S-246285
No.
VancouverRegistry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

PENDER HARBOUR AND AREA RESIDENTS ASSOCIATION

PETITIONER

AND

LIEUTENANT GOVERNOR IN COUNCIL OF THE PROVINCE OF BRITISH COLUMBIA, HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

Lieutenant Governor in Council of the Province of British Columbia
c/o Ministry of Attorney General
1001 Douglas Street,
Victoria, BC V8W 9M9

His Majesty the King in Right of the Province of British Columbia
c/o Ministry of Attorney General
1001 Douglas Street,
Victoria, BC V8W 9M9

Attorney General of British Columbia
1001 Douglas Street,
Victoria, BC V8W 9M9

AND ON NOTICE TO:

shíshálh Nation
5545 Sunshine Coast Hwy,
Sechelt, BC V0N 3A0

The address of the registry is:

The Law Courts
800 Smithe Street
Vancouver, BC V6Z 2E1

The petitioner estimates that the hearing of the petition will take four (4) days.

This matter is an application for judicial review.

This proceeding is brought for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The ADDRESS FOR SERVICE of the petitioner is: McMillan LLP Barristers and Solicitors Suite 1500, 1055 West Georgia Street P.O. Box 11117 Vancouver, BC V6E 4N7 (Attention: Joan M. Young and Robin Junger) Fax number address for service (if any) of the petitioner: N/A E-mail address for service (if any) of the petitioner: joan.young@mcmillan.ca and robin.junger@mcmillan.ca
(2)	The name and office address of the petitioner's lawyer is: Same as address for service.

CLAIM OF THE PETITIONER

OVERVIEW

1. This petition seeks a ruling on whether a Canadian province can, on its own accord, legislate and implement Indigenous rights in a manner that conflicts with section 35 of the *Constitution Act, 1982* and the related jurisprudence of the Supreme Court of Canda.

2. It also concerns the issue of whether a provincial government can authorize Indigenous governing bodies – such as the shíshálh Nation, representing no more than a minute fraction of the province – to have statutory decision-making authority over non-Indigenous persons under provincial law.

3. The Petitioner, a grassroots community organization, brings this case with a deep sense of responsibility as the case concerns fundamental questions about the rule of law and democratic principles, and is not a challenge to, or disrespect of, the constitutionally protected rights of Indigenous peoples recognized and affirmed under Canada's constitution.

Part 1: ORDERS SOUGHT

1. Declarations and orders in the nature of certiorari that:

   (a) The *Declaration on the Rights of Indigenous Peoples Act* ("**DRIPA**") is unconstitutional and inconsistent with section 35 of the *Constitution Act, 1982* and is, to the extent of such inconsistency, of no force and effect, and Order in Council 2022-444 is therefore also of no force and effect.

   or in the alternative,

   (b) The DRIPA is unconstitutional as it is in pith and substance a law related to "Indians, and Lands reserved for the Indians", as those terms are used in section 91(24) of the *Constitution Act, 1867,* and is beyond the legislative authority of the Province of British Columbia and thus of no force and effect.

   or in the alternative,

   (c) Order in Council 2022-444 is unconstitutional because it:

      (i) violates the democratic rights guaranteed by section 3 of the *Charter of Rights and Freedoms* ("***Charter***") by authorizing the transference of governance powers to an entity that is not responsible to the Legislative Assembly or the electorate of British Columbia;

      (ii) is unreasonable;

      (iii) is not saved by section 1 of the *Charter*; and

      (iv) is of no force and effect.

   (d) Section 7 of the DRIPA is unconstitutional because it:

      (i) violates the democratic rights guaranteed by section 3 of the *Charter of Rights and Freedoms* ("***Charter***") by authorizing the transference

of governance powers to an entity that is not responsible to the Legislative Assembly or the electorate of British Columbia;

(ii) is not saved by section 1 of the *Charter*; and

(iii) is of no force and effect.

(e) An order in the nature of prohibition preventing the Respondent Lieutenant Governor in Council of the Province of British Columbia, or a minister of the Crown, from entering into any agreements pursuant to DRIPA section 7 or Order in Council 2022-444;

(f) An order that section 3 of DRIPA violates the principle of parliamentary supremacy by purporting to direct the substance of legislation that must be passed by future governments; and

(g) Costs;

(h) Such other orders as the Court deems just and appropriate.

Part 2: FACTUAL BASIS

Canada is a constitutional democracy

1. Canada is a constitutional democracy which, as noted in the preamble to the *Charter* "is founded upon principles that recognize the supremacy of God and the rule of law." Canada one of the few countries in the world that includes provisions respecting Indigenous rights in its constitution.

2. The Supreme Court of Canada stated in *Reference re Secession of Quebec*[1] that "...the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the

[1] [1998] 2 SCR 217 at para 48

accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability."

3. A foundation of Canadian democracy since 1867 is that electors chose who will represent them, and those elected are accountable to the electorate.

Pender Harbour and Area Residents Association

4. Pender Harbour (and the nearby areas including Madeira Park, Kleindale, Irvines Landing, and Garden Bay) is a diverse and vibrant rural coastal community located approximately 85 kilometers northwest of downtown Vancouver. The area falls within the Sunshine Coast Regional District.

5. Pender Harbour is an area of keen interest to boaters and water enthusiasts. There are over a thousand privately-held properties with waterfront access, all of which require a permit under the British Columbia *Land Act*, RSBC 1996, c 245 ("***Land Act***") for any dock structures.

6. The Petitioner, Pender Harbour and Area Residents Association ("**PHARA**"), is a society established under the British Columbia *Societies Act*, SBC 2015, c 18. Its purposes include providing a public forum for residents to raise issues of broad community concern, and speaking with a strong, united voice on behalf of the Pender Harbour area to all levels of government.

7. PHARA has a board presently comprised of 12 volunteer directors. None of them are remunerated for their time.

8. Since its creation, PHARA been advocating on behalf of its members with the British Columbia Provincial Government ("**Province**") regarding the management of tenures under the British Columbia *Land Act*. A central issue in those engagements has been dock permitting, and the degree to which PHARA believes the Province has subordinated and discounted the rights and interests of PHARA, its members, and others in a similar position.

9. PHARA is committed to building and maintaining strong relationships within its community, including with the shíshálh Nation. PHARA's concerns in this case are not directed at the shíshálh Nation but rather at the Province, and PHARA brings this litigation only after concluding it has been left with no other realistic options.

The United Nations Declaration on the Rights of Indigenous Peoples

10. While this petition relates most directly to the DRIPA, as discussed below, it is important to understand the history of the United Nations Convention on the Rights of Indigenous Peoples, which the DRIPA seeks to implement in British Columbia.

11. In 1982, the UN Special Rapporteur of the Subcommission on the Prevention of Discrimination and Protection of Minorities released a study about the systemic discrimination faced by Indigenous peoples worldwide.

12. In response, the UN Economic and Social Council created the Working Group on Indigenous Populations ("**WGIP**"), and in 1985, the WGIP began to draft a Declaration of Indigenous Rights ("**Declaration**").

