WILL BC'S UNDRIP ACTION PLAN CREATE COMPLIANCE CHALLENGES UNDER THE US *FOREIGN CORRUPT PRACTICES ACT*, THE UK *BRIBERY ACT* OR THE *CRIMINAL CODE OF CANADA*?

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Government news releases issued on a Friday are known to receive the least attention - and thus warrant the most scrutiny.

On Friday, June 11, 2021 the Government of British Columbia issued a news release entitled "Province seeks input from Indigenous peoples to shape future reconciliation."[1] Surely, that could not involve anything controversial, could it?

The news release refers to a draft plan that could significantly change who governs resource development in BC and potentially affect the legality of corporate payments to First Nations.

The draft action plan contains many commitments. One of them is as follows:[2]

> *the Province will take the following actions in collaboration with Indigenous peoples from 2021 to 2026...*
>
> *2.5 Negotiate new joint decision-making and consent agreements under section 7 of the [Declaration on the Rights of Indigenous Peoples Act ("DRIPA")] that include clear accountabilities, transparency and administrative fairness between the Province and Indigenous governing bodies. Seek all necessary legislative amendments to enable the implementation of any section 7 agreements. (Ministry of Indigenous Relations and Reconciliation)*

Section 7 of the DRIPA[3] is powerful and has not been used yet. It states:

> ***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[4] 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.*

To summarize – the Draft Action Plan (should it be finalized) commits the British Columbia government to entering into agreements that give Indigenous governing bodies:

- statutory decision-making powers over non-Indigenous people and companies; and/or
- a veto over decision-making by other statutory decision-makers.

This is clearly more than the Crown's "duty to consult" that has been established by the Supreme Court of Canada in relation to constitutionally protected assertions of Aboriginal rights and title.[5] It is even more than the powers held by Indigenous groups in respect of *proven* Aboriginal title - as the Court has been clear Indigenous groups do not have a complete veto even there on the basis of Section 35 of the *Constitution Act, 1982*.[6]

Many questions arise from such sweeping proposed changes to the governance of non-Indigenous people and business.

One of them relates to the payments companies frequently make to Indigenous groups pursuant to "Impact Benefits Agreement" (IBAs) or similar agreements - sometimes referred to as cooperation and benefit agreements, socio-economic participation agreements etc. These agreements are common in British Columbia and deal with projects such as mining, forestry, pipelines, transmissions lines, energy projects and other development. It is common for companies to enter into such agreements to secure support from an Indigenous governing body, in exchange for various commitments and benefits, including financial benefits. These are often in the millions of dollars - sometimes *many* millions of dollars – over the life of a project and they have been a significant benefit to many Indigenous communities across BC.

More specifically, it will be necessary to consider whether conferring such statutory decision-making / veto powers through an agreement under section 7 of the DRIPA would make an Indigenous governing body a government "official", "foreign official" or "foreign public official" for the purposes of the Canadian *Criminal*

Code, the US *Foreign Corrupt Practices Act* or the UK *Bribery Act*, and if so what the implications of that may be. While some uncertainty already exists in respect of Indigenous groups that have IBAs and hold powers as a band council under the *Indian Act* or under treaty settlement legislation, conferring new and additional legal power to regulate non-Indigenous persons and resource development may raise a new level of risk.

Criminal Code ss. 121-123

The *Criminal Code* prohibits individuals from engaging in "influence peddling" in respect of government officials. Under Section 118, an "official" is defined as a person who "holds an office" or "is appointed or elected to discharge a public duty". An "office" is further defined to include "an office or appointment under the government."[7]

Under Section 121, it is generally an offence for someone to give, offer or agree to give an official, any member of the official's family or to any other person for the official's benefit any type of reward or other benefit as consideration for exercising influence over a government transaction or matter of business.[8] Similarly, an individual who has, or pretends to have, influence with the government and accepts a reward or other consideration for such an exercise of influence is also guilty of an offence.[9]

US Foreign Corrupt Practices Act

The US *Foreign Corrupt Practices Act of 1977* (the "FCPA"), prohibits US companies and citizens, foreign companies listed on a US stock exchange, or any person acting in the US, from making an offer, payment, promise to pay or authorization to pay a foreign official for the purposes of inducing the foreign official to violate its lawful duty or otherwise secure an improper advantage.[10] The term "improper advantage" has been interpreted broadly, and could apply to a myriad of situations.

The definition of 'foreign official' is also broad, encompassing actors who act on the government's behalf. It includes:[11]

> *...any officer or employee of a foreign government or any department, agency or instrumentality thereof or of a public international organization or any person acting in an official capacity for or on behalf of any such government, department, agency, or instrumentality thereof ...*

The FCPA creates significant risks for any parties that take steps that could be seen as an attempt to influence foreign officials, which include, among others, civil enforcement actions brought by the US Securities Exchange Commission, disgorgement, civil penalties and criminal penalties.[12]

UK Bribery Act

The United Kingdom's *Bribery Act* is a broad and far reaching anti-corruption statute addressing bribery not only in relation to 'foreign officials', but also applies to private persons as well.[13] Pursuant to Section 1, bribery occurs when a person offers, gives or promises to give a financial or other advantage to another individual in exchange for improperly performing a relevant function or activity.

