration.

In this case, arguments based on the Declaration and the federal *UNDRIP Act* were not directly before the Supreme Court and were unlikely to be dispositive, but the Court still offered extensive *obiter dicta* comments on the effect of the federal *UNDRIP Act*. The Court has often developed the law in this area through *obiter dicta* but such *obiter* comments are most effective when they are well-reasoned, supported by careful analysis of the relevant case law and commentary, and where the reasoning is consistent with the Court’s contextual approach to statutory interpretation. *Obiter* comments that are conclusory rather than fully reasoned are less likely to offer guidance to lower courts, and instead may fuel false hopes and expectations. Time will tell which this is.

## Prior Treatment

Prior to its decision in this *Reference*, the Supreme Court of Canada had only referred to the Declaration in one case, and that in the separate concurring opinion of Justices Binnie and Major in *Mitchell v MNR*, [2001 SCC 33 \(CanLII\)](#). At that time, the Declaration was still in draft form (the Declaration was only formally adopted by the General Assembly in September 2007). The issue in *Mitchell* was whether Mitchell, as a citizen of the Mohawk Nation, had a constitutionally protected Aboriginal right to cross the international border freely without having to pay customs duties on goods destined for personal and community use as well as for non-commercial scale trade with other First Nations. The Court unanimously found that the right had not been established, but Justice Binnie (Justice Major concurring) went on to comment on what they referred to as the sovereignty implications of the claimed right or custom. In that separate opinion, Justice Binnie acknowledged the practical challenges and frustrations that the international boundary caused for the members of the Mohawk nation and other members of the Mohawk Confederacy. Justice Binnie then went on to note that “[t]here is some international support for special recognition of the plight of indigenous peoples in this respect” (at para 81) and he referred to what was then Article 35 of the Draft Declaration:

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders. (at para 81)

This provision, with some additional text, now finds its place in Article 36(1) of the Declaration as adopted. Justice Binnie then referred to similar provisions in Article 32 of [Convention \(No. 169\) concerning Indigenous and Tribal Peoples in Independent Countries](#) of the International Labour Organisation (Canada is not a party to this Convention) and Article 24 of the Draft of the Inter-American Declaration on the Rights of Indigenous Peoples. But Justice Binnie’s conclusion following these references was somewhat lame, for while he suggested that Canada had taken some “concrete steps to try to minimize the disruption of Akwesasne created by the international boundary, these measures, according to the respondent, fell well short of recognizing Mohawk entitlement.” (at para 84). Neither did Justice Binnie return to discuss these instruments in that part of his judgment where he concluded that “the international trading/mobility right claimed by the respondent as a citizen of the Haudenosaunee (Iroquois) Confederacy is incompatible with the historical attributes of Canadian sovereignty.” (at para 163).

It is perhaps at least as significant to note that the Supreme Court made no reference to the Declaration in all of the other Indigenous rights cases that came before the Court between 2007 and 2024, even though the Declaration might have helped framed the issue for the Court’s consideration. Two cases in particular come to mind: *Mikisew Cree First Nation v Canada (Governor General in Council)*, [2018 SCC 40 \(CanLII\)](#) (*Mikisew Cree (No 2)*) and *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, [2017 SCC 54 \(CanLII\)](#).

*Mikisew Cree (No 2)* considered whether the parliamentary legislative process engaged the duty to consult and accommodate. While the Court unanimously dismissed the case on the basis that the Federal Court did not have jurisdiction to hear the judicial review in question, the justices nonetheless provided extensive reasoning on the duty to consult issue. A majority of the Court

reasoned that the Crown did not have a duty to consult in the legislative process, while a minority (Justices Abella and Martin) considered that the duty to consult might be engaged. But not a single member of the court referenced UNDRIP, specifically Article 19 which provides that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Similarly, the Court might have referenced Article 11 (right to culture) and Article 12 (right to practice spiritual and religious traditions) of the Declaration in its decision in *Ktunaxa Nation*, where the Ktunaxa asserted that the development of a ski resort on lands they considered to be of special spiritual significance violated their right to freedom of religion under the *Charter*. But while the Court referenced several international human rights instruments of general or regional application in that decision, UNDRIP was left out of this list.