13. In 1993, an approved draft of the Declaration was sent to the Commission of Human Rights which established the Intergovernmental Working Group ("**IWG**"). The IWG consisted of human rights experts and over 100 Indigenous organizations.

14. Following the completion of the IWG process in 2005, a "comprise text" was submitted to the Human Rights Council ("**HRC**") which adopted the text by a majority vote in June 2006.

15. Of the 47 HRC members, Canada was one of two countries that voted against adoption of the text. 12 countries abstained.[2]

[2] Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine

16. On September 13, 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples ("**UNDRIP**"). Australia, Canada, New Zealand, and the USA opposed the adoption of UNDRIP. 11 countries abstained.[3]

17. At the time UNDRIP was adopted, some states expressed procedural and drafting concerns, as well as concerns about the substantive content of UNDRIP:

(a) Canada

> Over the past year, had there been an appropriate process to address these concerns, and the concerns of other Member States, a stronger declaration could have emerged, one acceptable to Canada and other countries with significant indigenous populations and which could have provided practical guidance to all States. Very unfortunately, such a process has not taken place.[4]
>
> By voting against the adoption of this text, Canada puts on record its disappointment with both the text's substance and the process leading to it. For clarity, we also underline our understanding that this Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law.[5]
>
> Unfortunately, the provisions in the Declaration on lands, territories and resources are overly broad and unclear and are susceptible of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have already been settled by treaty in Canada.[6]

(b) New Zealand

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[3] Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine. https://press.un.org/en/2007/ga10612.doc.htm

[4] United Nations, "United Nations General Assembly official records, 61st session 107 plenary meeting" (2007) at p 13

[5] *Supra* at p 13

[6] *Supra* at p 13

Four provisions in the Declaration are fundamentally incompatible with New Zealand's constitutional and legal arrangements, with the Treaty of Waitangi and with the principle of governing for the good of all our citizens. These are article 26 on lands and resources, article 28 on redress and articles 19 and 32 on a right of veto over the State.[7]

(c) Australia

Secondly, with regard to lands and resources, the declaration's provision could be read to require recognition of indigenous rights to lands without regard to other existing legal rights pertaining to land, both indigenous and non-indigenous.[8]

...Australia and others repeatedly called for a chance to participate in the negotiation on the current text of the declaration.

We are deeply disappointed that no such opportunity has been afforded to us. Having an opportunity to negotiate the text would have allowed us to work constructively with the entire membership of the United Nations to improve the declaration, and might have resulted in a text that enjoyed consensus.[9]

(d) USA

We worked hard for 11 years in Geneva for a consensus declaration, but the document before us is a text that was prepared and submitted after the negotiations had concluded. States were given no opportunity to discuss it collectively. It is disappointing that the Human Rights Council did not respond to calls we made, in partnership with Council members, for States to undertake further work to generate a consensus text. This Declaration was adopted by the Human Rights Council in a splintered vote. That process was unfortunate and extraordinary in any multilateral negotiating exercise and sets a poor precedent with respect to United Nations practice.

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[7] *Supra* at p 14

[8] *Supra* at p 11

[9] *Supra* at p 11

> The Declaration on the Rights of Indigenous Peoples, if it were to encourage harmonious and constructive relations should have been written in terms that are transparent and capable of implementation. Unfortunately, the text that emerged from a failed process is confusing and risks endless conflicting interpretations and debate about its application...[10]

DRIPA

18. The DRIPA was passed by the British Columbia Legislature on November 26, 2019, and came into force on November 28, 2019. It is a short act consisting of only seven substantive sections.

19. Section 2 of the DRIPA states that its purposes are:

    (a) to affirm the application of the Declaration to the laws of British Columbia;

    (b) to contribute to the implementation of the Declaration; and

    (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

20. Section 3 of the DRIPA requires the government to take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration, in consultation and cooperation with the Indigenous peoples in British Columbia.

21. Section 4 of the DRIPA sets out requirements related to achieve plans that are necessary "to achieve the objectives of the Declaration."

22. Section 5 of the DRIPA sets out requirements for annual reports to "report on the progress that has been made towards implementing the measures referred to in section 3 and achieving the goals in the action plan."

23. Section 6 and 7 of the DRIPA provide authority for agreements "on behalf of government" under which Indigenous governing bodies may be given joint

[10] *Supra* at p 15

statutory decision-making powers under provincial laws or to require the consent of the Indigenous governing body before the exercise of a statutory power of decision" ("**Section 7 Agreement**").

24. While the federal government has passed legislation related to implementation of the UNDRIP at the federal level, that legislation does not contemplate anything similar British Columbia's Section 7 agreements. That is to say, the federal legislation does not provide First Nations with joint statutory-decision making powers or consent powers.

25. The Province has repeatedly and consistently made clear that it considers itself bound to adhere to the UNDRIP by virtue of the passing of the DRIPA. For example:

(a) Many throne speeches made during the 41st and 42nd Parliament reference adherence and alignment with the UNDRIP or DRIPA:

> B.C. will be the first province in Canada to introduce legislation to implement the United Nations Declaration on the Rights of Indigenous Peoples, legislation co-developed with the First Nations Leadership Council and other Indigenous organizations.
>
> This legislation will form the foundation for the Province's work on reconciliation, mandating government to bring provincial laws and policies into harmony with the Declaration.
>
> This government committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples.
>
> Many said it could not be done.
>
> But this government challenged the status quo.
>
> It partnered with the First Nations Leadership Council to write a new law.
>
> And B.C. made history when this legislature unanimously endorsed the Declaration on the Rights of Indigenous Peoples Act.

***Legislative Assembly of British Columbia Throne Speech*, 41-5 (11 February 2020) at 11 (Hon Janet Austin)**

Reconciliation with Indigenous Peoples:

> This session, your government will build on the historic, unanimous passage of the Declaration on the Rights of Indigenous Peoples Act in this legislature – working to implement an action plan drafted in collaboration with Indigenous Peoples.

Better stewardship of our lands and resources:

> Most critically, B.C.'s commitment to reconciliation must come to life through the consultation, collaboration and co-management of land and resources envisioned in the Declaration on the Rights of Indigenous Peoples Act.

***Legislative Assembly of British Columbia Throne Speech*, 42-3 (8 February 2022) at 3, 13 (Hon Janet Austin)**

The future lies in a rights-based partnership approach to decisions respecting land, water and resource stewardship.

We will ensure this future through the ongoing implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

***Legislative Assembly of British Columbia Throne Speech*, 42-4 (6 February 2023) at 14 (Hon Janet Austin)**

...your government remains committed to implementing the Declaration on the Rights of Indigenous Peoples Act—which was endorsed unanimously by this legislature.

***Legislative Assembly of British Columbia Throne Speech*, 42-5 (20 February 2024) at 2 (Hon Janet Austin)**

(b) Recent ministerial mandate letters require the Ministers to execute their ministerial mandates and duties in accordance with the DRIPA:

> As Attorney General, part of your unique role is to ensure the rule of law is protected as a foundational principle in British Columbia. One of the greatest challenges and opportunities of modern British Columbia is to find ways to meaningfully recognize the two systems of law in our province – Indigenous

and Colonial – that co-exist and are recognized by our Constitution, our Courts, and by our government through the Declaration on the Rights of Indigenous Peoples incorporated into provincial law.

