COURT OF APPEAL FILE NO CA49428

SM'OOYGIT NEES HIWAS V. CHIEF GOLD COMMISSIONER OF BRITISH COLUMBIA

INTERVENER'S FACTUM

**COURT OF APPEAL**

ON APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE A. ROSS OF THE SUPREME COURT OF B.C. PRONOUNCED ON 26/09/2023

BETWEEN:

**SM'OOYGIT NEES HIWAAS, ALSO KNOWN AS MATTHEW HILL, ON BEHALF OF THE SMGYIGYETM GITXAAŁA, AND GITXAAŁA NATION**

**APPELLANTS**

(PETITIONERS)

AND:

**CHIEF GOLD COMMISSIONER OF BRITISH COLUMBIA, LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF BRITISH COLUMBIA, CHRISTOPHER RYAN PAUL, OLIVER JOHN FRIESEN**

**RESPONDENTS**
(PETITION RESPONDENTS)

COURT OF APPEAL FILE NO COURT OF APPEAL FILE NO. CA49430

EHATTESAHT FIRST NATION AND CHIEF SIMON JOHN V. CHIEF GOLD COMMISSIONER

INTERVENER'S FACTUM

**COURT OF APPEAL**

ON APPEAL FROM THE ORDER OF THE HONOURABLE JUSTICE A. ROSS OF THE SUPREME COURT OF B.C. PRONOUNCED ON 26/09/2023

BETWEEN:

**EHATTESAHT FIRST NATION AND CHIEF SIMON JOHN IN HIS CAPACITY AS CHIEF OF THE EHATTESAHT FIRST NATION ON BEHALF OF ALL MEMBERS OF THE EHATTESAHT FIRST NATION**

**APPELLANT**

(PETITIONERS)

AND:

**HIS MAJESTY THE KING IN RIGHT OF BRITISH COLUMBIA, AS REPRESENTED BY THE CHIEF GOLD COMMISSIONER; ATTORNEY GENERAL OF BRITISH COLUMBIA; PRIVATEER GOLD LTD.; LIEUTENANT GOVERNOR IN COUNCIL OF BRITISH COLUMBIA; ANDRE LYONS, CALVIN MANAHAN, AND FOREST CRYSTAL LTD.**

**RESPONDENTS**
(PETITION RESPONDENTS)

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**INTERVENER'S FACTUM**

**B.C.'S HUMAN RIGHTS COMMISSIONER**

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## OPENING STATEMENT

B.C.'s Human Rights Commissioner, 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.

While the court below correctly identified the *Declaration on the Rights of Indigenous Peoples Act,* S.B.C. 2019, c. 44 [*DRIPA*] as a human rights statute that must be interpreted "expansively", the court failed to give any effect to that finding. The incorporation of the United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP] into the laws of B.C. means that the articles of UNDRIP must be given legal effect in B.C. and must be justiciable.

The Supreme Court of Canada [SCC] describes human rights legislation as quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes. Quasi-constitutional legislation is legislation that expresses and protects fundamental societal values and is therefore more important than other legislation, except for the Constitution.

Quasi-constitutional legislation intends to give rise to rights of vital importance that must be enforceable in court. Various SCC decisions provide guidance about what this means in practice, with the focus on expanding protection rather than limiting liability.

The goal of *DRIPA* is to uphold the human rights of Indigenous Peoples in B.C. and advance reconciliation. *DRIPA* must therefore be given an expansive interpretation that best upholds the human rights of Indigenous Peoples and advances reconciliation.

B.C. courts are the only possible venue for disputes about the consistency between the laws of B.C. and UNDRIP. As a result, it is crucial that B.C. courts provide guidance about the consistency between B.C. laws and UNDRIP when asked to do so.

Section 3 of *DRIPA* states that in consultation and cooperation with the Indigenous Peoples in B.C., the government must take all measures necessary to ensure the laws of B.C. are consistent with the Declaration. In accordance with international law, "all measures necessary" is a justiciable standard.

