



# **BETTER MANAGEMENT OF PRIVATE DOCKS ON THE GORGE WATERWAY**

JANUARY 2025

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**Cover images:** Examples of private docks along the Gorge. (Holly Pattison) **NOTE:** The photos provided are random representative examples of private docks found along the Gorge, and their inclusion is not an accusation that there is anything improper about their safety, legality or environmental impact.

**Copyediting and layout:** Holly Pattison, Environmental Law Centre

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## EXECUTIVE SUMMARY

This memo addresses the environmental problem of privately owned residential docks in the waters of the Greater Victoria Area. Personnel for the non-profit society Veins of Life Watershed Society (“VOLWS”) are concerned about the growing number of homeowner-built docks in the Gorge, Upper Harbour, and Portage Inlet (collectively, “the Gorge”). VOLWS personnel estimate that there are currently around 150 of these private docks, and approximately half of those were constructed after 2000. They believe that many of these docks do not comply with provincial and federal legislation designed to safeguard the aquatic environment that are meant to safeguard the aquatic environment.

The purpose of this memo is to explore the legal avenues available to ensure that private, recreational docks are constructed in an environmentally safe manner along the Gorge. To address this question, the memo outlines the governmental authorities over private residential docks in the Gorge. It also recommends possible solutions for better regulation.

First, the Province of British Columbia (the “Province”) could exercise its jurisdiction to designate the Gorge as an “Application-Only Area,” thereby removing the permissive regulatory scheme for dock construction and require express authorization from the Minister of Water, Land and Resource Stewardship (“WLRS”). Second, the Province could institute a “Shared Management Plan” on the Gorge. This would involve sharing dock authorization, decision making, and management between multiple groups including the Province, Indigenous Nations, and possibly local governments.

Both of these potential solutions are presented after a detailed discussion about the ways the different levels of authority interact on the Gorge. They are only meant to highlight potential solutions, and further research is warranted into this issue.

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# INTRODUCTION

Since 2000, Veins of Life Watershed Society (VOLWS) personnel estimate that homeowners abutting the Gorge Waterway (“the Gorge”)<sup>1</sup> have built approximately 80 private docks, bringing the total number of private docks to approximately 150. This has led VOLWS to wonder: are these docks in compliance with the federal and provincial laws intended to minimize the potentially harmful environmental effects of docks?

VOLWS believes that private docks need to be adequately regulated to ensure environmental protection for aquatic life. This concern is known to governments: the laws around docks at the federal and provincial level reference the environmental harm they carry. For example, some federal laws and policies are crafted to ensure private docks do not harm fish or fish habitat.<sup>2</sup> Further, provincial laws and policies relating to private docks express the need to consider the effects on the aquatic environment during construction and upkeep.<sup>3</sup>

The environmental impact of docks can also affect the rights and title of Indigenous Nations, highlighting the importance of environmentally conscious and inclusive management approaches. One recent example of this impact, and how the Province has responded it, is the co-management approach between the shíshálh Nation and the Province over private docks in Pender Harbour.<sup>4</sup> Following studies on the impact of private docks on Indigenous rights and on the environment, the Province and the Nation created a co-government plan that regulates and permits private docks in Pender Harbour.<sup>5</sup> The initial plan has been subsequently revised and amended, and is now called the shíshálh swiya Dock Management Plan out of respect for the First Nation’s swiya (*ancestral lands and waters*).<sup>6</sup>

Elsewhere in British Columbia, communities have raised concerns about environmental impacts from private docks. In 2021, the Minister of Forests, Lands, Natural Resource Operations and Rural

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<sup>1</sup> In this report, the Gorge includes the ocean waters north of Victoria’s Johnson Street Bridge; other reports and documents may differentiate this area into the Gorge, Portage Inlet, and/or Victoria Upper Harbour. See Appendix A for a map of the area.

<sup>2</sup> Government of Canada, “Guide to construction of alteration of private dock or structure - Canada.ca” (last modified 21 January 2022), online: <[canada.ca/en/navy/corporate/esquimalt-harbour/pleasure-craft/guide-construction-alteration-private-dock-structure.html](https://canada.ca/en/navy/corporate/esquimalt-harbour/pleasure-craft/guide-construction-alteration-private-dock-structure.html)>.

<sup>3</sup> Province of British Columbia, “Land Use Operational Policy Private Moorage” (amended 9 May 2024), online as pdf: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/private\\_moorage.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/private_moorage.pdf)>, s 11.3 [*Land Use Operational Policy: Private Moorage*].

<sup>4</sup> Simon Little & Paul Johnson, “Dispute brewing over changes to private dock management on Sunshine Coast,” *Global News* (2 February 2024), online: <<https://globalnews.ca/news/10269383/dispute-brewing-changes-private-dock-management-sunshine-coast/>>.

<sup>5</sup> Province of British Columbia, News Release, “Pender Harbour Project” (last modified 13 November 2024; last visited 16 February 2024), online: <<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/regional-crown-land-initiatives/pender-harbour-project>>.

<sup>6</sup> Province of British Columbia and shíshálh Nation, *shíshálh swiya Dock Management Plan* (Draft November 2023), online as pdf: <<https://comment.nrs.gov.bc.ca/api/public/document/6560f5b40d24d60022df8270/download>> [*shíshálh swiya Dock Management Plan*].

Development issued Ministerial Order No. M329/2021 (the “Order”) prohibiting any new docks from being built in the Southern Gulf Islands area and southeast shoreline of Vancouver Island.<sup>7</sup> When the Minister first issued the Order, news reports suggested that the Minister planned the ban out of concern for the environmental harms that docks carry and expressed the need for the Province to develop a cumulative effects approach for the area in approving new private docks.<sup>8</sup>

This Order was meant to be in effect for only two years, however it has recently been replaced with Ministerial Order No. M244 that extends the “Private Moorage No Application Zone” until August of 2025.<sup>9</sup> This replacement Order now falls under the administration of WLRS.<sup>10</sup> A recent exchange in the BC Legislature between the then MLA for the area and the Minister reveals that the Order has created tensions. The MLA, himself a member of Tsartlip First Nation, urged the Minister to create better processes for regulating docks in the area. He also encouraged collaboration with First Nations.<sup>11</sup> The current status of these issues remains unknown at the time of writing.

First Nations have been impacted by development in the lands surrounding the Gorge Waterway and some are seeking collaborative solutions regarding the private docks. The Songhees Nation, which is a Lekwungen (ləkˈwəŋən) people, declared an interest in designating the Gorge as a “special management area” (“SMA”). The objective of the SMA is the successful return of Pacific herring and Pacific salmon fisheries as self-sustaining populations.<sup>12</sup> The Gorge-Colquitz Special Management Area Collaborative (“GCSMAC”) is a voluntary initiative led by First Nations along with the Province, Canada, regional districts, and all municipalities surrounding the Gorge Waterway and within the Colquitz and Craigflower watersheds. GCSMAC members have been meeting since 2019 to advance the SMA Collaborative Action Plan founded in collaborative working principles.<sup>13</sup> The Action Plan consists of a series of strategic actions driven by a Collaborative Protocol Agreement establishing a Steering Committee and Technical Advisory Group to institute collaborative governance to achieve the SMA objective through evidence-based decisions using adaptive management and by striving for consensus.<sup>14</sup>

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<sup>7</sup> Ministerial Order No M329 is effective 24 August 2021 to 23 August 2023 under the *Land Act*, [RSBC 1996] c 245, s 10.1.

<sup>8</sup> Elizabeth Nolan, “Ministerial order bans new dock applications in Gulf Islands” (Gulf Island Driftwood, 25 August 2021), online: <<https://gulfislandsdriftwood.com/ministerial-order-bans-new-dock-applications-in-gulf-islands/>>.

<sup>9</sup> Ministerial Order No M244 is effective 24 August 2023 to 25 August 2025 under the *Land Act*, [RSBC 1996] c 245, s 10.1.

<sup>10</sup> Administration of the *Land Act* has since been transferred from the Ministry of Forests to the Ministry of Water, Land and Resource Stewardship (“WLRS”). *Land Use Operational Policy: Private Moorage*, *supra* note 3.

