BC Court of Appeal Hearing Legal Backgrounder,
Gitxaała Nation v BC (Chief Gold Commissioner)

In a hearing to be held January 20-22, 2025 the BC Court of Appeal will hear arguments in a partial appeal[1] of the BC Supreme Court decision in **Gitxaała v. British Columbia (Chief Gold Commissioner)**. This will be the first time an appellate court is asked to rule on the legal enforceability and interpretation of BC's ***Declaration on the Rights of Indigenous Peoples Act*** (DRIPA).

Background
In October 2021, the Gitxaała Nation launched a historic legal challenge to BC's "free entry" mineral claim-staking regime under the *Mineral Tenure Act* (the "Regime"). In the case, among other things, Gitxaała sought to quash several mineral claims (which convey significant ownership and exploration rights) that had been registered in their territories without consultation or consent. A similar judicial review was filed by Ehattesaht First Nation in June 2022 and the cases were heard together over 14 hearing days in spring 2023.

On September 26th, 2023, Gitxaała Nation and Ehattesaht First Nation achieved a significant victory. The British Columbia Supreme Court held that BC's Regime for granting mineral rights, which allows automatic online staking and registration of mineral claims in BC without consulting First Nations, breached the provincial Crown's constitutional duty to consult. The declaration was suspended for 18 months to give BC time to work with First Nations to design a new regime.

However, the court did not grant the DRIPA-related relief sought by the Nations: the judge refused to declare that BC's Regime was inconsistent with the UN Declaration on the Rights of Indigenous Peoples (UN Declaration), or that BC had a legal duty to reform its Regime to align with the UN Declaration in consultation and collaboration with Nations. This was because Justice Ross held that DRIPA did not implement the UN Declaration into the domestic laws of BC and that **s. 3** of DRIPA was not "justiciable", (i.e., not legally enforceable in court).

In the result, the draft "**mineral claims consultation framework**" proposed by BC to take effect in March 2025 is no more than a glorified "referral" process, without reference to the standards set by the UN Declaration. **BC asserts** that a framework related to meeting the s. 35 constitutional duty to consult is separate and distinct from aligning BC's mineral tenure laws with the UN Declaration, promising the latter will occur on a later timeline.

What is Gitxaala's Position in this Appeal?
Arguments raised in Gitxaała materials filed with the BC Court of Appeal include:

- The UN Declaration was incorporated into the positive law in Canada, federally through the **federal UN Declaration Act** and provincially through DRIPA. Both acts aim to align laws with minimum Indigenous human rights standards.
- As a result of DRIPA sections 1(4), 2(a), 3, and section 8.1(3) of the *Interpretation Act* **all** BC laws must be interpreted consistently with the UN Declaration, including the common law test for the duty to consult – which means upholding the right to free, prior and informed consent.
- Courts should apply a "presumption of conformity" of laws with the UN Declaration, including the common law. The UN Declaration has as much interpretive weight as a ratified international instrument in Canada because of the UN Declaration Act and/or DRIPA s. 2(a) has a "procedural" effect

[1] BC Court of Appeal file CA49428.

on interpretations of domestic law in BC, i.e., by affirming that courts should presume conformity of laws with the UN Declaration.

- BC's commitment to aligning laws is a legal duty, enforceable in court, and not merely a political promise. UNDRIP consistency is matter the courts have institutional capacity and legitimacy to adjudicate.
- Under section 3 of DRIPA, any inconsistency between laws or their implementation, and the UN Declaration imposes a legal duty on BC to consult to consult and cooperate about measures to address the inconsistency.
- A declaration from the BC Court of Appeal recognizing the Regime's inconsistency with the UN Declaration is important to establish that alignment with the UN Declaration must be the enforceable standard for any reforms to the MTA and its Regime for granting mineral rights.

What is Ehattesaht's Position in this Appeal?

Arguments raised in Ehattesaht's materials filed with the BC Court of Appeal include:

- The BC Supreme Court erred by casting DRIPA as a commitment to take future acts to implement the UN Declaration—giving it no present legal effect—and for refusing to issue declaration that the Regime was inconsistent with rights under the UN Declaration.
- DRIPA has the effect of incorporating the UN Declaration into the law of BC and is a statutory recognition that the rights in the UN Declaration exist and apply in this province.
- The question was not whether DRIPA implements the UN Declaration but how. The common law, statute, administration of laws, and constitutional rights and obligations must be interpreted in relation to and measured against the Declaration. An interpretation in conformity with the UN Declaration must be preferred.
- Indigenous rights in the UN Declaration, incorporated provincially by DRIPA, inform the interpretation of s. 35 rights and should inform the duty to consult in keeping with the Honour of the Crown and the commitments made by the government to implement the UN Declaration.
- The UN Declaration must be applied to both the MTA as legislation and also statutory decisions and administration of the MTA.
- The question of the Regime's consistency with the UN Declaration is a legal one, even if it arises in the context of political commitments made by the government to First Nations and Ehattesaht is entitled to bring this question before the court on judicial review as an entity effective by administrative action—constrained by the incorporated DRIPA—under the MTA.

What is BC's Position in this Appeal (Chief Gold Commissioner of BC, Lieutenant Governor in Council of BC, and Attorney General of BC)?

Arguments raised in the AG's materials filed with the BC Court of Appeal include:

- The BC Supreme Court correctly determined that consistency of the Regime with the UN Declaration is not justiciable in this case. The justiciability of DRIPA in future cases is not foreclosed.
- Inconsistency is a matter for consultation and cooperation between the government and Indigenous Peoples under s. 3 of DRIPA—thus rendering it a political collaboration issue rather than a justiciable issue.
- DRIPA is a framework for UN Declaration implementation with legislative accountability that does not in this case warrant court intervention.