## PART 1 - STATEMENT OF FACTS

1. B.C.'s Human Rights Commissioner [Commissioner] is an independent officer of the Legislature. The Commissioner's statutory mandate is to protect and promote human rights in B.C., including those arising from international human rights obligations.[1]

2. The Commissioner relies on the Facts as set out by the Appellants. [2]

## PART 2 - ISSUES ON APPEAL

3. The Commissioner refers to and relies on the Appellants' statements of the issues on appeal.

## PART 3 – ARGUMENT

### *DRIPA* is a quasi-constitutional human rights statute

4. The court below correctly identified *DRIPA* as a human rights statute that must be interpreted "expansively".[3] Respectfully, the court below erred in failing to give any effect to that finding.

5. As a human rights statute, *DRIPA* attracts the same interpretive principles as those that apply to other human rights legislation. Canadian courts recognize that human rights statutes occupy an elevated position in the legal landscape.[4] The SCC describes human rights legislation as "quasi-constitutional legislation that attracts a generous interpretation to permit the achievement of its broad public purposes."[5]

6. Quasi-constitutional legislation is legislation that expresses and protects fundamental

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[1] *Human Rights Code*, R.S.B.C. 1996, c. 210, s.47.12(1) [*Code*].
[2] Appellant's Factum, Ehattesaht First Nation, at paras. 1-17; Appellant's Factum, Sm'ooygit Nees Hiwas, also known as Matthew Hill, on behalf of Smgyigyetm Gitxaala, and Gitxaala Nation, at paras. 2-20.
[3] *Gitxaala v. British Columbia (Chief Gold Commissioner),* 2023 BCSC 1680, Joint Appeal Record p. 110 at para. 469.
[4] *Insurance Corporation of British Columbia v. Heerspink,* [1982] 2 S.C.R. 145; *CN v. Canada (Canadian Human Rights Commission),* [1987] 1 S.C.R. 1114 [*CN*] at p. 1136; *Dickason v. University of Alberta,* [1992] 2 S.C.R. 1103 at 1154; *Sullivan on the Construction of Statutes*, 7th Ed., Ch 19, § 19.01 [1] [*Sullivan*].
[5] *McCormic v. Fasken Martineau DuMoulin LLP,* 2014 SCC 39 at para. 17.

societal values and is therefore more important than other legislation, except for the Constitution. The SCC has recognised human rights legislation,[6] the *Official Languages Act,*[7] and privacy legislation[8] as quasi-constitutional.

7. The principles of interpretation and application that apply to quasi-constitutional legislation generally are the same as those that apply to human rights legislation.[9] Therefore, relevant principles may be identified from looking at decisions related to forms of quasi-constitutional legislation other than human rights legislation.

8. There are several principles that apply to quasi-constitutional legislation:

   a. It must be given a broad, purposive and liberal interpretation.[10] Rights are to be construed broadly, while defenses and exceptions are to be construed narrowly.[11] This means that an interpretation that takes a narrow view of the legislation is a legal error, as is an interpretation that does not to the greatest extent possible give effect to the underlying purpose of the legislation;

   b. Quasi-constitutional legislation intends to give rise to rights of "vital importance" that must be capable of enforcement in court.[12] The SCC has warned against searching for "ways and means to minimize those rights and to enfeeble their proper impact."[13] At the same time, interpretations must both be grounded "in the text and scheme of the legislation *and* reflect its broad purpose";[14] and

   c. Where it is in conflict or inconsistent with other legislation, the quasi-constitutional

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[6] *Robichaud v. Canada (Treasury Board),* [1987] 2 SCR 84; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Communauté urbaine de Montréal*, 2004 SCC 30; *New Brunswick (Human Rights Commission) v. Potash Corporation of Saskatchewan Inc.,* 2008 SCC 45 [*Potash*].
[7] R.S.C., 1985, c. 31 (4th Supp.); *Lavigne v. Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53 [*Lavigne*]; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401,* 2013 SCC 62.
[8] *Lavigne; Douez v. Facebook Inc.*, 2017 SCC 33 [*Douez*].
[9] *Sullivan,* Ch 11, § 11.04 [4].
[10] *Potash* at para. 65.
[11] Sullivan, §19.1, 19.8-19.10.
[12] *Douez*; *CN* at 1134.
[13] *CN* at p. 1134.
[14] *Schrenk,* at para. 32 (emphasis in original).

legislation prevails, regardless of which is more specific and which was enacted first.[15] This element is not in issue in this appeal.