And finally, one of us (Hamilton) has written that the Court missed an opportunity to comment on the significance of UNDRIP very recently in its opinion in *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#) (see Robert Hamilton, “[The IAA Reference: A Missed Opportunity for Guidance on Important Issues Pertaining to Indigenous Peoples](#)”). Bankes has also suggested that the Court might have considered the implications of Article 27 of the [International Covenant on Civil and Political Rights](#) in its decision in *Grassy Narrows First Nation v Ontario (Natural Resources)*, [2014 SCC 48 \(CanLII\)](#) (see Nigel Bankes, “[Grassy Narrows, Division of Powers and International Law](#)”; and for an example of a decision from the Norwegian apex Court that works through how Article 27 might work in domestic litigation see the [Fosen Wind Farm Case](#) (2021)).

### **Reference re: *FNIM Act***

But in this blockbuster decision, the Court went all-out in referencing and discussing the substantive content of UNDRIP. What changed?

What has changed, at least since the *Mikisew Cree (No 2)* and *Ktunaxa Nation* decisions, is that the Parliament of Canada has taken steps to implement the Declaration in Canadian law. While the federal government endorsed the Declaration without qualification in 2016 at an executive level, the prevailing view was that the Declaration could not have effect as domestic law until it was implemented through legislation. Parliament has now developed an approach to doing just that, referencing implementation of the Declaration in no fewer than fifteen statutes and, in 2021, passing the federal *UNDRIP Act*.

In this reference case, the most specifically relevant federal statute referring to UNDRIP was the very statute that the Attorney General of Quebec sought to impugn, namely the *FNIM Act*. This statute contains two references to the Declaration. The first is a preambular statement recognizing that “the Government of Canada is committed to implementing” the Declaration. The second reference occurs as one of the three stated purposes of the Act, namely to “contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples” (*FNIM Act* at s 8(c)).

But apparently equally relevant from the Court’s perspective was the more general, and perhaps more normatively significant, federal *UNDRIP Act*. Prior to this decision, there had been very little judicial engagement with the terms of the federal *UNDRIP Act*, although British Columbia’s UNDRIP implementation legislation has been the subject of judicial comment, most notably in *Gitxaala v British Columbia (Chief Gold Commissioner)*, [2023 BCSC 1680 \(CanLII\)](#), which one of us commented on [here](#). A significant issue in *Gitxaala* and in the academic writing on UNDRIP implementation legislation (federal and provincial) is the question of what domestic legal effect should be accorded to the statutory endorsement of the Declaration in such legislation. As some of the commentary notes, (see for example, Gib van Ert, “[The impression of harmony: Bill C-262 and the implementation of the UNDRIP in Canadian law](#),”; Nigel Bankes, “[Implementing UNDRIP: some reflections on Bill C-262](#)” – both commenting on the earlier Bill 262; and see Nigel Bankes, “[Implementing UNDRIP: An Analysis of British Columbia's Declaration on the Rights of Indigenous Peoples Act](#)” (2020) 53(4) *UBC Law Review* 971 – on the BC legislation). UNDRIP implementation legislation to date falls far short of the language adopted by legislatures concerned to accord domestic legal status on international treaties or land claims agreements (modern treaties) with Indigenous communities.

For example, the *Carriage by Air Act*, [RSC 1985, c C-26](#), gives legal effect to a number of treaties including the Warsaw Convention and the Montreal Convention by a series of provisions stipulating that the provisions of the Convention set out in the relevant Schedule to the Act “have the force of law in Canada”, leading the Supreme Court of Canada to observe in *Thibodeau v Air Canada*, [2014 SCC 67 \(CanLII\)](#), that “the Montreal Convention ... is part of Canadian federal law by virtue of the *Carriage by Air Act* ...” (at para 14). Similarly, s 4(1) of *Nisga'a Final Agreement Act*, [SC 2000, c 7](#) provides that “[t]he Nisga’a Final Agreement is approved, given effect and declared valid and has the force of law,” while s 5 declares that “[t]he Nisga’a Final Agreement is binding on, and can be relied on by, all persons.”