I expect you to prioritize the following:

> Support all ministries to deliver initiatives listed in the Action Plan required by the Declaration on the Rights of Indigenous Peoples Act, to keep building strong relations based on recognition and implementation of the inherent rights of Indigenous Peoples protected in Canada's constitution.

Attorney General Ministerial Mandate Letter

Our historic partnership with First Nations leadership to pass the UN Declaration on the Rights of Indigenous Peoples into law domestically in British Columbia was groundbreaking – but it was also just the beginning of the journey and work with Indigenous Peoples in our province.

The Action Plan for the Declaration on the Rights of Indigenous Peoples Act, along with innovative, true, and meaningful reconciliation initiatives with rights and title holders across the province, will be how we will bring to life our commitments under this remarkable legislation in ways that the entire province can see, touch, and feel in their daily lives.

...I expect you to prioritize making progress on the following:

> Lead work across ministries to implement the Declaration Act Action Plan in consultation and cooperation with Indigenous Peoples, including reporting annually on progress.
>
> Through the new Declaration Act Secretariat, continue to ensure new legislation and policies are consistent with the Declaration on the Rights of Indigenous Peoples Act.
>
> Support ministries to implement agreements under Sections 6 and 7 of the Declaration on the Rights of Indigenous Peoples Act that enable shared statutory decision-making authority, and advance the

recognition of First Nations self-determination and Indigenous laws.

Minister of Indigenous Relations and Reconciliation Ministerial Mandate Letter

(c) In the Honourable Josie Osborne's statement on "Mining Month 2023", Minister Osborne states, "First Nations have a crucial role in British Columbia's mining sector. Our approach to natural-resource development must be done in collaboration and partnership with the rightful owners of the land. And through the *Declaration on the Rights of Indigenous Peoples Act* Action Plan, we are committed to modernizing the *Mineral Tenure Act* to continue to build and strengthen our work together. We have already initiated a process of consultation and co-operation with First Nations to advance this work, consistent with the Interim Approach from the Declaration Act Secretariat."

(d) Recent news releases from 19 provincial ministries reference adherence to and alignment with the DRIPA.

26. The Province has created the Declaration Act Secretariat, a central agency within the provincial government dedicated to the implementation of the DRIPA. Its purpose is to guide and assist the Province to ensure all provincial laws align with the DRIPA. The Declaration Act Secretariat reports to the Minister of Indigenous Relations and Reconciliation.[11]

27. On March 30, 2022, the Province released the first DRIPA Action Plan for the years 2022-2027 (the "**Action Plan**"). The Action Plan contains 89 actions and refers to undertaking these actions "*in consultation and cooperation*" with Indigenous

[11] British Columbia, "Declaration on the Rights of Indigenous Peoples Act" (July 29, 2024), online: *British Columbia Provincial Government* https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-indigenous-peoples

groups 18 times. No mention is made of any consultation or cooperation with other British Columbians.

28. Key actions contained in the Action Plan related to matters at issue in this litigation include:

> 1.3 Utilize sections 6 and 7 of the Declaration Act to complete and implement government-to-government agreements that recognize Indigenous self-government and self-determination. (*Ministry of Indigenous Relations and Reconciliation*)
>
> 2.1 Establish a Secretariat to guide and assist government to meet its obligation to ensure legislation is consistent with the UN Declaration on the Rights of Indigenous Peoples, and is developed in consultation and cooperation with Indigenous Peoples. (*Declaration Act Secretariat*)
>
> 2.4 Negotiate new joint decision-making and consent agreements under section 7 of the Declaration Act 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, Ministry of Land, Water and Resource Stewardship*)

THE DOCK MANAGEMENT PLAN

29. In April 2015, the Province released a draft of what has become known as the "Dock Management Plan" ("**DMP**") which purported to impose various restrictions on the issuance and amendment of dock tenures under section 11 of the *Land Act* in relation to the Pender Harbour area.

30. The draft DMP caused considerable public concern and in August 2015, the Province contracted with Barry Penner, KC to undertake an independent review of the matter. Mr. Penner is a former Attorney General, Minister of Environment and Minister of Indigenous Relations and Reconciliation.

31. On November 8, 2015, Mr. Penner issued a report ("**Penner Report**") to the Province, which was subsequently released publicly. It documented a list of

questions and concerns that had been expressed related to the draft DMP and government actions, including the following:

- Complaints about lack of public consultation and input into development of the DMP.

- Insistence that docks are integral to the economy and way of life at Pender Harbour, as they provide reliable access for navigation (both recreational and commercial).

- Curiosity as to why a DMP was developed for Pender Harbour – eg. "why are we being singled out?" – and not other areas along the BC coast. This question stems from sentiment that there is nothing particularly unique about Pender Harbour from an environmental perspective to warrant the additional requirements contained within the DMP, compared to standards required by the Ministry and Fisheries & Oceans Canada elsewhere.

- Questions as to whether any environmental studies been done which support more stringent measures for dock design and maintenance, or which indicate docks are causing harm to fish and other species in the area identified in the DMP as Zone 1. If so, why have they not been released to the public? Why is the Ministry going beyond what the Department of Fisheries & Oceans requires?

- Skepticism regarding the archeological significance of the foreshore, given that it is under water more than once per day and considering the effects of residential and commercial development for the past 100 years or more.

- Suspicions that the DMP's requirements for archeological surveys and studies are motivated by a desire to generate revenue for the shíshálh Nation, since they have offered to make qualified staff available for these surveys for $500 each.

- Belief that the shíshálh Nation doesn't or shouldn't have aboriginal rights or title to the foreshore of Pender Harbour due to their apparent physical absence for much of the past 100 years, or if they do have such rights, that the non-aboriginal population should not be impacted.

- Concern that the BC Government has granted too much influence to the shíshálh Nation in managing the foreshore, and has tolerated the establishment of two unauthorized structures erected by the shíshálh Nation on Crown land (provincial park) in

the past year, thereby potentially bolstering a future aboriginal title claim.

- Related to the point immediately above, objections were raised about the use of the shíshálh Nation logo alongside the logo of the BC Government on the top of the DMP, and to the use of the phrase "collaborative management between the shíshálh Nation and the Province of British Columbia" under the heading of Principles and Objectives in the DMP.

- Confusion regarding section 6.1 (a) of the DMP ("The Province will encourage prospective applicants for new dock tenures to engage with the shíshálh Nation early, prior to submitting an application"). What form would such engagement take? What is the purpose?

- Suggestions that the BC Government should let the courts decide whether the shíshálh Nation actually have a legitimate claim to aboriginal rights and title involving the foreshore of Pender Harbour before agreeing to "co-management" with the shíshálh Nation.

- Anger over alleged comments attributed to leaders from the shíshálh Nation to the effect that they will own the foreshore throughout the Sunshine Coast, and the shíshálh Nation will have the final say as to whether docks are permitted.

- Political/philosophical objections to a level of government (shíshálh Nation), for which residents of Pender Harbour are not eligible to vote, being granted a formal role in developing policy and guidelines which govern the activities of the Pender Harbour residents.

