

Pender Harbour and Area Residents Association



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January 18th, 2023

Honourable David Eby Premier@gov.bc.ca

Honourable Niki Sharma AG.Minister@gov.bc.ca

Honourable Murray Rankin IRR.Minister@gov.bc.ca

Honourable Anne Kang MUNI.Minister@gov.bc.ca

Chief and Council shíshálh Nation - wpaul@shishalh.com

Dear Premier, Ministers and Chief and Council:

The Pender Harbour and Area Residents Association and its members have a clear interest in the province's proposal to enter into an agreement with the shíshálh Nation under section 7 of the *Declaration on the Rights of Indigenous Peoples Act* (the "DRIPA"). We are therefore deeply concerned with the lack of consultation that has occurred to date. More specifically, we do not accept the proposition set out in Jennifer Spencer's December 16, 2022 correspondence to us which deferred our November 4, 2022 request for engagement, stating:

The Province and shíshálh Nation are still in the early stages of negotiations and the Province is in the process of undertaking necessary internal work on components of the Agreement and required legislative amendments. At this time, the Province and shíshálh Nation are not at a stage to begin consultation with PHARA or other identified third parties...

The very purpose of consulting with us must be to inform the province's position in those negotiations, and to ensure the province has fully and duly considered the potential impact on our (and other) interests as it begins to negotiate with the shíshálh. Consultation with us once "components of the agreement" are developed

and “required legislative amendments” identified is not adequate as the cake will have been baked by then. Surely the province would never adopt this approach when undertaking consultation with Indigenous groups, so the double standard here is deeply concerning.

For that reason, we are writing to request your immediate response to the following questions. We also ask that the negotiations be put on hold until satisfactory answers are provided to each of these questions and we can provide any further submissions we deem appropriate upon consideration of your responses.

These are not minor issues or legal technicalities – they go to the core of our system of responsible government and the Rule of Law. And as this is not the only s. 7 DRIPA agreement the government will be contemplating, we believe these are matters that should be of great interest to all British Columbians and anyone investing here.

Our questions are as follows:

1. What entity will be the Indigenous governing body as that term is used in the DRIPA? Will it be:
 - a. The Sechlet Indian Band?
 - b. The shíshálh Nation as referenced in section 1 of the *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27?
 - c. The Council / *hiwus ?iy te hihewhiwus* as referenced in section 8(1) of the *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27?
 - d. Some other entity?
2. Why does the August 2, 2022 Order-in-Council 444 refer to the Sechelt Indian Band rather than the shíshálh Nation?
3. Does the fact that the Order in Council provides the minister only a right to negotiate an agreement under s. 7(1)(a) DRIPA, and not s. 7(1)(b), mean that the shíshálh consent or agreement will not be required in order for a tenure to be issued under section 11 of the *Land Act*?
4. If shíshálh consent or agreement is not required, then what does the requirement that the statutory power be exercised “jointly” by the Indigenous governing body and the province mean in s. 7(1)(a)?
 - a. How would it differ from the present situation under the October 2018 “Foundation Agreement” entered into by the province and the shíshálh?
 - b. Will there be two instruments issued and/or two decisions rendered?
 - c. What will happen if the provincial statutory decision-maker and the Indigenous governing body cannot agree?

