

LOCAL GOVERNMENTS AND FIRST NATIONS

Challenges, Possibilities, and the Future of Collaborative Governance

Reece Harding and Julia Tikhonova

November 25, 2021

What will we discuss?

1. **Section 35(1) *Constitution Act***
2. **Duty to Consult and Accommodate**
3. ***Declaration on the Rights of Indigenous Peoples Act* (“DRIPA”)**
 - (i) BC’s Draft Action Plan
 - (ii) Decision-making Agreements
4. **Truth and Reconciliation Calls to Action**
5. **Reconciliation and Collaborative Governance**
 - (i) Protocols and communication agreements
 - (ii) Economic development partnerships
 - (iii) Servicing agreements
 - (iv) Land planning
 - (v) Educational and cultural engagements

1. Section 35(1), *Constitution Act*

- Aboriginal peoples are given constitutional protection
- Section 35(1) *Constitution Act, 1982* reads:

“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”
- Constitution is Canada’s supreme law

Section 35(1), *Constitution Act*, contd.

- What are Aboriginal rights?
 - Not defined in s. 35(1)
 - Diverse rights that are integral to the distinct culture of the group. Includes:
 - Practices
 - Customs
 - Traditions
 - Aboriginal title: *sui generis* title encompassing the right to exclusive use and occupation of land for variety of purposes

2. Duty to consult and accommodate

- *Haida Nation v. British Columbia*
- The Crown duty arises when:
 1. the Crown has knowledge, real or constructive, of the potential existence of an Aboriginal right or claim;
 2. the Crown contemplates a decision or conduct that engages the Aboriginal claim or right; and
 3. the contemplated Crown decision or conduct may adversely affect the Aboriginal claim or right (*Haida Nation v. British Columbia*)

Duty to Consult and Accommodate, contd.

- *Neskonlith Indian Band v. Salmon Arm*, 2012 BCCA 379
 - City of Salmon Arm issued a permit for shopping mall development near Neskonlith territory
 - The Neskonlith considered the affected area their territory, but were not involved in litigation nor negotiations for aboriginal title; pre-proof
 - The Neskonlith claimed they were not adequately consulted as per *Haida Nation* duty to consult

Duty to Consult and Accommodate, contd.

- *Neskonlith Indian Band v. Salmon Arm*
 - Held: City had no duty to consult
 - Practically speaking, local governments do not have the resources to consult with First Nations every time a decision affects their rights

Duty to Consult and Accommodate, contd.

- What does this mean for local governments?
 - Local governments are not the Crown
 - No direct constitutional relationship with First Nations
 - No duty to accommodate
 - Engagement obligations to First Nations are rooted in their statutes
- However, local governments do have various opportunities for reconciliation efforts via collaborative governance

3. Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44 (“DRIPA”)

- BC legislation
- Aims to formally incorporate the Indigenous rights instrument, *United Nations Declaration on the Rights of Indigenous Peoples* (“UNDRIP”), into law
- BC first jurisdiction in Canada (and in most of the world) to adopt UNDRIP into law
- DRIPA sets out a process to align BC’s laws with UNDRIP

i. BC's Draft Action Plan

- Section 4 of DRIPA requires BC to prepare/implement an Action Plan to achieve objectives of UNDRIP
- Province has prepared a draft: includes list of actions to be taken by the Province in cooperation with Indigenous peoples from 2021 to 2026
- Final plan to be released in early 2022

i. BC's Draft Action Plan

- 4 categories of actions:
 - Self-determination and inherent right of self-government
 - Title and rights of Indigenous Peoples
 - Ending Indigenous-specific racism and discrimination
 - Social, cultural and economic well-being

Actions directly impacting local governments

- Action 1.13: “Support inclusive regional governance by advancing Indigenous participation in regional district boards.”
- Action 3.1: “Provide essential training across the BC public service and other public institutions and corporations to build foundational competence and understanding of the rights of Indigenous peoples, the UN Declaration, the Declaration Act, Indigenous history, treaties, Indigenous-specific racism, the dynamics of proper respectful relations and meaningful reconciliation.”