- Regret that tensions and animosity have increased between the shíshálh Nation and the non-aboriginal community.

- Statements that any government efforts at reconciliation generally with First Nations (including with the shíshálh Nation) should not directly affect or impact the non-aboriginal population, or at least not the non-aboriginal population in Pender Harbour.

- Worries that property values near the water, especially for water access-only lots, have been devalued significantly due to uncertainty as to whether dock tenures will be granted/renewed, and due to public controversy over the DMP. Specifically, I was told that in 2014 there were 4 or 5 properties that sold for in excess of $1 million, but this year there have been no sales in the

Pender Harbour for prices in excess of $1 million. This information has not been independently verified.

- Warnings that the requirements of the DMP will eventually be imposed elsewhere in BC with negative economic consequences if the DMP is implemented for Pender Harbour.

- Less frequently, property owners expressed their opinion that they were without representation when it came to development of the DMP. These individuals did not believe that either the provincial government (as represented by the Ministry) or the Sunshine Coast Regional District is advocating on their behalf, but instead are pursuing a "government agenda."

- In conjunction with comments about a lack of representation, some individuals expressed theories (which I firmly believe are unfounded) that the DMP is meant to punish voters in the Constituency of Powell River – Sunshine Coast for electing an Opposition MLA, or that Pender Harbour has a small population so the government can get away with experimenting with a DMP, or that the interests of Pender Harbour property owners are being sacrificed to somehow gain First Nations support for the BC Government's liquefied natural gas agenda.

32. On October 4, 2018, the Province and the shíshálh Nation signed a 99-page document entitled the shíshálh Foundation Agreement ("**Foundation Agreement**").

33. The Foundation Agreement was signed six months after Mr. Penner had been contracted and approximately one month before the release of the Penner Report. The Penner Report contains no indication that Mr. Penner was aware of any ongoing bilateral discussions between the shíshálh Nation and the Province on such matters. Similarly, to the Petitioner's knowledge, no third parties were consulted during the negotiation of the Foundation Agreement.

34. The Foundation Agreement provides, among other things, for a "shared decision-making process" that applies to dock tenures. The shared decision-making process is spelled out in Appendix H of the Foundation Agreement. It does not provide the shíshálh Nation with a veto over provincial decisions.

35. Section 23 of Schedule P of the Foundation Agreement contains a "no fettering" provision, making clear that "...the establishment of the Board, Solutions Forum and tables, and the implementation of decision-making processes, does not affect the jurisdiction or fetter the discretion of any Decision Maker or other decision-making authority".

36. Since the signing of the Foundation Agreement in 2018, it has become extraordinarily difficult, if not impossible, for residents to obtain, amend or extend dock tenures under section 11 of the *Land Act* in the area to which the Foundation Agreement applies. Thus, while the Foundation Agreement may not have provided the shíshálh Nation with a legal veto over dock tenure decisions under the *Land Act*, it most cases it provided a *de facto* veto to the shíshálh Nation.

37. The Foundation Agreement was influenced directly by the Province's commitment to the UNDRIP. The recitals state, in relevant part:

> D. The Province introduced Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples on May 22, 2018 to help guide the Province on a path of respect, partnership and collaboration, as the Province implements the UN Declaration and the Truth and Reconciliation Commission of Canada's Calls to Action;
>
> E. The UN Declaration is a statement of the rights that are necessary for the survival, dignity and well-being of Indigenous peoples around the world. Among other things, the UN Declaration recognizes the right to self-determination and self-government, and to the preservation, practice and revitalization of Indigenous cultures and traditions;
>
> F. The UN Declaration provides that 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 exploration of mineral, water or other resources;

G. Implementation of the UN Declaration requires transformative change in the Province's relationship with Indigenous people, including with shíshálh Nation;

H. The Province is committed to true, lasting reconciliation with shíshálh Nation through a renewed Government-to-Government relationship based on recognition of rights, respect, cooperation and partnership, and as part of that commitment will be fully adopting and implementing the UN Declaration, the Calls to Action of the Truth and Reconciliation Commission, and the Supreme Court of Canada's decision in Tsilhqot'in Nation.

THE SECTION 7 AGREEMENT NEGOTIATIONS

38. On August 2, 2022, Order in Council 2022-444 was issued pursuant to section 7 of the DRIPA. It states:

> On the recommendation of the undersigned, the Administrator, by and with the advice and consent of the Executive Council, orders that (a) the Minister of Indigenous Relations and Reconciliation and the Minister of Forests are authorized, on behalf of the government, to negotiate an agreement with the Sechelt Indian Band relating to the exercise, jointly by the Minister of Forests and the Sechelt Indian Band, of the power under section 11 of the Land Act to dispose of, by way of a lease or licence issued to a person entitled under that Act, Crown land within the area outlined in bold black on the attached map for the purpose of a private or commercial dock...

39. That same day, the Province issued a media release stating, in part:

> The shíshálh Nation and the Province of British Columbia are starting negotiations on the first joint decision-making agreement to be negotiated under Section 7 of the Declaration on the Rights of Indigenous Peoples Act (Declaration Act).
>
> The agreement, when negotiated, will apply to decisions on dock tenures in the shíshálh swiya (territory/birthplace/world) and builds upon the current model for making shared decisions on dock tenures created in 2018.
>
> "Agreements under the Declaration Act are a powerful and important way to recognize Indigenous jurisdiction and decision-making authority, " said Murray Rankin, Minister of Indigenous Relations and Reconciliation....

Quick Facts

> On Nov. 28, 2019, the Declaration Act was passed into law and B.C. became the first jurisdiction in Canada to implement the UN Declaration on the Rights of Indigenous Peoples.

40. On August 15, 2022, the Province issued another media release indicating that "[t]he shíshálh Nation and the Province of British Columbia have committed to negotiate a decision-making agreement under Section 7 of the Declaration on the Rights of Indigenous Peoples Act". The release noted that PHARA, along with six other entities would "be consulted during negotiations on the decision-making agreement."

41. The Section 7 Agreement negotiations relate to the same subject matter addressed by the DMP and, to some extent, the Foundation Agreement. But PHARA considers the Section 7 Agreement negotiations more legally problematic. This is because, unlike the DMP and the Foundation Agreement, the Section 7 Agreement is being negotiated pursuant to purported statutory authority, with the potential to legally modify statutory decision-making under the *Land Act* in ways that the Province could not validly do by way of the DMP or the Foundation Agreement.

42. On September 22, 2022, the Province sent a letter to all dock owners and advised them of the Province's intent to negotiate an agreement with the shíshálh Nation under Section 7, and that the Province would be in touch with dock owners at a later date.

43. On November 4, 2022, PHARA, expressed concern about the lack of consultation that had been publicly promised.

44. The Province replied on December 16, 2022 in a manner that was not satisfactory to PHARA. Specifically, Jennifer Spencer, Negotiator, the Coast Regional Negotiations Team of the Ministry of Indigenous Relations and Reconciliation ("**Ms. Spencer**") stated that:

> 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...