By contrast, UNDRIP implementation legislation to date uses very different language. Section 4(a) of the federal *UNDRIP Act* provides that one of the purposes of the Act is to affirm it as an international human rights instrument *with application* in Canadian law (we think it important to quote the entire sections of these Acts):

### **Purposes**

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. (at s 4)

Similarly, British Columbia’s legislation the *Declaration on the Rights of Indigenous Peoples Act*, [SBC 2019, c 44](#) also provides that a purpose of the Act is to affirm the application of the Declaration to the laws of British Columbia.

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. (at s 2)

Finally, and to complete the picture, s 5 of the *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act* of the Northwest Territories, [SNWT 2023, c 36](#), the most recent of the general UNDRIP implementing statutes, provides

The purposes of this Act are

- (a) to affirm the Declaration as a universal human rights instrument with application to the Indigenous peoples of the Northwest Territories and the laws of the Northwest Territories;
- (b) to provide a framework for the implementation of the Declaration by the Government of the Northwest Territories in collaboration and cooperation with Indigenous Governments or Organizations; and
- (c) to affirm the roles and responsibilities of Indigenous Governments or Organizations in the implementation of the Declaration.

In addition, the NWT statute contains two relevant preambular provisions:

Whereas the Government of the Northwest Territories recognizes that the Declaration should be implemented in the laws of the Northwest Territories;

Whereas the Declaration is approved as a source for the interpretation of the laws of the Northwest Territories;

In *Gitxaala*, Justice Alan Ross acknowledged that the legal effect to be accorded to s 2(a) of the BC legislation was itself a question of statutory interpretation (at para 452). In his careful analysis, Justice Ross emphasised that s 2(a) of BC’s legislation was included within a purposes clause and that in his opinion “the enumerated purposes are stated broadly and lack the clear and precise language found within the other provisions of the Act.” (at para 260) He went on to say:

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.

The BCHRC [BC Human Rights Commission, an intervener] submits that s. 2(a) of DRIPA [the BC UNDRIP Act] implemented the Declaration such that it now has the full force and effect of law in British Columbia. To be clear, if correct, this would be a substantive outcome of great significance. In that context, I am unable to conclude that the legislature, having used broad and imprecise language, intended that the statement of purpose in s. 2(a) would effect such a significant outcome. (at paras 461-462)

Justice Ross supported his conclusion by referring to other statutory implementing legislation as well as the balance of s 2. How, he asked, could it be contended that s 2(a) had fully implemented the Declaration if paragraph (b) “provides that the purpose of DRIPA includes ‘to contribute to the implementation’ of *UNDRIP*.” (at para 464). This decision reflects (but does not refer to) much of the commentary on these Acts, which sees them as requiring the development of process for aligning laws with the Declaration but as falling short of giving the Declaration itself the force of Canadian law; and that is what commentators generally mean when they say that the current model of implementation legislation does not “incorporate” the Declaration into Canadian law.

But in this reference opinion the unanimous Supreme Court seemingly took a completely different stance, stating in two different places in the introductory paragraphs of the opinion that the Declaration “has been incorporated into the country’s positive law”. It made the point first in the summative introduction, observing:

Recognized by Parliament as “a universal international human rights instrument with application in Canadian law”, the Declaration has been incorporated into the country’s positive law by the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (“UNDRIP Act”), s. 4(a). (at para 4).

The same paragraph goes on to acknowledge that:

This statute recognizes that the Declaration “provides a framework for reconciliation” (preamble); s. 5 of the same statute requires the Government of Canada, in consultation and cooperation with Indigenous peoples, to take “all measures necessary to ensure that the laws of Canada are consistent with the Declaration”. The statute’s preamble expressly provides that the implementation of the Declaration in Canada “must include concrete measures to address injustices” facing, among others, Indigenous youth and children.

The Court made the same point at para 15:

In 2021, Parliament enacted the UNDRIP Act, s. 4(a) of which affirms the Declaration “as a universal international human rights instrument with application in Canadian law”. It is therefore through this Act of Parliament that the Declaration is incorporated into the country’s domestic positive law.

