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BARRISTERS & SOLICITORS

CASELAW UPDATE AND OTHER LEGAL NEWS

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CASELAW UPDATE AND OTHER LEGAL NEWS

I. INTRODUCTION

Recently, there have been a number of significant legislative updates and court decisions that affect local governments. In this paper, we examine three legislative updates and two court decisions that every local government should be aware of, and understand the implications of, as follows:

- Bill 41 – Declaration on the Rights of Indigenous Peoples Act – British Columbia recently became the first province to begin implementation, through legislation, of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). As we transition into the era of reconciliation, it is important for local governments to understand the legal principles at work between local governments and First Nations.

- Passenger Transportation Regulation Amendments – New regulations came into force this year that support the full implementation of online platform "ride-sharing" services, such as Uber and Lyft, in British Columbia.

- Cannabis Regulations Amendments – The legalization of non-medical cannabis is entering its second phase, which will permit the sale of three new classifications of cannabis products, including edible cannabis such as baked goods and beverages.

- *Canadian Plastic Bag Association v. Victoria (City)*, 2019 BCCA 254 – In July, the BC Court of Appeal ruled in favour of the plastic bag industry, quashing a business regulation bylaw enacted by the City of Victoria that prohibited businesses from providing plastic shopping bags to its customers.

- *Buechler v. Island Crisis Care Society*, 2019 BCSC 1899 – In November, the British Columbia Supreme Court held that a temporary supportive housing development was not subject to municipal zoning bylaws.

II. LEGISLATIVE UPDATES

A. Bill 41 – Declaration on the Rights of Indigenous Peoples Act

1. UNDRIP

UNDRIP was adopted by the United Nations in September 2007, and is the most comprehensive international instrument on the rights of Indigenous peoples. It consists of 46 articles that offer guidance to governments on the human rights of Indigenous peoples and how to recognize and promote those rights.

Overall, UNDRIP establishes a universal framework of minimum standards for the survival, dignity and well-being of Indigenous peoples, and elaborates on fundamental freedoms as they apply to the specific situation of Indigenous peoples. While UNDRIP is not (yet) legally binding in Canada, it is often relied upon by First Nations as a tool to have their rights recognized and protected.

Some of the key articles in UNDRIP are:

> *Article 3*:
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> *Article 4*:
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
>
> *Article 5*:
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.
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> *Article 8*:
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> 1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
>
> 2. States shall provide effective mechanisms for prevention of, and redress for:
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> …
>
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources ….

Article 10:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11:

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12:

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 18:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 23:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 25:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 32:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 38:

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

As can be seen from a review of the above, UNDRIP is intended to confirm broad rights in Indigenous peoples, such as the right to self government, and to provide broad protections to Indigenous peoples in relation to those rights. This includes, for example, the Provincial government taking legislative steps to ensure that the rights of Indigenous peoples are not affected except with free, prior and informed consent as well as just and fair compensation.

Of particular note is the broad rights of Indigenous peoples to their culture and its protection, which includes rights to traditionally owned, occupied or otherwise used lands, territories and resources and to the protection of those lands, territories and resources.

2. Bill 41 – Declaration on the Rights of Indigenous Peoples Act

On October 24, 2019, the Provincial government introduced draft legislation to implement UNDRIP. If passed, Bill 41 will become the *Declaration on the Rights of Indigenous Peoples Act*, and British Columbia will become the first province to have committed to align its laws with UNDRIP.

The Provincial government modelled Bill 41 after proposed legislation (Bill C-262) that was aimed at implementing UNDRIP at the Federal level, which stalled in the Senate and ultimately was not passed.

The purposes of the proposed *Declaration on the Rights of Indigenous Peoples Act* are set out in section 2 as follows:

> Purposes of Act
>
> 2 The purposes of the Act are as follows:
>
> > (a) to affirm the application of the Declaration to the laws of British Columbia;
> >
> > (b) to contribute to the implementation of the Declaration;
> >
> > (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

The language of the proposed *Declaration on the Rights of Indigenous Peoples Act* imposes a legal obligation on the Provincial government to ensure greater involvement of Indigenous peoples in all governmental decision-making that may impact their rights.

