



No. L020662  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**BETWEEN:**

The COUNCIL OF THE HAIDA NATION and Guujaaw, suing on his own behalf and on behalf of all members of the HAIDA NATION

**PLAINTIFFS**

**AND:**

HER MAJESTY THE QUEEN IN RIGHT OF BRITISH COLUMBIA  
and THE ATTORNEY GENERAL OF CANADA

**DEFENDANTS**

**STATEMENT OF DEFENCE  
OF THE DEFENDANT HER MAJESTY THE QUEEN IN  
RIGHT OF THE PROVINCE OF BRITISH COLUMBIA**

**THE TITLE CLAIM & THE PLAINTIFFS' STANDING**

1. Unless otherwise expressly admitted herein, the Defendant, Her Majesty the Queen in right of the Province of British Columbia ("British Columbia") denies each and every allegation in the Statement of Claim.
2. In further answer to paragraph 1 of the Statement of Claim, British Columbia does not admit the existence of the "Haida Nation", and further references to the Haida Nation hereafter in this Statement of Defence are not admissions that such an entity exists or has existed.
3. In further answer to paragraphs 2 and 3 of the Statement of Claim, British Columbia denies that this is an appropriate case for a representative action, or that Guujaaw is authorized to bring this action as a representative of the members of the Haida Nation, and puts the Plaintiffs to the strict proof thereof.
4. In further answer to paragraph 4 of the Statement of Claim, British Columbia admits that the lands identified on Schedule "A" to the Writ of Summons are known as Queen Charlotte's Island (hereafter referred to as the

"Queen Charlotte's"), but does not admit that Plaintiffs are indigenous to the Queen Charlotte's, or that the Queen Charlotte's and surrounding waters, sub-surface and air space are the territory of the Haida Nation.

### **THE ROYAL PROCLAMATION OF 1763**

5. In further answer to paragraph 5 of the Statement of Claim, British Columbia denies that the *Royal Proclamation of 1763*, or the principles or practices otherwise reflected in the *Royal Proclamation of 1763*, were at any time binding in law upon the British Crown, its colonies and successors, in acquiring sovereign title to the land and sea now comprising British Columbia, including the Queen Charlotte's, and in colonizing the said territory.

6. In the alternative, and in further answer to paragraph 5 of the Statement of Claim, the terms of the *Proclamation*, including the policies concerning the Indians set out therein, were subject to change by the Crown at any time. British Columbia says that any policies set out therein have been modified by legislation, including the following, and to that extent govern British Columbia's alleged duties to the Plaintiffs, which are not admitted but denied:

- (a) The Imperial Statute 21 & 22 Vict. 99, being an Act to provide for the Government of British Columbia.
- (b) The Imperial Order in Council dated 2<sup>nd</sup> September, 1858 ordering the Governor of the Colony of British Columbia, *inter alia*, to make all such laws and ordinances as may be necessary for the peace, order and good government of Her Majesty's subjects and others in the Colony.
- (c) The Imperial Letters Patent dated 2<sup>nd</sup> September 1858, appointment James Douglas Governor of the Colony, and the Instructions that accompanied them.
- (d) The proclamation, issued on the 19<sup>th</sup> November, 1858 by James Douglas, Governor of the Colony of British Columbia, that the civil and criminal laws of England, as the same existed on 19<sup>th</sup> November, 1858, and so far as they were not, from local circumstances, inapplicable to the Colony, were in full force within the Colony.