45. On January 18, 2023, PHARA wrote Premier Eby, several ministers and the shíshálh Nation Chief and Council, referencing Ms. Spencer's response and stating:

> ... 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...
>
> 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...

46. PHARA's January 18, 2023 letter went on to pose 22 specific questions related to the Section 7 Agreement negotiations.

47. On January 23, 2023, Ms. Tonianne Mynen, Director, Strategic Initiatives, Ministry of Water, Land and Resources Stewardship ("**Ms. Mynen**") wrote two PHARA directors stating in part:

> ...Jennifer Spencer and I would like to arrange a call with yourself and Peter. We understand that the Minister Rankin's office is working on responding to your recent letter regarding joint decision-making with shíshálh Nation, and we would appreciate following up directly with you both...

48. On January 26, 2023, PHARA emailed Ms. Mynen and Ms. Spencer, stating.

> We confirm receipt of your invitation for a virtual 30 min meeting on Feb 2, 2023.
>
> We note from the heading on the invitation that the purpose of this meeting is to provide PHARA with a status report on the negotiations relating to Joint decision making with the shíshálh Nation. Considering the scheduled length of the proposed meeting, we understand this is the only item on the agenda. If this is incorrect, please provide us with an agenda so we can properly prepare for the meeting.
>
> Our correspondence dated January 18th, 2023 requested that negotiations cease until our questions are answered in writing. We repeat that request here since we expect that it will take Minister Rankin's staff considerable time to adequately answer our questions in writing as this is a complicated, first of its kind, process and the responses will have immense repercussions for the Province of British Columbia.
>
> Once the answers are provided, we will consider the same and provide our response.
>
> Accordingly, we will not consider this upcoming meeting a consultation as required under section 7(3) of the Declarations Act but merely a courtesy discussion to inform PHARA of where things stand at the moment. If it is meant to be more than that, then we ask that our questions be answered in writing before attending a meeting.
>
> Please confirm, by return, that you are in agreement with our understanding of the purpose of our scheduled meeting.

49. Neither Ms. Mynen nor Ms. Spencer responded to the request in the final paragraph noted above.

50. On February 2, 2023, two PHARA directors met with Ms. Spencer and Ms. Mynen to receive an update on the Section 7 Agreement negotiations. No substantive information was provided regarding the content of the Province's negotiations with the shíshálh Nation concerning the Section 7 Agreement, and provincial officials indicated they were not yet ready to engage on this.

51. On February 16, 2023, PHARA wrote Ms. Spencer and Ms. Mynen, stating:

> ... Although you do not foresee a system in which applicants have to deal with the government and nation separately, we are concerned about any attempt to remove the Province as the final statutory decision maker in any process.
>
> We believe it would be beneficial to the outcome of this process for PHARA to be an equal participant, included in any negotiations. Representing both the Pender Harbour community and dock owners, this will enable a more informed discussion and ensure that you are able to get this new and historical process right the first time. We have some valuable insights that will help make this process smoother and help get buy-in from the community.
>
> Once again, we ask that formal negotiations between the Province and the shíshálh Nation do not continue until we receive written answers to our formerly submitted questions. 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 must be considered in the framework of any agreement.
>
> We look forward to receiving these answers in the near future so we can continue this important conversation.

52. Three months later on April 6, 2023, Murray Rankin, Minister of Indigenous Relations and Reconciliation finally responded to PHARA's January 18, 2023 letter. He did not respond to the specific questions posed, but instead said:

> I reinforce the messaging you heard from provincial staff: this is ground-breaking work, and it is important that we get it right. BC and shíshálh are still discussing components of a joint decision-making model, including many of the questions you posed in your written correspondence....
>
> I can assure you that as outlined in the Declaration Act, BC will engage on Section 7 agreements with interested parties, including PHARA, on the joint decision-making agreement as it develops.

53. On April 13, 2023, Ms. Mynen wrote PHARA regarding a proposed meeting in May. It was however not clear whether the meeting would touch on the Section 7 Agreement negotiations.

54. A meeting was eventually set for May 16, 2023. In advance of the meeting, PHARA sent a letter to Ms. Mynen and Ms. Spencer on May 12, 2023, and addressed issues related to the DMP and noted the following:

> Lastly, we would also like to discuss with you the shishalh-BC Land Use Planning Project. This project has just recently come to our attention and we would like to know how this project relates to the Section 7 Agreement project we are currently discussing with you as well as the Pender Harbour Dock Management Plan.

55. At the May 16, 2023 meeting, no substantive information was provided regarding the content of the Province's negotiations with the shíshálh Nation concerning the Section 7 Agreement, and provincial officials again indicated they were not yet ready to engage on this. There was also no discussion of the shíshálh-BC Land Use Planning Project.

56. On September 25, 2023, PHARA wrote Ms. Spencer, stating:

> ...The Pender Harbour and Area Residents Association is holding a town hall meeting on October 22nd at 1-3pm at the Madeira Park Community Hall.
>
> We will be covering a number of community topics that PHARA is involved with and will be providing our residents with an update on the Dock Management Plan and the Section 7 negotiations.
>
> In advance of the meeting, could you please provide us with any update on the DMP and Section 7 negotiations....

57. On October 5, 2023, Ms. Spencer replied to PHARA stating:

> ... In terms of the invitation, thank you. The timing of your meeting is a bit ahead of the timelines we are working with. As an alternative, we could be available to join an in person or virtual open house hosted by PHARA between November 14-17th. Would you be willing to push out your meeting date or perhaps schedule another one? Generally speaking weekday evenings work much better for us than weekends
>
> A few things for consideration:

1. Joint Decision-Making updates: we should be ready in a few months to start some more detailed engagement with PHARA about how the negotiations are proceeding and to start dialogue. We can provide some updates on the negotiations and a bit of a background if you proceed with an October date. Our preference would be to touch on those background pieces at a November meeting...

58. On October 14, 2023, PHARA wrote to Ms. Spencer stating:

...Unfortunately we cannot move the Town Hall date as we have already promoted the event and there are a number of topics being covered.

We would appreciate any information regarding Section 7 and the Dock Management Plan you can share in advance of the 22nd of October which we can relay to Pender Harbour residents...

59. On October 20, 2023, Ms. Spencer wrote to PHARA, stating:

I'm sorry to be getting back to you so late at the end of the week. We were working hard this week, hoping to be ready to share more detail with you today we are not ready yet.

Please relay to your members that we plan to work with your Board to return to your members in November to have a more detailed conversation. We will set up a virtual meeting with the PHARA membership in November and will work with the PHARA board to plan that and we look forward to connecting with the membership then.

We'd also like to set up a call with you soon (perhaps next week) to talk about how the town hall went and to work with you on logistics for a November meeting.

Please let me know some availability you have during the week between Oct 23-27th and we can connect on next steps and how to work together.

60. On November 15, 2023, PHARA wrote to Ms. Spencer, stating:

Our Town Hall Meeting has come and gone. We advised our residents that we expected a further meeting and an update on the Dock Management Plan as well as the Section 7 negotiations in November. We are now half way through the month and as far as I am aware we have not been contacted for this purpose. (Guy is

> currently out of the country). It would be most appreciated if you could advise when we might hear from you regarding these matters at your earliest convenience.
>
> We look forward to hearing you.