<sup>11</sup> Adam Olsen, “Budget Estimates: Engaging Minister Cullen on docks in the Southern Gulf Islands” (9 April 2024), online as podcast: <<https://www.youtube.com/watch?v=fOC3obqYtRM>>.

<sup>12</sup> GCSMAC, *Special Management Area (SMA) Collaborative Action Plan* (12 September 2019), online as pdf (via District of Highlands): <<https://www.highlands.ca/AgendaCenter/ViewFile/Item/5321?fileID=5587>> at 2.

<sup>13</sup> The principles are voluntary membership, consensus and evidence-based decision making, integrated management, respect for existing authorities, inclusivity, adaptive management, transparency, efficiency, accessibility, and being Indigenous led and informed. *Ibid* at 3–4.

<sup>14</sup> *Ibid* at 2-3.

The instances of private docks and Provincial regulation noted above leads VOLWS personnel to wonder: does the proliferation of private docks on the Gorge provide a similar case for the Province to improve upon its exercise of authority to limit or regulate private docks? If so, how can this be done? To answer these questions, this memo begins with an overview of the federal, provincial, and municipal authority over the waters in the Gorge. A careful analysis of the different layers of government reveals that the Province has considerable authority over regulating docks on the Gorge waterway north of the Selkirk Trestle that demarcates the federal public harbour. However, federal laws on certain matters, including transportation, navigation, and fisheries, still apply to these inland waters. Further, municipalities can make zoning or bylaws on the waters in the Gorge, within certain limitations.

After examining the various Crown jurisdictions, the memo then turns to what it means for future research on the legality of private docks in the Gorge. Finally, the memo identifies two possible solutions for how the Province could better regulate and authorize private docks on the Gorge. The first solution is to designate the Gorge as an Application-Only Area. The second solution is to institute a Shared Management Plan through effective co-governance. The memo concludes with a consideration of the Shared Management Plan in Pender Harbour as a relevant example in place elsewhere in the province.



## OVERVIEW OF SHARED AND OVERLAPPING JURISDICTION

In Canada, the federal and provincial governments share jurisdiction to make laws for and to regulate waterbodies. The federal government has jurisdiction over matters such as beacons, buoys, and lighthouses; navigation and shipping; seacoast and inland fisheries; and public harbours.<sup>15</sup> Further, in some cases in Canada, waters fall under exclusive federal jurisdiction. Public Works and Property of each province are the Property of Canada, including public harbours enumerated in the Third Schedule to the *Constitution Act, 1867*.<sup>16</sup> An example of this is the Victoria Harbour, which is located near the Gorge and federal jurisdiction applies more extensively.

As a designated public harbour, the Victoria Harbour falls under federal jurisdiction and activities within it must comply with federal laws.<sup>17</sup> The Gorge extends inland from the harbour's north boundary at Selkirk Trestle. The south boundary of Victoria Harbour is demarcated by a line running west from Ogden Point breakwater to the south end of Macauley Point.<sup>18</sup> The federal government also has jurisdiction over aquatic areas below the low-water mark and extending offshore,<sup>19</sup> as well as over waters associated with particular matters, as highlighted above for public ports, navigation, and fisheries.

Other aquatic areas of the Gorge are not considered public harbours. These areas are considered foreshore, which is the intertidal area between high and low water marks.<sup>20</sup> As with all legal topics relating to the foreshore, the issue of jurisdiction is complex. Broadly, the Province is authorized to act within all the inland waters north and west of the Selkirk Trestle along the Galloping Goose Trail. However, as these waters extend inland from the Pacific Ocean, Canada retains authority to act in circumstances where waters are important for navigation.<sup>21</sup> Further, the Province delegates authority to municipalities to enact land-use bylaws within their boundaries, and some small parts of the Gorge have shoreline boundaries within municipalities.<sup>22</sup> There are also agreements between the Province and the City of Victoria about private docks on the Gorge within the city's jurisdiction. In other words, all private docks in the Gorge must comply with federal, provincial,

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<sup>15</sup> *Constitution Act, 1867*, ss 91(9–10, 12), 108, 3rd sched.

<sup>16</sup> *The Corporation of the City of Victoria v Zimmerman*, 2018 BCSC 321 at para 19 [Zimmerman].

<sup>17</sup> Transport Canada owns and manages the Port of Victoria, which spans from the Ogden Point Breakwater to the Selkirk Trestle. Transport Canada, "Port of Victoria" (last modified 18 August 2022), online: <<https://tc.canada.ca/en/marine-transportation/ports-harbours-anchorage/port-victoria>> [Port of Victoria].

<sup>18</sup> OC 507/24, (1924), Schedule A ["OC/1924"].

<sup>19</sup> *Attorney-General for British Columbia v Canadian Pacific Railway Company*, [1906] AC 204, 1906 CarswellBC 109 at para 8.

<sup>20</sup> Generally, waters in the offshore (areas below the low-water mark) are outside of provincial authority. *Ibid*.

<sup>21</sup> These include but are not limited to the *Canadian Navigable Waters Act*, RSC 1985, c N-22 and *Fisheries Act*, RSC 1985, c F-14.

<sup>22</sup> *Local Government Act*, RSBC 2015, c 1 Part 14; see also William Buholzer, *British Columbia Planning Law and Practice* (Toronto: Lexis-Nexis Canada, 2001) (loose-leaf updated 2024), app 1, C.2.A1.8 [Buholzer].

and municipal legislation to some degree. [Appendix A](#) of this memo breaks down that authority on different areas in Victoria Harbour and the Gorge Waterway.

In the following sections, this memo details how federal, provincial, and local governments may act on the waters in the Gorge in relation to regulation and permitting of private docks. We conclude that, while there are different ways the levels of government can act, the Province holds the jurisdiction to exert greater control over private docks. The next section discusses in detail how the legal authority for different levels of government operates to regulate docks in the Gorge.

## ASPECTS AND LIMITS OF FEDERAL JURISDICTION

As previously stated, the waters south of the Selkirk Trestle are designated as a public port.<sup>23</sup> The *Public Ports and Public Port Facilities Regulations* of the *Canada Marine Act* (SC 1998, c 10) authorize activities such as building, placing, rebuilding, repairing, altering, moving, or removing any structure or work on, in, over, under, through, or across land or water in a public port or at a public port facility. any “[b]uilding, placing, rebuilding, repairing, altering, moving or removing any structure or work on, in, over, under, through or across land or water in a public port or at a public port facility”<sup>24</sup> Accordingly, homeowners wishing to build private docks in these waters would likely need to obtain permission from a federal port official before constructing a dock in a public port. [Appendix A](#) shows the areas of federal jurisdiction relating to public harbour laws, represented by the dark blue area on the map by the dark blue area on the map.

In the inland waters north of Selkirk Trestle, federal legislation can still apply if private docks affect areas of federal jurisdiction, such as navigation and shipping under the *Canadian Navigable Waters Act* (RSC, 1985, c N-22).<sup>25</sup> Therefore, if a provincial or municipal government enacts a law or bylaw regarding private docks, a court can strike that law down or decide that only part of it applies if it interferes with federal powers such as navigation and shipping.<sup>26</sup> An example of this occurred in the 2015 case, *West Kelowna v Newcomb* (BCSC), where a municipality enacted a zoning bylaw banning all moorage in navigable waters.<sup>27</sup> In this case, the Court interpreted the bylaw in a way that would not interfere with the federal powers of navigation and shipping.<sup>28</sup> The federal government also has authority to legislate with respect to fish and fish habitat.<sup>29</sup> However, we found no cases concerning private docks interfering with fish or fish habitat. Cases cited in this

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<sup>23</sup> Port of Victoria, *supra* note 17; *Public Ports and Public Port Facilities Regulations*, SOR/2001-154 at s 1, sched 1 part 6 [Port Regulations]; *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23 [Lafarge].

<sup>24</sup> *Port Regulations*, *ibid* at ss 35–6, sched 4, item 12.

<sup>25</sup> *Early Recovered Resources Inc v British Columbia*, 2005 FC 995, paras 81-82 [Early Recovered Resources]; *West Kelowna (District) v Newcomb*, 2015 BCCA 5, paras 27-29 [Newcomb]; *Lafarge*, *supra* note 23 at para 4.

