No. S219179
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SM'OOYGIT NEES HIWAAS, also known as Matthew Hill, on behalf of the SMGYIGYETM GITXAAŁA, and GITXAAŁA NATION

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, GMR GLOBAL MINERAL RESOURCES CORP., and JOHAN THOM SHEARER

RESPONDENTS

No. S224680
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

EHATTESAHT FIRST NATION and CHIEF SIMON JOHN in his capacity as Chief of the Ehattesaht First Nation on behalf of all the members of the Ehattesaht First Nation

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.; ALMEHRI MINING INC.; and GMR GLOBAL MINERAL RESOURCES CORPORATION

RESPONDENTS

WRITTEN ARGUMENT OF THE INTERVENOR HUMAN RIGHTS COMMISSIONER FOR BRITISH COLUMBIA

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I. INTRODUCTION

1. The *Declaration on the Rights of Indigenous Peoples Act* (the "*Act*") is a quasi-constitutional human rights statute that has primacy over other legislation.[1] The *Act* must be interpreted according to the well-established principles applicable to human rights legislation: liberally, broadly, and purposively. Pursuant to this interpretive approach, the Commissioner says the *Act* has implemented the *United Nations Declaration on the Rights of Indigenous Peoples* (the "*Declaration*") into domestic law. Alternatively, the rights to self-determination and self-government are customary international law and should be implemented by this court.

2. The *Act* is remedial. Courts must fashion remedies that advance the *Act*'s purpose; particularly to construe the laws of B.C. consistently with the rights enshrined in the Declaration to advance reconciliation. Such remedies include declaratory relief when statutory provision cannot be construed consistently with the *Act*.

3. The immediate affirmation of the Declaration to the laws of B.C mandates that courts give broad meaning to Indigenous Peoples' rights to self-determination and self-government. These rights are the pillar of Indigenous Nations' collective human rights. Where there is no consultation with an Indigenous Nation, there is a *prima facie* breach of their rights to self-determination and self-government because the Crown has pre-empted any opportunity for the Indigenous Nation's relevant laws to be part of the matrix of decision-making. Courts can remedy this breach by declaring the offending provision invalid to the extent necessary to ensure the breach does not continue.

II. FACTS

4. The 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 norms.[2]

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[1] *Declaration on the Rights of Indigenous Peoples Act,* S.B.C. 2019, c. 44 [*DRIPA*].

[2] *Human Rights Code*, R.S.B.C. 1996, c. 120, s.47.12(1) and Affidavit #1 of Kasari Govender made on 10 November 2022 at paras 20-29.

5. The Commissioner refers to and relies on the Facts of the Petitioners as set out in Gitxaala's Further Amended Petition and Ehattesaht's Amended Petition.

III. ARGUMENT

A. The *Act* is quasi-constitutional human rights legislation

6. The Commissioner submits that the *Act* is fundamental and quasi-constitutional law, specific to the human rights of Indigenous Peoples. Properly characterizing the *Act* is not a rhetorical exercise: it is central to how courts must interpret and apply this legislation.

7. The Supreme Court of Canada has long recognized that certain legislation has an elevated status because it is adopted to perform a more fundamental role in our society than ordinary statutes. The courts consider such legislation fundamental law, and privilege it as quasi-constitutional in nature, because it reflects our most important societal goals. Quasi-constitutional legislation extends beyond human rights codes *per se*. The principles of application apply to statutes whose purpose is to advance or uphold fundamental values, such as human rights generally or particularly.[3]

8. Lamer J. explained the normative basis for human rights legislation attracting quasi-constitutional status:

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider that law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others.[4]

9. Sopinka J. further articulated the basis for and consequences of human rights legislation being quasi-constitutional:

> In approaching the interpretation of a human rights statute, certain special principles must be respected. Human rights legislation is amongst the most pre-eminent category of legislation. It has been described as having a "special nature, not quite constitutional but certainly more than the ordinary" [citations omitted]. One of the reasons such legislation has been so described is that it is often the final

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[3] See, for example *Lavigne v Canada (Commissioner of Official Languages*, 2002 SCC 53 at paras 22-25 (WL).
[4] *Insurance Corp. of British Columbia v Heerspink*, [1982] 2 S.C.R. 145 [*Heerspink*] at para 32 (WL).

> refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed [citations omitted].[5]

10. There is no legal test to determine whether a statute is quasi-constitutional. Rather, courts look to its purpose and whether it was adopted to fulfill societal objectives that are more fundamental than ordinary statutes. A primary consideration is the statute's relationship to Canada's Constitution and the principles that underpin it.[6]

11. The Commissioner submits, first, that the *Act's* connection to advancing the inherent human rights of Indigenous Peoples, as reflected in Canada's constitutional order, is clear and obvious. The connection is evident on the face of the *Act*. Section 1 of the *Act* defines the terms "Indigenous governing body", "Indigenous peoples", and "statutory power of decision" by reference to s.35 of the *Constitution Act*, *1982*. The rights of "Aboriginal peoples" are, of course, recognized and affirmed in s. 35 of the *Constitution Act*, *1982*. This constitutional connection is one basis on which to find the *Act* is quasi-constitutional.

12. A second basis is found in the fact that the Declaration is attached as a Schedule to the *Act*. The Declaration is an international human rights instrument developed via the United Nations' Human Rights Council.[7] Further, as discussed further below at paras. 18-33, the *Act* expressly affirms the application of this human rights instrument to the laws of B.C.

13. Finally, Hansard reflects that the Legislature clearly intended to enact human rights legislation of fundamental importance when it passed the *Act*. "Human rights" as the subject of the *Act* were referred to dozens of times in Hansard from the time "Bill 41- 2019 Declaration on the Rights of Indigenous Peoples Act" was introduced until the time it received Royal Assent.

14. The comments in Hansard were substantive and speak to why the *Act* is quasi-constitutional legislation. Following are a few examples that demonstrate the Legislature intended to, and did, pass a quasi-constitutional human rights statute when it made Bill 41 law:

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[5] *Zurich Insurance v Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 at para 18 (WL).
[6] J. Helis, *Quasi-constitutional Laws of Canada*, (Toronto: Irwin Law, 2018) [Helis] at 1, 177-185.
[7] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

> Through this legislation, we are recognizing the human rights of Indigenous peoples in law… this is no ordinary bill and our proceedings today are certainly extraordinary … we believe that implementing the UN Declaration on the rights of Indigenous peoples [sic] will help us continue to build a stronger British Columbia that includes everyone. This is about ending discrimination, upholding human rights and ensuring more economic justice and fairness. We are at an important moment in history. This new law is a critical step towards true and lasting reconciliation. [8]
>
> For the first time in the history of this province and in the history of Canada, this legislation is going to affirm human rights—norms that have been long established, but in an Indigenous context. They are human rights that Canadians have been supporting and advocating for decades. They are the rights that are established in our very own Charter.[9] [Emphasis added.]

15. Reflecting the joint drafting of Bill 41, Indigenous leaders attended the "extraordinary" proceedings when it received Royal Assent, reflecting their understanding of the Bill:

> Our shared commitment to implement the UN declaration calls for a transformative change in the government's relationship with Indigenous peoples. This law is a key step to that transformation. The shift to a human rights foundation and approach to reconciliation will foster greater understanding and more harmonious relations among Indigenous peoples and other British Columbians. It will support a new modernized relationship.[10]

16. In light of the connection to Canada's Constitution, the express incorporation of an international human rights instrument in the *Act*, and Hansard, it is clear that the Legislature intended to pass human rights legislation that recognizes, affirms, and codifies Indigenous Peoples' human rights and seeks to advance reconciliation.[11]