9. Because *DRIPA* is human rights legislation and therefore has quasi-constitutional status, interpretations of it must follow the above principles. These principles are not mere words: they significantly impact how courts are to approach human rights legislation. As discussed below, decisions by the SCC provide guidance about what this means in practice.

***A broad, purposive and liberal interpretation***

10. The SCC's decision in *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62 [*Schrenk*], illustrates how a broad and purposive interpretation of human rights legislation is put into practice. In *Schrenk*, the SCC considered s. 13 of the *Code*, which prohibits discrimination "regarding employment." The issue was whether egregious behaviour by someone who was neither the complainant's employer nor his superior could be considered discrimination "regarding employment" within the meaning of the *Code.*

11. "Employment" is a defined term in the *Code*, with the examples given focused on formal employment relationships.[16] The BCCA therefore concluded that offensive behaviour that took place outside a relationship in which the respondent had economic power over the complainant was outside the jurisdiction of the Human Rights Tribunal.[17]

12. The SCC *Schrenk* court was split 6-3.[18] A critical difference between the majority decision and the dissent was in their analysis of the underlying meaning of the prohibitions in the *Code.* The minority focused on a technical reading of each section, concluding that the *Code* only protected certain "designated classes of

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[15] Sullivan, §§ 11.53-11.55, 19.1.
[16] *Code,* s. 1.
[17] *Schrenk v. British Columbia (Human Rights Tribunal),* 2016 BCCA 146 at paras. 33-36.
[18] Rowe J. wrote for himself and Moldaver, Karakatsanis, Wagner and Gascon J.J., Abella J. wrote a separate opinion concurring with the majority, and McLachlin C.J. wrote the dissent for herself, Côté and Brown JJ.

relationships."[19] This focus led the minority to see the *Code* as primarily identifying (and limiting) who could be held liable for discriminatory conduct.

13. The SCC *Schrenk* majority noted that the *Code* must be given a broad and purposive reading in line with the interpretive principles applicable to human rights law, and that such a reading required finding that discrimination "regarding employment" extended beyond the employer-employee relationship to protect specific "contexts of vulnerability.[20] In reaching this conclusion, the majority analysed the multiple purposes of the *Code* and the way these are expressed in the protections and remedies in the *Code*. In its analysis, the majority explicitly rejected narrower interpretations of s. 13 of the *Code* as "unduly formalistic".[21]

14. The *Schrenk* majority's focus on expanding protection rather than on limiting liability exemplifies the broad, generous and purposive interpretation that must be afforded to human rights instruments.

15. Pursuant to *Schrenk,* the broad, generous and purposive interpretation of *DRIPA* that is required must focus on how it can best give effect to the protections it offers. Crucially, these protections include the rights in UNDRIP as incorporated into the laws of B.C. by *DRIPA*.

16. The goal of *DRIPA* is to uphold the human rights of Indigenous Peoples in the province and advance reconciliation.[22] *DRIPA* must therefore be given an expansive interpretation that best upholds the human rights of Indigenous Peoples and advances reconciliation.

***Quasi-constitutional rights must be enforceable***

17. The SCC's decision in *Douez* provides guidance about the significance of quasi-constitutional rights being enforceable. In *Douez*, the SCC recognized that courts have a special interest in being able to adjudicate issues involving quasi-constitutional

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[19] *Schrenk* at paras. 115-118 (McLachlin, C.J.).
[20] *Schrenk* at paras. 37- 49, 51-59, 67 (Rowe, J.).
[21] *Schrenk* at para. 40 (Rowe, J.).
[22] British Columbia, Ministry of Indigenous Relations and Reconciliation, *Declaration on the Rights of Indigenous Peoples Action Plan 2022-2027*, (Victoria: Reconciliation Transformation and Strategy Division) at i, 1.

rights.[23] Though this finding was made in a contract law context, the principles it articulates about the significance of quasi-constitutional privacy legislation also apply to *DRIPA* as a quasi-constitutional human rights statute.

