

## Proposed Amendments to British Columbia's Land Act Intended to Increase Decision-Making Authority for Indigenous Peoples Over Crown Lands

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The provincial government of British Columbia (the Province) recently released a proposal to amend the *Land Act* (the Proposed Amendments).<sup>1</sup> The Proposed Amendments are intended to provide greater decision-making powers to Indigenous peoples in British Columbia and have the potential to impact the use of Crown lands in British Columbia.

### The Land Act and the Proposed Amendments

The *Land Act* permits the Province to convey Crown land for community, industrial and business use through the granting of Crown land, and the issuance of leases, licences, permits and rights-of-way.<sup>2</sup> The Ministry of Water, Land and Resource Stewardship notes the immense scope of the *Land Act*, stating that the statute allows for “access and use of public land for 25 separate programs, from communication towers to agriculture to waterpower projects.”<sup>3</sup> Decision-making authority under the *Land Act* is currently restricted to the designated minister (the Minister). Decisions by the Minister under the *Land Act* may trigger the Province's duty to consult Aboriginal peoples<sup>4</sup> where such decisions have the potential to adversely impact Aboriginal and treaty rights.<sup>5</sup>

At this stage, the Proposed Amendments are general statements of intent, and it is unclear what their exact form will be if they are implemented. However, slides issued by the Ministry of Water, Land and Resource Stewardship state that the Proposed Amendments will allow the Province to enter into agreements with Indigenous governing bodies (IGBs) that will split decision-making under the *Land Act* between the Minister and IGBs.<sup>6</sup> The Province states that it hopes to negotiate agreements with IGBs and begin sharing decision-making on public land use in the late spring of 2024.<sup>7</sup>

The Proposed Amendments are intended to align the Province's laws with the *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) and “implement the [DRIPA] decision-making provisions.”<sup>8</sup> DRIPA allows the Province to enter into agreements with IGBs to share decision-making on the use of public land.<sup>9</sup> However, amendments to the *Land Act* are required to give these agreements legislative force.

## Implications of the Proposed Amendments

The Proposed Amendments are general statements of intent to inform an ongoing engagement process. The Province anticipates that following the engagement process, the Proposed Amendments will be introduced as a bill in the spring 2024 legislative session. Since the Proposed Amendments have yet to be finalized into legislation, it is difficult to say what their exact implications will be.

However, based on the information released by the Province so far, it is likely that the decision-making power of IGBs under the *Land Act* will be limited to specific instances tailored to each IGB set out in individual agreements. As discussed below, this fits a potential trend of how the Province has attempted to implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in British Columbia since the enactment of DRIPA. This also raises questions as to the scope of decision-making authority that will be shared with IGBs and how this will impact governance by the Province.

### **The Impact of the Proposed Amendments Will Likely Depend on the Scope of Agreements with IGBs**

The Province has stated that the Proposed Amendments will give legislative effect to agreements with IGBs related to the *Land Act*. In response, there has been concern that this will effectively give Indigenous governments a “veto power” over decisions related to Crown lands. However, it is unlikely the Proposed Amendments on their own will empower IGBs with decision-making authority over Crown lands. Instead, the scope and potential for IGBs to wield such powers will depend on the nature of the agreements that IGBs enter into with the Province.

The devolution of decision-making to IGBs is consistent with agreements the Province has entered into in the past several years. In particular, the Province’s recent agreements with the Tahltan Nation (the Tahltan Agreements) require Tahltan consent for the expansion and changes to specific projects on Tahltan traditional territory.<sup>10</sup> These agreements scope the decision-making authority for Tahltan to specific instances and do not provide a veto-power over all projects on Tahltan traditional territory. The Proposed Amendments may result in the Province entering into similarly scoped agreements with IGBs under the *Land Act*.

### **The Proposed Amendments May Reflect the Province’s Strategy for Implementing DRIPA**

DRIPA is British Columbia’s legislation relating to implementation of UNDRIP in British Columbia. Section 3 of DRIPA states that “in consultation and cooperation with the Indigenous peoples in BC, the government must take all measures necessary to ensure the laws of BC are consistent with the [UNDRIP].”<sup>11</sup> Section 7 of DRIPA allows the Province to negotiate agreements with IGBs relating to the exercise of a statutory power of decision by an IGB or jointly by an IGB and the Province.<sup>12</sup>