- (e) The proclamation, issued on the 14<sup>th</sup> February, 1859 by the said Governor that provided, *inter alia*, that all the lands in British Columbia belonged to the Crown in fee.
- (f) The proclamation, issued on January 4, 1860, respecting the acquisition of Crown lands in British Columbia.
- (g) The Pre-emption Act, issued January 19, 1861.
- (h) The Pre-emption Consolidation Act, August 27, 1861.
- (i) Land Ordinance Act, April 11, 1865.
- (j) Pre-emption Payment Ordinance, March 31, 1866.
- (k) Pre-emption Payment Ordinance, March 10, 1869.
- (l) Land Ordinance, June 1, 1870.
- (m) The Imperial Order in Council made on 19<sup>th</sup> July, 1862.
- (n) The Imperial Order in Council made on 11<sup>th</sup> June, 1863.
- (o) The Imperial Statute 26 & 27 Vict. c. 83, being an Act to define the boundaries of the Colony of British Columbia and to continue an Act to provide for the government of the Colony.
- (p) The Ordinance of the Colony of British Columbia made on 11<sup>th</sup> April, 1865, being an ordinance for regulating the acquisition of land in the Colony and being numbered 27.
- (q) The Imperial Statute 29 & 30 Vict., c. 67 enacted on 6<sup>th</sup> August, 1866 and being an Act for the union of the Colony of Vancouver Island with the Colony of British Columbia.
- (r) The Union Proclamation, 1866 made by Frederick Seymour, Governor of the Colony of British Columbia, on 17<sup>th</sup> November, 1866.
- (s) The English Law Ordinance, 1867, being an ordinance of the United Colony of British Columbia that was enacted on 6<sup>th</sup> March, 1867.
- (t) Chapter 70 of the Revised Statutes of British Columbia, 1871.
- (u) The Terms of Union, 1871, admitting the Colony of British Columbia into the Dominion of Canada.
- (v) Section 2 of Chapter 69 of the *Consolidated Acts of British Columbia, 1888* and the corresponding provisions in subsequent

Revised Statutes of the Province, the latest of which is section 2 of the *Law and Equity Act*, RSBC 1979, c. 224.

- (w) *Constitution Act, 1867*, ss. 91(24), 92(5), 92(13), 109 and 111.
- (x) *Indian Reserve Ordinance, 1869*, R.S.B.C. 1871, No.125, and successor legislation.
- (y) P.C. 1875-1088 of November 10, 1875.
- (z) O.C. 1138 of January 6, 1876.
- (aa) the McKenna-McBride Agreement of September 24, 1912.
- (bb) P.C. 1912-3277 of November 27, 1912.
- (cc) O.C. 1341/12 of December 31, 1912.
- (dd) *Indian Affairs Settlement Act*, S.B.C. 1919, c.32.
- (ee) *British Columbia Indian Lands Settlement Act*, S.C. 1920, c.51.
- (ff) O.C. 911/23 of July 26, 1923.
- (gg) P.C. 1924-1265 of July 19, 1924.
- (hh) Scott-Cathcart Agreement of March 22, 1929.
- (ii) P.C. 1930-208 of February 3, 1930.
- (jj) O.C. 1151/30 of September 24, 1930.
- (kk) *Constitution Act, 1930*, 20-21 George V., c.26 (U.K).
- (ll) O.C. 1036/38 of July 29, 1938.

7. In the further alternative, and in further answer to paragraph 5 of the Statement of Claim, if the British Crown was legally bound to follow the principles or practices reflected in the *Royal Proclamation of 1763*, which is denied, British Columbia denies that the British Crown acted contrary to those principles and practices.

#### **TERMS OF SUCCESSORSHIP**

8. In further answer to paragraph 6, British Columbia admits that on May 16, 1871 it became a successor to the Colony of British Columbia, but only to the extent of the terms and conditions agreed to between the Parliament of Canada and the Legislative Council of the Colony of British Columbia, and as provided for in a Schedule to an Imperial Order in Council dated May 16, 1871 (the *Terms of Union, 1871* (U.K.), R.S.C. 1970, Appendix II, No.10, Schedule to the

*Constitution Act, 1982*, item 4). In particular, British Columbia denies that it is a successor to the British Crown of the "charge of the Indians, and the trusteeship and management of lands reserved for their use and benefit".