<sup>26</sup> *Early Recovered Resources*, *ibid* at paras 81-82; *Newcomb*, *ibid* at paras 27-29.

<sup>27</sup> *Newcomb*, *ibid*.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Fisheries Act*, RSC 1985, c F-14.

report concern private docks and jurisdiction by focusing on docks interfering with the federally established right of navigation.<sup>30</sup>

## THE CANADIAN NAVIGABLE WATERS ACT AND DOCKS

The *Canadian Navigable Waters Act* prohibits the construction of any structures on, over, or across navigable waters, including the Pacific Ocean, except in accordance with the Act or with permission from the federal Transport Minister.<sup>31</sup> Docks that meet criteria set out in the Act are permitted without the express approval from the Transport Minister.<sup>32</sup> These criteria relate to the position of docks relative to other properties, structures, and navigation channels and routes, the size of the docks, and the permitted uses of the docks.<sup>33</sup> Docks that do not meet the requirements may still be constructed after receiving permission from the Minister of Transport Canada.<sup>34</sup>

The British Columbia Court of Appeal confirmed that federal powers cannot be used to repeal or override provincial, and by extension, municipal laws that regulate docks.<sup>35</sup> Although municipal regulation of docks falls under provincial jurisdiction and may affect federal navigation powers, this does not necessarily invalidate municipal dock regulations. Where there is overlap in provincial and federal jurisdiction over a matter, courts prefer to allow laws to share jurisdiction.<sup>36</sup> Where there is a conflict between a valid federal and a valid provincial law, and the provincial law “frustrates the purpose” of the federal law, the provincial law is rendered inoperative to the extent of the conflict.<sup>37</sup> Provincial legislation may be rendered inapplicable where it legislates within the “protected core” of federal jurisdiction.<sup>38</sup> In summary, while provincial and municipal laws on docks may intersect with federal powers, they may remain valid unless they expressly conflict with or intrude upon core areas of federal jurisdiction, such as navigation.

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<sup>30</sup> *Salt Spring Island Local Trust Committee v B & B Ganges Marina Ltd*, 2007 BCSC 892 [*Salt Spring Island Local Trust*]; *West Kelowna (District) v Newcombe*, 2013 BCSC 1411; *Newcombe*, *supra* note 25.

<sup>31</sup> *Canadian Navigable Waters Act*, *supra* note 21, ss 3, 5(1), schedule part 1, item 2.

<sup>32</sup> *Ibid* at ss 3, 4(1); *Minor Works Order*, SOR/2021-170, ss 13-14 [*Minor Works Order*].

<sup>33</sup> *Minor Works Order*, *ibid* at s 14.

<sup>34</sup> *Canadian Navigable Waters Act*, *supra* note 21 at ss 4(1), 28(2).

<sup>35</sup> *Salt Spring Island Local Trust*, *supra* note 27 30 at paras 66, 72-73.

<sup>36</sup> *Canadian Western Bank v Alberta*, 2007 SCC 22 (CanLII) at paras 24, 37, 43 [*Canadian Western Bank*]; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 (CanLII), [2015] 1 SCR 693 at para 17; *Reference re Agricultural Products Marketing Act*, 1978 CanLII 10 (SCC), [1978] 2 SCR 1198; *Fédération des producteurs de volailles du Québec v Pelland*, 2005 SCC 20, 1 SCR 292, at para 15; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, 2 SCR 536 at paras 44-45; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, 3 SCR 134, at para 63.

<sup>37</sup> *Multiple Access Ltd. v McCutcheon*, 1982 CanLII 55 (SCC) at para 163.

<sup>38</sup> *Canadian Western Bank*, *supra* note 36; *Buholzer*, *supra* note 22 at 3-6, c 3.A.4.3.14.

## ASPECTS AND LIMITS OF PROVINCIAL JURISDICTION

As long as matters do not interfere with federal powers of navigation, fisheries or other areas of federal jurisdiction, the Province can create laws for waters north of Selkirk Trestle.<sup>39</sup> The Province administers this land under the *Land Act*, which grants it broad jurisdiction to administer Crown lands including aquatic “lands.”<sup>40</sup> Appendix A of this report represents these areas in pink, green, orange, and teal based on the respective municipality. This renders the Gorge primarily provincial land yet subject to specific federal and municipal legislation.<sup>41</sup>

On top of the federal requirements, dock construction must comply with provincial legislation. In British Columbia, the Province grants individuals the ability to construct private structures on foreshores pursuant to the *Land Act*, which requires express permission from the Minister.<sup>42</sup> The Province divides up the types of areas based on what kind of permissions they require such that there are General Permission Areas and Application-Only Areas.

### GENERAL PERMISSION AREA

General Permission Areas require no express permission from the Minister. This means that parties can build docks without having to apply to the Province for permission, provided that the docks conform to the General Permission requirements. These requirements are set out by WLRS in an exhaustive policy document authorized under the *Land Act*.<sup>43</sup> Some requirements include dock location,<sup>44</sup> how docks can be used,<sup>45</sup> what construction materials can be used,<sup>46</sup> mandatory setbacks, and the lengths of docks.<sup>47</sup> The requirements prohibit any dock from ‘unduly’ disturbing riparian vegetation on Crown lands.<sup>48</sup> There is also a requirement that docks are not located over an “Area of Special Interest” defined in section 1 as “known archaeological sites, areas of eel grass, ecological reserves, parks, protected area designations or any combination of these.”<sup>49</sup> Further, Appendix 3 of the Province’s Private Moorage Policy prohibits docks from being grounded during

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<sup>39</sup> *Port Regulations*, *supra* note 23, s 1, sched 1 part 6; *Lafarge*, *supra* note 23.

<sup>40</sup> *Land Act*, [RSBC 1996] c 245, s 4

<sup>41</sup> *Early Recovered Resources*, *supra* note 25 at paras 81-82; *Newcomb*, *supra* note 25 at paras 27-29; *Lafarge*, *supra* note 25 at para 4.

<sup>42</sup> *Land Act*, *supra* note 40, ss 11, 38–40, 51.

<sup>43</sup> Province of British Columbia, *Provincial General Permission of the Use of Crown Land for Private Moorage* (9 May 2024), online as pdf: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/private\\_moorage\\_general\\_permission.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/private_moorage_general_permission.pdf)> [General Permission].

<sup>44</sup> *Ibid*, s 4.

<sup>45</sup> *Ibid*, s 5.

<sup>46</sup> *Ibid*, ss 3.2–3.3

<sup>47</sup> *Ibid*, ss 3.9–3.9

<sup>48</sup> *Ibid*, s 3.5.

<sup>49</sup> No dock may be built over an Area of Special Interest as defined to include eelgrass. *Ibid*, ss 1, 2.1(c).

low tide.<sup>50</sup> Thus, another requirement for docks in these General Permission Areas is that the docks cannot disturb the seabed. For docks that satisfy all requirements of General Permission, there is no initial fee or ongoing rent charged by the Province.<sup>51</sup>

Notably, section 7 of the policy regulating private docks in General Permission Areas leaves all dock placement to the discretion of the Minister.<sup>52</sup> This means that the Minister, at any time and at their sole discretion, and without incurring any liability to the owner or users of the dock, can require all or parts of the docks to be removed from Crown land.<sup>53</sup> If the Minister requires dock removal, the dock owner must remove it and return the Crown land to a 'safe, clean and tidy' condition.<sup>54</sup> Additionally, the cost of removing the dock is born by the owner of the dock.<sup>55</sup>

If any of the docks in a General Permission Area do not meet the requirements set out in the policy,<sup>56</sup> the dock owner must apply to the Province for Specific Permissions.<sup>57</sup> Applications for private docks for Specific Permissions undergo a separate review process.<sup>58</sup> In brief, such an application to construct docks on the Gorge would require maps, information about the proposed dock, and a management plan. It also requires proof of upland ownership or leasehold tenancy accompanied by a Letter of Consent from the owner, and written confirmation from local government that the proposal complies with existing zoning bylaws.<sup>59</sup> It requires an application fee and an application, that includes maps, plans and information about the proposed dock.<sup>60</sup> At the discretion of the Province, applicants may be required to provide and address issues from a Baseline Marine Habitat Assessment and an archaeological assessment.<sup>61</sup> An application fee of \$250 is also required for Specific Permissions.<sup>62</sup>

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<sup>50</sup> Province of British Columbia, "Land Use Operational Policy Private Moorage" (amended 9 May 2024), online as pdf: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/private\\_moorage.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/private_moorage.pdf)> at 11 [*Land Use Operational Policy: Private Moorage*].