Paragraph 15 is a little more precise insofar as restating the affirmation language of s 4(a) and then, in a separate sentence continues: “It is *therefore* through this Act of Parliament that the Declaration is incorporated into the country’s domestic positive law.” (Emphasis added). This paragraph also quotes s 4(b) which provides (as noted above in full context) that the purpose of the Act “is also to ‘provide a framework for the Government of Canada’s implementation of the Declaration’.” The Court acknowledges as well that s 5 calls upon Canada to take the necessary measures to ensure that the laws of Canada are consistent with the Declaration, and that s 6 calls for the preparation and implementation of an action plan to achieve the objectives of the Declaration.

While much of this is simply descriptive of the contents of the federal *UNDRIP Act*, the statement that the Declaration is incorporated “into the country’s domestic positive law” is a statement of legal effect. The Court makes this statement without comparing the language of s 4 of the Act with the language of other implementation statutes, such as the implementation statutes for modern

treaties or international agreements, without discussing the relevant literature or case law on ratification legislation, without referencing any element of the parliamentary record, without explaining how the two paragraphs of s 4 fit together, and without explaining how s 4 should be read in the context of the entire statute. It is, in sum, a profoundly unsatisfying example of the exercise of statutory interpretation.

The Court does not return to a discussion of the federal *UNDRIP Act* until much later in its opinion in the context of a consideration of the “practical effects” of the *FNIM Act* – all as part of assessing the characterization or pith and substance of that Act. It will be recalled that earlier in its judgment the Court had suggested that the provisions of the *FNIM Act* “may be loosely grouped into three categories ...: (1) provisions affirming the right of self-government; (2) provisions establishing national standards; and (3) provisions setting out concrete implementation measures.” (at para 55). The Court subsequently used these headings as part of its analysis of the legal and practical effects of the *FNIM Act*. Here is what the Court had to say about the practical effects of the Act (all under the heading of “Concrete Implementation Measures”):

The concrete Implementation measures provided for in the Act must be interpreted in light of the UNDRIP. In keeping with the obligations imposed on it by the country’s positive law, 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” (UNDRIP Act, s. 5). To this end, the minister “must . . . prepare and implement an action plan to achieve the objectives of the Declaration” (s. 6(1)) and prepare an annual report on the progress made in fulfilling this obligation (s. 7(1)). (at para 85)

Hence, while the Court references what might be considered the implementation provisions of the federal *UNDRIP Act*, it does not reference s 4 of that Act as part of its federalism analysis of the *FNIM Act*.

As a result, it is far from clear what the Court meant when it said that the Declaration was part of “the country’s positive law”, while at the same time the Court clearly recognized that the Declaration needs implementation not only by the provisions of federal *UNDRIP Act* itself but by more specialized legislation such as the *FNIM Act*. Important questions therefore remain.

Did the Court really mean the Declaration is part of the “law of the country,” or just part of *federal* law? What are we to make of the fact that the federal *UNDRIP Act* does not contain an express statement that the Act binds the Crown (either federal or provincial)? The Court makes great play of s 7 of the *FNIM Act* – the provision binding the Crown in that Act – in its discussion of the *FNIM Act*, but says nothing as to its absence in the federal *UNDRIP Act*. Are we to understand that the federal *UNDRIP Act* is part of the positive law of the country except so far as it might have implication for the Crown? That would truly be a bizarre result. But if it does bind the Crown, how does the Court reach that conclusion?

This inconsistency also arises in respect of the Honour of the Crown. We are told the legislative affirmation of the right of self-government in the *FNIM Act* triggers the Honour of the Crown, which, among other things, gives rise to a duty of diligent implementation and prevents the Crown from arguing in negotiations or, it appears, even court proceedings, that the right of self-

government in relation to child and family services does not exist. But what of the affirmation in s 4(a) of the federal *UNDRIP Act*? Does that give rise to similar obligations? Does the Honour of the Crown play any role in relation to the federal *UNDRIP Act*?