9. In answer to paragraph 8, British Columbia admits that it claims all unencumbered title to land on the Queen Charlotte's pursuant to Section 109 of the *Constitution Act, 1867*. In further answer to paragraph 8, British Columbia maintains that the pleading in this paragraph should be struck pursuant to Rule 19(24) (b) of the *Rules of Court* as being unnecessary.

**NO TRESPASS OR OTHER INFRINGEMENT OF ABORIGINAL RIGHTS,  
INCLUDING TITLE**

10. In further answer to paragraphs 9 and 10 of the Statement of Claim, British Columbia denies that prior to and since 1846, the Queen Charlotte's has been occupied and possessed communally and exclusively by a unified, single Aboriginal group, whether known as the Haida Nation or otherwise, and puts the Plaintiffs to the strict proof thereof.

11. In further answer to paragraph 10 of the Statement of Claim, British Columbia denies that the particulars alleged therein at subparagraphs (a) and (b) could in law sustain a claim for aboriginal title. With respect to the particulars at subparagraphs (c), (d) and (e) of paragraph 10, British Columbia does not admit that the customs, laws, traditions or trading relationships as alleged support the claim for aboriginal title and puts the Plaintiffs to the strict proof thereof.

12. In the alternative and in further answer to both paragraphs 9 and 10, and in answer to paragraph 11 of the Statement of Claim, British Columbia says that at or before the time persons of European ancestry first made contact with Aboriginal people who spoke the Haida language, these Aboriginal people lived in small autonomous family groups which were widely dispersed and were not politically unified or organized. Further, any Aboriginal title in the Queen Charlotte's, which is not admitted, did not extend to the whole of the territory as claimed, but was only limited to specific sites and puts the Plaintiffs to the strict proof of the location and extent of such limited portions.

13. Further, the Aboriginal family groups living on the Queen Charlotte's and before the time the British Crown assumed sovereignty over this territory, abandoned the sites they occupied, failed to maintain any substantial connection they may have had to these sites (other than land set apart for Indian Reserves and later created as such), and either left the Queen Charlotte's, or consolidated at two sites, Skidegate and Masset. Canada has recognized various collections of members of those Ancestral Haida speaking family groups as separate bands within the meaning of the *Indian Act*, and provided Indian Reserves for these bands, the largest being at the villages of Skidegate and Masset.

14. In answer to paragraph 12 of the Statement of Claim, British Columbia does not admit prior to or following contact with Europeans, the Haida Nation exercised the practices, customs and traditions set out therein, or that any of those practices, customs and traditions were integral to a distinctive Haida Nation society, and British Columbia puts the Plaintiffs to the strict proof thereof.

15. In further answer to paragraph 13 of the Statement of Claim, British Columbia does not admit that the Haida Nation has been, or is, ready, willing, and able to enter into good faith treaty negotiations and puts the Plaintiffs to the strict proof thereof. Further, British Columbia maintains that the allegations in paragraph 13 regarding the Plaintiffs' alleged willingness to enter into a treaty are unnecessary, and calculated to prejudice the defendant, British Columbia and should therefore be struck pursuant to Rule 19(24)(b) and (c) of the *Rules of Court*.

16. In further answer to paragraph 13, British Columbia denies that there exists in law an interest in land in the province of British Columbia known as "Haida Title" and says that all references to Haida Title in the Statement of Claim should be struck pursuant to Rule 19(24)(a) and (b) of the *Rules of Court* as being unnecessary, and disclosing no reasonable claim in law.

17. In further answer to paragraphs 15 and 16 of the Statement of Claim, British Columbia denies that it has unlawfully or unconstitutionally occupied and exploited the resources of the Queen Charlotte's as alleged, or at all. In the

alternative, and in further answer to paragraphs 15 and 16, British Columbia denies that any actions taken by or authorized by British Columbia with respect to the settlement, development, exploration, or resource exploitation of the lands, or the sea or seabed in or around the Queen Charlotte's within the jurisdiction of the Province of British Columbia in any way interfered with the exercise or evolution of the laws, customs and traditions as alleged or at all and puts the Plaintiffs to the strict proof thereof.