18. The *Douez* court commented that:

> [25] … Courts are not merely "law-making and applying venues"; they are institutions of "public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies" (T. C. W. Farrow, *Civil Justice, Privatization, and Democracy* (2014), at p. 41). Everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters.

19. *Douez* stands for the proposition that B.C. courts should take jurisdiction over and make decisions on issues arising from quasi-constitutional legislation wherever possible. The *Douez* court emphasized the importance of adjudication in B.C. of quasi-constitutional rights in a situation where the alternative was a foreign venue. For disputes about the consistency between the laws of B.C. and UNDRIP, B.C. courts are the only possible venue. B.C. courts must provide guidance about the consistency between B.C. laws and UNDRIP when asked to do so.

20. The holding in *Douez* is consistent with the Supreme Court's previous comments that human rights legislation "is intended to give rise, amongst other things, to individual rights of vital importance, rights capable of enforcement, in the final analysis, in a court of law."[24] It is also consistent with the rule of law and the right to an effective remedy enshrined in Article 8 *United Nations Universal Declaration of Human Rights*.[25]

**S. 2(a) of *DRIPA* and art. 40 of UNDRIP make questions of inconsistency justiciable**

21. The Commissioner refers to and supports the Appellants' argument that *DRIPA* incorporates UNDRIP into the laws of B.C.

22. The Commissioner submits that pursuant to the principles of interpretation and application that apply to quasi-constitutional human rights legislation, the incorporation of UNDRIP into the laws of B.C. through *DRIPA* means that the rights in UNDRIP are

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[23] *Douez* at para. 58.
[24] *CN* at p. 1134.
[25] *United Nations Universal Declaration of Human Rights,* UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III).

enforceable in B.C. *DRIPA* does not contain any express or implied language that would bar the conclusion that UNDRIP has the force of law.[26]

23. The incorporation of UNDRIP into the laws of B.C. means that the articles of UNDRIP must be given legal effect in B.C., lest incorporation be rendered meaningless. A meaningless incorporation of UNDRIP would in turn violate the principle that the legislature does not speak in vain.[27]

24. UNDRIP stipulates that the rights therein must be enforceable: art. 40 of UNDRIP requires that Indigenous Peoples have access to a system of dispute resolution in respect of conflicts with states and the right to a remedy for violations of their individual and collective rights.[28] The United Nations Expert Mechanism on the Rights of Indigenous Peoples has described art. 40 as a "key component" of UNDRIP[29] that ensures access to justice for Indigenous peoples seeking to enforce the substantive rights set out in UNDRIP.[30]

25. Common law principles also hold that where there is a right, there is a remedy.[31] For rights-holders to have access to a remedy, courts must assess and make determinations in respect of allegations that those rights have been violated. B.C. courts have the authority and legitimacy to resolve disputes involving the rights in UNDRIP.[32] While negotiation is a preferable way of reconciling state and Indigenous interests, Indigenous Peoples' claims can be, and are, also pursued through litigation.[33]

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[26] *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 at paras. 47-48.
[27] *A.G. (Que.) v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831 at para. 28.; *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 32; Sullivan §§8.23-8.31.
[28] United Nations Declaration on the Rights of Indigenous Peoples, art. 40, being Schedule (*Section 1)* of *DRIPA*.
[29] United Nations Human Rights Council Expert Mechanism on the Rights of Indigenous Peoples, *Access to justice in the promotion and protection of the rights of indigenous peoples*, A/HRC/EMRIP/2013/2 (April 29, 2013) at para. 8.
[30] Ibid. at paras. 8-15.
[31] *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at para. 120.
[32] *Highwood Congregation v. Wall,* 2018 SCC 26 at para. 34.
[33] *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para. 88.