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[8] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)* 41st Parl., 4th Session [*Hansard*], Issue No. 280 (24 October 2019) at 10222 (Hon. S. Fraser).
[9] *Hansard*, Issue No. 286 (30 October 2019), at 10382 (A. Olsen).
[10] *Hansard*, Issue No. 280 (24 October 2019), at 10228 (C. Casimir). The Indigenous ceremony for the introduction of the *Act* is appended as an Appendix to Hansard, enacting what scholars describe as "intersocietal law". Robert Hamilton, "Indigenous Legal Traditions, Intersocietal-law and the Colonisation of Marine Spaces" *The Rights of Indigenous Peoples in Marine Areas*. Ed. Stephen Allen, Nigel Bankes and Øyvind Ravna (Oxford: Hart Publishing, 2019).
[11] For further examples of the Legislature's intention to pass a human rights statute of vital importance see: *Hansard*, Issue No. 286 (30 October 2019) at 10371 and 10374 (Hon. S. Fraser), *Hansard*, Issue No. 291 (19 November 2019), at 10520 and 10521 (Hon. S. Fraser), and *Hansard,* Issue No. 295 (21 November 2019), at 10698.

17. The *Act* is quasi-constitutional human rights legislation and stands to be interpreted accordingly. Protected rights must be interpreted broadly, liberally, and purposively, while exceptions and defences are to be construed narrowly.[12] The court's task when interpreting human rights legislation is to "breathe life, and generously so, into the particular statutory provisions [in issue]".[13]

B. Interpreted properly the *Act* creates a justiciable standard for the alignment of British Columbia's laws with the Declaration

i. The *Act* implements the Declaration

18. The Commissioner submits that, pursuant to the principles of statutory interpretation applicable to human rights legislation, the *Act* implements the *Declaration* into the domestic law of B.C. The general approach to statutory interpretation is well-settled: courts must look at the text, context, and purpose of the statute to determine the legislative intent.[14]

19. The *Act* is distinct among B.C.'s statutes. The Commissioner acknowledges that the *Act's* drafting is unconventional and may give rise to ambiguities. The Legislature has left some analytical heavy lifting to the courts. However, any ambiguities can and must be resolved by a purposive, broad, and liberal interpretation of the *Act*. Should this court find there is more than one way to interpret the *Act*, the better interpretation must accord with the legislation's purpose (protecting and upholding the human rights of Indigenous Peoples) and Canada's international obligations under the Declaration.

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[12] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis Canada Inc, 2014) [*Sullivan*] at §19.1 and §19.21, *British Columbia (Public Service Employee Relations Commission v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 at paras 43-44, *British Columbia Human Rights Tribunal v Schrenk*, 2017 SCC 62 at paras 31, 50-51.

[13] *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445 [*Canada (Human Rights Commission)*] at para 246 aff'd in *Canada (Human Rights Commissioner) v. Canada (Attorney General)*, 2013 FCA 75.

[14] *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2015 FCA 4 [*Hupacasath*] at para 48. For a summary of the history of the Declaration at the United Nations, see Brenda L. Gunn, "Overcoming Obstacles to Implementing the *UN Declaration on the Rights of Indigenous Peoples* in Canada" (2013) 31 *Windsor YB Access Just* [Gunn, "*Overcoming Obstacles*"] at 150-153.

20. The purpose of the *Act* that is particularly relevant to the cases at bar is contained in s. 2(a): "to affirm the application of the *Declaration* to the laws of British Columbia".[15] This affirmation is in the present tense. Accordingly, it has immediate effect. This construction is buttressed by s. 1(4) which provides that "Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia".[16] This provision is meaningless unless it was intended that the Declaration be applied to the laws of B.C. by the courts.

21. No other enactment in B.C. contains a phrase analogous to s. 2(a). The Commissioner submits the use of "affirm" was intended to convey a sense of immediacy and applicability within the context of provincial constitutional jurisdiction.