18. In further answer to paragraphs 15 and 16, and in answer to paragraph 17 of the Statement of Claim, British Columbia denies that it has trespassed or committed nuisance against these Plaintiffs as alleged or at all. Further, since joining Confederation in 1871, British Columbia has lawfully held title and jurisdiction over the lands and resources on and around the Queen Charlotte's as agreed upon and set out in the *Terms of Union*, and the *Constitution Act, 1867*. British Columbia denies that any of the actions it has taken in regard to the land and resources of the Queen Charlotte's was made without lawful jurisdiction, or that the Plaintiffs are entitled to compensation for these actions.

19. In further answer to paragraphs 15, 16, 17 and 18 of the Statement of Claim, British Columbia says that the Plaintiffs have failed to provide sufficient particulars such that British Columbia knows the case it must meet. In the alternative, if the Plaintiffs are found to have aboriginal rights, including title to the Queen Charlotte's, or any portion therefore, which is not admitted, British Columbia does not admit any infringement as alleged.

20. In further answer to paragraphs 15, 16, 17 and 18 of the Statement of Claim, British Columbia does not admit that any act or authorization within its constitutional jurisdiction has resulted in the alleged infringement of the Plaintiffs' aboriginal rights, including title, in relation to the waters and airspace surrounding the Queen Charlotte's, which claims are not admitted, and puts the Plaintiffs to the strict proof thereof.

21. In further answer to paragraph 18 of the Statement of Claim, the Plaintiffs have failed to provide sufficient particulars of the alleged infringements such that

British Columbia knows the case it must meet. British Columbia further awaits the particulars these Plaintiffs allege will be provided at paragraphs (g) and (h) of the Prayer for Relief in the Statement of Claim. If the Plaintiffs are found to have Aboriginal rights, including title as alleged, or at all, within the land, sea or air surrounding the Queen Charlotte's, and if such aboriginal title and/or right has been infringed as claimed, which is not admitted, the said infringements may be justified pursuant to s. 35 of the *Constitution Act, 1982*.

### **FIDUCIARY DUTY**

22. In further answer to paragraph 19 of the Statement of Claim, British Columbia does not admit that it is subject to the fiduciary duty therein alleged. In the alternative, if British Columbia is subject to the fiduciary duty as alleged, it has fulfilled, and is fulfilling, that duty and has otherwise acted in every respect consistent with the honour of the Crown.

23. In further answer to paragraph 19 of the Statement of Claim, British Columbia denies having refused or failed to engage in consultation with the Plaintiffs in a manner that is inconsistent with British Columbia's obligations either at common law or pursuant to s. 35 of the *Constitution Act, 1982*.

24. In further answer to paragraph 19 of the Statement of Claim, British Columbia says that the reference to its alleged failure to negotiate ought to be struck out pursuant to Rule 19(24)(b) and (c) and being unnecessary and prejudicial to these defendants.

### **TITLE CLAIM INCOMPATIBLE WITH CROWN SOVEREIGNTY**

25. In answer to the whole of the Statement of Claim, British Columbia says that the Plaintiffs' claim of aboriginal title is incompatible with Crown sovereignty and thus such a title claim cannot be capable of recognition at common law. In particular, without limiting the generality of the foregoing, the concept of aboriginal title, to the extent that it incorporates a right of exclusive use and occupation over the whole of the waters and seabed included in the boundaries attached as Appendix "A" to the Statement of Claim, cannot be reconciled with



the fundamental requirements of sovereignty, including sovereignty over significant marine passages, sovereign international borders, and sovereignty with respect to the airspace.

### **BRITISH COLUMBIA NOT LIABLE**

26. In further answer to the whole of the Statement of Claim, British Columbia says that to the extent any alleged trespass occurred before 1871, and to the extent there was and is any liability in respect of these alleged trespasses, which is not admitted but denied, any such liability was a liability of the Imperial Crown. This became a liability of the Dominion of Canada by operation of the *Constitution Act, 1867* and remains today a liability of Her Majesty in right of Canada ("Canada"), not British Columbia. British Columbia pleads and relies upon s. 111 of the *Constitution Act, 1867*, and the Terms of Union.