26. Read together, s. 2(a) of *DRIPA* and art. 40 of UNDRIP mean that the courts of B.C. must adjudicate claims that a B.C. law does not conform to UNDRIP. By necessary implication, this means that the combined operation of s. 2(a) of *DRIPA* and art. 40 of UNDRIP makes the consistency between the laws of B.C. and UNDRIP justiciable.

**"All measures necessary" is justiciable under s. 3 of *DRIPA***

27. The Commissioner supports the Appellants' arguments that the consistency between the laws of B.C. and UNDRIP is justiciable under s. 3 of *DRIPA* and adds the following comments.

28. Section 3 of *DRIPA* states that "[i]n consultation and cooperation with the Indigenous Peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."

29. Justice Ross made no finding in respect of whether the Province has taken "all measures necessary" was justiciable, as in his view the parties below agreed that it was not.[34]

30. The requirement to take all necessary measures is not novel. It appears in several international human rights instruments that Canada has acceded to,[35] including art. 38 of UNDRIP; art. 2(1) of the International Covenant on Economic, Social and Cultural Rights [ICESCR]; art. 2 of the Convention Against Torture [CAT]; art. 2 of the International Convention on the Elimination of Racial Discrimination [CERD]; art. 2 of the Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW]; and art. 4 and 9 of the Convention on the Rights of Persons with Disabilities [CRPD].[36]

31. Committees of experts drawn from member countries monitor compliance with these

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[34] *Gitxaala*, at para. 491.

[35] These instruments use various similar phrases to convey similar ideas, including "all measures necessary", "all appropriate means", and "immediate, effective and appropriate measures". UN bodies' interpretations do not distinguish between these.

[36] Canada ratified the CERD in 1970, the ICCPR and ICESCR in 1976, CEDAW in 1981; CAT in 1987; and the CRPD in 2010: Government of Canada, *International Human Rights Treaties to which Canada is a Party* (2021), https://www.justice.gc.ca/eng/abt-apd/icg-gci/ihrl-didp/tcp.html.

conventions, for example by publishing general jurisprudential statements (referred to as "general recommendations") and hearing complaints from individuals (referred to as "individual communications").[37] Consequently, there is a quasi-judicial body of committee views interpreting these international human rights instruments.

32. The committees entrusted with monitoring and enforcing the aforementioned international human rights instruments treat "all measures necessary" and similar phrases as *ipso facto* justiciable.[38] This is apparent in both their general recommendations and views.

33. For example, article 2 of the CEDAW requires states to "agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women". In its general recommendation on this article, the CEDAW Committee states that "Each State party must be able to justify the appropriateness of the particular means it has chosen … Ultimately, it is for the Committee to determine whether a State party has indeed adopted all necessary measures at the national level aimed at achieving the full realization of the rights recognized in the Convention."[39] GR 28 shows that the CEDAW Committee treats "all appropriate means" as justiciable, and

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[37] Individual communications are only available for countries that have consented to this procedure, generally through an Optional Protocol. Of the treaties listed, Canada is a signatory to the optional protocols for the ICCPR, CEDAW and CRPD and has recognized the competence of the CAT Committee to hear individual communications under article 22 of that Convention.

[38] See e.g. *Ali v. Tunisia* (2008), CAT/C/41/D/291/2006; *Urra Guridi v. Spain* (2005), CAT/C/34/D/212/2002; *L.R. et al. v. Slovak Republic* (2013), CERD/C/66/D/31/2003 [L.R.]; *Matson v. Canada* (2022), CEDAW/C/81/D/68/2014 [*Matson*]; *Angela González Carreño v. Spain* (2014), CEDAW/C/58/D/47/2012 [*Carreño*]; *R.K.B. v. Turkey* (2012), CEDAW/C/51/D/28/2010 [*RKB*]; *Tayag Vertido v. the Philippines* (2010), CEDAW/C/46/D/18/2008; *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice v. Austria* (2007), CEDAW/C/39/D/6/2005; *F v. Austria* (2015), CRPD/C/14/D/21/2014 [*F v. Austria*]; *Gröninger v. Germany* (2014), CRPD/C/D/2/2010; *I.D.G. v. Spain* (2015), E/C.12/55/D/2/2014 [I.D.G.].

