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Gitxaala and the Conundrum of UNDRIP Implementing Legislation: The Sky Has Not Fallen In

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Case Commented On: *Gitxaala v British Columbia (Chief Gold Commissioner),* 2025 BCCA 430 (CanLII)

This case, which commenced as a judicial review application, 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*). The petitioners also claimed that the *MTA* regime was not consistent with the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP or UN Declaration) as required by section 3 of British Columbia's "implementing" legislation, the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 (*DRIPA*). This post focuses on that aspect of the case which was the only live matter by the time the case got to the Court of Appeal. A majority of that Court found in favour of the petitioners while the dissent concluded that the matter was not justiciable.

Some of the reactions to the judgment have been very hostile with some calling for the repeal of *DRIPA*. Premier Eby stops short of that, but has still promised to amend *DRIPA* in the Spring legislative session. I think that this is an overreaction. My own writings have suggested that while sections 4 (action plan) and 5 (annual report) are not justiciable, (see both my comment on first instance judgment in this case and a more extended commentary here: Nigel Bankes, "Implementing UNDRIP: An Analysis of British Columbia's *Declaration on the Rights of Indigenous Peoples Act"* (2020) 53 *UBC L Rev* 971) some elements of section 3 may be justiciable. The majority judgment confirms that consistency may be a justiciable question, at least where the Crown denies any inconsistency and therefore denies that it has any obligations under the section.

The First Nation petitioners had two main arguments.

First, the petitioners contended that the operation of an automated online registry permitting "free miners" to register claims to mineral rights on Crown land prior to consultation with affected First Nations (the "Mineral Claims Regime") was inconsistent with the Crown's constitutional duties. The petitioners succeeded before the chambers judge on that argument: 2023 BCSC 1680 (CanLII). Justice Ross concluded that the *MTA* afforded the Chief Gold Commissioner enough discretion to implement a consultation scheme under the *MTA* and therefore suspended the declaration that the scheme was unconstitutional for a period of 18 months to allow the design and

implementation of a program of consultation. For comment on this aspect of the decision see the ABlawg post by my colleague David Wright.

Second, the petitioner First Nations sought a declaration that the process for granting mineral titles under the *MTA* was inconsistent with the rights recognized in the UN Declaration and that therefore the government was in breach of section 3 of *DRIPA* which 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.

Justice Ross declined to grant relief on this line of argument, primarily on the basis of his assessment that section 3 does not create a justiciable right to a determination of (in)consistency.

Justice Ross also considered whether section 2(a) of *DRIPA* served to give the Declaration immediate legal effect.

> 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 …

Justice Ross rejected that argument:

> I find that a correct, purposive interpretation of *DRIPA* does not lead to the conclusion that *DRIPA* "implemented*"* *UNDRIP* into domestic law. Instead, *DRIPA* contemplates a process wherein the province, "in consultation and cooperation with the Indigenous peoples in British Columbia" will prepare, and then carry out, an action plan to address the objectives of *UNDRIP*. (At para 466, BCSC)

I commented on Justice Ross' judgment here.

The petitioner First Nations appealed Justice Ross's conclusions with respect to section 3 of *DRIPA*. There was no cross appeal on the duty to consult issues. Five months after Justice Ross handed down his judgment, the Supreme Court of Canada released its reasons in *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 (CanLII) (*First Nations Families Act Reference*). In that case the unanimous Court offered extensive *obiter* comments on the federal UNDRIP implementation legislation reasoning as follows:

> 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. (At para 4)

> …
> 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. (at para 15)

Robert Hamilton and I commented on the *Reference* opinion here: "What Did the Court Mean When It Said that UNDRIP 'has been incorporated into the country's positive law'? Appellate Guidance or Rhetorical Flourish?" At the time, we wrote that the *Reference* opinion represented "a profoundly unsatisfying example of the exercise of statutory interpretation."

> The Court [made its "domestic positive law"] 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. (at 6)

That said, lower courts, including the British Columbia Court of Appeal, can't help but be influenced by such a pronouncement, even if completely *obiter*. They must also grapple with what the Court actually meant by its domestic positive law statement. This decision represents the most extensive discussion of that question by an appellate court, albeit in the context of BC's *DRIPA* rather than the federal implementing legislation.

My discussion of the decision is organized around three questions: (1) Does section 2(a) of *DRIPA* accord the Declaration immediate legal effect in the sense of creating new substantive rights? (2) What is the interpretive significance of the Declaration when one reads *DRIPA* together with BC's *Interpretation Act*? (3) Is section 3 of *DRIPA* justiciable and, if so, what are the implications of that?

Does Section 2(a) of *DRIPA* Accord the Declaration Immediate Legal Effect in the Sense of Creating New Substantive Rights?