- BC has now "openly acknowledged" that the MTA requires alignment with the UN Declaration. BC has committed to modernizing the MTA in the DRIPA Action Plan prepared in consultation and cooperation with Indigenous Peoples under s. 4 of DRIPA.
- Justice Ross correctly concluded that UNDRIP "remains a non-binding international instrument."

What Parties are Intervening in the Hearing and What are Their Positions?
There are a number of groups intervening in this appeal. An intervenor is a person or group that is not a party to a case, but who is nonetheless allowed to make legal arguments on important issues in the case. The intervenors in the case are:

First Nations Leadership Council (FNLC), consisting of: the BC Assembly of First Nations, the First Nations Summit, and the Union of British Columbia Indian Chiefs jointly with the **B.C. Civil Liberties Association** (BCCLA). Arguments raised in FNLC/BCCLA's materials filed with the BC Court of Appeal include:

- When properly construed, *Interpretation Act* s. 8.1 (3) requires courts to consider relevant articles of the UN Declaration when interpreting provincial laws; the Justice Ross erred by not considering relevant UN Declaration such as Articles 26, 27, 29 and 32.
- 8.1(3) of the *Interpretation Act* requires courts, where possible, to interpret existing laws consistently with the Declaration or, where that is not possible, to say so and explain how the law at issue is inconsistent with the Declaration's requirements.
- Doing so will assist the Legislature, under s. 3 of DRIPA, to identify and remedy such inconsistencies between existing laws and the UNDRIP through legislative amendments.
- In this way, the Legislature has recruited the judiciary to assist in the ongoing process of 'aligning the laws of BC with UNDRIP'—rendering the matter at hand justiciable with a legal remedy available in courts. Accordingly, the BC Supreme Court erred by determining the matter to be non-justiciable.

The **Human Rights Commissioner for British Columbia** (BCHRC) – Kasari Govender. Arguments raised in BCHRC's materials filed with the BC Court of Appeal include:

- The BCHRC, an independent officer of the Legislative Assembly, intervenes in these joined appeals to fulfil her statutory mandate to protect and promote human rights in B.C., including B.C.'s compliance with its international human rights obligations.
- "B.C. courts are the only possible venue for disputes about the consistency between the laws of B.C. and UNDRIP." Accordingly, "it is crucial that B.C. courts provide guidance about the consistency between B.C. laws and UNDRIP when asked to do so".
- DRIPA is a quasi-constitutional human rights statute that must be interpreted "expansively" and given a "broad, purposive and liberal interpretation" that "best upholds the human rights of Indigenous Peoples and advances reconciliation.".
- Quasi-constitutional legislation intends to give rise to rights of "vital importance" that must be capable of enforcement in court".
- DRIPA ss. 2(a) and 3 must be interpreted in light of DRIPA, Art. 40 (right of Indigenous peoples to a system of dispute resolution and legal remedy).
- In accordance with international law, "all measures necessary" is a justiciable standard.
- In order to fulfill the Legislature's intention for DRIPA to be a "critical step towards true and lasting reconciliation" and interpret DRIPA accordingly, the Court of Appeal should affirm that DRIPA is an enforceable quasi-constitutional human rights statute and guide the courts to apply it as such.

Cheona Metals Inc
Cheona Metals is a BC mineral exploration company that supports compliance with the UN Declaration. Arguments raised in Cheona Metals' materials filed with the BC Court of Appeal include:

- The UN Declaration engages the presumption of conformity—meaning all domestic laws are presumed to conform to it. This is the case because Canada adopted UNDRIP without qualification, and its domestic application was legislatively affirmed federally and within BC.
- Thus, the courts must determine the consistency of existing legislation (such as the MTA) with UN Declaration rights.
- Certain rights expressed within UN Declaration are also directly adopted into the domestic common law as binding customary international law that are enforceable in B.C., even without legislative action—including the rights to self-determination, to lands and resources, to free, prior and informed consent, and to effective remedies.
- The Chambers judge's decision essentially denies Indigenous Peoples a remedy in the courts in the case that BC denies that a law is inconsistent with UNDRIP and refuses to engage in consultation or to take measures to ensure consistency. This would be fundamentally inconsistent with the right to effective remedies for breaches of international human rights.

The Association for Mineral Exploration British Columbia (AME)
Arguments raised in AME's materials filed with the BC Court of Appeal include:

- DRIPA envisions a collaborative process for aligning the laws of BC with the UN Declaration, including industry and other stakeholders. It would be inappropriate for the Court to intervene into this process.
- There is no basis for the orders sought by the appellants. The BC Supreme Court did not err.
- The court below properly identified the UN Declaration's role as an interpretive aid, however AME argues that neither the legal effects of DRIPA nor UNDRIP give rise to new or expanded duties of consultation in the s. 35 duty to consult framework.
- The AME states that "[a] holistic reading of UNDRIP reveals that it does not impose a standard of obtaining the consent of Indigenous groups for most rights, rather that it aspires to achieve consent through consultation". The existing s. 35 duty to consult framework already goes further than the UN Declaration.
- An incremental approach to interpretation provides greater predictability for an industry that represents a significant economic benefit to the provincial economy.

Conclusion
At stake in this appeal is whether the provincial government's DRIPA commitment to align laws with the UN Declaration is enforceable in the courts, and how DRIPA's application to the laws of BC should be interpreted. Absent such legal accountability the appellants say, DRIPA risks being reduced to a political promise, lacking enforceable legal weight.