[39] Committee on the Elimination of Discrimination against Women, "General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women" CEDAW/C/G/28 (December 16, 2010) [GR 28], at para 23.

this approach is also reflected in its Views on individual communications.[40]

34. Article 2(1)(d) of the CERD requires states to "prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination …". In *Er v. Denmark* (2007), CERD/C/71/D/40/2007 [*Er*], the CERD Committee did not accept Denmark's argument that art. 2(1)(d) of the CERD was a general policy statement that does not impose any concrete obligations on the state.[41] The Committee concluded that Denmark breached art. 2(1)(d) of the CERD because of its failure to carry out an effective investigation.[42] This finding required the Committee to treat "all appropriate means" as justiciable.

35. The obligation to take all necessary measures is also found in art. 2(2) of the International Covenant on Civil and Political Rights ("ICCPR"). The ICCPR is enforced by the Human Rights Committee, which treats art. 2 as only justiciable when combined with allegations that other ICCPR rights have been violated.[43] However, art. 2(2) has not been found to be non-justiciable.

36. Canadian courts have accepted that sources of international human rights law must inform interpretations of the *Canadian Charter of Rights and Freedoms.*[44] The extent to which interpretations of Canadian human rights legislation should treat sources of international human rights law similarly has not yet been considered. However, given the recognised resemblance between the *Charter* and human rights legislation[45] and the similar links between domestic and international human rights law as between the *Charter* and international human rights law,[46] a principled approach would accept international human rights law as an important interpretive source for Canadian

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[40] See e.g. *Matson*, *Carreño*, *RKB*.
[41] *Er* at para 4.6.
[42] *Er* at para. 7.4; See also *Hagan v. Australia* (2003), CERD/C/62/D/26/2002 at para. 4.4.
[43] *Poliakov v. Belarus* (2014), CCPR/C/111/D/2030/2011 at para. 7.4.
[44] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the "*Charter*]; *Reference Re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313 [*Re PSERA*] at paras. 57-60; *Quebec (Attorney General) v. 9147-0732 Québec inc.,* 2020 SCC 32 at para. 30.
[45] *Fraser v. Canada (Attorney General)*, 2020 SCC 28.
[46] *Re PSERA*, at para. 58.

human rights legislation. Canadian courts should therefore prefer interpretations of the terms in Canadian human rights instruments (like *DRIPA*) that conform with how the same terms are understood in international human rights instruments. *DRIPA* does not contain any language that explicitly or implicitly requires the court to diverge from established international jurisprudence. "All measures necessary" in s. 3 of *DRIPA* is a justiciable standard.

**Conclusion**

37. When *DRIPA* was first passed in the Legislature, it was described by the Minister of Indigenous Relations and Reconciliation as a "critical step towards true and lasting reconciliation."[47] This Court should give effect to the Legislature's intention and interpret *DRIPA* accordingly by affirming that it is an enforceable quasi-constitutional human rights statute and guiding the courts in this province to apply it as such.

38. All of which is respectfully submitted.

Dated at the City of Victoria, Province of British Columbia, this 3rd day of July, 2024.

_____

**Terri-Lynn Williams-Davidson, KC and**
**Sarah Y. Khan, KC**

Counsel for the Intervener, BC's Human Rights Commissioner

[47] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)* 41st Parl., 4th Session, Issue No. 280 (24 October 2019) at 10222 (Hon. S. Fraser).