Neither of the petitioner First Nations made the claim that section 2(a) of *DRIPA* accords the Declaration immediate legal effect in the sense of creating new substantive rights, either before Justice Ross or before the Court of Appeal. Nevertheless, Justice Dickson clearly felt compelled to deal with the question. The issue was raised at both levels of court by the intervening Human Rights Commissioner and perhaps the issue attained greater salience because of the Supreme Court of Canada's "positive law" comments. Here is what Justice Dickson had to say, evincing a much more compelling approach to statutory interpretation than that offered by the Supreme Court of Canada:

> [143] Read together with ss. 1(1), 1(4) and 2(b), in context and harmoniously with the *Declaration Act*'s scheme and object, I interpret s. 2(a) to mean that its first purpose is to state positively that *UNDRIP* is to be used by bringing it to bear on British Columbia laws, specifically, in the construction of the Act's substantive provisions. I also conclude

> that in affirming its domestic application, s. 2(a) incorporates (i.e., integrates) *UNDRIP* in its entirety into British Columbia positive law: *First Nations Families Act Reference* at paras. 4, 15. I interpret s. 2(b) to mean that the *Declaration Act*'s second purpose is to add to the process of bringing *UNDRIP* into active effect.
>
> [144] I agree with the judge that, standing alone, s. 2(a) does not implement *UNDRIP* in British Columbia law in the sense that it creates substantive rights arising out of *UNDRIP*.

In sum, section 2 of *DRIPA* gives the Declaration some immediate legal effect but not the effect of creating new substantive rights or (presumably) creating new causes of action. One aspect of that immediate legal effect (as we shall see in greater detail in the next section), is that the Declaration in its entirety has an "immediate interpretive effect" (at para 145).

In addition, Justice Dickson emphasises that those provisions of the Declaration that have the status of customary law do not require the imprimatur of *DRIPA* to have immediate and substantive effect - such provisions are already part of the law of British Columbia as confirmed by section 1(4) of *DRIPA*: "the rules and norms of customary international law are automatically incorporated into Canadian law and given direct effect without the need for legislation." (at para 58 and see also paras 62, 133, 139 & 155).

What is the Interpretive Significance of the Declaration When One Reads *DRIPA* Together with BC's *Interpretation Act*?

As part of implementing the Declaration in and through the laws of British Columbia, the province, in addition to enacting *DRIPA*, also amended the province's *Interpretation Act*, RSBC 1996, c 238 in September 2021 to include the following provision:

> Section 35 of *Constitution Act, 1982* and Declaration
>
> 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 Dickson concluded that section 8.1(3) makes it clear that the Declaration is always of interpretive significance when construing or interpreting any Act or regulation and that, as such, it gives rise to "a statutory rebuttable presumption of consistency between British Columbia enactments and *UNDRIP*…" (at para 125). This presumption of consistency is similar to the

common law's presumption of conformity between statutes and binding norms of international law – whether based on treaty or custom (*Ibid*). For Justice Dickson's earlier discussion of the presumption of conformity with international law, see at paras 60 – 62, referring *inter alia* to *Quebec (Attorney General) v 9147-0732 Québec inc.*, 2020 SCC 32 (CanLII) and *R v Hape*, 2007 SCC 26 (CanLII).

That makes sense to me and comports with what I said in my post on Justice's Ross' decision and elsewhere. The significance of this is that it should no longer be necessary to establish whether a particular provision of the Declaration (which is not a treaty) has attained the status of customary law before it can be relied on for interpretive or presumption of consistency purposes. The *Interpretation Act* along with section 2(a) of *DRIPA* simply says that the entire Declaration is of interpretive significance all the time.

Unfortunately, Justice Dickson didn't leave it there. Earlier in her judgment she had observed that "*UNDRIP* aggregates, articulates and extends a range of internationally binding rights, obligations and general principles, together with internationally recognized minimum standards of achievement, aspirations and concerns …" (at para 66). And "Some of its articles overlap with existing rules of treaty, custom or general principles of law of broad application, expressed in specific relation to Indigenous peoples." (*Ibid*) This, I think, is unexceptional. However, instead of concluding that the legislature had evidently intended to erase these normative distinctions for interpretive and presumption of consistency purposes when it enacted *DRIPA* and later reinforced that with the amendment of the *Interpretation Act*, Justice Dickson seems to have reaffirmed these normative distinctions in a way that I suspect will prove problematic for counsel in presenting cases and for lower courts seeking to follow this direction. At the very least it will add significant complexity. Here is what Justice Dickson had to say:

> 97. Focusing attention on relevant *UNDRIP* articles is essential to any determination of *UNDRIP* consistency. Moreover, the requirement of consistency means that *UNDRIP* must be understood and addressed on its own terms, namely, as an international legal instrument of rights-recognition, standard-setting, and goal-pursuing, as opposed to law-creation. *Depending on the interpretive issue in question, the court may need to assess the extent to which a relevant article expresses a binding international right, obligation or general principle, a minimum standard, or an aspiration*. This is because:
>
> i. *UNDRIP* is not, and does not purport to be, law-creating (it does not create rights by recognizing them);
>
> ii. *UNDRIP* both recognizes existing rights and extends them, without distinction; and
>
> iii. binding rights and obligations (specific legal entitlements and duties), general principles (guiding truths or values), minimum standards (levels of quality or measurements), and aspirations (goals) differ.
>
> In my view, the same is true of the related demands of consistency.

98. *In other words, an assessment of the international legal status of an Indigenous right expressed as such in UNDRIP may be required to give effect to s. 8.1(3) in the interpretive process*. Insofar as *UNDRIP* expresses a binding international right, obligation, or general principle, to be consistent, an enactment should clearly conform, with due regard for local particularities. On the other hand, insofar as *UNDRIP* expresses an internationally recognized minimum standard or an aspiration, the margin of appreciation is greater, and general harmony will suffice for consistency to be achieved.

99. The jurisprudential implications of s. 8.1(3) for domestic legal practitioners are significant. As Professors Brunnée and Toope observed in 2002, Canadian courts and counsel are not typically steeped in international law, and they have tended to approach and apply it hesitantly. At the hearing of the appeal, counsel made similar observations. However, the fact is that the Legislature has chosen to incorporate a complex, multi-faceted international instrument into domestic legislation, and, if possible, provincial enactments must now be interpreted consistently with that instrument in all its complexity.

100. The rights, obligations, principles and standards expressed in *UNDRIP* are rooted in international law. In my view, consideration of their source, nature, and reach cannot be avoided or side-stepped in the interpretive exercise mandated by s. 8.1(3), either on the basis that *UNDRIP* is not itself a binding instrument (as the respondents suggest) or that every article of *UNDRIP* describes "rights" in the sense that term is used in domestic law (as the appellants suggest). I would not accede to either position, neither of which respond to the complex and varied nature of *UNDRIP*. As I see it, to determine whether a proposed interpretation of an enactment is consistent with *UNDRIP*, depending on the issue, it may be necessary to analyse the source, nature, and reach of the relevant right, obligation, standard, or goal expressed as such in its article(s). (at paras 97 – 100)

(The underlining is Justice Dickson's, the emphasis in italics is mine.)

Justice Dickson returns to this theme of the differential normative (and interpretive) weight of different provisions of the Declaration at paras 128 – 130.

In my view this differential approach is not required by the language of *DRIPA* or the *Interpretation Act*. Section 2(a) of *DRIPA* simply states that the purposes of the Act include "to affirm the application of the Declaration to the laws of British Columbia"; and section 8.1(3) of the *Interpretation Act* simply states that "Every Act and regulation must be construed as being consistent with the Declaration." Justice Dickson's approach introduces unnecessary and undesirable complexity in the application of the two statutes. I agree that the Declaration needs to be read a whole, and in a way that takes into account text (including the open-textured nature of the language in some cases), context and purpose (and I think that the domestic and international approaches to interpretation endorse essentially the same methodology). But I don't see anything in either statute that requires an interpreter to establish the international legal status of a particular article before deciding what interpretive weight to accord that article, or for the purposes of applying the presumption of consistency.

Is Section 3 of *DRIPA* Justiciable and, if so, what are the Implications of That?

Here again is the text of section 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.

While Justice Ross at first instance appears to have considered that certain elements of section 3, considered in isolation, might be justiciable (see my post on Justice Ross' judgment), his overall conclusion was that the opening language of the section ("in consultation and cooperation") precluded judicial determination of the issue of consistency:

> … 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 section 3 does not call upon the courts to adjudicate the issue of consistency. (at paras 490 and 491, BCSC)

That was not persuasive for Justice Dickson:

> Properly interpreted, s. 3 does not preclude judicial adjudication of whether a British Columbia law is consistent with *UNDRIP* or oust the courts' jurisdiction to do so when asked by an Indigenous litigant to resolve a dispute with the Crown on an allegedly duty-triggering inconsistency. The question of consistency is fundamentally legal in nature, it can be adjudicated by the court against an objective legal standard, and, where disputed, is on its face justiciable. That it may also be complex and subject to consultation between the government and Indigenous peoples does not impact its justiciability. (at para 175)