22. The Commissioner says the courts must infer from the drafting of s. 3 of the *Act* that not all B.C.'s laws are consistent with the Declaration. If it was the Legislature's view that they were, there would be no need for any measures to ensure consistency let alone "all necessary measures".[17] If s. 3 had been meant to ensure future enactments were consistent with the Declaration, the Legislature would have included clear and express language to say so. It did not.

23. The Legislature had choices in how it drafted the *Act* and how it met the long overdue need for reconciliation. It not only passed legislation, but it passed legislation that includes the mandatory recognition of the Declaration as of the date it received Royal Assent[18]. For example, Manitoba's legislature chose arguably weaker language that is forward looking and placed that language in a preamble ("will be guided by… the principles in the UN Declaration"); B.C.'s Legislature, on the other hand, chose the present tense for key provisions and placed it in the operative section of the *Act*.[19]

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[15] *DRIPA, supra* note 1, at s. 2(a).
[16] *Ibid.*, at s. 1(4).
[17] *Ibid.*, at s. 3.
[18] *Ibid.,* at s. 10.
[19] *The Path to Reconciliation Act*, C.C.S.M., c. R30.5, preamble. See also, *Interlake Reserves Tribal Council Inc et al, v The Government of Manitoba,* 2020 MBCA 126 at para 39.

24. Section 7(2) of the *Interpretation Act* says, "If a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise."[20] Section 2(a)'s immediate affirmation of the Declaration, read in conjunction with s. 1 (3)-(4) of the *Act* must be read as giving immediate effect to the Declaration in relation to the laws of B.C. The Declaration must be interpreted and applied to the circumstances as they arise.

25. Further and in any event, ousting the inherent jurisdiction of this court to interpret and apply the *Act*, including the rights set out in its Schedule, would delay the application of the Declaration to the laws of B.C. which is impermissible pursuant to s. 1(4).

26. The amendment to the *Interpretation Act* further supports the Commissioner's argument that the *Act* implemented the Declaration into provincial law. The *Interpretation Act* now says that "Every Act and regulation must be construed as being consistent with the Declaration": this is the language of primacy, discussed further below at paras. 36-39.[21]

27. Further, by passing the *Act,* the Legislature took a step beyond what the law already recognized: that domestic enactments are presumed to conform with international human rights norms and "where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations".[22] Applying the *Act* as a justiciable standard to provincial legislation is necessary to ensure that B.C. does not breach the Declaration. Accordingly, the Commissioner submits, the *Act* must be read as implementing the Declaration.

28. To the extent there are alternative constructions of the legal effect of the *Act*, the Commissioner says the court must adopt the interpretation which best upholds the human rights at issue: Indigenous Peoples' collective human rights. The Commissioner acknowledges Hansard reflects some legislators' view that Bill 41, if passed, would not

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[20] *Interpretation Act,* R.S.B.C. 1996, c. 238 [*Interpretation Act*] at s. 7(2).
[21] *Helis, supra* note 6 at pp 97-105 and *Sullivan, supra* note 12, at 19.21. *Interpretation Act*, *supra* note 20, s. 8(1)(3).
[22] *Canada (Human Rights Commission)*, *supra* note 13 at para 351. See also *Baker v Canada (Minister of Citizenship & Immigration)*, 1999 SCC 699 at para 70 (WL) and *Canada (Minister of Citizenship and Immigration) v Vavilov* at para 182 (WL).

give the Declaration full force and effect.[23] The Commissioner says a legislator's opinion on the legal effect of legislation is not the litmus test for statutory intent.[24] Additionally, this opinion does not account for s. 8.1(3) of the *Interpretation Act,* enacted subsequent to the *Act*. The court should prefer the broad, liberal, and purposive interpretation that advances the broad purpose of the *Act* and give it effect.[25]

29. The *Act* is a remedial statute. Section 8 of the *Interpretation Act* says that every Act or regulation must be construed as being remedial.[26] Black's Law Dictionary defines a remedial statute as "Any statute other than a private member's bill; a law providing a means to enforce rights or redress injuries".[27] The rights the *Act* gives a means to enforce include, but are not limited to, those in the Schedule to the *Act*. The injuries the *Act* seeks to redress are the injuries to Indigenous Peoples that arise from the continued operation of B.C. laws that breach those rights.

