Cassels

UNDRIP in British Columbia: Introduction of Bill 41

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On October 24, 2019, the British Columbia (BC) government introduced Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, in the BC legislature.[1] Bill 41, which was co-developed with the First Nations Leadership Council and other Indigenous organizations, fulfills the BC government's commitment to fully implement the Universal Declaration on the Rights of Indigenous Peoples (UNDRIP) into BC legislation.[2]

The BC government has stated that Bill 41 "is a critical step towards true and lasting reconciliation."[3] While this underlying objective is laudable, Bill 41's attempt to import an international "declaration" directly into Canadian law will create new challenges in the BC government's efforts to further reconciliation.

Challenges with Directly Implementing UNDRIP

The creation and adoption of UNDRIP, and the embrace of the principles therein, represent progress for the recognition and protection of Indigenous rights globally. In this context, UNDRIP provides an important benchmark in a world that has too often harmed, mistreated, and exploited Indigenous peoples.[4]

While UNDRIP reflects critical elements of Indigenous rights, it was designed as a guide rather than a specific legal instrument to be directly implemented as law. As formulated, it is not directly compatible or implementable at the national level. Such incompatibilities are particularly evident in the Canadian context, given Canada's established and sophisticated Indigenous rights regime, unequaled by any nation state on the globe.

Since the adoption of the *Constitution Act, 1982*,[5] Canada and the provinces have been working to further reconciliation with Indigenous peoples. Through decades of litigation over section 35, the Canadian Indigenous rights regime has evolved, and continues to evolve, to provide increasing clarity and certainty for Indigenous and non-Indigenous peoples alike.

This evolution is the result of a tremendous investment of time and resources by Indigenous peoples, governments, the judicial system, and Canadians generally.

As a blunt and deliberately high-level document, UNDRIP is not reflective of Canada's nuanced and sophisticated constitutional and legal framework, particularly in respect of Canada's unique constitutional protection of Indigenous rights in section 35. By simply incorporating UNDRIP in its entirety into BC's legal system, Bill 41 introduces substantial uncertainty into BC's pursuit of true and lasting reconciliation.

Challenges within Bill 41

In attempting to incorporate UNDRIP into BC legislation, Bill 41 faces a number of implementation challenges.

Conflicting Considerations

Subsection 1(2) of Bill 41 requires the BC government to consider the diversity of the Indigenous peoples in BC, including their "distinct languages, cultures, customs, [and] practices," for the purposes of implementing the Bill.[6] This requirement is followed by section 3 of Bill 41, which requires the BC government to "take all measures necessary," in consultation and cooperation with the Indigenous peoples in BC, "to ensure the laws of British Columbia are consistent" with UNDRIP.[7]

As presently drafted, these two sections present significant, and potentially unresolvable, challenges. In BC, there are approximately 200 distinct First Nations and the Métis.[8] Each of these Indigenous groups have their own unique cultures and traditions.[9] Bill 41 fails to contemplate and explain how the BC government's consultation and cooperation process will adapt when conflicts of interest between these diverse Indigenous groups inevitably arise as the BC government attempts to fulfill the requirements of sections 1(2) and 3.

Uncertain Application

Subsection 2(a) of Bill 41 affirms the application of UNDRIP to BC laws. This affirmation is followed by the above-mentioned requirement in section 3 of Bill 41 that the BC government "take all measures necessary" to ensure that its laws are consistent with UNDRIP. By imposing the broad standard of "all measures necessary," and not establishing any reasonable limits to these "measures," Bill 41 lacks the specificity, flexibility, and nuance necessary to identify and protect the existing laws and processes that are effective but may not be in strict accordance with UNDRIP. Indeed, it is difficult to ascertain how every single BC law and regulation[10] can be consistent with all 46 articles in UNDRIP.

Unclear "Objectives"

Section 4 of Bill 41 requires the BC government to prepare and implement an action plan to achieve the "objectives" of UNDRIP. However, UNDRIP does not contain explicit "objectives," and it does not contain any "aims," "goals," or "intentions." Instead, UNDRIP consists of 24 preambular statements and 46 articles (made up of 74 distinct paragraphs), most of which are broadly-phrased, none of which are referred to as "objectives," and many of which use different language than that emanating from Canada's constitutional and legal framework.