<sup>51</sup> *Ibid*, s 5.1.1; Province of British Columbia, Assistant Deputy Minister Reconciliation, Lands and Natural Resource Policy, WLRS, *Land Policy: Pricing* (29 October 2018), online as pdf: <[gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/pricing.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/pricing.pdf)>, s 18.1.1 [*Land Policy: Pricing*].

<sup>52</sup> *General Permission*, *supra* note 43, s 7.

<sup>53</sup> *Ibid*, s 7.1.

<sup>54</sup> *Ibid*, s 7.2.

<sup>55</sup> *Ibid*, s 7.3.

<sup>56</sup> The Province has also released a checklist and interpretive guide for dock owners to determine if their docks meet the requirements. Province of British Columbia, "General Permission Requirements Checklist and Interpretive Guide" (February 2023), online as pdf: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/general\\_permission\\_checklist\\_and\\_interpretive\\_guide.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/general_permission_checklist_and_interpretive_guide.pdf)>.

<sup>57</sup> *Land Use Operational Policy: Private Moorage*, *supra* note 3, s 5.1.1.

<sup>58</sup> *Ibid*, s 5.1.2.

<sup>59</sup> Province of British Columbia, "Private Moorage - Marine: Application Requirement Checklist" (last accessed 14 November 2024), online as pdf: <[gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/checklist\\_marine.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/checklist_marine.pdf)> [*Marine Application Checklist*].

<sup>60</sup> *Land Use Operational Policy: Private Moorage*, *supra* note 3, ss 10.1.1–10.1.2.

<sup>61</sup> *Ibid*.

<sup>62</sup> Province of British Columbia, Assistant Deputy Minister Reconciliation, Lands and Natural Resource Policy, WLRS, *Land Procedure: Crown Land Fees* (9 May 2024), Table 1 Item 5 [*Land Procedure: Crown Land Fees*].

If a dock is suspected of violating its General Permission Area requirements, a party can contact the Ministry to check if the dock has obtained Specific Permissions. If the dock violates General Permission requirements and does not have Specific Permissions, a party can report the suspected violation to the Ministry through the Report all Poachers and Polluters (“RAPP”) web portal.<sup>63</sup>

In summary, General Permission Areas allow for the construction of docks without the need for express permission from the Minister, provided they adhere to stringent requirements set by the Province. These include specific guidelines on location, usage, materials, and environmental impact. The Minister retains the authority to mandate the removal of docks at any time, with the cost borne by the dock owner. If a dock does not meet these requirements, the owner must obtain Specific Permission through a more detailed application process that includes various assessments and an application fee

## APPLICATION-ONLY AREA

The Minister has also designated waters as Application-Only Areas in some parts of the Province. “Application-Only Area” means that homeowners must apply to the Province to build or keep their private dock. Currently, there are only three Application-Only Areas in British Columbia: 1) the West Coast Region – Vancouver Island and Gulf Islands; 2) West Coast Region – Sooke Basin; and 3) South Coast Region – Mainland.<sup>64</sup> The West Coast Region (Vancouver Island and Gulf Islands) has a partial Application-Only Area that applies solely to ‘new’ or proposed (i.e., not yet constructed) docks.<sup>65</sup> Notably, the area of the Gorge Waterway is only General Permission Area and does not fall under the Application-Only Area designation.

## WATERS ON THE GORGE ARE A GENERAL PERMISSION AREA

Since all the waters of the Gorge are a General Permission Area, it simplifies the process for constructing private docks by eliminating the need for express permission from the Minister. Dock owners must strictly adhere to comprehensive requirements set forth by the Province, which cover aspects such as location, usage, materials, and environmental impact. Land use policy further ensures docks do not harm the environment, particularly riparian vegetation and areas of special interest, such as eelgrass beds. These requirements also prohibit docks from ever being grounded during low tide. If a dock fails to meet these requirements, the owner must seek a Specific Permission through a detailed application process to the Province. This process involves submitting maps, plans, and various assessments, along with an application fee. Non-compliance

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<sup>63</sup> Province of British Columbia, “Report All Poachers and Polluters (RAPP)” (last visited 14 November 2024), online: <<https://forms.gov.bc.ca/environment/rapp/>>.

<sup>64</sup> *Land Use Operational Policy: Private Moorage*, *supra* note 3; Province of British Columbia, “Land use – private moorage” (last modified 17 September 2024), online: <<https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/crown-land-uses/residential-uses/private-moorage#Applications>>.

<sup>65</sup> *Ibid.*



with General Permission requirements can lead to the Minister ordering the removal of the dock with the owner bearing the costs of removal and restoration of Crown land.

## ASPECTS AND LIMITS TO MUNICIPAL JURISDICTION

Under the *Land Act*, Crown land is defined as “land, whether or not it is covered by water, or an interest in land, vested in the government.”<sup>66</sup> While the Province can grant Crown land for municipal use, further conveyance of the land for use or occupation by other parties must be advisable to (i.e., permissible by) WLRS.<sup>67</sup> For example, the Corporation of the City of Victoria (“Victoria”) Licence of Occupation for the Gorge Waterway Park (“GWP”) is intended for public use and recreational benefit but does not allow Victoria to unilaterally grant land for private use.<sup>68</sup>

Despite these limitations, municipalities have other means to regulate private docks. Municipalities fall under provincial authority as entities created by statute.<sup>69</sup> The Province delegates the authority to municipalities to enact bylaws within their boundaries, including for land-use regulation and issuing development or temporary use permits.<sup>70</sup> Municipal bylaws must not conflict with provincial laws, meaning that any municipal zoning bylaw for private docks must fully align with provincial laws and regulations and ‘there is absolutely no wriggle room’.<sup>71</sup> This principle logically extends to bylaws regarding the permitting and regulation of private docks. A municipal bylaw would be of no effect if it was inconsistent with any provincial laws enabling its jurisdiction, such as the *Land Act* under which the Licence of Occupation is held by the City of Victoria.<sup>72</sup> The British Columbia Supreme Court (BCSC) decision in *Zimmerman* upheld Victoria’s municipal zoning against private moorings for the GWP, which it controls under its licence with the Province. This supports and aligns with the public interest objectives of the Victoria’s municipal licensing of provincial Crown lands along the Gorge Waterway.<sup>73</sup>

Two tools that municipalities can use to further regulate docks are Official Community Plans (“OCPs”) with associated zoning bylaws, and bylaws in general. A bylaw is a law enacted by a subordinate legislative body exercising its delegated authority.<sup>74</sup> Using the authority delegated through the *Local Government Act*, municipalities can develop OCPs, which outline long-term visions for community development, including policies on transportation, utilities, land use, recreation, and housing.<sup>75</sup> Zoning bylaws associated with OCPs can regulate the use, density, and

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<sup>66</sup> *Land Act*, *supra* note 40, ss 1, 18, 55; *Lawrence v British Columbia (Attorney General)*, 2010 BCSC 309

<sup>67</sup> *Ibid*, s 39.

<sup>68</sup> *Zimmerman*, *supra* note 16 at para 76.

<sup>69</sup> *Constitution Act, 1867*, s 92(8).

<sup>70</sup> *Local Government Act*, RSBC 2015, c 1, ss 479, 488, 493.

<sup>71</sup> See Buholzer, *supra* note 22.

<sup>72</sup> *Community Charter*, SBC 2003, c 26, s 10 [*Community Charter*]; *ibid*.

<sup>73</sup> *Zimmerman*, *supra* note 16.

