

Implementing UNDRIP in British Columbia in a Post-Yahey Context: What to Expect After the *Yahey v. BC* Litigation (S151727) and the Agreement on Industrial Development and Cumulative Effects Management

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Abstract

Almost two years after the ground-breaking verdict that the Supreme Court of British Columbia issued in the context of the *Yahey v. BC* litigation, on January 18, 2023, the Province of British Columbia signed a historic agreement with Blueberry River First Nation (BRFN) to address the cumulative effects of industrial development on the meaningful exercise of Treaty 8 rights in the Nation's traditional territory while establishing collaborative approaches to land and resource planning. At the same time, the Province concluded agreements with other Treaty 8 First Nations (Doig River, Fort Nelson, McLeod Lake, Prophet River, Saulteau and West Moberly First Nations) concerning cumulative effects management, land planning and resource exploitation.

These agreements have been praised as ground-breaking steps towards a new relationship that Government and Industry are eager to build with First Nations while healing the land and ensuring certainty for Industry to carry on resource development in British Columbia. This happens as the Province and the Federal Government move forward with their action plans to implement the United Nations Declaration on the Rights of Indigenous Peoples (hereafter UNDRIP) at the provincial and federal levels. It also comes at a time of significant challenges British Columbia must face, between new First Nations development projects (i.e., the Cedar LNG project) that the Province is actively supporting and recent litigations initiated by some First Nations to see UNDRIP adequately implemented in the BC legal framework (i.e., the trial initiated by Gitxaala and Ehattesaht First Nations concerning the lack of consultation regarding how BC grants mineral claims).

Keywords: *UNDRIP, FPIC, cumulative effects, Treaty 8, British Columbia, First Nations*

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1 The impact of the Yahey v. BC litigation on UNDRIP implementation in Canada

In the *Yahey v. BC* verdict (June 2021), Justice Burke sentenced that the BC Province could not continue to authorise activities that breached Treaty 8 and its unwritten promises and ordered the parties (BRFN and the BC Province) to consult and negotiate to establish enforceable mechanisms to assess and manage the cumulative effects of industrial development on the BRFN's traditional territory, so to ensure that Constitutional and Treaty rights are respected.¹ In the Reasons for Judgement, Justice Burke did not explicitly refer to UNDRIP. However, the ruling may pave the way for integrating specific provisions, such as FPIC – Free, Prior and Informed Consent, within the Canadian legal framework.

The Province of British Columbia demonstrated its commitment to UNDRIP by deciding not to appeal Justice Burke's verdict to the Supreme Court of Canada. Such a decision may be seen in the light of the fact that BC was the first Canadian Province that passed an Act (DRIPA, the Declaration on the Rights of Indigenous Peoples Act, on November 28, 2019), according to which UNDRIP must find full implementation within the BC legal framework.² The Federal Government followed by passing the United Nations Declaration on the Rights of Indigenous Peoples Act (UNDA) on June 21st, 2021. The approval of these Acts does not mean that UNDRIP is automatically implemented at the provincial and federal levels. In fact, the BC Province and the Federal Government are developing two different plans to implement UNDRIP within their legislative frameworks.

As for BC, following the approval of DRIPA and as established in Section 4, the Province worked on an action plan to meet the goals of UNDRIP in consultation and cooperation with Indigenous Peoples. The plan was released on March 30, 2022. It identifies 89 priority actions to advance the work in four priority areas to achieve the objective of UNDRIP, such as Indigenous Peoples' Self-determination and Inherent Rights of Self-Government, Indigenous Peoples' Titles and Rights, Ending Indigenous specific racism and discrimination, and Ensuring Socio-Cultural and Economic well-being of Indigenous Peoples.³

As for the Federal Government, in December 2021, the Government of Canada commenced a two-phased consultation and cooperation process with Indigenous Peoples with the aim of implementing the Act.⁴ In the first phase concluded in December 2022, priorities and measures for a Draft Action Plan were identified. A first Draft of the plan was released on March 20, 2023, with Hon. David Lametti, Minister of Justice, announcing that the Government wishes to finalise the Draft by June 2023.⁵ The measures proposed in the Action Plan are organised into four chapters, such as Shared priorities, First Nations priorities, Inuit priorities, and Métis priorities. Two more sections (Vision for the Future and Shared Understandings/Principles) will be developed in Phase 2 of the consultation and cooperation process.⁶ It is important to underline that these two new laws (DRIPA and UNDA) will

not suddenly transform the implementation of Indigenous rights in Canada in the way many First Nations might hope. But they do provide a way to use UNDRIP to assert and define Indigenous rights within Canada, and Canadian courts will be more likely to use UNDRIP to interpret those rights.

