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DRIPA AND LOCAL GOVERNMENTS

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I. INTRODUCTION

In November 2019, the provincial government adopted the *Declaration on the Rights of Indigenous People's Act* ("DRIPA"). Aimed at reconciling Indigenous rights with provincial legislation, DRIPA has potentially far-reaching effects, and has been the source of much speculation and debate as to its impact on the various levels of government including local government.

This paper will review some of the more significant aspects of DRIPA and identify the ways in which it has, and might, impact local governments. Reviewing DRIPA will necessarily involve covering the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), on which DRIPA is based and which is attached to the legislation.

This paper will also offer some modest commentary regarding how the *Community Charter* and *Local Government Act* may be brought into conformity with UNDRIP and DRIPA. Our purpose is to give local governments some sense as to how this legislation may change their roles and practices moving forward.

Several court cases have confirmed that local governments are generally not obliged to fulfill the Crown's duty to consult and accommodate under the *Constitution Act.* Instead, the obligations of local governments to Indigenous peoples are rooted in statutory obligations. With this in mind, DRIPA will be important for local governments, because its purpose is to bring provincial law, including enabling statutes such as the *Community Charter* and *Local Government Act,* into alignment with the commitments and obligations set out in UNDRIP. This is very likely to alter local governments' statutory obligation to Indigenous peoples.

II. UNDRIP PRIMER

UNDRIP is central in British Columbia's reconciliation efforts with Indigenous peoples. It was adopted in 2007 by the United Nations General Assembly, and recognizes and affirms the rights of Indigenous peoples, including the right to self-governance, as well as identifying historical marginalization and encouraging states to take steps towards complying with and implementing their obligations towards Indigenous peoples. UNDRIP is a relatively short document – it consists of a brief preamble followed by 46 Articles outlining Indigenous rights. Despite its brevity, UNDRIP's scope is exceptionally broad: it engages with the economic, fiscal, social, environmental, legal, political, international, and, in particular, territorial concerns of Indigenous peoples. While UNDRIP's vision and aspirations are far-reaching, many of the Articles within UNDRIP are phrased in general terms and broad language. As a result, there continues to be uncertainty regarding the specific obligations and objectives that can be distilled from UNDRIP.

For example, Article 18 states that "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." How would such general language be shaped into meaningful outcomes in local government legislation? Time will tell.

A further example of this is at Article 19 which reads "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 19 is significant, because it creates a duty for the state to consult and cooperate with Indigenous groups on the basis of free, prior and informed consent. Again, time will tell how such concepts may be shaped into local government decision-making. It is clear that these Articles, and others, within UNDRIP leave a great deal of latitude for Indigenous groups and government to determine what exactly UNDRIP means in practice.[1]

As a United Nations resolution, UNDRIP was not immediately binding law in Canada. Provincial and federal governments have viewed it as a framework or point of reference for facilitating reconciliation, but did not initially formally commit to implementing it as statutory law. Instead, until recently UNDRIP has played an important role in galvanizing dialogue around Indigenous issues and placing expectations upon federal and provincial governments to proactively address these issues. In November, 2019, British Columbia took up this challenge when it adopted DRIPA. Canada also adopted similar legislation in June, 2021.

III. DRIPA PRIMER

DRIPA is remarkably short. It totals 10 sections and even with the inclusion of UNDRIP itself is only 11 pages in length. For our purposes, DRIPA has three key features:

- An affirmation of UNDRIP*'s* application and a mandate that the provincial government bring its laws into alignment with UNDRIP (sections 2 and 3);
- A requirement that the Province create and implement an action plan and annual reporting (sections 4 and 5); and
- Permits the Province to enter into decision-making agreements with Indigenous governing bodies in the exercise of statutory authority (sections 6 and 7).