61. On November 20, 2023, Ms. Spencer wrote to PHARA to discuss further meetings related to the DMP and said:

> ... For the Section 7 negotiations, we are simply not ready for external engagement. I understand this is likely frustrating, however doing this work is taking time and we are not able to share more currently. As per the requirements under the Declaration Act, engagement will occur with PHARA...

62. On November 22, 2023, PHARA responded to the November 20, 2023 email and said:

> ... As time goes on, we are becoming increasingly concerned about the lack of engagement concerning the negotiation of the Section 7 agreement under DRIPA. Those concerns were expressed in our letter of January 18th, 2023 and nothing has changed to address those concerns....

63. On January 6, 2024, the PHARA wrote to shíshálh Nation Chief Lenora Joe, seeking to engage in direct and constructive dialogue. The letter stated:

> Dear hiwus yalxwemult Lenora Joe
>
> I extend warm greetings to you and the esteemed members of the shíshálh Nation. My name is Peter Robson, and I am writing as President of the Pender Harbour and Area Residents Association (PHARA). We seek an opportunity to engage in meaningful dialogue regarding the proposed draft to the Pender Harbour Dock Management Plan, which has significant implications for both our communities.
>
> We believe that open communication is essential to maintaining the strength of our relationship. Our waterfront communities share a delicate balance between environmental stewardship and economic sustainability. The proposed amendments to the Dock Management Plan, in their current form, raise serious questions about their efficacy in achieving a harmonious balance. We are particularly concerned about the potential adverse economic effects on our local

> communities and small businesses which heavily rely on recreational boating to sustain their economies.
>
> PHARA believes that a collaborative approach is essential to comprehensively address these concerns. We understand that the Dock Management Plan directly impacts the rights and interests of the shíshálh Nation, and we wish to engage in a dialogue that fosters collaboration and mutual respect. We believe that by working together, we can address the concerns of both our communities and find common ground that respects the environment, cultural heritage, and the livelihoods of all involved.
>
> PHARA is eager to arrange a meeting at your earliest convenience, and we would be honoured to come to your community to discuss the Dock Management Plan in detail. We seek to build a bridge of understanding and collaboration that benefits both our communities.
>
> Please let us know a time that suits you, and we will make every effort to accommodate your schedule. We appreciate your consideration of this request and look forward to the opportunity for a respectful and constructive dialogue...

64. PHARA did not receive a reply or acknowledgment from the shíshálh Nation to the January 6, 2024 letter.

65. On January 10, 2024, PHARA's legal counsel wrote to Nathan Cullen, Minster of Water, Land and Resource Stewardship seeking an extension on the consultation period for the Province's proposed updates to the DMP:

> Our understanding is that the consultation process is set to close January 12, 2024. Our clients have recently asked your staff to extend the consultation period further and set a meeting involving legal counsel. So far, however, staff have been unable to confirm whether that request will be accommodated.
>
> We strongly encourage you to ensure an extension is put in place, so that the [DMP] and proposed amendments can be the subject of meaningful discussion, including with the parties' legal counsel. In our view, the November 24 correspondence and materials referenced raise – on their face – significant administrative law problems given your common law obligations in respect of applications under s.11 of the *Land Act*.

> It is also noteworthy that there is a clear discrepancy between the proposed [DMP] and the Crown land policies and procedures otherwise adopted and applied by the Province in respect of the *Land Act* decision making...These documents are drafted in a manner that better respects the legal implications of policy or guidance material, something the [DMP] seems wholly unalive to.

66. On January 27, 2024, PHARA wrote to Ms. Mynen and Ms. Spencer stating, in part:

> As we indicated to you earlier PHARA has retained McMillan LLP for the purposes of obtaining legal advice on this issue. You should be aware that our Counsel sent a letter to the Honourable Minister Nathan Cullen on January 10th, 2024, a copy of which is attached hereto for your convenience. Our Counsel has suggested that we meet with legal Counsel in order to have meaningful discussions concerning the significant administrative law issues arising and the government's common law obligations under the Land Act. To date, our Counsel has not received a response to this correspondence.
>
> Your most recent correspondence does not address the suggestion of meeting with Counsel but appears to simply repeat the "previously offered format" and refers to the 'PHARA Engagement Plan". We ask you to address our Counsel's suggestion of meeting with Counsel as it has resulted in some confusion at our end. Are we meeting with or without Counsel present?
>
> We also note you have not addressed our earlier request to have our meeting "live streamed" to the public so that our members and dock owners can hear what is being discussed. Can you please provide an explanation of why a recording of the event poses a safety risk, as suggested in your email.

67. In late January 2024, a significant amount of media attention erupted regarding changes that the Province was quietly proposing to the *Land Act* to enable First Nation joint decision-making or consent decision-making. This issue was directly relevant to the Section 7 Agreement negotiations and a PHARA representative was interviewed on numerous occasions.

68. On February 19, 2024, PHARA wrote Ms. Mynen and Ms. Spencer, with Premier David Eby and Minister Cullen copied, stating:

> We are writing to express our disappointment at the lack of response to our previous correspondence dated January 27th.
>
> Additionally, Minister Cullen's failure to acknowledge receipt of our Counsel's letter dated January 10th is concerning.
>
> Despite recent media statements indicating a commitment to thorough consultation on the Land Act amendments, which directly impact ongoing negotiations with the shíshálh Nation and our Dock Management Plan, there has never been meaningful consultation with those most impacted, and we have yet to receive any response to our recent correspondence from your Ministry.
>
> We look forward to hearing from you and the Minister.

69. On February 21, 2024, Minister Cullen released a statement and announced the government had decided "not to proceed with the proposed amendments to the Land Act."

70. On March 17, 2024, PHARA wrote an open letter to Minister Cullen, with a copy to Premier David Eby and all cabinet ministers stating:

> **Re: More secret talks after the Land Act debacle?**
>
> It was less than a month ago that you were forced to announce a major reversal on your Land Act amendment plans. You reluctantly admitted that you had dropped the ball on public engagement. Vaughn Palmer reported that you had been in quiet discussions with "a select list" of people – presumably all under NDAs (non-disclosure agreements).
>
> But the secrecy did not end there. Those Land Act amendments were going to play themselves out first on the Sunshine Coast where you are, right now, negotiating an agreement with the shishalh Nation to give it powers under s. 11 of the Land Act...
>
> Let's just say that PHARA, and others, are not accepting being shut out of those secret talks either...
>
> The Sunshine Coast dock management plan has become a bellwether for your government's reconciliation plans across BC, and you surely must see that ordinary people are getting increasingly concerned. So we urge you, if you are serious about reconciliation and democracy, to do the following:

> 1. Publish the full text of the more than 1,700 comments you received on the dock management plan (redacting personal identifiers if you wish).
>
> 2. Scrap the present dock management plan and start again from scratch, in an inclusive, public and transparent process.
>
> 3. Rescind Order in Council 2022-444 and keep final decision-making authority regarding dock tenures under the Land Act with the Province (and of course undertaking meaningful consultation with the shishalh Nation as the courts require).

