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RECONCILIATION: WHERE DO WE GO FROM HERE?

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Guy Patterson and Nick Falzon

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I. INTRODUCTION

Reconciliation as a matter of Canadian constitutional law begins with a basic historical fact, which the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 summarized as follows: "[p]ut simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered". As courts have consistently recognized, not only were aboriginal people already here when settlers arrived, they were "living in organized societies with their own distinctive ways of life"[1].

Pre-existing organized societies means pre-existing legal orders[2]. Yet the assertion of Crown sovereignty assumes a legal if not a physical vacuum. So how can the assertion of Crown be reconciled with the historical fact of pre-existing organized societies, with their own legal orders? Canada's constitution responds with section 35. Section 35 does not recognize indigenous legal orders or self-government; instead, it recognizes and affirms aboriginal and treaty rights.

Unlike the Charter of Rights, which also operates as a constraint government power, section 35 doesn't say anything about the content or nature of the rights that it recognizes and affirms. This means Canada's Aboriginal peoples have been obliged to prove the existence of those rights, typically through protracted litigation, on a case-by-case basis. Through some of those cases courts have recognized an aboriginal right to the land itself, also known as aboriginal title.

Last year we wrote about *Cowichan Tribes v. Canada (Attorney General)*, 2025 BCSC 1490 [*Cowichan Tribes*], the first case in which any Canadian court had declared aboriginal title over land for which fee simple title had been granted and registered in the land title office. That case hasn't done much to advance reconciliation, at least in part because it left unanswered the practical question of how underlying aboriginal title, once proven, can be reconciled with the indefeasibility of fee simple title said to result from registration under the *Land Title Act*.

If reconciliation means something other than a declaration of aboriginal title over fee simple land, what does it mean? In *Haida Nation* the Court said reconciliation means the Crown must act honourably, as a fiduciary, and "cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued". Honourable conduct on the part of the Crown lay at the heart of the Court's approach to reconciliation: "[n]othing less is required if we are to achieve the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."

The BC Court of Appeal has since decided local governments do not owe a constitutional duty to consult under *Haida*, but in the case of an official community plan requiring provincial

[1] R. v. Sappier; R. v. Gray, 2006 SCC 54.
[2] Finch, Lance "The Duty to Learn: Taking account of indigenous legal orders in practice".

approval, the potential impact of the plan on aboriginal interests triggered the province's duty, which it had not discharged despite the local government's valiant efforts. Beyond section 35 and the *Haida* duty to consult, our provincial government made its own grand gesture toward reconciliation when it enacted the Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c. 44 (DRIPA), which created a statutory framework for discharging the province's constitutional duty, and also gave special, if somewhat nebulous, legal status to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP and DRIPA have attracted renewed attention in recent months, following the BC Court of Appeal's decision in *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430 (Gitxaala). Apparently to the surprise of some lawmakers, the Court said DRIPA incorporated UNDRIP "into the positive law of British Columbia with immediate legal effect".

The balance of this paper reviews the context for, and some historical antecedents to, DRIPA, and attempts to identify what if anything it might mean for local governments.

II. ABORIGINAL RIGHTS AND TITLE

To understand UNDRIP and DRIPA, some further discussion of section 35 of the *Constitution Act* is warranted. Section 35 of the *Constitution Act, 1982* states:

> Recognition of existing aboriginal and treaty rights
> 35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Courts have found that Aboriginal rights include things like hunting and fishing, which are uses to which land may be put, but also the concept of title, which was at the centre of the *Cowichan Tribes* case. Section 35 provides constitutional protection for the activities, uses, and ownership rights that pre-existed the Crown's assertion of sovereignty. Along with Aboriginal rights, section 35 protects treaty rights. Treaty rights come from "agreement[s] entered into by the Sovereign and a group of her subjects with the intention to create special legal relations between them" *(Shot Both Sides v. Canada,* 2024 SCC 12 at para. 46). After the enactment of section 35, a First Nation may have a constitutional claim for breach of a treaty entered into between the Nation and the Crown.