<sup>74</sup> Buholzer, *supra* note 22 at Appendix 1, A1.3

<sup>75</sup> RSBC 2015, c 1.

form of buildings and land. This includes leased and licensed provincial Crown lands, although zoning bylaws remain inapplicable on all federal Crown lands, regardless of who is using that land.<sup>76</sup> Municipalities can also use bylaws to regulate the construction and use of private residential docks along marine foreshore areas according to a specific standard.<sup>77</sup> Relevant examples include environmental standards to protect aquatic habitats, such as eelgrass beds, standards to protect Indigenous cultural and heritage remains, such as middens, and standards to minimize effects on water quality. Municipalities have the authority to enforce their bylaws, which could include issuing tickets or fines for violations.<sup>78</sup>

Like all bylaws, zoning bylaws can set standards to protect aquatic habitats and water quality and include enforcement measures such as fines. For instance, the *Community Charter* states that a municipality cannot pass bylaws about the protection of the natural environment or wildlife unless they align with provincial regulations, are passed pursuant to agreements with the responsible minister, or are approved by the responsible minister.<sup>79</sup> Municipalities around the Gorge could thus use OCP zoning bylaws or bylaws in general to regulate docks on the Gorge. In the next section, we review how the different municipalities along the Gorge Waterway – Esquimalt, Saanich, Victoria, and View Royal – employ these tools to manage and regulate private docks in the Gorge Waterway.

## ESQUIMALT BYLAWS

The Corporation of the Township of Esquimalt (“Esquimalt”) requires individuals to obtain development permits from the Township to construct docks on the Gorge. Esquimalt’s OCP designates the entire Township as a Development Approval Information Area (“DAIA”). It states that the reason for this designation is to respect the “sensitive shoreline” and protect the biodiversity around the Gorge.<sup>80</sup> The OCP also states that one of its objectives is to “protect the ecological integrity of Esquimalt’s shorelines.”<sup>81</sup> The OCP states that to reach this goal, Esquimalt will, whenever feasible, “[a]void the expansion of dock area ... or other shoreline hardening structures” and encourage the “[r]emoval or reductions in the surface area of existing private

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<sup>76</sup> Relevant federal uses include First Nation reserves, Transport Canada port lands, or National Defence Canada (“DND”) lands and their lessees. *Ibid* at c 7, M.2.7.77.

<sup>77</sup> Examples include treating foreshores as sensitive ecosystems and establishing them as green infrastructure designated as environmental development permit areas. See Deborah Curran and Erin Gray, *Green Bylaws Toolkit for Protecting and Enhancing the Natural Environment and Green Infrastructure* (Vancouver: Stewardship Centre for British Columbia, 2021) at 8, 105–107 [*Green Bylaws*].

<sup>78</sup> *Ibid*.

<sup>79</sup> *Community Charter*, *supra* note 72 at ss 9(1)(b–c), 9(3–5).

<sup>80</sup> Corporation of the Township of Esquimalt, *Official Community Plan Bylaw, 2018, No 2922* (September 2019) at 20-21 [*Esquimalt OCP*].

<sup>81</sup> *Ibid*.

docks.”<sup>82</sup> To facilitate this, the OCP mandates that all Esquimalt land near the Gorge require a development permit and this land is not subject to general bylaw exemptions.<sup>83</sup>

On February 3, 2020, council for Esquimalt voted unanimously to ‘grandfather’ in existing bylaw-non-compliant docks, such that staff would not enforce bylaws if the docks were adequately maintained and not enlarged.<sup>84</sup> In these instructions, the grandfathered docks attached to ‘private land’ (i.e.: upland property privately owned by the dock owner) required no further work by the dock owner.

Grandfathered docks attached to ‘public land’ (i.e.: upland property publicly owned by the Township of Esquimalt) require the dock owner to enter into a Licence of Use and Occupation with the Township (the “Esquimalt Licence”).<sup>85</sup> The Esquimalt Licence expressly requires dock owners to conform with provincial and federal legislation regarding how the dock was built.<sup>86</sup> The Esquimalt Licence expressly requires the parties to agree that it is not a lease and expressly differentiates between Township and Crown lands such that the Esquimalt Licence does not appear to constitute a direct Crown grant.<sup>87</sup>

Regardless of whether Esquimalt docks are considered attached to ‘private land’ or ‘public land,’ the docks are still built on the foreshore. Thus, they are required to either conform with the provincial General Permission as described previously in this report, or non-conforming docks would require Specific Permissions from the Province.

## SAANICH BYLAWS

The Corporation of the District of Saanich’s (“Saanich”) *Zoning Bylaw No 8200* prohibits any building or structures constructed or located on the foreshore, and it expressly includes the Gorge Waterway.<sup>88</sup> Section 2 of the bylaw also considers “non-conforming use” defined as “a use or activity which was lawful prior to the adoption, revision or amendment to this bylaw” to provides an exception; however, the bylaw is silent on docks.<sup>89</sup> Bylaws enacted prior to September 2003 do not provide an exception for private docks to the current prohibition under section 5.16(a), and

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<sup>82</sup> *Ibid* at 80.

<sup>83</sup> *Ibid* at 73.

<sup>84</sup> Corporation of the Township of Esquimalt, Council Meeting (3 February 2020, last accessed 18 November 2023), online (video): <[esquimalt.ca.granicus.com/player/clip/537](https://esquimalt.ca.granicus.com/player/clip/537)> [Esquimalt Council Meeting Feb 3 2020].

<sup>85</sup> The Township of Esquimalt, *Licence of Use and Occupation* (22 January 2020, last accessed 17 December 2023), online: <[esquimalt.ca.legistar.com/View.ashx?M=F&ID=27335&GUID=8D0C7EBA-BB15-4DB9-BF2C-D3520D3B0791](https://esquimalt.ca.legistar.com/View.ashx?M=F&ID=27335&GUID=8D0C7EBA-BB15-4DB9-BF2C-D3520D3B0791)> [Esquimalt Licence].

<sup>86</sup> *Land Act*, *supra* note 40 at ss 8(3), 11(2)(b), 32, 38.

<sup>87</sup> *Esquimalt Licence*, *supra* note 85 at arts 2.2(c) (but incorrectly as another duplicated (b)), 7.2, 8.1, 15.8.

<sup>88</sup> The Corporation of the District of Saanich, *Zoning Bylaw No 8200*, (8 September 2003), s 5.16(a) [Saanich Zoning Bylaw].

<sup>89</sup> *Ibid* at ss 2, 3.3.

any dock constructed in Saanich after 2003 would be in contravention since docks are located “upon or over the land lying below the natural boundary of the ocean.”<sup>90</sup>

## VICTORIA BYLAWS

The City of Victoria (“Victoria”) zones the “Gorge Waterway Park District” as an area which prohibits “docks, wharfs, and piers except as accessory park use” and only a single residential zone permits dock construction.<sup>91</sup> Victoria’s zoning bylaw provides that no structures are permitted to be constructed unless granted express permission under the *Zoning Regulation Bylaw* or the specific zone’s zoning bylaws. There do not appear to be any express permission requirements in the *Zoning Regulation Bylaw* for constructing or using docks. Additionally, the bylaw’s definitions of “building” and “outdoor feature” do not explicitly reference docks.<sup>92</sup>

In Victoria, there are 18 zoning districts that abut with the Gorge Waterway and only one of these zones permits docks. The other districts include those designated as industrial-commercial, residential, mixed commercial-residential, and recreational zoning. The area zoned as the “Dockside District” has residential zoning and provides permissions for docks “for ferry boats” and “for pleasure boats,” which suggests these docks are for private use.<sup>93</sup>

## VIEW ROYAL BYLAWS

The Town of View Royal (“View Royal”) requires individuals to obtain development permits to construct docks on the Gorge Waterway including Portage Inlet. The OCP designates all areas near the foreshore as Development Permit Areas (“DPA”) to consider the ecological value of watercourses and shorelines.<sup>94</sup> Owners of land in the DPAs must obtain a development permit before constructing or altering a structure, but repairs to existing structures are exempt if there is a potential safety hazard.<sup>95</sup> The OCP provides guidelines for the construction and replacement of docks, though these guidelines do not mention provincial policies regarding dock construction or cover many of the provincial checklist requirements.<sup>96</sup> The OCP expressly states that its implementation does depend on decisions from federal and provincial agencies that hold jurisdiction.<sup>97</sup>

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<sup>90</sup> *Ibid* at s. 5.16(a); District of Saanich Planning Department, personal communication (email on 25 November 2024 at 9:31 am).