30. There are no clear and express words to suggest that the Legislature intended to limit the remedial nature of the *Act* to those provisions found in ss. 4-7. Rather, the statute read as a whole and in its relevant context evinces the contrary intention. Sections 4-7 indicate certain measures to be taken to give effect to s. 2(a), but do not limit implementation mechanisms to these measures. The *Declaration* applies to the laws of B.C. now and did from the date the *Act* came into force.[28]

31. The rights codified in the *Act*, including its Schedule, are justiciable. "In judicial review, courts are in the business of enforcing the rule of law, one aspect of which is 'executive accountability to legal authority' and protecting 'individuals from arbitrary [executive] action'."[29] Non-justiciable cases are rare: "Assessing whether or not legal rights exist on

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[23] *Hansard*, Issue No. 292 (19 November 2019), at 10570 (S. Fraser).
[24] *Felipa v Canada (Citizenship and Immigration)*, 2011 FCA 272 at para 31.
[25] *O'Malley v Simpson-Sears Ltd*., [1985] 2 S.C.R. 536 at para 12 (WL).
[26] *Interpretation Act*, *supra* note 20, at s. 6.
[27] Bryan A. Garner, *Black's Law Dictionary 11th Edition* (St. Paul, MN: Thompson Reuters, 2019) sub verbo "remedial statute".
[28] *DRIPA*, *supra* note 1, at s. 10.
[29] *Hupacasath*, *supra* note 14, at para 66.

the facts of a case lies at the core of what courts do. Under the constitutional separation of powers, determining this is squarely within our province".[30]

32. It may be that B.C.'s preference is that all the work to be done to ensure its laws are brought in line with the Declaration happens through the mechanisms set out in ss. 4-7 of the *Act*. Respectfully, that interpretation does not withstand a purposive interpretation. The *Act* is a statute that speaks directly to the human rights of Indigenous Peoples. Its provisions raise justiciable questions.

33. The *Act*, read broadly and purposively as a human rights statute, is not an enactment that should be interpreted to reserve the power of enforcement to the government. Had this been the Legislature's intent, it was incumbent on it to say so clearly and expressly. It did not.

ii. The rights to self-determination and self-government are customary international law, enforceable by judicial implementation

34. In the alternative, if this court does not agree that the *Act* implements the Declaration into B.C.'s domestic law, the Commissioner submits that the rights to self-determination and self-government are customary international law, enforceable by the judiciary. Customary international law does not require legislative implementation to have full force and effect. Rather, as *Nevsun Resources v. Araya*, demonstrates, "the adopting of customary international law as part of domestic law by way of automatic judicial incorporation" is neither new nor dependent on legislative action.[31]

35. To determine whether a norm has become customary international law requires assessing whether there is "general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal obligation."[32] The Commissioner submits that Articles 3 and 4 of the *Declaration* are customary international law that recognize Indigenous Peoples' rights to self-determination and self-government.[33] It is entirely

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[30] *Hupacasath, supra* note 14 at paras 62-67 and 70.
[31] *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 [*Nevsun*] at para 86-87.
[32] *Ibid.*, at para 77.
[33] International Law Association, Sofia Conference (2012), "Rights of Indigenous Peoples: Final Report", at 30; International Law Association, Kyoto Conference (2020), "Implementation of the Rights of Indigenous Peoples", at 2, and; Aldo Chircop et al, "Is There a Relationship between UNDRIP and UNCLOS?", 33 *Ocean Yearbook* at 101-103.