Under section 3 of the proposed legislation, the Provincial government will be legally obligated to, in consultation and cooperation with the Indigenous peoples in British Columbia, "take all measures necessary" to ensure the laws of British Columbia are consistent with UNDRIP.

As a measure of its performance under the proposed legislation, the Provincial government will be required to prepare and implement an action plan intended to achieve the objectives of UNDRIP, and to provide an annual report setting out the progress that has been made by it to ensure consistency between the laws of British Columbia and UNDRIP and to achieve the goals set out in the action plan. Both the action plan and the annual report will be required to be prepared in consultation and cooperation with the Indigenous peoples in British Columbia.

In the same manner that the language of the proposed legislation is broad in purpose, the language is broad in the obligation on the Provincial government to take measures to ensure the laws of British Columbia are consistent with UNDRIP and to implement action plans for such purposes. The language provides very little information as to what those measures may be or what those action plans may entail.

In this regard, the ultimate effect of the proposed legislation on local governments is uncertain. While both the Premier and the Minister of Indigenous Relations and Reconciliation for British Columbia have stated that the proposed legislation does not provide Indigenous governing bodies with a veto, that is not clear from the language of Bill 41. What is clear from that language is that, in order to meet its obligations under the proposed legislation, the Provincial government will have to make changes to the powers of local governments and how those powers are exercised.

The potential impact of Bill 41 on local governments is highlighted by sections 6 and 7, which provide as follows:

> Agreements
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> 6 (1) For the purposes of this Act, a member of the Executive Council, on behalf of the government, may enter into an agreement with an Indigenous governing body.
>
> (2) Subsection (1)
>
> (a) is subject to section 7, and
>
> (b) does not limit the power of the member to enter into an agreement under any other enactment.

Decision-making agreements

7 (1) For the purposes of reconciliation, the Lieutenant Governor in Council may authorize a member of the Executive Council, on behalf of the government, to negotiate and enter into an agreement with an Indigenous governing body relating to one or both of the following:

(a) the exercise of a statutory power of decision jointly by

(i) the Indigenous governing body, and

(ii) the government or another decision-maker;

(b) the consent of the Indigenous governing body before the exercise of a statutory power of decision.

(2) A member authorized under subsection (1) to negotiate an agreement may enter into the agreement without further authorization from the Lieutenant Governor in Council unless the Lieutenant Governor in Council restricts the initial authorization to only the negotiation of the agreement.

(3) Within 5 days after the Lieutenant Governor in Council authorizes the member to negotiate an agreement under subsection (1), the member must make public a summary of the local governments and other persons the member intends to consult before or during the negotiation.

(4) An agreement entered into under subsection (1)

(a) must be published in the Gazette, and

(b) is not effective until the agreement is published in the Gazette or a later date specified in the agreement.

(5) For certainty, subsection (4) applies to an agreement that amends an agreement entered into under subsection (1).

The power to enter into an agreement with an Indigenous governing body granting that body either joint decision-making authority or a veto (through the withholding of consent) over the making of a decision is limited to the exercise of statutory powers of decision, which is defined in the *Judicial Review Procedure Act* as follows:

> "statutory power of decision" means a power or right conferred by an enactment to make a decision deciding or prescribing
>
> > (a) the legal rights, powers, privileges, immunities, duties or liabilities of a person, or
> >
> > (b) the eligibility of a person to receive, or to continue to receive, a benefit or licence, whether or not the person is legally entitled to it,
>
> and includes the powers of the Provincial Court.

In the context of local governments exercising their powers, it must be noted that, while every power of a local government is a statutory power, not every statutory power is a "statutory power of decision". As such, much of what local governments do could not be the subject of an agreement under sections 6 and 7 of the proposed *Declaration on the Rights of Indigenous Peoples Act*.

The foregoing being said, the scope of local government powers that could be the subject of an agreement under sections 6 and 7 of the proposed legislation is significant.