[1] *Ross River Dena Council v. Canada,* 2017 YKSC 59; *Snuneymuxw First Nation v. Board of Education – School District #68,* 2014 BCSC 1173 ("*Snuneymuxw*"). Courts on multiple occasions have rejected the notion that UNDRIP is binding or of legal effect. In *Snuneymuxw,* Chief Justice Hinkson noted that UNDRIP is "aspirational only", and that it is "too general in nature to provide real guidance to courts" (para 59). While UNDRIP is necessarily of some significance in that DRIPA is intended to affirm and implement it in British Columbia, the courts have strictly circumscribed the impact that it has on existing legislation.

A. UNDRIP Alignment

In mandating that the provincial government bring itself into conformity with the UN Declaration, DRIPA states as follows: "in consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with UNDRIP". To date, there have been a handful of significant legislative reforms to carry out this mandate. We will mention a few of these: the *Judicial Review Procedure Act* ("JRPA"), the *Interpretation Act,* and the upcoming *Emergency and Disaster Management Act* ("EDMA").

The JRPA is legislation that governs the judicial review of actions by statutory decision-makers, including the provincial and local governments. The key change is in section 22, which allows for decisions of an Indigenous governing body concerning whether to give consent under section 6 and 7 decision-making agreements to be judicially reviewed in BC courts. For local governments, this amendment would not seem to have a direct impact but as noted below, if section 6 and 7 decision-making agreements proliferate, local governments may need to rely upon this provision to ensure the court's engagement is concerned with how a decision-making agreement was implemented and affects its interests. At this time, as we will note below, how section 6 and 7 agreements will affect local governments is not clear.

Importantly, the *Interpretation Act* was also amended through the addition of section 8.1. Section 8.1(3) provides that "every Act and regulation must be construed as being consistent with the Declaration." While this change may seem minor, its implications may not be, and as will be seen below this section has already been the subject of some recent litigation analyzing DRIPA.

Last, we should mention the recently introduced new emergency disaster management legislation. The EDMA is significant because it represents a drastic overhaul of the ways in which disaster management decision-making will occur in British Columbia. It requires various decision-makers, including local governments, to consult and cooperate with, and in some cases obtain the consent of, Indigenous governing bodies in developing and executing emergency disaster management. We discuss this legislation in more detail below, as it provides a helpful example for what changes may be coming to other local government focussed legislation such as the *Community Charter* and *Local Government Act.*

B. Early Court Commentary

Initially, there were some commentators that suggested that when adopted DRIPA automatically put UNDRIP in place as binding law in British Columbia, and rendered all provincial law subject to UNDRIP's requirements. Early and recent caselaw has confirmed that DRIPA *does not* have any such effect.

The first opportunity for the courts to directly consider and apply DRIPA was *Gitxaala v. British Columbia (Chief Gold Commissioner)* ("*Gitxaala*"), which was decided in September 2023. In *Gitxaala,* the Gitxaala and Ehattesaht Nations challenged the province's regime for staking

mineral exploration claims under the *Mineral Tenure Act.* Under that Act, miners could register a claim over unclaimed Crown land, which would entitle them to certain exploratory rights. The process for staking an exploration claim is extremely simple: any person with a "free miner" certificate was permitted to register a claim online, at which point they were entitled to explore and dig up the area to search for minerals. If minerals were found, then the miners were required to obtain additional permits, at which time the Crown would engage with its duty to consult with any First Nations whose traditional lands were affected by the mining. The provincial Crown did not engage in any consultation when exploration claims were initially registered, which meant that miners were entitled to enter upon and dig up lands that were potentially subject to Aboriginal title claims with no consultation or accommodation from the Crown.