Under Section 3, a "relevant function or activity" covers:

- any function of a public nature;
- any activity connected with a business;
- any activity performed in the course of a person's employment; and
- any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).[14]

These relevant functions and activities do not need to be performed in the United Kingdom; if the person performing the relevant function is expected to perform the activity in good faith or impartially, or is in a position of trust by performing the activity, then the provision applies so long as there is some nexus with the United Kingdom (for example, if the person is a UK corporation).[15]

The *Bribery Act* also applies to bribery of foreign public officials. A foreign public official is, again, broadly defined to include individuals holding "legislative, administrative or judicial position[s] of any kind, whether appointed or elected" or who exercise a public function in relation to a country or territory outside the United Kingdom.[16] Importantly, the prohibition does not just include situations where the payment is made to the foreign public official - it also includes circumstances where an individual pays a third party with the official's "assent or acquiescence".[17]

Determining whether an issue exists will clearly depend on the facts of each case and the terms of any particular section 7 agreement. It may also be affected by whether the government enters into the section 7 agreement with the same Indigenous governing body that receives benefits under an IBA (e.g. a specific First Nation or Tribal Council that signed the IBA), or whether such agreements are entered into with a different (potentially even new) entity.

In the first scenario, the potential concern seems fairly obvious because payments would be made to the same entity that is making decisions under provincial law that affect the payor.

In the second scenario it may be less obvious, but not necessarily less problematic. If it would be illegal to pay money to statutory decision-maker X under the *Criminal Code*, the FCPA or the *Bribery Act*, then would it be any more permissible to pay money to a party that statutory-decision maker is "authorized to act on behalf of"?

Considering a couple fictitious examples may help illustrate the potential concern (though whether these examples will ever materialize remains to be seen).

- The Alpha Mining Company ("**Alpha**") is a US based company listed on the New York Stock Exchange. Alpha owns and operates several mines in North America, including the ABC Mine in British Columbia. The ABC Mine is in the traditional territory of the X First Nation (XFN). Alpha has for some years had an IBA with the XFN that requires it to pay the XFN $250,000 for every year the ABC Mine operates. It also commits the XFN to support any future permit applications / amendment applications Alpha may need to keep the mine running, so long as there are no material environmental concerns.

  If the government entered into a section 7 agreement with the XFN so that the XFN assumed decision-making authority within its traditional territory over permitting under the *Mines Act* and the *Environmental Management Act*, would the ongoing payments to the XFN now constitute payments to a "foreign official" and be contrary to the Section 78dd-2(a)(1)(A)(i) of the FCPA discussed above?

- Beta Global Assets corp. is a UK headquartered company that has interests in multiple sectors and countries around the world.

  Beta recently acquired a junior mining company in British Columbia that is seeking to develop the Sure Winner project, which is at the advanced exploration stage.

  The Sure Winner project is located in the traditional territory of the Y First Nation (YFN).

  The YFN is a member of a new entity called the BC Indigenous Resource Governance Authority, which is a society created under the BC *Societies Act* for the express purpose of entering into section 7 agreements with the government, on behalf of Indigenous groups that hold Aboriginal rights. It recently did so, and the agreement provides that any new major resource project in areas set out in a schedule to the agreement requires consent from the BC Indigenous Resource Governance Authority. The Sure Winner project is in one of those areas.

  Beta fears the BC Indigenous Resource Governance Authority will not give its consent to the project unless the YFN is on board. So Beta proposes an IBA with the YFN that would provide various benefits and, in exchange, would require the YFN to advise the BC Indigenous Resource Governance Authority it supports the Sure Winner project proceeding.

  Would Beta be in breach of the *Bribery Act* in this scenario? More, specifically, would Beta be bribing the BC Indigenous Resource Governance Authority if Beta provides benefits to the YFN? In other words, would that amount to giving a "financial or other advantage…to another person with…[the BC Indigenous Resource Governance Authority's] assent or acquiescence" for the purposes of paragraph 6(3)(a)(ii) of the *Bribery Act* discussed above?

  Similarly, would the BC Indigenous Resource Governance Authority be considered an "official" under the

Criminal Code?[18] If so, would Beta be in breach of the influence peddling provisions in Section 121(1)(d) by paying benefits to the YFN in return for YFN advising the BC Indigenous Resource Governance Authority it supports the Winner Mine and as such the BC Indigenous Resource Governance Authority should consent to it?

These are complex and important questions. However, unfortunately, there is nothing in the Draft Action Plan that indicates whether or to what extent consideration has been given to them. It is therefore something that companies operating in the BC resource sector will want to monitor very closely and obtain fact-specific legal advice on, if and as section 7 agreements are entered into. This is particularly – but not only – true for companies that are subject to FCPA or the *Bribery Act*.[19]

If they have to choose between having agreements to secure support from Indigenous groups, and complying with anti-corruption legislation, some companies may chose a third option – simply invest elsewhere.