2 How to manage cumulative effects in a post-Yahey context – the BRFN-BC agreement signed in January 2023

The changes brought by the verdict intertwined with the firm will of the BC Province to start implementing UNDRIP in the legal framework certainly facilitated the negotiations between the BC Province and BRFN. In October 2021, a preliminary agreement was reached. The BC Province agreed to allocate a total amount of C\$ 65 million to the BRFN for land restoration activities and cultural practices revitalization.⁷ Over a year later, on January 18, 2023, a final agreement was signed between the Blueberry River First Nation and the BC Province. According to the deal, a C\$ 200 million restoration fund is to be established by June 2025 to support the healing of the land from decades of industrial disturbance. In terms of non-monetary compensation, the agreement sets an ecosystem-based management approach for future land-use planning in BRFN's most culturally relevant areas, besides limiting new petroleum and natural gas (PNG) development projects in association with the development of a new strategy for future oil and gas activities; protections for old forests, traplines and wildlife co-management efforts. In addition, it was agreed to provide BRFN with a C\$ 87.5 million financial package over three years, with the possibility to increase the amount based on PNG revenue-sharing and provincial royalty revenues in the next two fiscal years.⁸

The BC Government praised the agreement as a tool that marks the beginning of a new era towards the path to Reconciliation between BC and the many First Nations that inhabit the Province. As BC Premier David Eby stated:

I've always believed that negotiation, rather than litigation, is the way forward for achieving reconciliation and strengthening vital government-to-government relationships. This historic agreement between British Columbia and Blueberry River First Nations not only brings more predictability for the region and local economy, but it helps ensure that we are operating on the land in partnership to ensure sustainability for future generations.⁹

BRFN Chief Judy Desjarlais echoed Eby's words, stating that:

This agreement provides a clear pathway to get the hard work started on healing and restoring the land and start on the joint planning with strong criteria to protect ecosystems, wildlife habitat and old forests. With the knowledge and guidance of our Elders, this new agreement will ensure there will be healthy land and resources for current and future generations to carry on our people's way of life.¹⁰

While the Province negotiated with BRFN, six other Treaty 8 First Nations of Northeastern British Columbia (Doig River, Fort Nelson, McLeod Lake, Prophet

River, Saulteau and West Moberly First Nations) were involved in negotiations on cumulative effects management. As a result, a consensus document was co-developed and signed on March 22nd, 2022, in which it was established that the parties shared commitments and solutions. Such a document was approved for implementation in July 2022. Based on it, on January 18, 2023, the Government of British Columbia concluded separate agreements with each of the six Treaty 8 First Nations involved in negotiations. While ensuring a better fulfilment of Treaty 8 rights, these agreements provide certainty and predictability for Industry and the government regarding resource exploitation in BC.¹¹

3 Between industrial development and UNDRIP implementation at the provincial level

The agreements signed between BC and the Treaty 8 First Nations are highly relevant in a Province that will most likely experience significant industrial development in the years to come. Key projects, such as the BC Hydro Site C Dam, the Coastal Gas Link Pipeline, and the LNG liquefied facility in Kitimat, are expected to be completed and operational in the next couple of years. In addition, new development projects, such as the Cedar LNG floating liquefied facilities proposed by the Haisla First Nation, have been approved; and new ones proposed (i.e., the KSI Lisims LNG floating liquefied facilities proposed by the Nisga'a Nation).¹² Furthermore, it must be considered that Northeastern BC hosts the Montney Play, one of Canada's largest shale gas formations. Located underneath the traditional territory of the Blueberry and Doig River First Nations¹³, the Montney Play has recently been depicted as Canada's largest carbon bomb (and the sixth in the world) due to the emissions it could generate should its hydrocarbons be extracted and used.¹⁴ Collaboration between the Government and First Nations to manage industrial development has become the only way to cope with and mitigate its side effects.

This is testified by other significant agreements recently concluded in BC. For example, the Tobacco Plains Indian Band (Yaq̓it ʔa·knuq̓i 'it) finalized a deal with NWP Coal Canada in January 2023, according to which the community will have the power to veto a proposed mining project. Defined as a 'one-of-a-kind' Environmental Assessment Process and Consent Agreement, the Band will act as a regulator and reviewer of the Crown Mountain Coking Coal Project, located near Sparwood, BC, in the unceded lands of the Yaq̓it ʔa·knuq̓i 'it. This means that while engaging in the Project's Environmental Assessment, the Band will have the power to give or withhold its Free, Prior and Informed Consent (FPIC) to the Project.¹⁵

The debate around FPIC and its implementation is at the core of some recently initiated litigations between BC First Nations and the BC Government. This is the case of the litigation commenced by the Gitxaala and Ehattesaht First Nations in early April 2023, which challenges how British Columbia grants mineral claims.¹⁶ According to the current system regulated by the Mineral Tenure Act, it is sufficient to

make an online mineral claim to start exploring an area for minerals and have rights over what is found.¹⁷ The Mineral Titles Online system offers the possibility to acquire and maintain mineral and placer claims. Whereas placer titles can only be acquired in placer claim or placer lease areas in the Province, mineral titles can be acquired anywhere, providing that there are no other interests in the selected areas (such as parks, reserves, and other mineral titles). The fee for mineral claim registration amounts to C\$ 1.75 per hectare, while C\$ 5 per hectare is charged for placer claim registration.¹⁸