The Nations sought two declarations from the Court regarding the exploration claim registration process: 1) that it breaches the Crown's duty to consult; and 2) that it is inconsistent with UNDRIP and DRIPA. The Nations argued that DRIPA creates certain rights for Indigenous peoples, and that the Province's administration of mineral exploration under the *Mineral Tenure Act* was inconsistent with those rights. This argument was predicated on the contents of UNDRIP itself, certain sections of DRIPA, and in particular the impact of section 8.1 of the *Interpretation Act*. In particular, the Nations pointed to the following provisions in DRIPA:

> **Purposes of Act**
>
> 2 The purposes of this Act are as follows:
>
> (a) to affirm the application of the Declaration [UNDRIP] 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.
>
> **Measures to align laws with Declaration**
>
> 3 In consultation and cooperation with Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

The Nations focused on sections 2(a) and 3, suggesting that the former rendered UNDRIP a law of full force and effect, and that the latter created justiciable rights for Indigenous peoples in British Columbia.

The Court found it significant that s. 2(a) was a purpose statement. As such, s. 2(a) could be used to guide the interpretation of DRIPA, but was not a "rights-creating, substantive provision." The Court found it unlikely that the provincial legislature would have introduced legislation with such a far-reaching and significant impact without using more precise and

rigorous language. As noted above, the language of UNDRIP is extraordinarily broad, and in many cases vague, and the court was unwilling to accept that the provincial government would have set such ill-defined expectations and obligations. The Court concluded that DRIPA does not subject existing legislation to UNDRIP – it requires that the province take steps towards bringing its laws into alignment with UNDRIP.

As for s. 3, the Nations submitted that under its terms, the provincial government was obliged to amend its laws in the event that they are found to be inconsistent with UNDRIP – in effect, the Nations sought to interpret s. 3 as a positive duty on the province to engage in legislative reform where existing legislation was inconsistent with UNDRIP.

The Court rejected these arguments. While section 3 clearly raises the question of whether provincial laws are consistent with UNDRIP, the Court stated that it "was not intended to invoke the courts to adjudicate every instance where the laws of BC may be inconsistent with UNDRIP." Rather, section 3 is an ongoing process to which the provincial government has committed itself. While undergoing that process does require consultation and cooperation with Indigenous peoples, and failing to engage in that consultation and cooperation could be considered a breach of section 3, DRIPA does not subject all provincial law to a judicial review for consistency with UNDRIP.

Gitxaala confirms, for now, that contrary to some early commentary as to the impact of DRIPA on provincial legislation, UNDRIP has not been automatically implemented into British Columbia's domestic law, nor does DRIPA create justiciable rights. Rather, it "contemplates a process wherein the province, 'in consultation and cooperation with the Indigenous peoples in British Columbia' will prepare, and then carry out, an action plan to address the objectives of UNDRIP."[2] As mandated by section 8.1 of the *Interpretation Act,* DRIPA and UNDRIP are interpretive aids that assist the reading of legislation such as the *Mineral Tenure Act,* but they do not automatically amend or alter the terms of provincial legislation.

In a second decision that was issued just three days after *Gitxaala*, *Kits Point Residents Association v. Vancouver (City)* ("*Kits Point*"), the courts have confirmed that section 8.1 of the *Interpretation Act* can impact the judicial review of local government actions, even without amendments to the *Community Charter* and *Local Government Act.* The residents of Kits Point sought to challenge a decision made by the City of Vancouver to authorize and execute a service agreement with the Squamish Nation. The residents were doing so because the agreement would support the Squamish Nation in building a large residential and commercial development on reserve land located on the south side of False Creek.

The City's decision to enter into the servicing agreement was challenged on two grounds: that it was made in a closed meeting, and that it was made without consulting neighbouring landowners. The residents argued that Council's closure of the meeting did not fall under any of the enumerated grounds for closing a meeting under section 165(1) of the *Vancouver Charter.*

[2] *Gitxaala,* para 466.

Council had closed the meeting on the ground it was discussing a proposed activity, work or facility that could reasonably be expected to harm the interests of the City if said discussion was held in public (the equivalent to s. 90(1)(k) of the *Community Charter*). The residents argued that the phrase "interests of the City" was exclusive to residents and communities of Vancouver, and that the discussions could not reasonably have harmed those interests.

