

Legal Update on Status of UNDRIP in British Columbia

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During the British Columbia (BC) throne speech on February 12, 2019,¹ the BC government announced its commitment to introduce legislation (the Proposed Legislation) that implements the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) into BC provincial legislation.² UNDRIP is an international, aspirational document supported by some parts³ of the international community to recognize and protect the rights of Indigenous peoples globally. The Proposed Legislation will be developed by the BC government in coordination with the First Nations Leadership Council and other Indigenous organizations. If the Proposed Legislation is passed, BC will be the first province in Canada to legislate its endorsement of UNDRIP. In developing the Proposed Legislation, the BC government should consider key legal questions as well as previous attempts by Parliament to implement UNDRIP in order to minimize potential uncertainty for project proponents and Indigenous groups alike.

Previous Efforts to Implement UNDRIP in Canada

The Proposed Legislation is not the first effort to implement UNDRIP in Canada. In 2016, Member of Parliament Romeo Saganash introduced Bill C-262,⁴ a bill which was intended to force all Canadian laws to comply with UNDRIP. Supported by the federal Liberal government and the federal New Democratic Party, Bill C-262 passed the House of Commons but died on the Order Paper in the Senate.

Bill C-262 highlighted the challenges with attempting to adopt UNDRIP in its entirety into Canadian law. UNDRIP was designed to be a global benchmark and a guide to address realities for Indigenous peoples throughout the international community. However, unlike other nations, Canada already possesses a sophisticated Indigenous rights regime. Canada is the only world nation with an established system for limiting unilateral state action against Indigenous peoples. As it was drafted, Bill C-262 would have been a potential hindrance to Canada's reconciliation efforts. By requiring Canada to "take all measures necessary" to ensure its laws are consistent with UNDRIP, Bill C-262 overlooked the need for a flexible and nuanced approach where the blunt and deliberately general provisions of UNDRIP are incompatible with Canada's constitutional framework.

Potential Challenges with the Proposed Legislation

Similar to Bill C-262, the primary challenge with the Proposed Legislation is appropriately acknowledging and addressing the difficulty of ensuring that BC laws comply with UNDRIP. In order to avoid the pitfalls uncovered by Bill C-262, the BC government will need to take a more flexible and nuanced approach when drafting the Proposed Legislation. In particular, the BC government will need to contemplate and explain

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how the Proposed Legislation will modify or alter existing BC laws where incompatibilities with UNDRIP exist.

The most concerning challenge with the Proposed Legislation may be the implementation of the concept of “free, prior and informed consent” (FPIC) with respect to resource development projects and project proponents. UNDRIP requires governments to obtain FPIC prior to developing any project affecting, among other things, 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, effectively granting Indigenous peoples a form of veto over project approvals. This interpretation goes beyond the regime in the *Constitution Act, 1982*⁵ and is incompatible with the duty to consult under Canadian law.

Key Considerations of the Proposed Legislation

While the Proposed Legislation has yet to be released, project proponents should be proactive in examining and, to the extent possible, engaging with the following key issues:

- Is there a distinction between UNDRIP’s effects on Aboriginal title versus Aboriginal rights as defined in Canadian law?
- Is there a distinction between UNDRIP’s application to Crown lands, municipal lands or private lands?
- Would the Proposed Legislation increase the ability of less-affected groups to have a form of veto over the approval of a project?

Looking Ahead

The BC government intends to introduce the Proposed Legislation in this session of the legislature. Additionally, with the upcoming federal election, it should be noted that the federal Liberal Party has also pledged to renew efforts to implement UNDRIP in Canada.⁶ Therefore, further developments on the status of UNDRIP in British Columbia, and Canada as a whole, may be expected in the months ahead.

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¹ British Columbia, Legislative Assembly, Speech from the Throne, 41st Parl, 4th Sess (12 February 2019) at 11 (Hon Janet Austin).

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

³ Thomas Isaac, Comments to House of Commons Standing Committee on Indigenous and Northern Affairs (April 23, 2018), online here.

⁴ Bill C-262, An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples, 1st Sess, 42nd Parl, 2016.

⁵ Schedule B to the Canada Act 1982 (UK), 1982, c 11.

⁶ Joan Bryden, “Trudeau promises to legislate implementation of UNDRIP if re-elected” (19 June 2019), CTV News, online:

<<https://www.ctvnews.ca/politics/trudeau-promises-to-legislate-implementation-of-undrip-if-re-elected-1.4473659?cache=%3FautoPlay%3Dtrue>>.

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