As it stands, it does not appear that the federal *UNDRIP Act* had any bearing on the legal conclusions in this Reference. The Court considered that the federal *UNDRIP Act* provided context for the enactment of the *FNIM Act*, but the result was based entirely on a conventional division of powers analysis: the pith and substance of the *FNIM Act* is squarely within federal jurisdiction under s 91(24) and the *Act* is therefore constitutionally valid. There is perhaps a more important implicit finding: the federal approach to legislative implementation of the Declaration is constitutional, and the federal government should be able to give effect to Indigenous rights of self-government in relation to matters of central significance to their nations. Again, though, the federal *UNDRIP Act* seems to play little role in this. It helps explain the *rationale* for the federal approach, but it has no legal bearing on the validity of the *FNIM Act*.

### **The Court's References to the Declaration**

In addition to the Court's references to the federal *UNDRIP Act*, the reference opinion also contains numerous references to the Declaration itself, including the following:

- Preamble # 13: “[Recognizing] ... the right of indigenous families and communities to retain shared responsibility for the upbringing . . . and well-being of their children, consistent with the rights of the child”. (at para 3; see also at paras 14 & 86)
- Article 3: Indigenous peoples have the right to “freely determine their political status and freely pursue their economic, social and cultural development”. (at para 14)
- Article 4: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs” (at para 3; see also at paras 14 & 86)
- Article 7(2): the right not to be subjected to any act of violence, including “forcibly removing children of the group to another group”. (at para 3; see also at para 86)
- Article 13(1): the right of Indigenous peoples to transmit their histories, languages and cultures to future generations. (at paras 3, 14 & 86)
- Article 13(2) the correlative duty of the State to take measures to ensure that the Article 13(1) right is protected. (at para 14)
- Article 38: “[States] “in consultation and cooperation with indigenous peoples, . . . the appropriate measures, including legislative measures, to achieve the ends” of the Declaration. (at paras 4, 14 & 87)

This is a positive development. The Court identifies several specific articles of the Declaration as relevant to the issue it is considering. The overwhelming trend in Canadian courts to date has been simply to refer to the “the Declaration” as a whole, rather than engaging with particular articles. We will discuss briefly below why this is important. While, again, it is difficult to make the case that any of these articles does any real work in the Court's federalism analysis, the Court has dramatically elevated the normative status of the Declaration. In doing so, it has signalled the importance of the Declaration to lower courts.



But, while the Court has undoubtedly instructed lower courts to consider the Declaration and taken the important step of highlighting particular articles of relevance, it failed to provide guidance on a central issue that lower courts will have to grapple with, specifically, the legal status of the Declaration not only as a matter of domestic law but also as a matter of international law.

Increasingly, commentators and lawyers are highlighting that it is insufficient to simply state that the Declaration is a “non-binding” international instrument without domestic effect other than that given to it by statute. Indeed, submissions were made to the Court on exactly this point.

In a well-reasoned intervenor [factum](#) submitted on behalf of the Union of British Columbia Indian Chiefs, the First Nations Summit of British Columbia, and the British Columbia Assembly of First Nations, Gib van Ert (one of the country’s leading experts on the relationship between International and domestic law) and Fraser Harland made this argument clearly. They noted the need for guidance from the Court, arguing that “lower court invocations of the Declaration offer little in the way of methodology or reasoning to support or reject its judicial use” and that “Guidance from this Court is needed” (*factum*, para 2). They argued, persuasively, that blanket statements that the Declaration is “non-binding” (as the Court said in this case: “the Declaration is not binding as a treaty in Canada” (*Reference*, para 4)), are unhelpful and ought to be avoided (*factum*, para 5).

The reason is straightforward: while a Declaration as a legal instrument does not create binding legal obligations in the same way that an international treaty does, several of the articles of the Declaration refer to obligations that *are* included in binding international instruments, and several more reflect customary international law. In the former case, the presumption of conformity would come into play, while in the latter any customary norms would be applicable in Canadian courts even absent statutory incorporation (see *Nevsun Resources Ltd v Araya*, [2020 SCC 5 \(CanLII\)](#)). Guidance as to the application of these rules to the Declaration would have been welcomed. It is unfortunate that the Court chose to simply refer to the Declaration as “non-binding” when it ought to have understood the complexity of the issue and the need for guidance. While a “cautious approach” in reference cases may be advisable (as the Court itself noted at para 111), *none* of the discussion of the Declaration was relevant to the legal determination of the issue before the Court. Having decided to wade into an analysis of the Declaration, the Court could have provided more comprehensive guidance on the questions that lower courts must grapple with. The Court referred in this case to the pedagogical role of Parliamentary law-making: it may have done well to embrace its own role in this regard with a little more enthusiasm.