In reaching its decision, the Court considered section 8.1(3) of the *Interpretation Act,* and noted that in light of that section, "the relevant statutory provisions of the *Vancouver Charter* must be construed in a manner that upholds the rights of Indigenous peoples and in a manner that is consistent with UNDRIP." The Court found that to narrowly interpret the meaning of "interests of the City" in the manner sought by the residents would be inconsistent with section 8.1(3), and that the phrase encompasses "a variety of considerations including the reputation of the City, fiscal issues, and the consideration to be given to a wide variety of stakeholders, including the relationship between the City and the Nation."[3]

As such, the residents were unsuccessful in challenging the City's decision. *Kits Point* demonstrates that the changes that have been made to the *Interpretation Act* can impact upon how courts will look at a local government's enabling statutes, even prior to any specific amendment to those statutes.

C. BC Action Plan

Section 4 of DRIPA requires the province to prepare and implement with the cooperation of Indigenous governing bodies an Action Plant to implement UNDRIP. BC's first Action Plan was released in March, 2022 and is a five-year (2022-2027) roadmap to implement UNDRIP into BC law.[4] The Action Plan is broad in scope (94 items) but with a focus on four specific categories of actions:

- Self-determination and inherent rights of self government;
- Title and rights of Indigenous peoples;
- Ending indigenous specific racism and discrimination; and
- Social, cultural and economic well-being.

[3] *Kits Point,* para 182.
[4] British Columbia, *Declaration on the Rights of Indigenous Peoples Act Action Plan, 2022-2027* (March 30, 2022): https://www2.gov.bc.ca/assets/gov/government/ministries-organizations/ministries/indigenous-relations-reconciliation/declaration_act_action_plan.pdf (accessed November 6, 2023).

Of these 94 items many will have indirect impacts on local government. There are, however, very few action items that directly involve or invoke local government jurisdiction. The Action Plan includes the following:

> 1.11: Support inclusive regional governance by advancing First Nations participation in regional district boards.
>
> 3.1: Develop essential training in partnership with Indigenous organizations, and deliver to the B.C. public service, public institutions and corporations that aims to build foundational understanding and competence about the history and rights of Indigenous Peoples, treaty process, rights and title, the UN Declaration, the B.C. Declaration Act, the dynamics of proper respectful relations, Indigenous-specific racism, and meaningful reconciliation. (*Public Service Agency, Ministry of Finance – Crown Agencies and Board Resourcing Office*)
>
> 4.27: Review the principles and processes that guide the naming of municipalities and regional districts, and evolve practices to foster reconciliation in local processes (*Ministry of Municipal Affairs*)

From these specific action items, it is clear that the Province's first Action Plan does not anticipate immediate changes to local government jurisdiction and decision-making. *Gitxaala* confirms that presently, local governments land use planning powers, for example, are not subject to UNDRIP. Having said this, as noted above, many other action items indirectly will affect local governments and not in an insignificant way.

A good example of this can be seen in the EDMA, which is specifically referred to in action item 1.10 in the Action Plan.[5] The EDMA represents a major overhaul and modernization of the Province's management and response to emergencies. It greatly expands the kinds of events that could constitute an emergency, including natural disasters, terrorist attacks, and pandemics, and it more clearly establishes the roles, responsibilities, and powers that are held by various decision-makers and stakeholders during an emergency.

[5] For more information regarding the EDMA, the provincial government has published papers related to public engagement and the policy concepts that it relies upon, and regularly updates where the bill currently stands. You can access this information and follow the bill's progress here: https://www2.gov.bc.ca/gov/content/safety/emergency-management/emergency-management/legislation-and-regulations/modernizing-epa (accessed November 6, 2023).

