

## BCSC Finds UNDRIP Not Implemented into BC Law

Arend J.A. Hoekstra, Aaron Cressman, Jake Farrow

October 31, 2023

### Overview

On September 27, 2023, the British Columbia Supreme Court (BCSC) released its decision in *Gitxaala v. British Columbia (Chief Gold Commissioner)* (Decision). The Decision addressed the claims of two First Nations (First Nations) that British Columbia's (BC or the province) free entry mineral tenure regime, set out under the *Mineral Tenure Act* (MTA),<sup>1</sup> was inconsistent with the Crown's duty to consult and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and its associated provincial legislation,<sup>2</sup> the *Declaration on the Rights on Indigenous Peoples Act* (DRIPA).<sup>3</sup> For more information on the duty to consult aspects of the Decision, see our recent update.

The First Nations claimed that DRIPA imposed an obligation on the province to amend the MTA to make it consistent with UNDRIP.<sup>4</sup> However, the Court found that DRIPA is an aspirational piece of legislation that does not formally implement UNDRIP into provincial law, and as a result, does not impose positive obligations on the province to amend the MTA.<sup>5</sup>

### UNDRIP and DRIPA

UNDRIP is an international instrument adopted by the General Assembly of the United Nations in 2007.<sup>6</sup> UNDRIP is intended to establish "minimum standards for the survival, dignity and well-being of the Indigenous peoples in the world," setting out the individual and collective rights of Indigenous peoples.<sup>7</sup> Among other things, UNDRIP recognizes the Indigenous right to self-governance, the right to practice and maintain cultural, political, and legal traditions, and the right to traditional land ownership.<sup>8</sup>

Canada announced its endorsement for UNDRIP via a "declaration" in May 2016.<sup>9</sup> In 2019, BC's legislature enacted DRIPA, which states its purpose at section 2 as affirming the application of UNDRIP to the laws of BC, contributing to the implementation of UNDRIP, and supporting the affirmation of, and development of relationships with, Indigenous governing bodies.<sup>10</sup> Section 3 of DRIPA states that "in consultation and cooperation with the Indigenous peoples in BC, the government must take all measures necessary to ensure the laws of BC are consistent with the [UNDRIP]."<sup>11</sup>

### UNDRIP's Application to BC Law

The First Nations claimed that the statutory process for granting mineral rights under the MTA is inconsistent with DRIPA, arguing that DRIPA implemented UNDRIP and imposed a positive obligation on the province under section 3 of the act to ensure that all legislation was in line with the principles of UNDRIP. However, The Court found that UNDRIP had not been implemented into BC law and that DRIPA does not impose a justiciable obligation on the province to ensure its laws are in line with UNDRIP.<sup>12</sup>

In reaching this conclusion, the Court first considered what was required for an international standard to be “implemented” into domestic law. The Decision notes that a non-binding international instrument endorsed by the government does not become a binding source of domestic law until it is implemented through legislation.<sup>13</sup> The Court found that declarations are a “non-binding international instruments,” and that as a matter of law, Canada’s endorsement of UNDRIP is solely an expression of political support.<sup>14</sup>

Second, the Court considered whether DRIPA implements UNDRIP into provincial law or imposes positive obligations on the province to ensure its laws align with UNDRIP. The Court found that purposive statements, such as those found in section 2 of DRIPA, are “not intended to be a rights-creating, substantive provision(s),” and lack the clear and precise language necessary for implementation. In particular, the Court found the inclusion of the phrase “contribute to implementation” in section 2 of DRIPA as strongly indicative that section 2 is not intended to implement UNDRIP.

Third, the Court considered whether section 3 of DRIPA imposed a justiciable question<sup>15</sup> as to whether the province, in consultation with the Indigenous peoples of BC, took all measures necessary to ensure the laws of the province are consistent with UNDRIP. The Court found that while it can consider whether Indigenous peoples of BC were consulted in implementing UNDRIP, the province does not have a positive obligation to ensure all provincial law are consistent with UNDRIP.<sup>16</sup>

## Key Takeaways

The Decision provides some clarification on the extent of UNDRIP’s influence on BC law and the requirements of DRIPA. This goes a step further than previous BCSC decisions, which have relied on UNDRIP as an interpretive device but have not attempted to determine its precise applicability to Canadian law.<sup>17</sup> Three key takeaways arising from the Decision include:

- UNDRIP lacks legislative authority in BC;
- Provincial obligations under DRIPA are limited; and,
- UNDRIP will likely be used as an interpretive tool.

