Cassels

BCSC Decision Suggests Implications for UNDRIP Legislation in Canada

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In November 2019, British Columbia became the first Canadian jurisdiction to incorporate the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into law, through an Act which "required the government of British Columbia to 'prepare and implement an action plan to achieve the objectives of the Declaration.' "[1]

In June 2021, the federal government followed suit by passing its own legislation intended to "'affirm the Declaration as a universal international human rights instrument with application in Canadian law' and to provide a framework for the federal government's implementation of the [D]eclaration."[2]

The implications of UNDRIP legislation have been vigorously debated. In the Supreme Court of British Columbia's (Court) recent decision *Thomas and Saik'uz First Nation v. Rio Tinto Alcan Inc.* (*Saik'uz First Nation*), the defendants (Canada, the Province of British Columbia, and Rio Tinto Alcan Inc.) argued that "the recent UNDRIP legislation has no immediate impact on existing law and is simply 'a forward-looking' statement of intent that contemplates an 'action plan' yet to be prepared and implemented by either level of government."[3]

While the Court ultimately reached a determination in *Saik'uz First Nation* without relying on UNDRIP, it considered the potential implications of UNDRIP legislation in its analysis and, in doing so, provided some insight as to how UNDRIP legislation may supplement, refine, and alter existing jurisprudence addressing Aboriginal rights and reconciliation.

The United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP is an aspirational, international document that is intended to reflect "the minimum standards" of Indigenous rights around the world, and it is intended to serve as a guide and a benchmark in the review of a country's Indigenous rights performance.[4] It was adopted by the UN General Assembly on September 13, 2007.

In *Saik'uz First Nation*, the Court paid particular attention to four articles of UNDRIP, which address the lands, territories and resources of Indigenous peoples, and which have potential implications for all Canadians:

Article 26

(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

(2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

(3) States [i.e. Canada and British Columbia] shall give legal recognition and protection to these lands, territories and resources.

Article 27

States shall … [give] due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used.

Article 28

(1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

(2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

(1) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.[5]

As the Court summarized, "UNDRIP states in plain English that Indigenous peoples such as the plaintiff First Nations in this case have the right to own, use, and control their traditional lands and territories, including the waters and other resources within such lands and territories."[6]

Recognizing Conflict Between UNDRIP and Existing Law

In its analysis, the Court recognized that it would not be able to fully adopt the principles of UNDRIP in its decision, noting "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."[7]

However, the Court did not hold back from identifying areas of conflict.

One area where the Court identified conflict between UNDRIP and existing common law was in the context of asserting and proving Aboriginal title. The Court noted that, notwithstanding the language of UNDRIP, Indigenous peoples were expected to address "the almost insurmountable obstacles placed in the path of Indigenous groups seeking to establish [Aboriginal] title even though they have occupied the land 'since time immemorial.' "[8] Specifically, the Court highlighted the "absurdity of the exercise" required of Indigenous peoples to establish their historic rights, given that their status as Indigenous peoples under UNDRIP was "unquestionable."[9]

Reinforcing Common Law with UNDRIP

In its decision, the Court found several occasions to use UNDRIP to further reinforce comments and decisions founded on existing common law.

The first instance arose when the defendants argued that Aboriginal rights (including Aboriginal title) are only actionable against the Crown, and not a private party, at common law. In response, the Court noted that not only was Aboriginal title fully capable under common law in supporting such a claim against a private party, but "[t]o suggest otherwise is absurd and, in my opinion, disrespectful of the rights of Indigenous peoples respecting their traditional territories whether embodied in UNDRIP or simply as a matter of reconciling the assertion of Crown sovereignty with the legitimate interests of this land's original occupants and their descendants."[10]

Second, the Court noted that a right to seek common law remedies for impact to fish should be available "simply as a matter of principle (and one which also incidentally accords with UNDRIP)."[11]

Finally, when the Court recognized the Crown's potential historic liability to the plaintiff First Nations in respect of past damages, it noted that "Article 28 of UNDRIP is to the same effect."[12]

Expanding Common Law with UNDRIP

While the Court held back from using UNDRIP to escape existing common law, and from relying exclusively on UNDRIP principles in rendering a decision, it highlighted how UNDRIP may start to inform and change existing law.

Specifically, the Court noted that, "[e]ven if [UNDRIP legislation] is simply a statement of future intent, … it is one that supports *a robust interpretation of Aboriginal rights*."[13]

This statement is significant, as it suggests that even the most restrictive interpretation of UNDRIP legislation has implications for Canadian courts, the Crown, Indigenous peoples, and all Canadians *today*.

Implications: Door Is Open for the SCC to Provide Direction

In its analysis, the Court recognized that it required direction from the Supreme Court of Canada (SCC) in respect of understanding the effect of UNDRIP legislation, if any, on existing common law, particularly given the areas of conflict between the two. In identifying these areas of conflict, the Court appeared to suggest that, in some of these instances, UNDRIP may serve as a more preferable approach than existing common law.

The Court has left the door open for the SCC to provide direction in respect of the areas of conflict between UNDRIP and existing common law, and to determine the role that UNDRIP legislation plays in addressing these areas of conflict.

Implications: UNDRIP Legislation May Have Implications Today

The Court's statement that UNDRIP legislation "supports a robust interpretation of Aboriginal rights" suggests that UNDRIP legislation may have immediate implications for those operating in the Aboriginal law space. Namely, that UNDRIP legislation may be used to support a more generous approach to interpreting Aboriginal rights within the confines of existing common law.

The adoption of a generous approach to interpreting Aboriginal rights is not an insurmountable, or a particularly novel, requirement. The SCC has taken a similar approach in the context of the honour of the Crown, noting that "[t]he historical roots of the principle of the honour of the Crown suggest that *it must be understood generously* in order to reflect the underlying realities from which it stems."[14] It remains to be seen how UNDRIP legislation, and UNDRIP itself (comprised of 24 preambular statements and 46 articles), may engage with other principles, such as the honour of the Crown, when considering Aboriginal rights.

Implications: Anticipate More Judicial Consideration

The adoption of UNDRIP legislation both provincially and federally generated substantial debate regarding their effects, if any. In considering these perspectives, the Court noted that "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."[15]

The uncertainty regarding UNDRIP legislation has now moved from the forums of political debate to the courts, and it appears that the courts are open to modifying Canada's legal framework to incorporate UNDRIP; this is not surprising given the importance of reconciliation within the Canadian constitutional framework.

In *Saik'uz First Nation*, the Court actively engaged UNDRIP principles (but constrained itself within the confines of existing common law) and in doing so provided some indication of where future decisions, and the law, may lead.

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[1] *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 205 [*Saik'uz First Nation*].

[2] *Ibid* at para 206.

[3] *Ibid* at para 211.

[4] *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 61st Sess, Annex, UN Doc A/Res/61/295 (2007), art 43.

[5] *Saik'uz First Nation* at para 207.

[6] *Ibid* at para 208.

[7] *Ibid* at para 212.

[8] *Ibid* at para 274.

[9] *Ibid* at para 280.

[10] *Ibid* at para 367.

[11] *Ibid* at para 371.

[12] *Ibid* at para 490.

[13] *Ibid* at para 212. [Emphasis added.]

[14] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 17. [Emphasis added.]

[15] *Saik'uz First Nation* at para 212.

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