III. UNDRIP

Unlike section 35, UNDRIP is not a part of Canada's Constitution. It is an international human rights instrument developed and adopted by the United Nations General Assembly in 2007. The Court in *Gitxaala* provided the following commentary:

> [2] *UNDRIP* is an international declaration of the individual and collective rights of the world's Indigenous peoples. Adopted by the United Nations General Assembly in 2007, it identifies "the urgent need to respect and promote the inherent rights of indigenous peoples" (preamble) and provides that the rights it recognizes "constitute the minimum standards for the survival, dignity and well-

> being of indigenous peoples of the world" (art. 43). Among other things, *UNDRIP* affirms that Indigenous peoples have the right to self-determination (art. 3), the right to self-government (art. 4), and rights to own, use and control their traditional lands, territories and resources (arts. 26, 27, 29, 32). It also encourages states to implement "all their obligations as they apply to indigenous peoples under international instruments" (preamble) and provides that states shall consult and cooperate in good faith with Indigenous peoples "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources" (art. 32(2)).
>
> [3] Canada initially voted against the General Assembly's adoption of *UNDRIP*. However, over time its position shifted, and in 2016 the federal government endorsed *UNDRIP* without qualification…

Canada's original reluctance to sign UNDRIP was in part due to the constitutional protection of Aboriginal and treaty rights offered by section 35. Other excuses included:

> …concerns with various provisions of the Declaration, including provisions dealing with lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of Indigenous peoples, States and third parties. These concerns are well known and remain…[3]

Canada ultimately changed its tune:

> … we have since listened to Aboriginal leaders who have urged Canada to endorse the Declaration and we have also learned from the experience of other countries. We are now confident that Canada can interpret the principles expressed in the Declaration in a manner that is consistent with our Constitution and legal framework.[4]

Canada's statement on the adoption of UNDRIP called the document "aspirational" and "non-legally binding".[5] That characterization is borne out by the following Articles of UNDRIP, among others:

> Article 11
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> …
>
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to

[3] Canadian Statement on Support for the United Nations Declaration [http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp]
[4] Ibid.
[5] Ibid.

> their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
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> 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 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.
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> 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.
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> Article 32
> …
> 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.

Even if Canada was right to characterize UNDRIP as aspirational and non-binding, concerns about the consequences of signing were perhaps understandable: while courts were wrestling with the promise of section 35 – reconciling the pre-existence of self-governing aboriginal societies with the assertion of Crown sovereignty – the government was wondering about how to reconcile the promise of UNDRIP with Canada's pre-existing constitutional framework.

Central to Canada's UNDRIP hesitation was the role of "consent". UNDRIP uses the terms "free and informed consent" and "free, prior and informed consent", and requires consent of Indigenous people before governments make decisions that affect them. How would UNDRIP's consent model interact with section 35, which by than had been interpreted as imposing on the Crown a "duty to consult" and perhaps accommodate before making any decision that may affect a constitutionally protected but unproven Aboriginal right?

The Court in *Haida* said the duty to consult might require consent in some cases, but that requirement was never assumed or automatic under *Haida*:

> 24 The Court's seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.

Article 19 of UNDRIP can and perhaps can only be interpreted as requiring First Nations' consent before any government makes a decision that might affect them. That might be the right thing to do in a particular case, but it has never been embraced as a legal requirement under Canada's constitution and goes much further than any Canadian court had ever gone, at least until *Gitxaala* (in which the Court considered the contours of the long-standing constitutional duty to consult, as well as a much newer possibility: consultation as a made-in-British Columbia statutory duty).