While an Indigenous governing body could not be given joint decision-making authority or a veto under sections 6 and 7 of the proposed legislation in relation to a local government's exercise of its land use powers generally (as the exercise of those powers do not always engage a statutory power of decision), such a body could be given authority in circumstances engaging land use planning issues such as the following (as these circumstances engage a statutory power of decision):

- Applications for amendments to official community plans and zoning bylaws;
- Applications for development variance permits, temporary use permits, and development permits; and
- Applications for subdivision approval.

Each of the foregoing relate to circumstances where local governments are obligated to consider applications for land use approvals and exercise discretion in whether to approve those applications and grant the sought after approvals (in the case of development permits, the discretion is limited to the determination of whether the application meets the objectives and guidelines applicable to the development permit for which the application was made). In this context, a joint decision-making authority or veto can be understood.

What remains unclear is how an agreement under sections 6 and 7 of the proposed legislation would operate in the context of the exercise of non-discretionary approvals by local governments (e.g., the approval of a building permit application, where all of the requirements of the applicable building bylaw have been met and the applicant is entitled to the issuance of the permit).

It should be noted that, under section 7(3) of the proposed legislation, a member of the Executive Council is not under any obligation to consult with affected local governments before entering into an agreement with an Indigenous governing body. Rather, the section simply requires that the member make public a summary of the local governments that the member intends to consult. In this regard, the member has a complete unfettered discretion as to consultation with affected local governments.

Assuming that Bill 41 is passed and the *Declaration on the Rights of Indigenous Peoples Act* is enacted, it will be interesting to see how the Provincial government addresses the independence of local governments in the context of its new obligations under the Act.

B. Passenger Transportation Regulation Amendments

After years of anticipation, new ride-hailing regulations took effect in British Columbia earlier this year.

Since September 3, 2019, the Passenger Transportation Board (the "PTB") has been accepting applications from companies for ride-hailing licences.

The PTB has the sole authority to regulate the supply and boundaries of vehicles providing ride-hailing services, and has recently determined that:

- There will be no initial limit on fleet size; and
- Drivers providing ride-hailing services will have larger operating areas than taxis, with the province divided into five regions.

Similar to taxis, drivers providing ride-hailing services will be required to obtain a commercial Class 4 licence. Beyond that requirement, companies providing ride-hailing services will be required to ensure that their drivers complete a criminal-record check and to verify that all vehicles used for ride-hailing have passed an inspection.

Additionally, ride-hailing companies and all drivers providing ride-hailing services must comply with all provincial regulations and any applicable municipal bylaws. In this regard, municipalities have the authority to require business licences for ride-hailing services and to establish conditions that must be met in order to obtain such a licence. With respect to the latter authority, municipalities have the ability to establish different business licence conditions for taxi fleets and ride-hailing fleets, if they wish. Business licence requirements may apply to ride-hailing companies, individual drivers who are operating as independent contractors, or

both. Municipalities also have the authority to regulate in relation to taxis and ride-hailing vehicles through street and traffic bylaws, and can establish different street and traffic regulations for taxis and ride-hailing vehicles. This might include designating drop-off and pick-up zones for ride-hailing use in busy areas, or permitting ride-hailing vehicles to use restricted lanes.

It should be noted, though, that municipalities are not permitted to:

- Prohibit online ride-hailing services from operating within their boundaries;
- Regulate the number of vehicles that provide ride-hailing services in their boundaries;
- Refuse to issue a business licence for the sole reason that the person holds a business licence issued by another municipality; or
- Lower the minimum rates below those set by the PTB, which are currently set on par with taxi service rates (meaning that even when ride-hailing services are up and running in British Columbia, those expecting to see a significant savings over taxi services, as may be the case in other jurisdictions where the same ride-hailing service is offered, might find themselves disappointed).

Any existing municipal bylaws that prohibit passenger directed vehicles or regulate the number of vehicles that may be operated within a municipality will therefore have no effect on ride-hailing companies.

Furthermore, the question of whether individual drivers for certain ride-hailing services are more appropriately classed as employees or independent contractors is currently the subject of litigation in several jurisdictions, the outcome of which may alter the state of affairs regarding municipalities' ability to require individual business licences.

