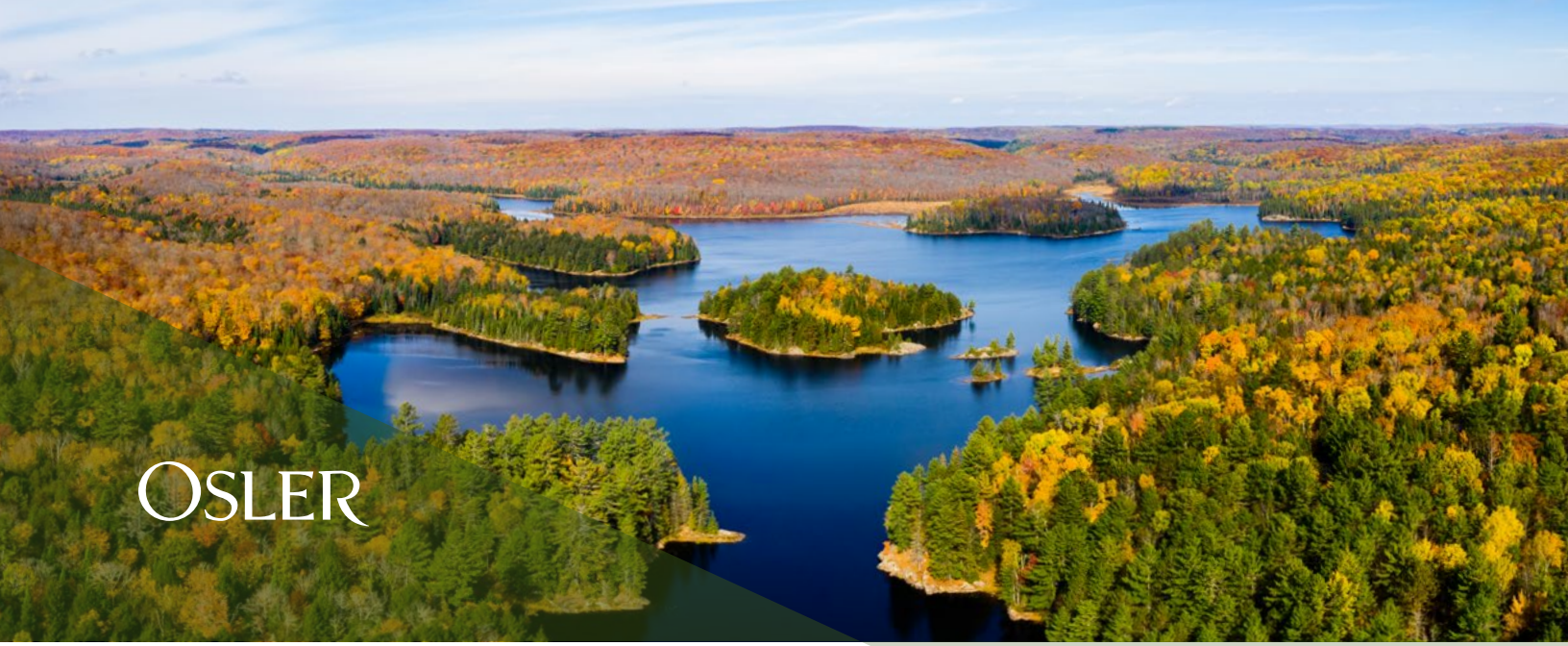

OSLER

INDIGENOUS LAW

Look before you leap: Impact of recent developments in Indigenous law

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Indigenous law in Canada has evolved significantly over the last decade, and 2021 was no exception. While the past year was overshadowed by the tragic discovery of unmarked graves at former residential school sites and resulting pressures to advance reconciliation with Indigenous peoples, 2021 also included significant developments in Indigenous law affecting infrastructure and resource development, including (1) the federal United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) bill receiving royal assent; (2) the British Columbia (B.C.) Supreme Court's ruling that cumulative effects of industrial development infringed the treaty rights of a B.C. First Nation; and (3) the Federal Court's recognition of the Crown's duty to consult regarding economic benefits linked to Aboriginal rights. These developments are likely to have significant impacts on infrastructure and resource development, Aboriginal and treaty rights, and partnerships with Indigenous groups in the coming years.

Federal UNDRIP bill becomes law

On June 21, 2021, Bill C-15, the *United Nations Declaration on the Rights of Indigenous Peoples Act* (Canada) (the Act) received royal assent. The Act is Canada's first substantive step towards ensuring federal laws reflect the standards outlined in UNDRIP, a non-binding international instrument that sets out "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

The Act sets out two key goals:

1. affirm UNDRIP as a universal international human rights instrument with application in Canadian law
2. provide a framework for the government of Canada to implement UNDRIP

The Act requires Canada, in consultation with Indigenous peoples, to take all measures necessary to ensure that Canada's federal laws are consistent with UNDRIP. To accomplish this, the Act requires the designated minister to, within two years, prepare and implement an action plan to achieve the objectives of UNDRIP. The Act also requires federal law-makers, when adopting new statutes and amendments, to consider whether they are consistent with UNDRIP.

Perhaps most notably, UNDRIP requires states to obtain "free, prior and informed consent" (FPIC) in their consultations with Indigenous peoples. Although the stated intention is not for FPIC to operate as a "veto" power, the concept of FPIC will likely change current consultation approaches and the practical expectations of parties involved in such consultations. The Act's implementation will also likely strengthen incentives for proponents to partner with Indigenous groups in project development, thereby achieving their FPIC.