appropriate that the judiciary recognize this status and incorporate these rights into domestic law.[34]

C. As human rights legislation the *Act* prevails if there is a conflict between it and any other enactment

36. Statutes must be interpreted to comply with the *Act*.[35] Absent the ability to construe an impugned provision such that it complies with the *Act*, the *Act* must have primacy, as does other human rights legislation. This is one of the critical implications flowing from a law's quasi-constitutional status. As Professor Sullivan explains, "In cases of conflict or inconsistency with other types of legislation, the human rights legislation prevails regardless of which is more specific, and which was enacted first".[36]

37. Because the rights protected by quasi-constitutional legislation represent fundamental law, primacy can be inferred regardless of whether a quasi-constitutional statute contains an express primacy clause.[37]

38. Accordingly, to the extent that one might characterize the *Human Rights Code*, or we say, the *Act*, as more general than what is codified in another, ordinary enactment, the more specific provision cannot stand if there is an irresolvable conflict regardless of its purported specificity or when it was enacted in relation to the human rights legislation relied on.

39. There is no persuasive and principled basis to say that human rights legislation specific to Indigenous Peoples should not be subject to the same rules of construction as other human rights law or, indeed, other quasi-constitutional laws.

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[34] *Nevsun, supra* note 31, at para 87.
[35] *Interpretation Act*, *supra* note 20, s. 8.1(3).
[36] *Sullivan*, *supra* note 12, at §19.1.
[37] *Heerspink*, supra note 4 at para. 32, *Craton v. Winnipeg School Division, No.1*, [1985] 2 S.C.R. 150 at para 8 (WL) [*Craton*]; *Canada (Attorney General) v. Druken*, [1989] 2 FC 24 (FCA) [*Druken*] at para 14 leave to appeal den'd [1988] SCCA No 433; *Newfoundland (Human Rights Commission) v Newfoundland (Workplace, Health, Safety & Compensation Commission)*, 2005 NLCA 61 at paras 15-16.

D. Declaratory relief is available when ordinary provisions cannot be construed consistently with the rights affirmed by the *Act*

40. To give effect to the primacy of human rights legislation, including the *Act*, courts must be able to order remedies that put an end to the offending conduct, even when it arises from a legislative enactment. When it is impossible to read an offending provision consistently with human rights legislation, it is open to courts to provide declarative relief to the extent necessary to ensure the impugned provision no longer operates to conflict with the human rights legislation it breaches.[38]

41. Decision makers granting such declaratory relief often use the language of invalidity, though some cases declare the offending provision inoperative or inapplicable. Whatever the language, the effect is the same: provisions that cannot be construed consistently with human rights legislation cannot continue to operate. This declaratory relief is distinct from that rooted in the constitutional division of powers analysis. In the case of the primacy of human rights statutes, a declaration of invalidity, inapplicability, or inoperability are unrelated to the Legislature's power to pass a law pursuant to the *Constitution Act, 1867* ss. 91-92. Rather, it is grounded in the recognition that human rights legislation protects rights that are more fundamental to our society than those enshrined in ordinary statutes.

42. This remedial approach arose in the context of the judicial review of administrative tribunals decisions; however, the Commissioner submits that it is equally available to superior courts with inherent jurisdiction.[39]

43. The Legislature could have precluded this remedial power to declare offending provisions invalid with express words to the contrary. There are no such words in the *Act* or in the *Interpretation Act*. Absent express words in a particular statute, the Commissioner submits that this declarative relief must be available when courts decide an impugned provision cannot be construed to be consistent with the *Act*, including its Schedule.

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[38] T*ranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at paras 36 and 53, *Craton v Winnipeg School Division No.1*, 149 D.L.R. (3d) 542 at para 12, aff'd in *Craton, supra* note 37 at paras 8-9; *Druken*, *supra* note 37 at para 14.

[39] *S.A. v Metro Vancouver Housing Corp.*, 2019 SCC 4, at para 60.