Changing this system is among the main reasons why the Gitxaala and Ehattesaht First Nations filed a claim against British Columbia, challenging how the Province grants mineral titles on their unceded lands. The two cases (*Gitxaala Nation v. Chief Gold Commissioner of B.C. et al.* and *Ehattesaht First Nation v. His Majesty the King in right of B.C. et al.*) have received full support from the BC Human Rights Commission, with the Commissioner appearing in court to testify. It is understood that these litigations will be the first legal test for BC following the release of the DRIPA Action Plan in March 2022. According to BC Human Rights Commissioner Kasari Govender, the Act is an essential piece of human rights legislation in BC. As such, it must take primacy over statutes like the Mineral Tenure Act and be interpreted broadly.¹⁹ As she stated:

This case is a test of what the Declaration Act means and how it applies to BC laws. We say the court must adopt the interpretation of the Act that best upholds the human rights at issue: Indigenous Peoples' collective human rights. That is, we say, that the Declaration on the Rights of Indigenous Peoples is not merely aspirational international law, but has been implemented here in BC's domestic law.²⁰

Linda Innes, elected Chief of the Gitxaala Nation, stated that the regime in place does not ensure any form of engagement or allow for consultation with the Nation. When mineral tenures are granted, the Crown or its proponents do not even notify the Nation. The current system is clearly based on a colonial heritage, as anyone with a mineral claim can start digging in the Nation's territory. According to one estimation, more than 70% of Gitxaala territory is available for 'staking' based on the current regime.²¹ With the recently started litigations, the two Nations are seeking a suspension of the current Online System of granting mineral claims and a declaration that the Crown has failed to meet its duty to consult with the Nations and obtain their FPIC when it comes to natural resource exploitation in their traditional territory (as provided by DRIPA). Whereas the two Nations argue that part of the problem is that the Crown keeps awarding mineral claims without involving, consulting and receiving consent from affected First Nations, the Province has a different view on the issue.

The BC Government argues that giving away mineral rights does not trigger the duty to consult; moreover, aligning the BC legal framework with the content of DRIPA cannot be done in court but only through real cooperation with First Nations. Whereas the BC mining association is concerned about the possibility that the online

claim system will be scrapped, two exploration companies support the First Nations' position. First Tellurium and Kingston argue that having a consent-based system instead of a free-entry mining regime would provide more certainty for the sector while building real and long-lasting relationships with interested First Nations and securing their FPIC for mineral exploitation projects.²²

4 Conclusions – the challenges of implementing UNDRIP at the federal level

The current developments in British Columbia, with new agreements concluded, development projects proposed by First Nations and approved by the Government, and new litigations commenced to see recognised Indigenous rights as provided in UNDRIP, clearly highlight the complex reality that First Nations, Industry and the BC Government must face. It also underlines that there is no one-size-fits-all approach that can be used when it comes to development-related issues and that each situation must be faced based on the specific needs and requirements of each First Nation. In such a context, a distinction-based approach is perhaps the best way to work with different First Nations while recognizing their specific features, needs, and attributes.²³

The distinction-based approach, introduced in 2016 by the Liberal Government, has been considered necessary to ensure that ‘the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.’²⁴ Such an approach stems from the recognition that First Nations, Métis Nation, and Inuit are the Indigenous Peoples of Canada and that they consist of distinct, rights-bearing communities with their own histories. The Government of Canada is committed to achieving reconciliation with Indigenous Peoples by forging a renewed, nation-to-nation, government-to-government, and Inuit-Crown relationship based on the recognition of rights, respect, cooperation, and partnership that must reflect the unique interests, priorities and circumstances of each People.²⁵

The Federal Government has used such an approach when developing the UNDRIP implementation plan (UNDA) to ensure that the different features and needs of the First Nations, the Métis Nation and the Inuit are duly taken into account. Nevertheless, there is still a considerable distance regarding the way in which the Government perceives UNDA and how Indigenous Peoples see it. Such a difference in views clearly emerged during the UNDRIP Special Meeting of the Assembly of First Nations that took place from April 3 to April 6, 2023, in Ottawa.

In a speech given during the meeting by Justice Minister David Lametti, UNDA was defined “as a draft. Not perfect, not final, and not complete.”²⁶ Nevertheless, the Government plans to finalize it by June 2023 to start implementing UNDRIP at the federal level. Such a position was met with strong concern and opposition by the Chiefs who attended the Assembly. As a result, a resolution was passed, urging

the Canadian Government to overhaul UNDA while allowing more time for real and meaningful consultation with First Nations. In addition to a lack of consultation, First Nations feel that the language on how to implement FPIC must be strengthened. As AFN National Chief RoseAnne Archibald stated:

Having free, prior and informed consent on development, or on any matter that has to do with lands and waters, is one of the key components of UNDRIP and why so many First Nations support it. So many First Nations want it implemented because of that particular clause.²⁷

Meaningful engagement can only be ensured with the full implementation of the principle of the FPIC. Whereas case laws and agreements can help advance the enforcement of FPIC, the Federal Government must recognize the necessity of having an Action Plan in which the implementation of FPIC is defined based on the views and requirements of Canadian Indigenous Peoples. This is a historic opportunity to advance Reconciliation while defining a common path for the future; it should be well-spent.

NOTES

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