## Conclusions

First and foremost, this unanimous reference opinion of the Court will serve to mainstream the Declaration as an important normative document in domestic litigation. While we have outlined some shortcomings with the Court’s approach above, this is by far the most substantial engagement with the Declaration that the Court has made and signals that all courts must consider the Declaration carefully. While the Court’s decision will be treated as authoritative (albeit only a Reference) in cases dealing with federal legislation, it should also be significant in those provincial or territorial jurisdictions that have adopted similar legislation: British Columbia and Northwest Territories. It may even have some spillover effect in jurisdictions that are yet to adopt UNDRIP implementation legislation. While counsel in Indigenous cases may have been reluctant to place too much emphasis on the Declaration, or indeed international human rights law more generally,

this has already begun to change, and we anticipate that going forward UNDRIP will inform all Indigenous litigation. How could it not?

Second, the interpretation of the legal effect of statutory references to the Declaration is first and foremost a question of statutory interpretation. Hence, while the Court’s statements in relation to the Declaration as positive law have to be treated with respect, especially in relation to the federal Act, they may not be equally determinative with respect to the UNDRIP implementation legislation of another jurisdiction. For example, in the case of BC, the legislative record contains numerous statements by the sponsoring minister to the effect that the legislation did not give legal effect to the Declaration (see Bankes, *UBC Law Review*, above). Or, as another example, the NWT legislation contains an express preambular statement as to the interpretive significance of the Declaration – which of course is quite different from saying that the Declaration is part of the positive law of the NWT.

Finally, we will have to wait for answers to many outstanding questions about the application of the Declaration in Canadian law. There is much that is encouraging in the Court’s discussion of the Declaration, and its embrace of the metaphor of braiding Indigenous, International, and Domestic law to explain the process of implementation suggests a view of implementation that sees the Declaration as heralding the development of a constitutional order that reflects legal pluralism. Yet, there is a danger to confining the Declaration to the “normative” sphere. The Court’s failure to discuss the clear rules concerning the incorporation of international law in Canadian courts (including customary international law) suggests the Court may be inclined to adopt a *sui generis* approach to the Declaration. As always, caution must be exercised to ensure that a *sui generis* approach adds to, rather than derogates from, the legal protections that Indigenous peoples would otherwise enjoy.

We will likely have to wait for a different fact pattern to emerge to get more concrete guidance. As we outlined above, the Court’s decision tells us little about the actual legal impact of the Declaration or the federal *UNDRIP Act*. Two scenarios will undoubtedly soon require consideration. First, what happens when an Indigenous party directly challenges the validity of legislation on the basis that it is inconsistent with the Declaration? Second, what is the impact of the adoption of the Declaration on s 35 Aboriginal rights? In *Montour*, the Quebec Superior Court recently held that Canada’s commitment to UNDRIP requires courts to reconsider the test for s 35 Aboriginal rights and that the *Van der Peet* test must be reformulated to reflect Indigenous law (*R c Mountour*, [2023 QCCS 4154 \(CanLII\)](#)). These issues will soon require clear answers from appellate courts.

---

This post may be cited as: Nigel Bankes and Robert Hamilton, “What Did the Court Mean When It Said that UNDRIP ‘has been incorporated into the country’s positive law’? Appellate Guidance or Rhetorical Flourish?” (28 February 2024), online: *ABlawg*, [http://ablawg.ca/wp-content/uploads/2022/02/Blog\\_NB\\_RH\\_UNDRIP\\_Incorporation.pdf](http://ablawg.ca/wp-content/uploads/2022/02/Blog_NB_RH_UNDRIP_Incorporation.pdf)

To subscribe to *ABlawg* by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](#)