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Cumulative effects of industrial development and treaty rights

In *Yahey v. British Columbia*, the B.C. Supreme Court (BCSC) ruled that the rights of Blueberry River First Nations (BRFN) under Treaty 8 had been infringed by the cumulative impacts of decades of industrial development within BRFN's traditional territory in northeast B.C. This precedent-setting decision represents the first time a Canadian court has found an infringement of Indigenous treaty rights based on the cumulative impacts of policies and permitted development over decades, rather than based on a specific action or regulatory regime.

Following a trial, the BCSC concluded that B.C. had taken up lands in BRFN's traditional territory to such an extent that there were no longer sufficient and appropriate lands to allow BRFN's members to meaningfully exercise their treaty rights. The Court also ruled that the government of B.C., having had notice of BRFN's concerns but having permitted the cumulative impact of industrial development to erode BRFN's treaty rights, breached its fiduciary duty and its obligations to BRFN under Treaty 8. B.C. thereby failed to uphold the honour of the Crown. As a result of these failures, the BCSC declared that (1) B.C. cannot continue to authorize activities in BRFN's traditional territory that infringe BRFN's exercise of treaty rights; and (2) B.C. and BRFN must negotiate timely

enforcement mechanisms to assess and manage the cumulative effects of industrial development. The BCSC suspended the first declaration for six months to provide B.C. and BRFN time to negotiate a new regulatory framework.

B.C. determined not to appeal the decision.

Yahey has direct and serious implications for future development in BRFN's traditional territory, which covers most of northeast B.C. (including the Site C hydroelectric dam, most of the natural gas production in B.C. and several other resource developments including mines, wind projects and forestry operations). While B.C. and BRFN are actively negotiating changes to the regulatory process to comply with *Yahey*, it is unclear what changes will ultimately be agreed to, when this agreement will be struck and how other Treaty 8 First Nations in northeast B.C. (many of whose territories overlap with BRFN's) will be involved in the process. In the meantime, B.C. has suspended its review of all new permit applications in BRFN's territory and has also indefinitely suspended several existing permits in areas of special interest to BRFN. In effect, *Yahey* has given BRFN substantial control (if not a veto) over the future of resource development in northeast B.C.

The effects of *Yahey* are not likely to be confined to northeast B.C. The *Yahey* decision demonstrates a viable path to establishing an infringement of treaty rights on the basis of cumulative effects. Many parts of Canada have seen material population growth, as well as infrastructure and/or resource development since the time of historic treaties with Indigenous groups. We expect *Yahey* will lead to similar cumulative effects claims across Canada, particularly across the Prairies and northern Ontario under the historic numbered treaties similar to Treaty 8. Such claims could inject further uncertainty into Canada's regulatory approval processes, and, if successful, could significantly change the future of resource and infrastructure development in Canada.

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Duty to consult and economic rights

In *Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, Canada's Federal Court expressly recognized that the Crown must consult with Indigenous groups that have negotiated economic benefit agreements with resource developers before the Crown takes any action to delay or deny such developments.

In *Ermineskin*, Ermineskin Cree Nation (Ermineskin) had entered into benefit agreements with Coalspur Mines (Operations) Ltd. (Coalspur) respecting the potential impacts of its two proposed thermal coal projects in Alberta. While Coalspur's projects did not trigger the federal *Impact Assessment Act* (IAA), the federal Minister of Environment and Climate Change (Minister) decided to designate Coalspur's projects under the IAA without notifying Ermineskin (the Decision). The Decision created the potential for significant delays to Coalspur's projects that could eliminate Ermineskin's economic interests under the benefit agreements. Ermineskin challenged the Decision on the basis that the Minister had breached the Crown's duty to consult.

The Federal Court found that the Crown owed Ermineskin a duty to consult respecting the Decision's potential to adversely affect Ermineskin's economic rights. The duty to consult arose because Ermineskin's economic rights are closely related to, and derive from, its Aboriginal and treaty rights. Since there was "no consultation at all" in this case, the Crown failed to fulfil its consultation duty and, as such, the Federal Court quashed the Decision.

Ermineskin establishes that Indigenous groups have the right to be consulted whenever Crown conduct may affect their economic interests in resource development. Many Indigenous groups have substantial economic interests in resource development, and this decision highlights the value of Indigenous partnerships both for proponents and those Indigenous groups.

Outlook

We encourage resource and infrastructure developers across Canada to keep abreast of changes in Indigenous law and incorporate Indigenous considerations at the outset of project development. While the law in this area continues to evolve and often presents challenges and risks for new projects, it also creates opportunities for proponents who proactively identify and manage these issues. In particular, for projects that will affect specific Indigenous groups, partnerships or other forms of benefit agreements with those Indigenous groups may allow the developer to successfully manage project regulatory risk, while also providing meaningful benefits to local Indigenous communities.

AUTHORS

Richard J. King
Partner and Co-Chair, Regulatory, Environmental, Indigenous and Land

rking@osler.com
416.862.6626

Sander Duncanson
Partner, Regulatory, Environmental, Indigenous and Land

sduncanson@osler.com
403.260.7078

Alexander (Zander) McGillivray
Associate, Construction, Infrastructure and Energy

amcgillivray@osler.com
416.862.5956