The PTB has said that approvals for ride-hailing licences likely will not be forthcoming before late November, 2019, and it is anticipated that ride-hailing companies will begin operations by late December, 2019.

C. Cannabis Regulations Amendments

The Federal government legalized non-medical cannabis on October 17, 2018, and on October 17, 2019, the second phase of cannabis legalization came into effect as a result of amendments to the Cannabis Regulations. The Cannabis Regulations now permit the retail sale and commercial production of three additional classifications of cannabis products:

- Edible cannabis, which includes baked goods and beverages;
- Cannabis extracts, including liquids, tinctures, wax, hash, and cannabis oil; and,

- Cannabis topicals, including creams, balms, and other products applied to hair, skin, or nails.

While this new phase of cannabis legalization is now in effect, consumers are not yet able to purchase these products as federally licensed producers were required to submit a 60-day notice to Health Canada declaring their intent to sell a new cannabis product prior to any sales. As a result, the earliest that these new cannabis products could be available is late December, 2019.

On the enforcement front, most dispensaries which were operating prior to Federal legalization, and which have not yet been granted Provincial and municipal approvals to carry on business, have now been closed down, including those dispensaries in Vancouver which are attempting to appeal the decision from late 2018 that municipal restrictions on retail cannabis sales are not an infringement of the rights of medical users under the *Canadian Charter of Rights and Freedoms*. These dispensaries must challenge the Federal medical distribution scheme directly if they feel it is inadequate. Many British Columbia municipalities are in various stages of amending their zoning and licensing bylaws to permit dispensaries in certain locations within their jurisdictions, subject to regulatory limits intended to balance the public desire to purchase retail cannabis with the potential negative effects, such as increased law enforcement resource requirements.

The next frontier of unlawful dispensing appears to be in the realm of retail cannabis delivery services, which are expressly forbidden by Provincial legislation, but appear to be operating in several jurisdictions, potentially as an alternative to former unpermitted bricks-and-mortar stores which have been required to close. Although the Provincial Community Safety Unit should step in to assist in curbing these operations, municipalities may find, in certain circumstances, that direct enforcement steps are needed (e.g., where unlawful grow operations intended to supply these delivery services exist within municipal boundaries).

III. CASE LAW UPDATES

A. *Canadian Plastic Bag Association v. Victoria*

In *Canadian Plastic Bag Association v. Victoria*, the British Columbia Court of Appeal unanimously quashed a City of Victoria business regulation bylaw that prohibited all businesses within the City from providing single-use plastic shopping bags to customers. While the British Columbia Supreme Court had initially upheld the bylaw, affirming a local government's ability to regulate plastic bag use in 2018, the Court of Appeal disagreed.

The Court of Appeal ruled that any business regulation bylaws aimed at environmental protection require provincial approval, because environmental protection is listed as a provincial subject area in section 9(1) of the *Community Charter*.

Section 9 of the *Community Charter* provides, in part, as follows:

> Spheres of concurrent authority
>
> 9 (1) This section applies in relation to the following:
>
> (a) bylaws under section 8(3)(i) [public health];
>
> (b) bylaws under section 8(3)(j) [protection of the natural environment];
>
> (c) bylaws under section 8(3)(k) [animals] in relation to wildlife;
>
> (d) [Repealed 2015-2-47.]
>
> (e) bylaws under section 8(3)(m) [removal and deposit of soil and other material] that
>
> (i) prohibit soil removal, or
>
> (ii) prohibit the deposit of soil or other material, making reference to quality of the soil or material or to contamination.
>
> (2) For certainty, this section does not apply to
>
> (a) a bylaw under section 8 [fundamental powers] that is under a provision not referred to in subsection (1) or is in respect of a matter to which subsection (1) does not apply,
>
> (b) a bylaw that is authorized under a provision of this Act other than section 8, or
>
> (c) a bylaw that is authorized under another Act,
>
> even if the bylaw could have been made under an authority to which this section does apply.
>
> (3) Recognizing the Provincial interest in matters dealt with by bylaws referred to in subsection (1), a council may not adopt a bylaw to which this section applies unless the bylaw is
>
> (a) in accordance with a regulation under subsection (4),

> (b) in accordance with an agreement under subsection (5), or
>
> (c) approved by the minister responsible.