## APPENDICES: LIST OF AUTHORITIES

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# APPENDICES: ENACTMENTS

## *CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*
**10 December 1984, 1465 UNTS 85, (entered into force 26 June 1987)**

**Article 2**

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

## *CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN*
**18 December 1979, 1249 UNTS 13, Can TS 1982 No 31 (entered into force 3 September 1981)**

**Article 2**
States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

## *CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES*

**12 December 2006, 2515 UNTS 3, (entered into force 3 May 2008)**

### Article 4 - General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:
    a. To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;
    b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;
    c. To take into account the protection and promotion of the human rights of persons with disabilities in all policies and programmes;
    d. To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention;
    e. To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;
    f. To undertake or promote research and development of universally designed goods, services, equipment and facilities, as defined in article 2 of the present Convention, which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities, to promote their availability and use, and to promote universal design in the development of standards and guidelines;
    g. To undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost;
    h. To provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities;

   i. To promote the training of professionals and staff working with persons with disabilities in the rights recognized in this Convention so as to better provide the assistance and services guaranteed by those rights.
2. With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.
3. In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.
4. Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of persons with disabilities and which may be contained in the law of a State Party or international law in force for that State. There shall be no restriction upon or derogation from any of the human rights and fundamental freedoms recognized or existing in any State Party to the present Convention pursuant to law, conventions, regulation or custom on the pretext that the present Convention does not recognize such rights or freedoms or that it recognizes them to a lesser extent.
5. The provisions of the present Convention shall extend to all parts of federal states without any limitations or exceptions.

**Article 9 - Accessibility**

1. To enable persons with disabilities to live independently and participate fully in all aspects of life, States Parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures, which shall include the identification and elimination of obstacles and barriers to accessibility, shall apply to, inter alia:
   a. Buildings, roads, transportation and other indoor and outdoor facilities, including schools, housing, medical facilities and workplaces;
   b. Information, communications and other services, including electronic services and emergency services.
2. States Parties shall also take appropriate measures to:
   a. Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
   b. Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;

c. Provide training for stakeholders on accessibility issues facing persons with disabilities;
d. Provide in buildings and other facilities open to the public signage in Braille and in easy to read and understand forms;
e. Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
f. Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
g. Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
h. Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

## DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT [SBC 2019] CHAPTER 44

### Interpretation

**1** (1)In this Act:

**"Declaration"** means the United Nations Declaration on the Rights of Indigenous Peoples set out in the Schedule;

**"Indigenous governing body"** means an entity that is authorized to act on behalf of Indigenous peoples that hold rights recognized and affirmed by section 35 of the *Constitution Act, 1982*;

**"Indigenous peoples"** has the same meaning as aboriginal peoples in section 35 of the *Constitution Act, 1982*;

**"statutory power of decision"** has the same meaning as in the *Judicial Review Procedure Act*.

(2) For the purposes of implementing this Act, the government must consider the diversity of the Indigenous peoples in British Columbia, particularly the distinct languages, cultures, customs, practices, rights, legal traditions, institutions, governance structures, relationships to territories and knowledge systems of the Indigenous peoples in British Columbia.

(3) For certainty, nothing in this Act, nor anything done under this Act, abrogates or derogates from the rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.
(4) Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia.

**Purposes of Act**

**2** The purposes of this Act are as follows:
(a)to affirm the application of the Declaration to the laws of British Columbia;
(b)to contribute to the implementation of the Declaration;
(c)to support the affirmation of, and develop relationships with, Indigenous governing bodies.

**Measures to align laws with Declaration**

**3** In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.

**Schedule**

*(Section 1)*

United Nations Declaration on the Rights of Indigenous Peoples

**Resolution adopted by the General Assembly**

[*without reference to a Main Committee (A/61/L.67 and Add.1)*]

**61/295. United Nations Declaration on the Rights of Indigenous Peoples**

*The General Assembly,*

*Taking note* of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,[1] by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

*Recalling* its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

*Adopts* the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting*

*13 September 2007*

1. See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chap. II, sect. A.

**Annex**

**United Nations Declaration on the Rights of Indigenous Peoples**

**Article 38**
States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

**Article 40**

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

**HUMAN RIGHTS CODE**
**[RSBC 1996] CHAPTER 210**

**Definitions**

**1** In this Code:

**"age"** means an age of 19 years or more;

**"chair"** means the member designated under section 31 as the chair of the tribunal;

**"collective agreement"** means a collective agreement as defined in the *Labour Relations Code*;

**"commissioner"** means the Human Rights Commissioner appointed under section 47.01;

**"complainant"** means a person or group of persons that files a complaint under section 21;

**"complaint"** means a complaint filed under section 21;

**"discrimination"** includes the conduct described in sections 7, 8 (1) (a), (9) (a) and (b), 10 (1) (a), 11, 13 (1) (a) and (2), 14 (a) and (b), 43 and 47.21;