5. How does the province reconcile the conferral of the power to govern others under a DRIPA section 7 agreement, with the limits of the *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27 which is directed to shíshálh self-government (see especially sections 4 and 14) and only in respect of shíshálh lands as defined in section 1?
6. Does the Lieutenant Governor in Council intend to declare any provincial Crown lands and / or fee simple lands to be "shíshálh lands" under section 25.1 *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27?
7. If the shíshálh Council is the Indigenous governing body, will the *Indian Act Band Council Procedure Regulations* (C.R.C. 950) apply to shíshálh Council joint decision-making under the s. 7 agreement (given s. 35(1) of the shíshálh Nation Self-Government Act, S.C. 1986, c. 27)?
8. How will permit applicants / recipients know whether the Indigenous governing body has complied with section 9 of the *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27 (obligation to act through the Council) or the shíshálh constitution requirements set out under section 10 of the *shíshálh Nation Self-Government Act*, S.C. 1986, c. 27, or the *Indian Act Band Council Procedure Regulations* (C.R.C. 950) (to the extent applicable)? More specifically, will non-shíshálh members be given access to shíshálh council meetings, shíshálh decision-making processes and decision records to the same extent shíshálh members are?
9. How will the requirement that the Indigenous governing body "act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*" be reconciled with section 11 of the *Land Act* which allows the minister to dispose of Crown land "as the minister considers in the public interest"? What will happen in cases where the shíshálh Nation interests are inconsistent with the public interest?
10. To the extent the Indigenous governing body may be mandated to consider the shíshálh Nation's own interests, would this be limited to considering the standard set for the duty to consult in respect of asserted Aboriginal rights by the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, or would it be broader?
11. Will the Indigenous governing body be subject to:
 - a. The *Freedom of Information and Protection and Privacy Act* in terms of protection of confidential information and the public right to seek disclosure of information?
 - b. The *Ombudsperson Act*, in particular the ability of a person aggrieved by a decision of the Indigenous governing body to complain to the Ombudsperson and have the Ombudsperson investigate the matter

- c. The *B.C. Auditor General Act*, particularly the right to conduct examinations of government organizations (either directly or through the Ministry responsible for administration of the DRIPA)?

12. Will the Indigenous governing body, or members of the Indigenous governing body, be required to undertake the same oath required of public servant statutory-decision-makers under s. 21 of the *BC Public Service Act*, which states

As a member of the British Columbia Public Service, I do solemnly swear/affirm that I will:	
1	Loyally serve the people of British Columbia through their democratically elected government,
2	Honour and faithfully abide by the Standards of Conduct for Public Service Employees, and
3	To the best of my ability,
a	Act with integrity, putting the interests of the public and the public service above my own personal interest and avoiding all conflicts of interest, whether real or perceived,
b	Safeguard confidential information, not divulging it unless I am either authorized to do so or required to do so by law,
c.	Base my advice, recommendations and decisions on the objective evidence that is available to me,
d	Serve the government impartially, and

As a member of the British Columbia Public Service, I do solemnly swear/affirm that I will:

e .	Conduct myself honestly and ethically, in a manner that maintains and enhances the public's trust and confidence in the public service and does not bring it into disrepute.
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13. What conflict of interest laws or rules or policies will apply to the Indigenous governing body?
14. Will the Indigenous governing body be subject to the same policies and guidance documents applicable to provincial agencies in respect of the *Land Act* (especially the Crown Land Policies (<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/land-policies>) ?
- If not, will there be any provincial oversight over policies developed by the Indigenous governing body?
 - What, if any mechanism, will exist to deal with discrepancies between Indigenous governing body's policies and provincial policies?
15. Will any fees charged by the Indigenous governing body for application processing be subject to provincial approval, and considered public monies under section 11 of the *Financial Administration Act* [SBC 1981] ch. 15?
16. Will there be any restrictions on the Indigenous governing body that is the statutory decision-maker (or related entities) seeking or accepting financial benefits from applicants, other than as fees for processing of applications?
17. Will there be administrative law training requirements for Indigenous governing bodies or their members undertaking statutory decision-making? If so:
- Will it be mandatory?
 - Who will deliver it?
 - Will it be the same as statutory decision-makers who are provincial employees?
18. What process will exist for terminating the s. 7 agreement in the event the government determines the agreement is not working satisfactorily?

19. Were any other Indigenous groups consulted in the Lieutenant Governor in Council's decision to issue Order in Council 444?
20. Are any other Indigenous Groups being consulted in respect of the Minister's pending decision to enter into a s. 7 agreement with the shíshálh Nation?
21. Will there be any timing requirements imposed on the Indigenous governing body under the agreement? If so, what will be the consequences of any breach of those requirements?
22. Will the indigenous governing body undertake *Haida* consultation with other potentially affected First Nations? If so:
 - a. Will it expressly state its assessment of the strength of claim of those other Indigenous nations, as required by *Haida*?
 - b. Will it make decisions to discharge the "honour of the Crown" and "reasonably balance" Aboriginal and non-Aboriginal interests?

We thank you in advance for your consideration and anxiously await your reply.

Yours truly,

Sean McAllister
Director, PHARA

For enquiries and questions please contact board@phara.ca

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