71. Two days later, on March 19, 2024, Minister Cullen sent an email to PHARA. While his email addressed the issue of consultations on the DMP (alleging PHARA had not taken up invitations), it did not address the Section 7 Agreement negotiations or Order in Council 2022-444.

72. On March 21, 2024, PHARA responded to Minister Cullen stating in part:

> ... We respectfully disagree with your assertion that the PHARA board has "not taken up" meeting opportunities and "declined to meet" with you.
>
> The record – which I am happy to send to you directly for ease of reference if you wish – makes clear the opposite is true.
>
> PHARA has been trying for more than a year to meet with you and / or your colleague Mr. Rankin on the secret negotiations with the shishalh Nation to confer decision-making powers under the Land Act, and for months now on your amendments to the dock management plan (DMP).
>
> Yet the province has imposed numerous preconditions and limitations to the meetings that were of concern to us - particularly a lack of public access, as not every interested person in this area is a member of PHARA. And several times communications were – on the province's end – delayed until extremely close to a proposed meeting time, which had by then become impossible to accommodate. Put simply, it seems clear government was more interested in trying to establish a record of engagement than actual engagement.
>
> We must also note that, in numerous cases when our emails asked those questions or stated such concerns, we would get a phone message from your Deputy Minister, or a text asking us to call

> her. The obvious inference is the province did not want a paper trail of its engagement limitations, pre-conditions and inadequate answers to such questions...

73. To date, the Province has not provided PHARA with any substantive information about the Section 7 Agreement negotiations being undertaken pursuant to Order in Council 2022-444 and has refused PHARA any meaningful opportunity for input.

Part 3: LEGAL BASIS

Inconsistency with Canadian Constitutional law of Aboriginal rights

1. Canada has protected Aboriginal rights in its Constitution, specifically section 35 of the *Constitution Act, 1982*. It is one of the few countries in the world to do so. It states:

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

2. From the early cases on section 35, the Supreme Court of Canada has made clear that "Rights that are recognized and affirmed are not absolute."[12]

3. Instead, section 35 has been interpreted and implemented, in various contexts and various Supreme Court of Canada decisions which provide sophisticated and balanced tests to reconcile Indigenous and broader societal interests. Similar (albeit not identical) balancing of interest tests exist in each of the following categories:

   (a) asserted but unproven Aboriginal rights,

   (b) established Aboriginal rights; and

   (c) Aboriginal title.

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[12] *R v Sparrow*, [1990] 1 SCR 1075 ("*Sparrow*") at para 62

4. The DRIPA and UNDRIP are inconsistent with section 35 as it relates to each of those categories:

Asserted but unproven Aboriginal rights

5. In the context of asserted but unproven Aboriginal rights (which is the case for most of British Columbia, including the Pender Harbour area), the Supreme Court of Canada has interpreted section 35 as imposing on governments a "duty to consult" Indigenous groups where such asserted, but unproven, rights may be impacted by an action or decision government is contemplating making. This may include a duty to attempt to accommodate Aboriginal concerns and interests through conditions of permits, modifications to proposed projects, etc.[13]

6. The Supreme Court of Canada has expressly said numerous times that the duty to consult does not give Indigenous groups a "veto", and at the end of the consultation government must simply "reasonably balance" Aboriginal and non-Aboriginal interests.[14]

7. The "reasonable balancing" of Aboriginal and non-Aboriginal interests inherent in section 35 regarding asserted but unproven Aboriginal rights is inconsistent with section 7 of the DRIPA which empowers agreements to give First Nations actual statutory decision-making powers by way of joint-decision making or consent powers – i.e., a veto.

8. It is also inconsistent with section 3 of the DRIPA which obligates the government to take all measures necessary to ensure British Columbia's laws are consistent with the UNDRIP, which in turn contains the following provisions, *inter alia*:

Article 22

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[13] *Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73 ("Haida")
[14] *Haida* at paras 48, 50.

> 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...

Article 26

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired...

9. There is no reference to "reasonably balancing" Indigenous and non-Indigenous rights in the UNDRIP. While some limitation on rights is contemplated by Article 46 of the UNDRIP, the test is different and does not include the section 35 standard.

Established Aboriginal rights

10. There have been no judicial findings, treaties, or land claim agreements establishing specific Aboriginal rights in the Pender Harbour area, although it is possible this may occur in future.

11. Where Aboriginal rights are established – i.e., proven in court or confirmed by way of a treaty or land claim agreement, they are still not absolute. Instead, section 35 includes a right of governments to justify an infringement of Aboriginal rights for broader social good, provided a particular test is met. The test requires the government to demonstrate:

(a) a compelling and substantial objective; and

(b) the Honour of the Crown has been met. This requires considering whether:

(i) the infringement is really necessary;

(ii) the impairment is as minimal as possible, there is due consultation; and

(iii) there is compensation where warranted.[15]

12. The ability of government to infringe established Aboriginal rights under section 35 is inconsistent with section 7 of the DRIPA, which empowers agreements to give First Nations actual statutory decision-making powers by way of joint-decision making or consent powers – i.e., a veto.

13. It is also inconsistent with section 3 of the DRIPA, which obligates the government to take all measures necessary to ensure British Columbia's laws are consistent with UNDRIP which in turn contains the following provisions, *inter alia*:

Article 22

> 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...

Article 26

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[15] *Sparrow*

> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired...

14. The UNDRIP does not contain a test for infringement of established Aboriginal rights as section 35 permits. While some limitation on rights is contemplated by Article 46 of the UNDRIP, the test is different and does not include the section 35 standard.

Aboriginal title

15. Aboriginal title is the highest form of Aboriginal right included in section 35. It is the right to the land itself, to determine the use to which it is put, and to benefit from the fruits of the land. There has been no judicial finding or treaty respecting the existence of Aboriginal title in the Pender Harbour area, although is possible this will occur in future.

16. Like Aboriginal rights generally, the Supreme Court of Canada has made clear that Aboriginal title is not absolute. It can be infringed where the government can show (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the government action is consistent with the Crown's fiduciary obligation to the group.[16]

17. The UNDRIP does not contain a test for infringement of established Aboriginal title as section 35 permits. While some limitation on rights is contemplated by Article

[16] *Sparrow; Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 ("Tsilqot'in Nation")

46 of the UNDRIP, the test is different and does not include the same section 35 standard.

18. In addition to inconsistencies related to the balancing of interests discussed above, there is another fundamental inconsistency between section 13 of the DRIPA, the UNDRIP, and section 35 related to Aboriginal title itself. Specifically, Canada's section 35 rights related to Aboriginal title are limited to lands that the Indigenous groups had exclusive occupancy of at the time of the assertion of Canadian sovereignty. Yet section 3 of the DRIPA and the UNDRIP purport to afford Aboriginal title like rights to Indigenous groups on the mere basis that they have *"traditionally...occupied or otherwise used..."* lands. There is no reference to or requirement for exclusive use and occupancy as section 35 requires for Aboriginal title.[17]

19. For all the above reasons that the DRIPA is inconsistent with section 35, it is of no force and effect.[18]

Exceedance of provincial legislative jurisdiction

76. In the alternative, if the DRIPA is not invalid or inoperable on the basis that it is inconsistent with section 35, then it is beyond constitutional competence of the British Columbia legislature.