**"employers' organization"** means an organization of employers formed for purposes that include the regulation of relations between employers and employees;

**"employment"** includes the relationship of master and servant, master and apprentice and principal and agent, if a substantial part of the agent's services relate to the affairs of one principal, and **"employ"** has a corresponding meaning;

**"employment agency"** includes a person who undertakes, with or without compensation, to procure employees for employers or to procure employment for persons;

**"Indigenous"**, in relation to a person, means Indigenous within the meaning of "Indigenous peoples" as defined in the *Declaration on the Rights of Indigenous Peoples Act*;

**"intervenor"** means the commissioner entitled, or other person allowed, under section 22.1 to intervene in a complaint;

**"member"** means a person appointed under section 31 as a member of the tribunal;

**"occupational association"** means an organization, other than a trade union or employers' organization, in which membership is a prerequisite to carrying on a trade, occupation or profession;

**"panel"** means a panel designated under section 27.1 (1) (b);

**"party"**, with respect to a complaint, means the complainant and the person against whom the complaint is made and any person that the tribunal adds as a party;

**"person"** includes an employer, an employment agency, an employers' organization, an occupational association and a trade union;

**"trade union"** means an organization of employees formed for purposes that include the regulation of relations between employees and employers;

**"tribunal"** means the British Columbia Human Rights Tribunal continued under section 31.

**Discrimination in employment**

**13** (1)A person must not

(a)refuse to employ or refuse to continue to employ a person, or

(b)discriminate against a person regarding employment or any term or condition of employment

because of the Indigenous identity, race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2)An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

(3)Subsection (1) does not apply

(a)as it relates to age, to a bona fide scheme based on seniority, or

(b)as it relates to marital status, physical or mental disability, sex or age, to the operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan, whether or not the plan is the

subject of a contract of insurance between an insurer and an employer.

(4)Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

**Powers of commissioner**

**47.12** (1)The commissioner is responsible for promoting and protecting human rights, including by doing any of the following:

(a)identifying, and promoting the elimination of, discriminatory practices, policies and programs;

(b)developing resources, policies and guidelines to prevent and eliminate discriminatory practices, policies and programs;

(c)publishing reports, making recommendations or using other means the commissioner considers appropriate to prevent or eliminate discriminatory practices, policies and programs;

(d)developing and delivering public information and education about human rights;

(e)undertaking, directing and supporting research respecting human rights;

(f)examining the human rights implications of any policy, program or legislation, and making recommendations respecting any policy, program or legislation that the commissioner considers may be inconsistent with this Code;

(g)consulting and cooperating with individuals and organizations in order to promote and protect human rights;

(h)establishing working groups for special assignments respecting human rights;

(i)promoting compliance with international human rights obligations;

(j)intervening in complaints under section 22.1 and in any proceeding in any court;

(k)approving a program or activity under section 42;

(l)initiating inquiries under sections 47.14 and 47.15.

(2)The commissioner may not file a complaint with the tribunal under section 21 but may assist a person or group of persons with any aspect of a complaint.

## *INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION*

**7 March 1966, 660 UNTS 195, (entered into force 4 January 1969)**

**Article 2**

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end: (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

## *INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS*

**19 December 1966, 999 UNTS 171, Can TS 1976 No 47 (entered into force 23 March 1976)**

**Article 2**

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

**INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS 16 December 1966, 993 UNTS 3, Can TS 1976 No 46 (entered into force 3 January 1976)**

**Article 2**

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

***UNIVERSAL DECLARATION OF HUMAN RIGHTS***
**UNGA, 3rd Sess, UN Doc A/810 (1948) GA Res 217A (III)**

**Article 8**

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.