Much has been said about UNDRIP being an aspirational declaration rather than a legally-binding convention. However, Bill 41 places a positive obligation on the BC government to, among other things, consult and cooperate with Indigenous peoples in conforming its laws with UNDRIP. Given this obligation, namely that every single BC law and regulation must be consistent with the 46 articles (or 74 distinct paragraphs) in UNDRIP in a manner that recognizes the diversity of the Indigenous peoples in BC, it is difficult to see how section 3 can be implemented in any meaningful way. As such, with no transition provisions in Bill 41, the BC government will be challenged to demonstrate its adherence to the requirements of sections 1(2) and 3 from its effective date and into the future.

Concerns with Bill 41 as an Avenue for Reconciliation

In legislating its endorsement of UNDRIP, the BC government says it aims to form the foundation for the province's work on reconciliation.[11] Reconciliation is not a simple process. Under Canada's Indigenous rights regime, true reconciliation requires a consideration of both the Indigenous perspective and the broader, societal perspective. While reconciliation is used to limit unilateral state action against Indigenous peoples, it is also used to recognize that, at times, broader, societal interests justify potential incursions on Indigenous rights.[12]

In contrast, UNDRIP does not contemplate the term "reconciliation" and does not consider how Indigenous and non-Indigenous peoples can respectfully co-exist or how their interests can be "balanced."[13] Instead, UNDRIP offers the broad proposition that Indigenous rights should prevail over the general welfare of society. For example, UNDRIP requires governments to obtain "free, prior and informed consent" (FPIC) prior to developing any project affecting the lands and territories of Indigenous peoples. FPIC can be interpreted to imply that governments cannot act without the consent of Indigenous peoples even when such actions are matters of general policy for the good of society, and otherwise justifiable under Canadian law. Due to UNDRIP's strict terminology, this concept is particularly problematic in situations where a government decision or project is supported by the majority of affected Indigenous groups, but where there remains one holdout.

As presently drafted, Bill 41 does not account for this fundamental incompatibility, and as such, appears incapable of advancing the very objectives it sets out to achieve.

Opportunities for Bill 41: Taking a Flexible and Nuanced Approach

Despite the above-mentioned drafting challenges, Bill 41 has the potential to strengthen the relationship between the BC government and Indigenous peoples. In order to realize that potential, the BC government must focus on incorporating precise legislative language that contemplates Canada's established and sophisticated Indigenous rights regime. An amended Bill 41, which implements UNDRIP through a flexible and nuanced approach, would provide BC, and the rest of Canada, with a meaningful template for furthering reconciliation and protecting Indigenous rights.

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[1] Bill 41, *Declaration on the Rights of Indigenous Peoples Act*, 4th Sess, 41st Parl, 2019 [Bill 41].

[2] UNGAOR, 61st Sess, 107th Mtg, UN Doc 61/295 (2007).

[3] British Columbia, Legislative Assembly, *Draft Report of Debates (Hansard)*, 41st Parl, 4th Sess (24 October 2019) at 10:25 am (Hon S Fraser).

[4] In this legal update, the term "Indigenous peoples" has the same meaning as the term "aboriginal peoples of Canada" under section 35(2) of the *Constitution Act, 1982*, and includes "the Indian, Inuit and Métis peoples of Canada."

[5] Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[6] Bill 41, *supra* note 1, s 1(2). In its entirety, section 1(2) of Bill 41 reads: “For the purposes of implementing this Act, the government must consider the diversity of the Indigenous peoples in British Columbia, particularly the distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems of the Indigenous peoples in British Columbia.”
[7] *Ibid*, s 3. In its entirety, section 3 of Bill 41 reads: “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.”
[8] Province of British Columbia, “BC First Nations & Indigenous People” (2019), *WelcomeBC*, online: <https://www.welcomebc.ca/Choose-B-C/Explore-British-Columbia/B-C-First-Nations-Indigenous-People>.
[9] *Ibid*. Additionally, each of these Indigenous groups also have diverse customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories, and knowledge systems.
[10] Pursuant to section 41(2) of the *Interpretation Act*, a regulation made under the authority of an enactment has the force of law. As such, Bill 41’s references to “every single BC law” presumably includes all BC regulations made under the authority of an enactment.
[11] British Columbia, Legislative Assembly, Speech from the Throne, 41st Parl, 4th Sess (12 February 2019) at 11 (Hon Janet Austin).
[12] *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 at paras 31 & 50; *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648 at para 73.
[13] *Ibid.*