<sup>91</sup> The Corporation of the City of Victoria, *Zoning Regulation Bylaw No 80-159* (17 October 2019), ss 14(2)(a)-(b), Schedule B – Part 9.3.

<sup>92</sup> *Ibid*, Schedule A – Definitions.

<sup>93</sup> *Ibid* at Part 12.9 – CD-9 Zone, Dockside District, s 11.1, (last visited 18 November 2024) online: <[victoria.ca/media/file/129pdf](https://victoria.ca/media/file/129pdf)>.

<sup>94</sup> Town of View Royal, *Official Community Plan Bylaw No 811* at 178.

<sup>95</sup> *Ibid* at 179–180.

<sup>96</sup> *Ibid* at 180–181.

<sup>97</sup> *Ibid* at 194.

Based on recorded meetings from Esquimalt's February 3, 2020, Council, Esquimalt's January 13, 2020, Council of the Whole, and a news story from February 10, 2020, View Royal ostensibly grandfathered in these existing docks in a similar manner.<sup>98</sup> Most docks in place prior to View Royal's existence have a foreshore lease with the Province and are not monitored by the municipality. The Harbour Master or Ministry of National Defence Canada ("DND") may report their observations, or the public can complain about maintenance deficiencies to the municipality. Both could trigger the need for measures to bring them into conformance through the development permitting process and according to OCP guidelines.<sup>99</sup>

## SUMMARY OF FEDERAL, PROVINCIAL AND MUNICIPAL JURISDICTION

All docks must comply with federal and provincial regulations. Federal legislation requires that individuals obtain permission from the Minister of Transport Canada before constructing any structures on the Gorge as a navigable waterway. Permission from the federal Transport Minister is granted without the need for any applications if the structure meets legislative requirements, as discussed above. Docks found to be out of compliance with the requirements must obtain permission from the federal Transport Minister.

Provincial legislation sets out two types of areas where docks can be built: areas requiring General Permission and Application-Only areas. However, the Gorge Waterway is only General Permission. This means that while dock owners do not need permission before construction, the docks that they build must follow specific requirements. If the docks do not meet those requirements, then the owners need to get Specific Permission from the Province through WLRS.

In addition to compliance with federal and provincial regulations, dock construction must also be compliant with applicable municipal bylaws. Esquimalt and View Royal require municipal approval prior to dock construction on the Gorge, and Saanich does not permit any dock construction on the Gorge. Victoria has a single zoning district in which private non-commercial docks are permitted to be constructed on the Gorge. Victoria acknowledges that there are pre-existing structures in another district on the Gorge but does not comment on the future of those docks.

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<sup>98</sup> *Esquimalt Council Meeting Feb 3, 2020, supra* note 84; Nicole Crescenzi, "Esquimalt adds more legislation for private docks in its waterways," *Victoria News* (10 February 2020, last visited 17 December 2023), online: <[vicnews.com/news/esquimalt-adds-more-legislation-for-private-docks-in-its-waterways-67383](https://vicnews.com/news/esquimalt-adds-more-legislation-for-private-docks-in-its-waterways-67383)>.

<sup>99</sup> Town of View Royal Planning Department, personal communication (phone call on 20 November 2024 at 1:40 pm) [View Royal Planning].

## FUTURE WORK AND ANALYSES

Additional research and analyses are likely necessary to determine an appropriate path forward (discussed below) for preventing the proliferation of unauthorized docks on the Gorge. Such analyses could include:

- A retrospective account of private dock proliferation on the Gorge over time, if such data are available;
- Analysis of which docks on the Gorge satisfy the General Permission requirements and which have been required to obtain Specific Permission.
- A place-based assessment of known areas of Indigenous archaeological, historical, and cultural significance along the Gorge and in the surrounding area;
- An examination of ecological and environmental needs of the Gorge, including areas that associate with fisheries or as a migratory bird sanctuary, and accounts of known habitat degradation; and
- A review of British Columbia’s other “Application-Only” areas” to analyze for possible implementation on the Gorge.



# POTENTIAL WAYS TO BETTER REGULATE PRIVATE DOCKS IN THE GORGE

## 1. DESIGNATE THE WATERS ON THE GORGE AN APPLICATION-ONLY AREA

There are some options available to municipalities on how to regulate private dock construction. As mentioned above, one or several municipalities can join together to ask the Province to create an Application-Only Area designation for the construction of docks in the region. Once the Minister designates an Application-Only Area, Provincial General Permission for private docks no longer applies.<sup>100</sup> However, this is only an option from Provincial Crown land (including land covered by water), and the Province cannot designate an Application-Only Area over federal public ports, such as the waters between the Selkirk Trestle and the boundary between the Ogden Point Breakwater and Macauley Point. Municipalities of View Royal, Esquimalt, or Saanich all border the Gorge waterway west of the Selkirk Trestle. They could apply to the Province to make the area Application-Only for private docks. The result of having this area designated as Application-Only would mean the parties wishing to build private docks on these waters must apply directly to the Province. This also means municipal bylaws regulating docks must be consistent with the Province in its sole power to grant permission to construct docks.

There are some reasons why the Gorge appears as an ideal candidate for the Application-Only Area status. The criteria considered in designating Application-Only areas include areas important for public access and use, environmentally sensitive areas, areas where First Nations have expressed a strong interest, and areas experiencing significant growth. There are concerns associated with waterfront development.<sup>101</sup> Several adjacent jurisdictions occupying the Gorge waterway exacerbate the problem: four municipalities in very close proximity each have different foreshore development requirements and objectives for private dock use along the foreshore (including prohibition in the case of Saanich). The failure of one of more municipalities to adequately regulate the foreshore within their boundaries could impart negative impacts on the waters and foreshores of the other municipalities.<sup>102</sup>

While designating the Gorge as an Application-Only Area may attract opposition from landowners whose existing docks are non-compliant, the Province needs to consider the rights and title of the Indigenous Nations in the area, including the lək̓ʷəŋən peoples known today as the Songhees<sup>103</sup>

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<sup>100</sup> *Land Use Operational Policy: Private Moorage*, *supra* note 3 at Appendix 5.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> Songhees Nation, "Community" (last visited 18 November 2024) online: <<https://songheesnation.ca/community>>.

and Esquimalt<sup>104</sup> First Nations, as well as the W̱SÁNEĆ First Nations.<sup>105</sup> Private docks in the Gorge may impede the exercise of their aboriginal and treaty rights. It is beyond the scope of this memo to outline these legal responsibilities, but this remains a significant factor for the Province to balance.<sup>106</sup> This memo concludes with an examination of a relevant and current case study in Pender Harbour, where the Province worked with a First Nation to create a shared management plan to regulate private docks.

## 2. ESTABLISH A SHARED MANAGEMENT PLAN: SHÍSHÁLH SWIYA DOCK MANAGEMENT CASE STUDY

The shíshálh swiya Dock Management is a co-management regime of private docks in the area in and around Pender Harbour. The shíshálh Nation<sup>107</sup> have been concerned for many years about the proliferation of private docks in the Harbour, as these docks appeared to harm the environment and infringe on their Aboriginal rights.<sup>108</sup> After the First Nation raised these concerns, the Province commissioned studies on the environmental effects of private docks. The study found the concerns to be valid and concluded that harms could be mitigated if the Province mandated changes to the materials from which the docks must be constructed and where new docks could be built.<sup>109</sup> After discussions with the shíshálh Nation, the Province implemented the shíshálh swiya Dock Management (formerly known as the Pender Harbour Project or the Pender Harbour Dock Management Plan).<sup>110</sup>

In 2016, the Province recognized that the shíshálh hold Aboriginal Rights and Title in their ancestral territory. They entered into a Government-to-Government Agreement with the

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<sup>104</sup> Esquimalt Nation, “Our Nation” (last visited 18 November 2024) online: <<https://www.esquimaltnation.ca/our-nation>>.

<sup>105</sup> W̱SÁNEĆ First Nations, W̱SÁNEĆ Leadership Council, “History & Territory” (last visited 18 November 2024), online: <<https://wsanec.com/history-territory/>>.