Despite the potentially significant findings from the Court, the Decision should be considered in the context of a lower court decision, as the Court itself noted in the Decision that “a higher court will ultimately determine the effect of DRIPA” and that “these reasons may represent the first in a long progression of

judicial considerations of UNDRIP and DRIPA.”<sup>18</sup>

## **UNDRIP Lacks Legislative Authority in BC**

The Decision clarifies that UNDRIP has not been implemented into law in BC. As a result, its impact at this point in BC is interpretive (per section 8.1 of the *Interpretation Act*) and aspirational.<sup>19</sup> It remains to be seen whether this finding applies to other UNDRIP-related legislation across Canada as well, such as the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*.<sup>20</sup>

The province’s actions are in line with the Decision’s findings: in spite of issuing *DRIPA*, BC has not taken significant steps to implement the principles of UNDRIP into provincial legislation. Although BC implemented an updated *Environmental Assessment Act* that is more in keeping with the free, prior, and informed consent requirements of UNDRIP, this came prior to the introduction of *DRIPA*, and few amendments to legislation aimed at implementing UNDRIP have been made since.<sup>21</sup> Further, the province’s UNDRIP Action Plan relies on largely aspirational language and does not set specific dates for its goals, doing little to assuage criticisms of *DRIPA* as being little more than “vacuous political bromide.”<sup>22</sup>

## **Provincial Obligations Under DRIPA**

The Decision states that although *DRIPA* does not implement UNDRIP, it still contains requirements for the province that must be adhered to. This includes Section 4 of *DRIPA*, which sets out the requirement for an action plan to be prepared and implemented and yearly reports on the status of the action plan to be issued in an effort to ensure of legislative harmony between BC law and UNDRIP.<sup>23</sup> The Decision also notes that *DRIPA* establishes consultation requirements between the BC government and Indigenous peoples as to whether current provincial laws are in alignment with UNDRIP.<sup>24</sup>

## **UNDRIP as an Interpretive Tool**

Although *DRIPA* may not implement UNDRIP into provincial law, the Decision affirms that section 8.1 of BC’s *Interpretation Act* requires courts to interpret existing legislation in a “a manner that is consistent with UNDRIP.”<sup>25</sup> This finding is consistent with the BCSC’s previous ruling in *Thomas and Saik’uz First Nation v Rio Tinto Alcan Inc*, which stated that UNDRIP “supports a robust interpretation of Aboriginal rights.”<sup>26</sup> Industry, governments and Indigenous communities should be mindful of the fact that, in spite of UNDRIP’s current lack of legislative authority, it will still play a role in determining the outcome of statutory interpretation.<sup>27</sup>

## **Conclusion**

The Decision clarifies that UNDRIP is not presently binding under BC law. While the decision relates only to

BC, it may be indicative of how similar federal legislation, as well as provincial legislation elsewhere, will be treated by the courts.

While DRIPA may not implement UNDRIP into BC law by itself, it does provide a process to achieve that ultimate objective. Whether that objective is achieved under DRIPA, and how long it takes, will depend on the legislatures, not the courts.

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<sup>1</sup> *Mineral Tenure Act*, RSBC 1996, c 292.

<sup>2</sup> UNGA, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 [UNDRIP].

<sup>3</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [DRIPA].

<sup>4</sup> *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 [Gitxaala].

<sup>5</sup> *Gitxaala*, at para 433.

<sup>6</sup> Adopted 143-4-11, 107th plenary meeting Issued in GAOR, 61st sess., Suppl. no. 49."Annex: UN Declaration on the Rights of Indigenous Peoples."

<sup>7</sup> UNDRIP, art 43.

<sup>8</sup> UNDRIP, preamble.

<sup>9</sup> Government of Canada, Indigenous and Northern Affairs Canada, *Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples*, (News Release, New York, NY) May 10, 2016.

<sup>10</sup> DRIPA, at s 2.

<sup>11</sup> DRIPA, at s 3.

<sup>12</sup> *Gitxaala*, at para 433.

<sup>13</sup> *Baker v Canada*, 1999 SCC 699, at para 69.

<sup>14</sup> *Gitxaala*, at para 437 and 438; *Ross River Dena Council v Canada*, 2017 YKSC 59, at para 302; *Snuneymuxw First Nation v Board of Education – School District #68*, 2014 BCSC 1173, at para 59.

<sup>15</sup> A question of justiciability is a determination of whether the courts have the institutional capacity and authority to resolve a matter (see *Gitxaala*, at para 486).

<sup>16</sup> *Gitxaala*, at paras 485-491.

<sup>17</sup> See *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc.*, 2022 BCSC 15, at para 212 [Thomas].

<sup>18</sup> *Gitxaala*, at para 435.

<sup>19</sup> *Interpretation Act*, RSBC 1996, c 238 [Interpretation Act].

<sup>20</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

<sup>21</sup> *Environmental Assessment Act*, SBC, 2018, c 15, at s 7; for further information on the provincial government's recent agreement with the Tahltan Nation, see our recent update.

<sup>22</sup> British Columbia, EAO, *Environmental Assessment Revitalization Indigenous Implementation Committee Meeting*, (10 July 2019), online; Thomas, at para 12.

<sup>23</sup> DRIPA, at s 4.

<sup>24</sup> *Gitxaala*, at paras 489 and 490.

<sup>25</sup> *Gitxaala*, at para 416.

<sup>26</sup> Thomas, at para 212.

<sup>27</sup> *Interpretation Act*, at s 8.1.

# Cassels

*This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.*