In this regard, it is noteworthy that the proposed federal United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) legislation, Bill C-15, is modelled generally on the BC legislation, but it does not contain a provision similar to BC's section 7 concerning Indigenous statutory decision-making and veto powers.[20]

The government is seeking engagement on the draft action plan only from Indigenous people

It is clear from the title of the news release that the government is seeking input only from Indigenous people. This is confirmed by a link at the bottom of the page entitled "Engagement Opportunity" which, when followed, states:[21]

> *On June 11, 2021, the Province released a draft of the action plan, to seek input and feedback from Indigenous peoples. This input will be used to finalize the action plan, which is expected to be released fall 2021.*

This is unfortunate, as it is difficult to understand how reconciliation between Indigenous and non-Indigenous people can possibly be advanced without discussing such important issues with all interested parties. This is especially true where it appears clear that the actions and commitments being contemplated will have far-reaching consequences for all British Columbians. It will not be enough to engage a broader community of interests *after* the action plan is finalized and the implementation phase begins.

Unless and until they are invited into the discussion, companies operating in British Columbia may want to watch carefully for more Friday news releases and review them carefully - no matter how innocuous the title may seem.

[1][ps2id id='1' target='/] Government of British Columbia, Ministry of Indigenous Relations and Reconciliation, Province seeks input from Indigenous peoples to shape future of reconciliation, (June 11, 2021).
[2][ps2id id='2' target='/] Government of British Columbia, Ministry of Indigenous Relations and Reconciliation, Declaration on the Rights of Indigenous Peoples Act Draft Action Plan (Victoria: Ministry of Indigenous Relations and Reconciliation, 2021), (the "Draft Action Plan").
[3][ps2id id='3' target='/] DRIPA, SBC 2019 C. 44
[4][ps2id id='4' target='/] This term is defined in s. 1 to mean, "an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by s. 35 of the *Constitution Act, 1982*".
[5][ps2id id='5' target='/] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.
[6][ps2id id='6' target='/] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44; see also *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, 1997 CanLII 302 (SCC) at para 165:

> The general principles governing justification laid down in Sparrow, and embellished by Gladstone, operate with respect to infringements of aboriginal title. In the wake of Gladstone, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.

[7][ps2id id='7' target='/] *Criminal Code*, RSC 1985, c C-46, s. 118.
[8][ps2id id='8' target='/] Similar provisions exist in the event that an individual attempts to bribe a municipal official: *Criminal Code*, *supra* note 7 at s. 123.
[9][ps2id id='9' target='/] *Criminal Code*, *supra* note 7 at s 121(1)(d).
[10][ps2id id='10' target='/] FCPA, *supra* note 10 at §78dd-2(a)(1)(A)(i).
[11][ps2id id='11' target='/] FCPA, *supra* note 10 at §78dd-1(f).
[12][ps2id id='12' target='/] See US Securities and Exchange Commission, "Spotlight on Foreign Corrupt Practices Act" (February 2, 2017).
[13][ps2id id='13' target='/] *Bribery Act*, 2010 c. 23.

[14][ps2id id='14' target="/] *Bribery Act*, *supra* note 14 at ss. 3(1)-(2), 12.
[15][ps2id id='15' target="/] *Bribery Act*, *supra* note 14 at s. 3(3)-(6).
[16][ps2id id='16' target="/] *Bribery Act*, *supra* note 14 at para 6(3)(a)(5).
[17][ps2id id='17' target="/] *Bribery Act*, *supra* note 14 at s. 6(3)(a)(i)-(ii).
[18][ps2id id='18' target="/] See *Criminal Code*, *supra* note 7 at s. 118, which defines an official as "a person who (a) holds an office; or (b) is appointed or elected to discharge a public duty".
[19][ps2id id='19' target="/] Similar concerns exist with respect to similar agreement making powers the province put into the *Environmental Assessment Act*, SBC 2018 c 51. While this power has not been used to date, s. 7 of the *Environmental Assessment Act* states:

> 7. Despite any other enactment and whether or not an environmental assessment certificate is required, a reviewable project may not, without the consent of an Indigenous nation, proceed
>
> > (a) on treaty lands if the final agreement with the Indigenous nation requires this consent, or
> > (b) in an area that is the subject of an agreement, between an Indigenous nation and the government, that
> >
> > > (i) requires this consent, and
> > > (ii) is prescribed by the Lieutenant Governor in Council.

[20][ps2id id='20' target="/] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 43rd Parl, 2021 (as passed by the House of Commons May 25, 2021).
[21][ps2id id='21' target="/] Government of British Columbia, Ministry of Indigenous Relations and Reconciliation, "Declaration Act" (Accessed June 14, 2021).

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.