IV. DRIPA

A. *What is (was?) DRIPA?*

By the time BC's Chief Gold Commissioner issued certain mineral exploration rights to land within the traditional territory of the Gitxaala and Ehattesaht Nations, BC had become the first Canadian province to incorporate UNDRIP into its laws. It did this by adopting DRIPA, which has two key components. First, it includes a promise by the province to align all of its laws with UNDRIP (section 3). The promise is backed up with an action plan (section 3) and an annual report (section 5). Second, it gives government the power to enter into decision-making agreements with First Nations, relating to the exercise of a statutory power of decision. To this end DRIPA contemplates decision-making either on a joint basis, or requiring the consent of the First Nation before the government makes a decision (sections 6 and 7).

Section 2 of DRIPA provides a broad purpose statement:

> Purposes of Act
> 2 The purposes of this 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.

While multiple laws were amended in support of the project of aligning British Columbia's laws with UNDRIP, one important example is section 8.1 of the *Interpretation Act*:

> Section 35 of *Constitution Act, 1982* and Declaration
>
> 8.1 (1) In this section:
> "Declaration" has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;
> "Indigenous peoples" has the same meaning as in the *Declaration on the Rights of Indigenous Peoples Act*;
> "regulation" has the same meaning as in the *Regulations Act*.
> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.
> (3) Every Act and regulation must be construed as being consistent with the Declaration.

Leaving aside the incremental legislative changes contemplated by sections 2-5 of DRIPA, as well as the *Interpretation Act* amendments, before *Gitxaala* it was widely assumed decision-making agreements under sections 6 and 7 of DRIPA were the centrepiece of the new legislation. These sections create a statutory framework for meeting and potentially exceeding the province's constitutional "duty to consult" obligations, through shared or consent-based decision-making. DRIPA agreements under ss. 6 and 7 could avoid the kinds of protracted litigation plaguing resource development and other projects, sidestepping arguments about the strength of unproven section 35 claims and the depth of consultation required in the meantime.[6] In some but not all cases, regardless of any constitutional duty, sections 6 and 7 of DRIPA create a legal basis for the otherwise "aspirational" free, prior and informed consent features of UNDRIP.

The Court in *Gitxaala* discovered a third and perhaps unanticipated aspect to DRIPA – a role for the Court in adjudicating claims that provincial legislation is inconsistent with UNDRIP.

V. INTERPLAY BETWEEN THE CONSTITUTION AND UNDRIP/DRIPA

A. *Gitxaala*

The *Gitxaala* decision was a judicial review of mineral tenure claims registered using an automated system with no consultation of potentially affected First Nations under the *Mineral Tenure Act*. The Nations said the Crown owed and had failed to discharge a duty to consult in relation to the registration of those claims. In the BC Supreme Court the Province said it owed no such duty, but gave up on that argument in the Court of Appeal.

[6] There are currently three active agreements co-decision-making agreements signed pursuant to the authority provided by sections 6 and 7 of DRIPA, all dealing with natural resource projects: The 'Namgis First Nation – British Columbia Decision-making Agreement (OIC 2025/596); Declaration Act Consent Decision-making Agreement for Red Chris Porphyry Copper-Gold Mine Project (OIC 2023/600); and the Declaration Act Consent Decision-Making Agreement for Eskay Creek Project (OIC 2022/307).

The fight in the Court of Appeal was over the lower court's findings on the legal role and effect of DRIPA. Two of three Court of Appeal judges decided that whether UNDRIP itself was merely aspirational and not legally binding, DRIPA went much further. DRIPA, the Court held, doesn't just require government to bring laws into alignment with UNDRIP and authorize decision-making agreements. It invites courts to assess existing provincial laws for consistency with UNDRIP itself, because "the Legislature has chosen to incorporate a complex, multi-faceted international instrument into domestic legislation." Accepting its own invitation, the Court considered whether the *Mineral Tenure Act* was consistent with UNDRIP. Unsurprisingly, the Court decided the automated system for registering claims without consultation, let alone consent, was not consistent with UNDRIP.