In particular, Justice Dickson considered that section 3 needed to be justiciable to deal with the scenario in which the Crown denied any inconsistency with the terms of the Declaration. In such a scenario, a consultative approach to developing the necessary measures would never gain traction absent judicial intervention. (See especially at para 178). Justice Dickson expanded on this as follows:

> As I see it, there are several ways in which a disputed question in relation to s. 3 of the *Declaration Act* may come before the court. For example, there may be a dispute about: i) whether there is an inconsistency between a British Columbia law and *UNDRIP* (as in this case); ii) whether the type of inconsistency in issue must be addressed by the Crown taking measures; iii) what measures should be taken; iv) the

> adequacy of the consultation process; or v) the meaning or extent of "cooperation". In every instance, justiciability concerns may arise, and, if they do, the court will need to determine whether, given the nature of the dispute, including the relevant articles of *UNDRIP*, the matter is justiciable. (At para 181.)

I think that this is a suitably nuanced approach to the questions of justiciability that may arise under section 3. This is especially so when yoked to the next part of Justice Dickson's judgment dealing with declaratory relief. As she notes, "Unlike most rulings, a declaratory judgment goes no further in providing relief than stating an applicant's rights …" (at para 190). The declarations sought by the petitioners in relation to *DRIPA* were not declarations that the *MTA* was invalid or unlawful, but simply declarations (at para 43) to the effect that the *MTA* was not *consistent* with *DRIPA*. And that distinction is crucial. A declaration of invalidity based on UNDRIP would necessarily entail the proposition that Justice Dickson had already rejected – namely that section 2 of *DRIPA* created new rights and obligations. A declaration of inconsistency does not have that consequence. See *Shot Both Sides v Canada*, 2024 SCC 12 (CanLII) at para 65: "A bare declaratory judgment does not grant consequential or coercive relief." And at para 70: "Declaratory relief takes on a "unique tenor" in the context of Aboriginal and treaty rights because it is a means by which a court can promote reconciliation to restore the nation-to-nation relationship …."

In this case, once the threshold question of justiciability was determined, resolution of the consistency question was relatively straightforward. Why? Because the Crown had not appealed Justice's Ross' ruling on the duty to consult. That relieved Justice Dickson from a detailed assessment of the terms of the Declaration (although as noted above, ordinarily "[f]ocusing attention on relevant *UNDRIP* articles is essential to any determination of *UNDRIP* consistency.") (at para 97)

All she really had to say in this case was that Article 32(1) ("consult and cooperate … in order to obtain their free and informed consent prior to the approval of any project") established a consultation/consent standard with respect to resource projects that, at a minimum, subsumes the section 35 duty to consult. Since the trial judge had concluded that the Crown was in breach of its duty to consult obligations under the *MTA* as then structured, it must also follow that the *MTA* regime is not consistent with Article 32(1) of the Declaration (my synthesis of paras 194 – 198).

Conclusions

Despite the way in which this judgment has been characterized in the media along with calls to repeal or amend *DRIPA* (see references in the introduction), I think that this is a balanced and nuanced interpretation of *DRIPA*.

The majority judgment does *not* endorse the view that *DRIPA* entails the legal consequence that "UNDRIP takes effect as if enacted in this Act". Instead, it endorses the (surely uncontroversial) view that *DRIPA* requires that UNDRIP will always be of interpretive relevance for provincial statutes and regulations. Furthermore, and in some instances, it endorses the view that section 3 of *DRIPA* is justiciable and that this may, in some cases, result in declaratory relief as to inconsistency. This falls far short of a declaration of invalidity but is instead a necessary spur to good faith consultation. In sum, the sky has not fallen in. The government of British Columbia

should not lead nor accede to demands that *DRIPA* needs to be modified. *DRIPA* was co-developed with Indigenous Nations and any amendments needs to be co-developed, whether or not as some argue, *DRIPA* is a quasi-constitutional statute (see Jeffrey Warnock, "Bill C-15's Special Status - Assessing the Likelihood that An Act Respecting the United Nations Declaration on the Rights of Indigenous Peoples will be treated as Quasi-Constitutional" (2025) 7-1 LLJ 1.

But I also think that Justice Dickson has unnecessarily complicated things by suggesting that we still need to consider the international legal status of a specific article of UNDRIP as part of weighing its interpretive significance. That was an important legal question *before* the adoption of *DRIPA*. *DRIPA* turned the page on that. We should not turn it back - even if such a return will have the salutary effect that Justice Dickson appears to celebrate, of making domestic lawyers more acquainted with international law (at para 100). We should only need to consider the customary legal status of a specific article of the Declaration in a situation where a party asserts that that article establishes a cause of action independently of *DRIPA*.

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