UBCM feedback – July 30, 2021 submission

- UBCM supports action item 1.13
- Requests opportunities for engagement of local governments in the following:
 - Indigenous participation in conservation and biodiversity efforts (2.9);
 - strategies to protect BC's wild salmon population (2.10);
 - consultation in protecting the environment (2.11);
 - development of policing reforms (3.12);
 - creating an urban Indigenous advisory table (4.16); and
 - undertaking a cross-government review of provincial supports and services (4.17)

ii. Decision-making Agreements

- Section 6 and 7 of *DRIPA* permit “agreements” on behalf of government with First Nations
 - June 2021: first Section 7 agreement between Tahltan Nation and BC government related to environmental assessment approvals for two mining projects in Tahltan Territory
 - Still in negotiation phase

4. Truth and Reconciliation Calls to Action

- The Truth and Reconciliation Commission of Canada (“TRC”) established as one of the mandated aspects of the residential school settlement agreement
- In June 2015, released its 94 “calls to action” regarding reconciliation between Canadians and Indigenous peoples
- 5 calls to action directly relevant to local governments

Truth and Reconciliation Calls to Action, contd.

- Calls upon *all* level of governments to:
 - #43: implement UNDRIP
 - #47: repudiate concepts used to justify European sovereignty over Indigenous peoples and lands
 - #57: provide education to public servants on the history of Aboriginal peoples
 - #75 and #77: Develop strategies for and collect records about ongoing commemoration of residential school survivors

5. Reconciliation and Collaborative Governance

- Many local governments have already embraced the aims of DRIPA and the TRC Calls to Action
- Some examples:
 - Protocols and communication agreements
 - Economic development partnerships
 - Servicing agreements
 - Land planning
 - Educational and cultural engagements

i. Protocols and communication Agreements

- Framework Agreement between Resort Municipality of Whistler, Squamish and Lílwat Nations, and the Province
 - Entered into in June 2020
 - Provides a framework for government-to-government relations
 - Provides the First Nations with development opportunities, a land exchange, and collaborative employee housing

i. Protocols and Communication Agreements

- Islands Trust Council and the Snuneymuxw First Nation
 - Signed Protocol Agreement and First Nations Engagement Principles
 - establishes a government-to-government relationship
 - Established 2019-2022 Reconciliation Action Plan to implement reconciliation
 - Specifies a timeline for implementing action items

ii. Economic Development Partnerships

- District of Squamish and Squamish Nation
 - Squamish Community Forest Corporation
 - Joint management of local forests
 - Board has equal representation from District and the Nation

ii. Economic Development Partnerships

- Northern Rockies Regional Municipality and Fort Nelson Nation
 - Granted a joint community forest licence by the Province
 - Municipality and First Nation developed partnership structure to operate the licence
 - Joint control, protection and management of forest resources
 - A “new level of collaboration”

iii. Servicing Agreements

- City of Kamloops and the First Nation of Tk'emlúps te Secwépemc
 - Community Transit Partnership Agreement
 - Addresses transit service issues
 - Facilitated establishment of new transit route through the Nation's lands

iii. Servicing Agreements

- City of Pitt Meadows and Katzie First Nation
 - Service agreements for sewer, water and fire protection services
 - Negotiation underway for servicing agreement re: policing and public safety

iv. Land Planning

- City of Powell River and Tla'amin Nation
 - Collaboration on various initiatives:
 - Sustainability Charter
 - Regional Emergency Plan
 - Regional Transportation Plan
 - Regional Trails Plan
 - City designated two land parcels in its historic townsite area to the Tla'amin

iv. Land Planning

- Town of Ladysmith and the Stz'uminus First Nation
 - Joint Ladysmith Waterfront Area Plan
 - Councils of the Town and the First Nation collaborated on planning and design
 - Recognized with a provincial planning award in 2018

v. Educational and Cultural Engagements

- Tsleil-Waututh and Metro Vancouver Regional District
 - Renaming initiative
 - Regional District's Belcarra Park will restore its name to "təmtəmíxwtən /Belcarra Regional Park"
 - Reflects the park's historical role as the Tsleil-Waututh Nation's largest ancestral village

v. Educational and Cultural Engagements

- District of Tofino, District of Ucluelet, Tla-o-qui-aht First Nations, and the Yuułuʔiłʔatḥ Government
 - Collaborated to develop the West Coast Nature, Education, Sustainability, Transformation (“NEST”) Program
 - Outdoor-based learning program that provides locals and tourists with workshops, field schools and courses
 - Some topics: Indigenous customs, wildlife, sustainability

Questions/Discussion