The Supreme Court of Canada has agreed to hear an appeal in *Gitxaala*, and of course the new provincial government has indicated its intention to repeal DRIPA altogether, but if nothing else the Court of Appeal's decision is a reminder that a legislator's intentions, no matter how emphatically stated, cannot defeat what judges think the actual words of a statute say. Before DRIPA received Royal Assent the Minister of Indigenous Relations said the proposed legislation gave the government a "path forward" for reconciliation, but did not give UNDRIP "legal force and effect".

In short, despite various statements to the contrary by the architects of DRIPA before its enactment, the Court of Appeal said DRIPA did have legal force and effect: it created an immediate "justiciable" issue as to whether provincial legislation is consistent with UNDRIP. The legislation in issue in *Gitxaala* was an easy target, but until the case is overturned or the legislation repealed, DRIPA appears to allow any party to attack any provincial law (including, just for example, the *Community Charter* or *Local Government Act*), on the basis of inconsistency with UNDRIP. It also seems to invite UNDRIP consistency claims about decisions made pursuant to provincial statutes, even if the statute itself is not inconsistent with UNDRIP aspirations.

B. *Kebaowek*

Short of intervention by the Supreme Court of Canada or the Legislature, the Federal Court of Appeal's decision in *Kebaowek* might take at least some of the wind out of *Gitxaala*'s sails. *Kebaowek* considered federal legislation that is similar but not identical to DRIPA.[7] The case arose from the Canadian Nuclear Safety Commission's decision to authorize a nuclear waste disposal facility. The question was whether, in discharging its duty to consult, the failure of the Commission to consider UNDRIP, through the federal *United Nations Declaration on the Rights of Indigenous Peoples Act* (UNDA), and its failure to obtain free-prior and informed consent, rendered the approval decision unlawful.

The Court noted the importance of section 8.1 of the *Interpretation Act* in *Gitxaala*, finding that in part because there was no federal equivalent, UNDA did not immediately implement the

[7] United Nation Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 (UNDA)

articles of UNDRIP into Canadian law. Accordingly, failure to apply UNDRIP and obtain free, prior and informed consent did not render the Commission's decision unlawful.

VI. TAKEAWAYS

Reconciliation does not begin, or end, with section 35, or UNDRIP, or DRIPA. For local governments hoping to find their own path forward, it might not matter what the province does with DRIPA or what the Supreme Court of Canada does with *Gitxaala*. The historical record, including the purported assertion of Crown sovereignty over existing organized societies, with their own legal orders, cannot be erased. As the Court said in *Delgamuukw*, "let us face it, we are all here to stay". And despite *Neskonlith* local governments have always had a role to play. In the absence of any specific legal framework, that role has never been clear, and the recent cases and legislation might just muddy the waters even further.

While DRIPA is in force, and probably more importantly until section 8.1 of the *Interpretation Act* is repealed, the landscape for many local government decisions has become more complicated. As creatures of statute, local governments must interpret statutes when making decisions.

Statutory interpretation is never easy, especially for an elected body of community members with no specific legal training. Both DRIPA and section 8.1 place reconciliation, and UNDRIP, at the heart of the interpretive exercise, but as *Gitxaala* did make clear, even lawyers and judges will struggle to interpret domestic statutes in a manner consistent with an aspirational, non-binding, international human rights instrument. It also seems to make clear that reconciliation might demand this of local governments even in the absence of a constitutional duty.

If the law of reconciliation remains unsettled, especially for those with no constitutional duty to consult, the comments of Lance Finch, a former justice of the BC Court of Appeal, are worth considering. Beyond any constitutional mandate grounded in the honour of the Crown, he suggested "a more widely applicable concept of honour [that] imposes [a] duty to learn: at the very least, to holding ourselves ready to learn". Local governments don't have any legal duty to learn, but former Justice Finch says an openness to learning and understanding, "to take account of the Aboriginal perspective" engages the principal of the rule of law. So where do local governments go from here? Regardless of the status of the law, maybe embracing Finch's conception of a duty to learn, is a hopeful and pragmatic option. Duty or not, we hope you found something to learn in this paper.

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