77. Section 91(24) of the *Constitutional Act, 1982* gives the federal parliament exclusive jurisdiction over "Indians and land reserved for the Indians".

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[17] *Tsilhqot'in Nation*

[18] *Constitution Act, 1867*, section 52

78. One of the reasons for section 91(24) "was probably the desire to maintain uniform national policies respecting the Indians." [19]

79. The Supreme Court of Canada has taken a broad approach to interpreting section 91(24), particularly in the context of implementing the UNDRIP. In a reference case involving federal legislation regarding *Indigenous* child welfare - typically a matter within provincial jurisdiction under section 91(13) related to property and civil rights in the province, the Court stated that such legislation fell squarely within federal authority under section 91(24). [20]

80. The Supreme Court stated "[t]he jurisdiction provided for in s. 91(24) is broad in scope and relates first and foremost to what is called "Indianness" or Indigeneity, that is, Indigenous peoples as Indigenous peoples."[21]

81. The DRIPA, with its square focus on the UNDRIP and Indigenous rights, is in "pith and substance" a law directed to Indianness and Indigeneity. It is directed exclusively to Indigenous peoples and their rights, and specifically the implementation of the UNDRIP in British Columbia. It is not legislation directed at another (provincial) subject matter that might incidentally affect Indigenous peoples.

82. If provincial governments were able to legislate squarely and directly with respect to Indigenous rights, it would have the potential to create a patchwork of inconsistent rights across Canada, and a patchwork of different standards for balancing Indigenous and broader societal interests. Such a patchwork would be impossible to reconcile with the principles of the Honour of the Crown and

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[19] Hogg, *Constitutional Law of Canada* (Toronto: Thompson Reuters, 2007) (looseleaf updated 2017, release 1) ch 28 at p 28-2 (citing C. Bell, "Have You Ever Wondered Where s. 91(24) Comes From?" (2004) 17 Can. J. Con. Law 285)

[20] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 ("Indigenous Child Welfare Reference")

[21] *Indigenous Child Welfare Reference* at para 94

Indigenous self-governance relied upon by the Supreme Court of Canada in *Indigenous Child Welfare Reference*, and would represent a grave incursion into federal legislative powers under section 91(24)

83. For all the above reasons, the DRIPA is outside the constitutional competence of the Province of British Columbia, and it is of no force and effect.[22]

Violation of Democratic Voting Rights

84. Section 3 of the Charter guarantees citizens the right to vote in an election of a legislative assembly. This is more than the mere right to cast a ballot – it includes a right of citizens to a meaningful role in the electoral process. It must be given a large and liberal interpretation – one which advances the values and principles of a free and democratic society.[23]

85. Democracy "expresses the sovereign will of the people" and "is commonly understood as being a political system of majority rule."[24]

86. The DRIPA violates the democratic rights of citizens because, through section 3, 5 and 6, it ties the hands of the legislators that are elected by citizens now and into future – requiring them to legislate and take other actions consistent with the UNDRIP irrespective of the wishes of the voters that elected them.

87. The Supreme Court of Canada stated that "the right of each citizen to participate in the political life of the country is one of fundamental importance in a free and democratic society."[25] Voting rights should be viewed "in a manner that ensures

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[22] Constitution Act, 1867 s. 52

[23] *Frank v Canada*, 2019 SCC 1 at paras 25-27: *Opitz v Wrzesnewskyj*, 2012 SCC 55 at paras 27-29, 37: *Figueroa v Canada (Attorney General)*, 2003 SCC 37 ("Figueroa")

[24] *Reference re Secession of Quebec,* [1998] 2 SCR 217

[25] *Figueroa*

that this right of participation embraces a content commensurate with the importance"[26] of the rights enshrined under section 3 of the Constitution.

88. In addition, section 6 and 7 of the DRIPA, and Order in Council 2022-444 violate the democratic rights of citizens because they transfer decision-making powers under provincial statutes to parties ("Indigenous Governing Bodies") that are neither elected by British Columbians, nor appointed by or accountable to such elected representatives.

89. These violations of democratic rights arising from DRIPA section 7 are compounded by the fact that such agreements, once signed, may implicate the "Honour of the Crown" - thus further limiting any remedial or residual role for government or the legislature going forward.[27]

Violation of Parliamentary Supremacy

90. Section 3 of the DRIPA violates the principle of parliamentary supremacy in that it seeks to prescribe the substance of legislation that must be passed by future legislatures, and tie them to an instrument adopted by another entity – the UN General Assembly.

91. As noted by the Supreme Court of Canada in *Reference Re Canada Assistance Plan (B.C.)*:

> It is clear that parliamentary sovereignty prevents a legislative body from binding itself as to the substance of its future legislation. The claim that is made in a "manner and form" argument is that the body has restrained itself, not in respect of substance, but in respect of the procedure which must be followed to enact future legislation of some sort, or the form which such legislation must take. In *West Lakes Ltd. v. South Australia*, *supra*, a "manner and form" argument was rejected. King C.J. said (at pp. 397-98):

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[26] *Figueroa*

[27] *Haida* at para 16: *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *Taku River Tlingit First Nation v British Columbia,* 2004 SCC 74; *Neskonlith Indian Band v Salmon Arm (City)*, 2012 BCCA 379 at paras 61-72

> Even if I could construe the statute according to the plaintiff's argument, I could not regard the provision as prescribing the manner or form of future legislation. A provision requiring the consent to legislation of a certain kind, of an entity not forming part of the legislative structure . . . does not, to my mind, prescribe a manner or form of lawmaking, but rather amounts to a renunciation *pro tanto* of the lawmaking power.
>
> Those words are fully applicable here.[28]

92. If a law could be passed to restrain future legislatures, it "would lay a dead hand on a government subsequently elected".[29]

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[28] [1991] 2 SCR 525 (cited with approval in *City of Surrey v British Columbia Minister of Public Safety and Solicitor General*, 2024 BCSC 881 at para 69)

[29] Peter Hogg, *Constitutional Law of Canada* (Toronto: Thompson Reuters, 2007) (looseleaf updated 2017, release 1) ch. 12 at p 12-8

Conclusion

93. Section 52(1) of the *Constitution Act, 1982* provides that any law inconsistent with the Constitution of Canada is of no force or effect, to the extent of the inconsistency.

94. The Petitioner asks that the relief be granted.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Sean McAllister, sworn September 10, 2024; and

2. Such further and other material as counsel may deem necessary and this Court may permit.

Date: September 10, 2024

Signature of lawyers for petitioner
Joan M. Young and Robin Junger

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs ..... of Part 1 of this petition

☐ with the following variations and additional terms:
.....
.....
.....

Dated: Signature of Judge Master

No.
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PENDER HARBOUR AND AREA RESIDENTS ASSOCIATION

PETITIONER

AND

LIEUTENANT GOVERNOR IN COUNCIL OF THE PROVINCE OF BRITISH COLUMBIA, HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

PETITION

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Attention: Joan M. Young and Robin Junger

File No. 306640