<sup>106</sup> *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 [DRIPA]; *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 (CanLII) [*Gitxaala*]; Nigel Bankes, “The Legal Status of UNDRIP in British Columbia: *Gitxaala v British Columbia (Chief Gold Commissioner)*” (5 October 2023), online (blog): <<https://ablawg.ca/2023/10/05/the-legal-status-of-undrip-in-british-columbia-gitxaala-v-british-columbia-chief-gold-commissioner/>>.

<sup>107</sup> It is important to state that the shíshálh Nation expresses self-government over their lands and the administration of resources and services available to members. *Sechelt Indian Band Self-Government Act*, s 4. See also: *shíshálh Nation Self Government Act*, SC 1986, c 27 at ss 14(1)(b), 14(4) [*shíshálh Nation*].

<sup>108</sup> *Sechelt Indian Band, lil xemit tems swiya nelh mes stutula A Strategic Land Use Plan for the shíshálh Nation*, (June 2007), online as pdf: <<https://shishalh.com/wp-content/uploads/2018/10/SLUP.pdf>>, s 5.5.1.

<sup>109</sup> *Ibid*, s 1.0.

<sup>110</sup> Province of British Columbia & shíshálh Nation, *Pender Harbour Dock Management Plan* (March 2021), online as pdf: <[gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/5-pender\\_harbour\\_dmp.pdf](https://gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/5-pender_harbour_dmp.pdf)> [PHDMP].

Nation.<sup>111</sup> Part of this Government-to-Government Agreement included environmental impact studies on Pender Harbour, believed to be the 2017 studies discussed below; a timeline to finalize the Pender Harbour Dock Management Plan (“PHDMP”), including a commitment to shared decision-making agreement; and for the shíshálh to release their claims regarding existing docks on Pender Harbour.<sup>112</sup>

In April 2015, the Ministry then known as the Ministry of Forests, Lands, Natural Resource Operations and Rural Development (“FLNRORD”) released a proposed co-management plan for docks in Pender Harbour.<sup>113</sup> At the time, the plan was called the PHDMP, and it was developed in collaboration with the shíshálh Nation. The plan focused on 1) minimizing and mitigating impacts to marine resource values; 2) protecting archaeological resources from future disturbance; 3) addressing individual and cumulative impacts of dock development on Aboriginal interests; and 4) advancing collaborative management between the shíshálh Nation and British Columbia.<sup>114</sup> This plan had four zones; these zones would either not permit new dock construction, permit only multi-party use or commercial dock construction, or permit all types of new dock construction.<sup>115</sup>

In 2017, FLNRORD finished two studies assessing the impact of docks on marine and foreshore environments in Pender Harbour.<sup>116</sup> The result of these studies showed the proliferation of docks (104 docks in 1978, 256 docks in 1990, and 326 docks in 2014) and it was found that owners constructed new docks during a previous dock application moratorium.<sup>117</sup> Approximately 15-33% of docks were constructed absent provincial authorization, depending on the zone.<sup>118</sup> Further, 61% (163/267) of authorized docks did not fall entirely within the area permitted for dock construction or were entirely outside that area.<sup>119</sup>

In 2018, the Province and shíshálh Nation implemented the PHDMP as a co-management plan for docks in Pender Harbour.<sup>120</sup> In 2021, a new plan was implemented and it was re-named the shíshálh swiya Dock Management.<sup>121</sup> The 2021 plan uses three zones for dock construction: (Zone 1) not allowing new dock applications, (Zone 2) allowing only multi-party use or commercial dock

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<sup>111</sup> Province of British Columbia & Sechelt Indian Band, *Shíshálh Government-To-Government Agreement* (21 June 2016), online as pdf: <[gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh\\_g2g\\_2016-06-21\\_final\\_public.pdf](https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_g2g_2016-06-21_final_public.pdf)> at 1 [*Shíshálh Gov-To-Gov Agreement*].

<sup>112</sup> *Ibid.*, ss 6.2(e), 6.3(d)-(f), 6.4(c).

<sup>113</sup> The Ministry has since been renamed as Water, Land and Resource Stewardship, or WLRS.

<sup>114</sup> MC Wright and Associates Ltd, *Impacts of Docks on Pender Harbour: Phase 2 Assessment* report prepared for FLNRORD (March 2018), online as pdf: <<https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/envirostudy.pdf>> at 1, s 1.0 [MC Wright et al].

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

<sup>117</sup> *Ibid.* at 11, s 2.3.3.

<sup>118</sup> *Ibid.* at 12.

<sup>119</sup> *Ibid.*

<sup>120</sup> Province of British Columbia, “shíshálh swiya Dock Management (formerly Pender Harbour Project)” (last modified 13 November 2024), online: <[gov.bc.ca/gov/content/industry/crown-land-water/crown-land/regional-crown-land-initiatives/pender-harbour-project](https://www2.gov.bc.ca/gov/content/industry/crown-land-water/crown-land/regional-crown-land-initiatives/pender-harbour-project)>.

<sup>121</sup> PHDMP, *supra* note 110.

applications, or (Zone 3) allowing all types of new dock applications.<sup>122</sup> The plan suggests new applicants (both for new dock construction or for docks not previously authorized) engage with the shíshálh Nation before submitting applications. The application requires 1) a habitat assessment by a Registered Professional Biologist (RPBio) or Registered Biological Technician (RBTech), 2) a preliminary field survey by a Professional Archaeologist to identify the potential need for further field studies, and 3) a management plan supported by an RPBio or RBTech.<sup>123</sup> The individual dock management plan sets out a variety of further requirements, such as not unduly blocking access to the foreshore and specifying the means, type, design, and location of the proposed dock.<sup>124</sup>

After such applications have been submitted, the Province consults with the shíshálh Nation in approving new dock construction.<sup>125</sup> The current decision-making process for docks is 1) an application review by the British Columbia-shíshálh Working Group, comprised of staff from the shíshálh Nation and the relevant Ministry; 2) a recommendation from the Working Group to the British Columbia-shíshálh Board, which is comprised of representatives from shíshálh Nation, FLNRORD (now WLRS), and the Ministry of Indigenous Relations and Reconciliation (“MIRR”); 3) the Board gives a recommendation to the shíshálh Nation Chief and Council and the relevant Ministry; and 4) a consensus decision is reached and provided to the applicant.<sup>126</sup> If authorization consensus cannot be achieved, the issue is raised at a Solutions Forum with representatives from the Province and the shíshálh Nation.<sup>127</sup>

When the first co-management plan was released in 2015, local residents from Pender Harbour were resistant. In response, the Province conducted an independent review to explore options to address community concerns.<sup>128</sup> Since this review, the Province has increasingly had to take more proactive steps to respond to the local residents’ concerns. On November 24, 2023, proposed amendments to the PHDMP were posted for public engagement and review, ending February 16, 2024.<sup>129</sup> In March 2024, the Province released *What We’ve Heard Report*, a report that summarizes the key themes and feedback from the public engagement period.<sup>130</sup> In response to

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<sup>122</sup> *Ibid* at s 5.2.

<sup>123</sup> *Ibid* at ss 4.1, 6.1.

<sup>124</sup> *Ibid* at ss 7.1, 8.1-8.16.

<sup>125</sup> *Ibid* at s 6.1(c).

<sup>126</sup> British Columbia, “shishalh and B.C. Shared Decision-Making – Province of British Columbia” (last modified 20 August 2024), online: <[gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/collaborative-stewardship-bc/shishalh-shared-decision-making](https://gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/collaborative-stewardship-bc/shishalh-shared-decision-making)>; shíshálh Nation & British Columbia, “Foundation Agreement” (4 October 2018), ss 4.38–4.60, online as pdf [*Foundation Agreement*]: <[gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh\\_nation\\_foundation\\_agreement\\_-\\_final\\_-\\_redacted\\_-\\_signed.pdf](https://gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/shishalh_nation_foundation_agreement_-_final_-_redacted_-_signed.pdf)>.

<sup>127</sup> Province of British Columbia, *ibid*; *Foundation Agreement*, *ibid* at s 4.33, Schedule I.

<sup>128</sup> MC Wright et al, *supra* note 114.