E. Failing to consult is a *prima facie* violation of Indigenous Peoples' rights to self-determination and self-government

44. The *Act*'s affirmation that the Declaration applies to the laws of B.C mandates that courts give meaning to the rights of self-determination and self-government as the animating principles of the Declaration, as well as to the express rights in Articles 3-5 and 27. The Petitioner Gitxaala argues that B.C.'s unilateral grant of mineral tenures on Gitxaala territory is contrary to and ignores Gitxaala's laws and as such has infringed upon their rights to self-determination and self-government. It is the Commissioner's position that respecting Indigenous Peoples' rights to self-determination and self-government requires the Crown to consult with Indigenous Nations to obtain their free, prior, and informed consent before it puts in place processes or takes actions that impact the territory over which an Indigenous Nation has asserted rights and title. Absent such consultation, Indigenous Peoples' rights to self-government and self-determination are breached on their face.

45. Self-determination is the central normative human rights value animating the Declaration. Importantly, and unlike much Aboriginal law in Canada, the Declaration grounds Indigenous Peoples' rights in their own legal traditions.[40] The Declaration is significant because it is:

> the only declaration in the UN which was drafted with the rights-holders, themselves, the Indigenous Peoples. We see this is as a strong declaration which embodies the most important rights we and our ancestors have long fought for; our right of self-determination, our right to own and control our lands, territories and resources, our right to free, prior and informed consent, among others... This is a declaration which makes the opening phrase of the UN Charter, "We the Peoples…" meaningful for the more than 370 million indigenous persons all over the world.[41]

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[40] Gunn, "Beyond Van der Peet: Bringing Together International, Indigenous and Constitutional Law" [Gunn, "Beyond Van der Peet*"*] in John Borrows et al, ed, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo: Centre for International Governance Innovation, 2019) [*Braiding Legal Orders*] at 136, 138.

[41] Gunn, "Overcoming Obstacles" *supra* note 13 at 148, quoting Victoria Tauli-Corpuz, "Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples" at the 61st Session of the UN General Assembly, 13 September 2007, New York.

46. The scope of Indigenous Peoples' rights to self-determination and self-government must be defined with regard to changing social conditions and evolving conceptions of Indigenous Peoples' human rights and human rights generally.[42] There is no doubt, however, that Canadian courts and the Legislature have already recognized Indigenous Peoples' right to self-determination and self-government, including as a value underpinning Canada's constitution.[43]

47. Integral to Indigenous Nations' right self-determination, as a human right, is the right to promote, develop, and maintain laws. Because the Declaration recognizes that Indigenous Peoples' rights are based in their own legal traditions, it is an instrument that, properly interpreted, can address "the disconnect between Canadian law and Indigenous law, moving away from the current colonial relationship toward a nation-to-nation relationship."[44] Crown conduct that fails to engage with Indigenous Peoples when their asserted rights and title are at issue prevents Indigenous Peoples' from effectively enacting their laws, both substantively and procedurally.

48. After too long being overlooked, Indigenous Peoples' laws have been gaining recognition in Canadian jurisprudence (even prior to the *Act*'s passage and including in jurisdictions that have no similar legislation). For example, in *Pastion v. Dene Tha' First Nation*, the court said, "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land".[45] In *Gamblin v. Norway House Cree Nation Band Council* the court noted that Indigenous jurisdiction is inherent and forms part of "the common law of aboriginal rights".[46] The affirmation of the *Declaration* to the laws of B.C. mandates that courts give broad and liberal meaning to the rights of self-determination and self-government.

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[42] *Sullivan, supra* note 12, at 19.1.
[43] For example, *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123, at para 81, Draft Principles that Guide the Province of British Columbia's Relationship, at p. 2, *Adoption Act,* R.S.B.C. 1996, c 5, s. 3.2 and *Child, Family and Community Service Act,* R.S.B.C. 1996, c. 46, ss. 4.1-4.2.
[44] Gunn, "Beyond Van der Peet*", supra* note 40, at 138.
[45] *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 8.
[46] *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 50.