27. In further answer to the whole of the Statement of Claim, any liability of British Columbia in respect of the alleged trespasses or infringements at all, which is not admitted but denied, would have been in respect of alleged acts or omissions of the Department of Indian Affairs. Before 1867 the Department of Indian Affairs was, successively, a branch of the Imperial Crown and the Province of Canada. After July 1, 1867 the Department of Indian Affairs was at all times, and it continues to be, a branch of Canada pursuant to s. 91(24) and s. 130 of the *Constitution Act, 1867*. British Columbia pleads and will rely upon those provisions of the Constitution and upon *An Act providing for the organisation of the Department of the Secretary of State of Canada, and for the management of Indian and Ordnance Lands, S.C. 1868, c. 42, The Indian Act, 1876, S.C. 1876, c. 18*, and the successors of those Acts of Parliament.

28. In further answer to the whole of the Statement of Claim, the fiduciary obligation of the Crown to Indians in Canada and any responsibility of the Crown to provide for the welfare and protection of native peoples are, as a matter of constitutional law, fundamentally an obligation and a responsibility of the Crown in right of Canada, not the Crown in right of a province. British Columbia has relied on that obligation and responsibility and further pleads and will rely upon s.

91(24) and s. 130 of the *Constitution Act, 1867*, and Term 13 of the Terms of Union.

29. By reason of the facts and law set out above, and apart from the effects of the Plaintiff's delay, the Plaintiff is entitled to none of the relief claimed in the statement of claim. And, in any event, the Plaintiffs are entitled to no relief against British Columbia.

30. In further answer to the whole of the Statement of Claim, British Columbia denies that the Plaintiffs have suffered damages and losses as alleged, or at all, and put the Plaintiffs to the strict proof thereof.

### **LIMITATIONS, LACHES & CROWN IMMUNITY**

31. To the extent that the events or acts said to constitute the alleged trespasses and/or infringements contrary to s. 35 of the *Constitution Act, 1982*, in respect of which the Plaintiffs seek relief such claims are time barred.

Throughout the period between the events, acts and alleged omissions on which the Plaintiffs now base their claim, and the date of commencement of this action, the Plaintiffs had full knowledge of those events, acts and alleged omissions and of the claim they now assert. In the alternative, if the Plaintiffs did not have such knowledge, which is denied, they could have obtained such knowledge by the exercise of reasonable diligence. Further, at all times since 1871, the events, acts and alleged omissions in respect of which these Plaintiffs now seek relief were, as pled, continuous, open, notorious and visible.

32. In further answer to the whole of the Statement of Claim, the Plaintiffs, who are responsible for the prolonged, inordinate and inexcusable delay in bringing this action and seeking the relief claimed herein, have acquiesced in the matters complained of, directly and indirectly, and further have acted, behaved and conducted themselves in such a manner as to have caused, induced or permitted British Columbia to believe, as in fact it did, that the Plaintiffs did not intend to make the claim herein against British Columbia. The action is therefore barred by the equitable doctrine of laches. British Columbia pleads and will rely upon the terms of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, as amended.

33. Further, the prodigious delay of the Plaintiffs in bringing this action gives rise to circumstances that make prosecution of the action unreasonable. The action is therefore barred by the equitable doctrine of laches on that ground as well.

34. The delay has been of such a length and extent that a reasonable expectation has arisen that the defendants, including British Columbia will not be held to account for the ancient obligations that the Plaintiffs allege existed and were breached. Further, the Plaintiffs have, instead of bringing suit in a timely fashion, slept on their alleged rights with the result that the public interest requires that the action be barred.