Recently, the British Columbia Supreme Court in *Gitxaala v. British Columbia (Chief Gold Commissioner)* found that DRIPA does not implement UNDRIP into British Columbia law.<sup>13</sup> In keeping with arguments put forward by the Province during the proceeding, the Court also found that DRIPA does not impose a positive obligation on the Province to ensure all Provincial laws are consistent with UNDRIP.<sup>14</sup>

The Proposed Amendments may shed light on the Province's strategy for implementing UNDRIP. Along with the Tahltan Agreements, the Proposed Amendments suggest a focus on empowering Indigenous peoples with statutory decision-making authority over their lands through the use of personalized agreements in accordance with section 7 of DRIPA. Instead of singular legislative amendments that provide all Indigenous groups in British Columbia with decision-making authority, these agreements suggest that the Province will avoid a "one size fits all" approach and attempt to implement such powers on a more piecemeal basis.

## **The Proposed Amendments Raise Questions Regarding Their Impact on Governance at Large in British Columbia**

British Columbia is home to 200 distinct First Nations, and the Métis Nation.<sup>15</sup> As a result, the Proposed Amendments raise questions as to how many IGBs will enter into agreements with the Province that allow for their shared decision-making with respect to the *Land Act*.

If the Proposed Amendments signal an intent to enter into agreements with representatives for all or most of the IGBs in British Columbia, this raises significant operational and governance questions given that such agreements could impact "access and use of public land for 25 separate programs."

The magnitude of this potential change to British Columbia's governance and regulatory regime over Crown land is unprecedented and could result in an untenable and unworkable Crown land governance and regulatory regime. For example, it is unclear how this shared decision-making would be tracked and communicated to the broader public, including what kind of registry would be available for such agreements and how their geographic application would be made clear. Further, it is also unclear how such *Land Act* agreements with IGBs would deal with overlapping land claims and other competing Indigenous interests.

However, if the Province only intends to negotiate shared decision-making power under the *Land Act* with only a select few IGBs and limits the scope of decision-making, this raises additional questions regarding the Province's intentions of which IGBs will be included and on what basis such *Land Act* agreements will be framed.

## **Consultation and Implementation Process**

The Proposed Amendments represent a significant shift in how the Province makes decisions regarding

Crown land, potentially resulting in significantly more decision-making authority for Indigenous peoples in accordance with DRIPA. Such changes have the potential to impact all sectors of society, including industry that relies on authorizations to use Crown land given under the *Land Act*. Interested parties should ensure that they provide input to the Province on the Proposed Amendments if they are concerned about how the amendments may impact them.

The Province is accepting written submissions on the Proposed Amendments via email to [LandActamendments@gov.bc.ca](mailto:LandActamendments@gov.bc.ca) until 3PM PST, March 31, 2024. During the consultation process, the Province will begin drafting legislation to clarify and implement the Proposed Amendments. It is expected that legislation will be introduced into the Legislature sometime between April 22 and May 16, 2024.

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<sup>1</sup> Land Act Amendments, govTogetherBC, online [Proposed Amendments].

<sup>2</sup> *Land Act*, RSBC 1996, c 245, s. 11 [*Land Act*].

<sup>3</sup> “Proposal to enable *Land Act* decisions to be made with Indigenous Governing Bodies,” Ministry of Water, Land and Resource Stewardship, online [Proposed Amendments Slides].

<sup>4</sup> Under section 35 of the *Constitution Act, 1982*, Aboriginal peoples includes the First Nation, Métis, and Inuit peoples of Canada.

<sup>5</sup> *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, at para 35.

<sup>6</sup> Proposed Amendment Slides.

<sup>7</sup> Proposed Amendments.

<sup>8</sup> Proposed Amendments Slides.

<sup>9</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s. 7 [DRIPA].

<sup>10</sup> Declaration Act Consent Decision-Making Agreement for Red Chris Porphyry Copper-Gold Mine Project, November 1, 2023; Declaration Act Consent for Decision-Making Agreement for Eskay Creek Project, June 6, 2022.

<sup>11</sup> DRIPA, s. 3.

<sup>12</sup> DRIPA, s. 7(a).

<sup>13</sup> *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680, at para 43 [*Gitxaala*]. For further information on the BCSC’s decision in *Gitxaala* and its implications for UNDRIP and DRIPA, please see our recent updates [here](#) and [here](#).

<sup>14</sup> *Gitxaala*, at paras 485-491.

<sup>15</sup> Province of British Columbia, “B.C. First Nations & Indigenous People,” online.