Of course, local governments play an important role in the new emergency management framework. For example, they are required to prepare comprehensive risk assessments within their jurisdiction and develop emergency management plans that set out roles, measures, and procedures to be followed in case of any given emergency. However, the EDMA also expressly requires local governments to consult and cooperate with Indigenous governing bodies whose traditional territory is within their jurisdiction when developing risk assessments and emergency plans, as well as to consider comments from those governing bodies and the rights of Indigenous peoples within those areas.

There are also requirements to coordinate with Indigenous governing bodies in implementing emergency management plans. Finally, in some cases it appears that emergency powers may not be exercised within an Indigenous governing body's traditional territory without their consent. These are significant changes to British Columbia's disaster management regime, and demonstrate the commitment from the province to ensure that Indigenous governing bodies have a clear role in decisions that impact on Indigenous interests.

D. Section 6 and 7 Decision-Making Agreements

DRIPA also permits the provincial government to enter into agreements with Indigenous governing bodies. Set out under sections 6 and 7, these agreements allow the Province or other statutory decision-maker (including local governments) to exercise statutory powers jointly with Indigenous governing bodies. DRIPA expressly provides that these agreements may require the consent of the Indigenous governing body in question before a statutory power is exercised.

Section 7(3) contemplates that these agreements will involve local government interests. It requires the province to provide a summary of local governments and other persons that it intends to consult before or during the negotiations for a given agreement. While this does not actually require consultation with local governments, they are specifically mentioned in the provision, so it seems that DRIPA anticipates local governments will be parties to these decision-making agreements.

As of yet, there are only a handful of decision-making agreements that have been made under DRIPA.[6] These agreements are varying in length, complexity, and subject matter – for example, the first one entered into was with the Tahltan Nation and related to a specific gold and silver mining project. The agreement states that the Tahltan Nation will conduct its own assessment of the project to determine whether it will grant its consent, and that the Tahltan Nation's consent is required before the project may go forward.

[6] In fact, on the provincial website, only three orders permitting the negotiation of a s. 7 agreement have been issued at the time of writing: https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples/making-decisions-together (accessed November 6, 2023).

We do not yet know how local governments will play a role in these agreements. It is possible that their decision-making powers could be made subject to the consent of Indigenous governing bodies, particularly when those decisions engage with traditional territories or other Indigenous interests. The EDMA, for example, clearly anticipates some agreements that may be made in relation to the exercise of emergency powers, such as evacuations, within traditional territories. The simple fact is that local governments and their status under a decision-making agreement remains to be seen.

IV. FUTURE CHANGES

The EDMA gives an indication of how the Action Plan will be rolled out to bring provincial legislation into conformity with the principles set out in DRIPA. For the moment, local governments' enabling legislation, the *Community Charter* and the *Local Government Act* has not been amended, and it may be years before any such amendments are even contemplated. However, there will be opportunities within the *Local Government Act* and *Community Charter* to advance the involvement of Indigenous governing bodies in local government decision-making. Consider these three examples below.

A. Regional Growth Strategies ("RGSs")

RGSs are the broadest planning tool available to local governments. They are an optional document, and are prepared and adopted by regional districts. They are also expressly forward-looking, and must anticipate at least 20 years of growth and change for the area that they cover. Boards are required to account for social, economic, and environmental objectives for the region, including population growth, housing, transportation, and service needs, and economic developments. Further, there are processes in place for ensuring that municipalities and neighbouring regional districts approve of an RGS before it is adopted.

At present, boards are required under s. 434(2)(c) of the *Local Government Act* to provide opportunities for early and ongoing consultation with Indigenous governing bodies in adopting an RGS. Given the precedent set by the EDMA, it seems possible that such a requirement could be expanded to include deeper involvement of Indigenous governing bodies with traditional territory within regional district jurisdiction.

Depending on the extent to which the Province intends to give Indigenous governing bodies influence over RGSs, it is feasible that in future legislation, there will be provisions ensuring that those bodies approve of an RGS before it is adopted. While there are already dispute resolution processes in place where full acceptance is not obtained by a regional district, could Indigenous governing bodies be given the authority to trigger those processes in future legislation?