49. Affirming the Declaration to the laws of B.C. means acknowledging that:

> … a foundational aspect of UNDRIP is the right of Indigenous peoples to participate in decision-making when their rights are impacted, according to their own traditional decision-making processes. If Canada were to begin to embrace the right of participation, then many more decisions (including resource development decisions) would take into consideration indigenous laws on land and resource use.[47]

50. Where there has been no consultation, in the Commissioner's respectful submission, a *prima facie* violation of an Indigenous Nation's rights to self-determination and self-government arises.

51. It is incumbent upon the Crown, and in its absence this Court, to breathe life into our constitutional living tree and strengthen Canada's constitutional roots because:

> … the ground from which Canada's Constitution grows first belonged to non-European peoples… Indigenous peoples' own laws became a broader source of Canadian law. The recognition and affirmation of Aboriginal and treaty rights is simultaneously commingled with their persistent denial…
>
> [Indigenous Peoples' rights enshrined in the Declaration are] not contingent on a non-Indigenous event (such as European contact or the assertion of foreign sovereignty, as problematically required by Canadian case law).[48]

52. B.C.'s most senior judges have given voice to the importance of respecting Indigenous Peoples' legal orders and the primacy of self-determination as part of the matrix of decision-making.[49] With the *Act*, B.C. has signaled that the judiciary should take Indigenous Peoples' legal orders seriously in their decision making.

53. The immediate affirmation of the Declaration to the laws of B.C. means courts must assess impugned Crown conduct, including the validity of statutory provisions that purportedly

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[47] Gunn, "Beyond Van der Peet", *supra* note 40, at 143.
[48] John Borrows, "Revitalizing Canada's Indigenous Constitution: Two Challenges", in *Braiding Legal Orders, supra,* note 35, at 29-30; he cites the leading case on the Constitution as a living tree: *Edwards v Canada (Attorney General)*, [1930] AC 124.
[49] Bauman, C.J.B.C., "A Duty to Act" (Paper delivered at the Canadian Institute for the Administration of Justice's 2021 Annual Conference: Indigenous Peoples and the Law, Vancouver, 17-Nov-2021) [unpublished], paras 4-5, building upon Lance Finch, C.J.B.C., "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper delivered at the CLE Society of BC's Indigenous Legal Orders, Nov-2012) [unpublished].

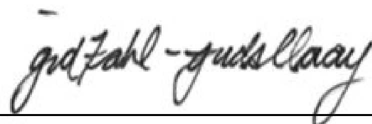
enable it act without consultation, to determine whether the Crown has violated Indigenous Peoples' rights to self-determination and self-government. Where the Crown does not allow Indigenous Peoples' laws to have effect, there is a *prima facie* breach of the rights to self-determination and self-government.

IV. CONCLUSION

56. The *Declaration* has been implemented into B.C.'s domestic law. Alternatively, the rights to self-determination and self-government are customary international law that should be implemented by the court. As a quasi-constitutional statute, the *Act* has primacy over ordinary enactments. Absent the ability to construe an enactment so it complies with the Declaration, courts should declare the offending provision invalid to prevent the continued operation of a law that undermines the human rights of Indigenous Peoples.

57. Indigenous Nations' laws are a primary expression of their self-determination. Statutes and the Constitution must be construed to give effect to the Declaration's articulation of Indigenous Peoples' rights. If the Crown fails to consult with an Indigenous Nation when their rights and title are at issue, there is a *prima facie* breach of their rights to self-determination and self-government. Courts can remedy these breaches by declaring the offending provision invalid to the extent necessary to ensure the breach does not continue.

All of which is respectfully submitted on behalf of the Human Rights Commissioner for British Columbia.



Date: January 23, 2023

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