Notwithstanding the Court of Appeal's acknowledgement that the City had authority to regulate business under section 8(6) of the *Community Charter*, and that the City's plastic bag ban was a valid business regulation, the Court ultimately decided that the City's primary aim in enacting the ban was the protection of the environment. The Court held, on that basis, that the bylaw was invalid since the City had failed to obtain approval for the bylaw from the Minister of Environment and Climate Change Strategy. In the Reasons for Judgment of the Court, Madam Justice Newbury stated:

> [50] It is apparent that the Province takes an active part in regulating and managing not only the disposal of waste but environmental protection generally; and that in so doing, it collaborates with municipalities, businesses, and various other bodies and formulates various schemes, programs and agreements.
>
> [51] From this, one can understand that the Province might wish to have the right to approve, or withhold approval of, municipal bylaws relating to environmental protection in order to ensure that a patchwork of different municipal laws does not hamper provincial environmental programs.

In reaching that conclusion, the Court of Appeal applied an interpretation to section 9(2)(a) of the *Community Charter* that ignores the plain meaning of the words of that section and reads into them a "pith and substance" analysis (i.e., the exception to the requirement of ministerial approval only applies where the bylaw is not in "pith and substance" a bylaw enumerated in section 9(1)).

The City, on the other hand, believes that the bylaw falls squarely within a municipality's jurisdiction to regulate business practices, and that the plain meaning of the words in section 9(2)(a) of the *Community Charter* apply in the circumstances. The City has applied for leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

B. *Buechler v. Island Crisis Care Society*

In *Buechler v. Island Crisis Care Society*, the British Columbia Supreme Court considered whether the use of land in Nanaimo for a temporary supportive housing development, known as Newcastle Place, fell within the scope of crown immunity conferred by section 14(2) of the *Interpretation Act*. Section 14(2) provides as follows:

> Government bound by enactments; exception
>
> 14 (1) Unless it specifically provides otherwise, an enactment is binding on the government.

> (2) Despite subsection (1), an enactment that would bind or affect the government in the use or development of land, or in the planning, construction, alteration, servicing, maintenance or use of improvements, as defined in the *Assessment Act,* does not bind or affect the government.

In this case, residents neighbouring the temporary supportive housing development sought a declaration that the operator of the housing development, the Island Crisis Care Society ("ICCS"), was subject to the City's zoning regulations, and that the housing development was not permitted under those regulations. The residents took the position that ICCS could not avail itself of the protection afforded under section 14(2) of the *Interpretation Act* as ICCS was not a governmental body.

The Supreme Court disagreed with the residents, finding in favour of ICCS. The Court held that, while ICCS was an independent not-for-profit society that had contracted with BC Housing to provide day-to-day management of Newcastle Place, BC Housing was the user of the lands rather than ICCS. In this regard, the Court stated:

> [34] While there is no doubt that ICCS is running the operation of Newcastle Place, I am not persuaded that this precludes a finding that BC Housing has been and remains the driving force in the development and the use of the Lands since the Lands were purchased by [the Provincial Rental Housing Corporation] in October 2018.

As BC Housing is an agent of the Crown, it is protected by statutory Crown immunity when carrying out its public functions, the Court held that it was open to BC Housing to rely on section 14(2) of the *Interpretation Act* to bypass municipal zoning regulations and to erect and operate Newcastle Place as a temporary supportive housing development on the lands.

Further, the Court stated that, in any event, this is precisely the kind of case where Crown immunity may be extended to private parties carrying out certain activities on Crown land at the request of the Crown. Thus, even if ICCS were the sole user of the lands, the Court found it would still be protected under section 14(2) of the *Interpretation Act* from the requirement of compliance with Nanaimo's zoning regulations.

NOTES