B. OCPs and Development Permit Areas ("DPAs")

OCPs are also optional planning tools, but there is new legislation on the way that will render them mandatory.[7] They generally cover a smaller geographic area than an RGS, and they can also be adopted by municipal councils in addition to regional boards. Within an OCP, a local government may identify development permit areas ("DPAs"), within which an individual seeking to subdivide or construct upon the land is required to obtain a development permit for certain purposes before doing so.

Under s. 475 of the *Local Government Act*, a local government must consider whether consultation is required with First Nations (along with other specified bodies) when developing an official community plan ("OCP"). Notably, this does not actually require consultation – local governments need only *consider* whether consultation is required when creating an OCP. Additionally, there are no provisions for designating DPAs based upon whether the area in question is the claimed traditional territory of an Indigenous governing body, or whether development within the area would otherwise engage with the rights of Indigenous peoples.

In bringing the *Local Government Act* in line with UNDRIP, it is feasible that the provincial government could impose additional consultation requirements for local governments adopting OCPs. Additionally, new DPA requirements could serve as a tool for facilitating engagement between developers, local governments, and Indigenous governing bodies. By requiring consultation as part of the development permitting process in areas that engage Indigenous peoples' rights, local governments can offer protection to those areas while sharing engagement duties with those who wish to develop land within those areas.

C. Special Closed Meetings

One way to facilitate increased engagement and coordination between Indigenous governing bodies and local governments would be to expand the grounds on which a meeting may be closed to the public. For example, it could be that wherever the subject matter of a meeting engages with negotiations with an Indigenous governing body (as was the case in *Kits Point*), a council or board has the discretion to close that portion of the meeting. It would be important to tailor these grounds to encourage open meetings wherever possible, but providing the option to close meetings could present opportunities for more frank discussions during the consultation process.

[7] Bill 44 – *2023 Housing Statutes (Residential Development) Amendment Act, 2023*. This bill was given first reading on November 1, 2023, and in its current state amends a number of the requirements relating to OCPs, particularly in relation to housing. It also requires that local governments use their zoning authority to provide for minimum housing supply targets, which could feasibly engage Indigenous territorial claims down the line.

V. CONCLUSION

DRIPA has been in effect for several years now, and we are just beginning to see the effects that it may have on local governments. *Gitxaala* makes it clear, for now, that while DRIPA has not had the immediate impact that was anticipated by some (i.e., subjecting all provincial legislation to UNDRIP), it is already changing the way that statutes are interpreted through the amendments to the *Interpretation Act,* and it will likely have an impact on new legislation, as evidenced by the EDMA.

For the moment, the *Community Charter* and *Local Government Act* remain unchanged, but the *Kits Point* case demonstrates that courts will begin to interpret decisions made under this legislation with UNDRIP in mind. While in *Kits Point,* this empowered the City of Vancouver to close a meeting while considering a servicing agreement with the Squamish Nation as a "stakeholder", section 8.1(3) of the *Interpretation Act* may see judicial reviews succeed on the basis that local governments have failed to consider Indigenous interests when making a decision.

However, DRIPA's full impact on local governments is yet to come. It is likely that our enabling statutes will be revised significantly in order to bring compliance with DRIPA, and any such amendments will introduce new stakeholders, decision-makers, and interests into the decision-making process. We anticipate that these changes will come at the larger-scale land-use planning stages, but this remains entirely uncertain. For the moment, the EDMA offers a strongest indication of how Indigenous governing bodies will be given a more prominent decision-making role. While the EDMA's practical effect remains to be seen and will depend in large part on regulations that have not yet been published, it appears to envision local governments playing a role in consulting and coordinating with, and obtaining the consent of, Indigenous governing bodies when Indigenous peoples and territories are impacted by a decision.

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