<sup>129</sup> Province of British Columbia, *supra* note 120; *shíshálh swiya Dock Management Plan*, *supra* note 6.

<sup>130</sup> From the report, the key concerns seem to be centered around changing current docks and boathouses, and the perceived economic cost associated with the dock management plan, see: Province of British Columbia, *What We’ve Heard Report: Engagement on Proposed Amendments to shíshálh swiya Dock Management Plan* (8 March 2024), online as pdf: <<https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water->

these concerns, the Province launched an Advisory Group to join in the co-management of Pender Harbour, and the Group included local representatives from Pender Harbour.<sup>131</sup> In August 2024, the Province released further PHDMP amendments.

The amended changes to the existing dock management plan can be summarized in three general areas. First, the plan gives existing tenured and untenured docks in marine waters new guidelines for renewal or tenure.<sup>132</sup> Existing private dock owners are required to complete a self-registration form<sup>133</sup> and will receive a temporary authorization for three years under the *Land Act*. Within these three years, the temporary authority will be transformed into a long-term 20-year renewable authorization, pending the Provincial approval. The approval period will ensure that individual docks are complying with the standards set out in the co-management plan, which include examining the materials of docks, where the docks are located and the size of these docks.<sup>134</sup> However, the Province reports that there have been amendments to the PHDMP designed to make the requirements more flexible for dock owners.<sup>135</sup>

The second kind of amendments to the dock management plan relate to docks in freshwater. These amendments direct the dock management plan to be paused in these areas of water until further studies on docks in freshwater are conducted. Further, existing dock owners in freshwater can apply for tenure but no new dock tenure will be considered until the studies are complete. Finally, there are a number of amendments relating to commercial docks, residential boathouses, and protecting cultural resources and critical habitats.<sup>136</sup>

Despite these changes, some residents around Pender Harbour are unhappy with the co-management regime. News reports suggest that the Pender Harbour Area Residents Association

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[use/crown-land/crown-land-uses/regional-initiatives/what\\_we\\_have\\_heard\\_report\\_-\\_shishalh\\_swiya\\_dmp\\_march\\_8\\_2024.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/shishalh-shared-decision-making/tor_for_dmpag.pdf) at 2–3.

<sup>131</sup> Province of British Columbia, *shishalh swiya Dock Management Plan Advisory Group Terms of Reference* (24 April 2024), online as pdf: <[https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/shishalh-shared-decision-making/tor\\_for\\_dmpag.pdf](https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/shishalh-shared-decision-making/tor_for_dmpag.pdf)>.

<sup>132</sup> Province of British Columbia, WLRs, “shishalh swiya dock management plan updated following public engagement” (14 March 2024), online: <<https://news.gov.bc.ca/releases/2024WLR50014-000350>>.

<sup>133</sup> The self-registration form became live on September 2024, and a link to the form can be seen here: Province of British Columbia, “Dock Registration” (last modified 26 March 2024), online: <<https://submit.digital.gov.bc.ca/app/form/submit?f=e8861b99-2c49-42e3-b7a5-9edaf5e3ae3d>>.

<sup>134</sup> The Province provides an overview of the requirements for existing docks. Province of British Columbia and shishalh Nation, “Fact Sheet: Changes for existing dock and boathouse owners in the shishalh swiya” (effective 1 July 2024), online as pdf: <<https://www2.gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/shishalh-shared-decision-making/factsheet.pdf>> [Dock and Boathouse Fact Sheet].

<sup>135</sup> Province of British Columbia, “Updates to management plan provide certainty for Sunshine Coast dock owners” (1 August 2024), online: <<https://news.gov.bc.ca/releases/2024WLR50037-001237>>.

<sup>136</sup> Dock and Boathouse Fact Sheet, *supra* note 134.

are ‘planning’ to launch a legal action against the Province for instituting this plan.<sup>137</sup> To our knowledge, no legal action has yet begun.

The PHDMP/shíshálh swiya Dock Management Plan is a case study of co-management between an Indigenous nation and the Province. This has meant that the Province needs to incorporate or ensure that it is acting for local residents as well as responding to the demands that reconciliation entails. The potential legal challenge to the dock management plan remains uncertain, but this plan gives an insight on the complicated but necessary nature of managing docks. Private docks are an environmental risk and can infringe on Indigenous rights. Co-management plans like the shíshálh swiya Dock Management Plan show one way that the Province can address these competing concerns.

For the Gorge, a shared management plan could involve representatives from the Province, First Nation(s), and each municipality deciding on dock construction authorizations and management, or it could be solely the Province and First Nations deciding on dock construction authorizations and effective co-management. Co-management recognizes the inherent jurisdictions of ləkʷəŋən and W̱SÁNEĆ peoples in the areas of the Gorge Waterway while drawing upon lessons learned elsewhere and over time, such as in the development of appropriate and acceptable standards for residents with waterfront properties under the shíshálh swiya Dock Management Plan.<sup>138</sup>

Although resistance is evident in the responses from the Pender Harbour residents, co-management regimes and other collaborative arrangements for shared decision making are expected to evolve and advance over time as the Province works to implement its commitment to Indigenous rights recognition.

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<sup>137</sup> Nelson Bennet, “DRIPA may face first legal test over boat docks” (14 May 2024), online:

<<https://www.biv.com/news/economy-law-politics/dripa-may-face-first-legal-test-over-boat-docks-8740833>>.

<sup>138</sup> Province of British Columbia, “What’s Changed?” Document: Summary of Proposed Amendments to the shíshálh swiya Dock Management Plan (December 2023), online: <[gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/whats changed document-shishalh swiya dock management plan proposed amendments.pdf](https://gov.bc.ca/assets/gov/farming-natural-resources-and-industry/natural-resource-use/land-water-use/crown-land/crown-land-uses/regional-initiatives/whats_changed_document-shishalh_swiya_dock_management_plan_proposed_amendments.pdf)>



## CONCLUSION

The authority over private docks in the Gorge waterway involves a complex interplay of federal, provincial, and municipal jurisdictions. While the Province holds significant authority, particularly over the waters north of the Selkirk Trestle, federal regulations related to navigation and shipping also apply. Additionally, municipalities have the power to establish bylaws and zoning regulations, provided they align with provincial and federal laws.

Provincial General Permission guidelines play a crucial role in regulating private docks in the Gorge, which is currently designated as a General Permission Area. Under this designation, dock owners are not required to obtain explicit permission from the Minister before constructing a dock. However, they must strictly adhere to comprehensive provincial requirements regarding location, usage, materials, and environmental impact. These guidelines are essential to prevent the negative ecological and cultural impacts associated with docks, such as harm to riparian vegetation, eelgrass beds, and Indigenous archaeological sites. The Minister retains the authority to order the removal of any dock that fails to meet these requirements, with the cost borne by the dock owner.

To enhance the enforcement of private dock regulations in the Gorge, the Province could consider two primary options: designate the Gorge as an Application-Only Area or institute a shared management plan. To designate the area as Application-Only would require all dock owners, including those with existing docks, to apply for provincial authorization. This approach provides greater oversight and control over dock construction and ensures compliance with provincial standards. To institute a shared management plan similar to the shíshálh swiya Dock Management Plan in Pender Harbour would significantly involve the First Nations in co-managing the area. Shared management plans would recognize Indigenous rights and title, incorporate traditional ecological knowledge, and ensure a more holistic and culturally sensitive approach to dock management.

The proliferation of private docks in the Gorge necessitates a more thoughtful and proactive approach to regulation. The existing General Permission system, while simplifying the construction process, relies heavily on voluntary compliance and may not effectively mitigate the environmental and cultural concerns associated with docks. The potential solutions discussed – designating the Gorge as an Application-Only Area or implementing a shared management plan – warrant further consideration and could significantly improve dock management practices in the region. These approaches would benefit from incorporating lessons learned from the shíshálh swiya Dock Management Plan, which, despite facing some local resistance, demonstrates a commitment to responsible dock development through co-management.

## APPENDIX A

### Map of the Gorge Waters, Including Federal Territory and Municipal Boundaries

Water within Municipal Boundaries is Still Subject to Provincial and Federal Legislation

*This map represents the areas of the waters in the Gorge waterway where different levels of government have exercised authority*