35. In the further alternative, British Columbia says that it is immune from liability for any actions taken or omissions made giving rise to a cause of action in damages for, *inter alia*, trespass, nuisance, breach of fiduciary duty, or negligence which occurred prior to the enactment of the *Crown Proceeding Act*, S.B.C. 1974, c.24. British Columbia further pleads and will rely upon the *Crown Procedure Act*, R.S.B.C. 1960, c.84, the *Crown Proceeding Act*, R.S.B.C. 1979, c.86, and the *Crown Proceeding Act*, R.S.B.C. 1996, c.89,

36. In further answer to the whole of the Statement of Claim, the Plaintiffs' right to bring these claims accrued to the Plaintiffs more than two years or alternatively six years before November 14, 2002 (the commencement date of the action). These claims are therefore barred by statute, and British Columbia pleads and relies upon sections 3(2)(a) and s.3(5) of the *Limitation Act*, R.S.B.C. 1996, c.266, as amended.

37. In the further alternative, and in answer to all of the Plaintiffs' claims against British Columbia, the Plaintiffs' right to bring these claims accrued to the Plaintiffs more than 30 years before November 14, 2002. These claims and the relief claimed in respect thereof, all of which are denied, are therefore barred by statute, and British Columbia pleads and relies upon s.8(1)(c) of the *Limitation Act*, R.S.B.C. 1996, c.266, as amended.

38. In further answer to the whole of the Statement of Claim, this claim is in respect of acts done in pursuance or execution or intended execution of an alleged statutory or other public duty or authority, or in respect of alleged neglects or defaults in the execution of such duty or authority. The cause of action arose and the alleged injury or damage there from occurred more than six years before the commencement of the action. The action is therefore barred by statute. British Columbia pleads and will rely upon the *Limitations Act*, R.S.B.C. 1996, c. 89.

39. The action is in part an action for an accounting. To the extent the Plaintiffs seek an order of an account with respect to any matter that arose more than six years before the commencement of this action, the relief claimed at subparagraph (f) is barred by statute. British Columbia pleads and relies upon the *Limitations Act*, R.S.B.C. 1996, c. 89 and its predecessors.

40. In addition, British Columbia pleads and will rely upon the following in defence of this action: *An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto*, (1834) 3 & 4 Will. IV. c.27; *An Act for Limitations of Action, and for Avoiding Suits in Law*, (1623), 21 Jac. I. c.16; the *Statute of Limitations*, R.S.B.C 1960, c.370; the *Limitations Act*, S.B.C. 1975, c.37, and the *Limitation Act*, R.S.B.C 1979, c.236, all of such acts being amended from time to time.

#### **PREROGATIVE RELIEF NOT AVAILABLE**

41. In further answer to the whole of the Statement of Claim, the Plaintiffs seek, in addition to damages, prerogative remedies quashing various forestry, fisheries, mineral and other tenures, permits and licenses issued by the defendants. The declarations claimed in paragraphs (f), (g), (h) and (i) are either in whole or large part prerogative remedies. To the extent the Plaintiffs seek to quash licenses, permits or other administrative actions, such relief is not available except by proceeding brought pursuant to s. 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, for which damages are not an available remedy. British Columbia says that such aspects of this claim should disposed

of summarily pursuant to s. 13 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 as if they were brought as an application for judicial review.

42. In the further alternative, the defendants, including British Columbia and thousands of other persons who would be directly affected by the relief claimed, including the prerogative remedies, and the public generally have conducted themselves, expended money and other resources and incurred obligations in reliance on the impugned tenures, permits and licenses. The declarations and other prerogative relief claimed would prejudice the defendants and other persons, would be inequitable, would lead to serious public inconvenience, would be contrary to public policy, and would be impracticable. In those circumstances, or any of them, such relief should not be granted. British Columbia pleads and will rely upon the provisions of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and such other authority as counsel may advise.

**WHEREFORE** British Columbia submits that this claim against it be dismissed with costs.

Dated: June , 2003

  
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**LISA MROZINSKI,**  
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ATTORNEY GENERAL OF CANADA

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**STATEMENT OF DEFENCE**

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