



Amended pursuant to Supreme Court Civil Rule 6-1 1(a)
Original Statement of Defence filed June 18, 2003

Action No. L020662
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE COUNCIL OF THE HAIDA NATION and Peter Lantin, suing on his own behalf, and on
behalf of all citizens of the HAIDA NATION

PLAINTIFFS

AND:

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

DEFENDANTS

AMENDED RESPONSE TO CIVIL CLAIM

Filed by: The Defendant, the Attorney General of Canada ("Canada")

PART 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 – Defendant's Response to Facts

1. The facts alleged in paragraphs 1, 2, 4, 5, 7, 13, 14 of Part 1 of the notice of civil claim (the "Claim") are admitted, except that Canada denies the following:
 - a. In response to paragraph 4, Canada accepts that the plaintiffs may define "Haida Gwaii" as they wish for litigation purposes, but denies that the area demarcated as "Haida Gwaii" on Schedule "A" attached to the Claim corresponds to the area normally designated by that term.

- b. In response to paragraph 5, Canada admits that the Crown asserted sovereignty over Haida Gwaii, obtained allodial title to areas of Aboriginal title, and obtained complete title to all other areas, but denies that this was done contrary to accepted principles and practices. Further, the question of whether the Royal Proclamation of 1763 applies in what is now British Columbia is a question of law to which the answer is currently unknown.
2. The facts alleged in paragraphs 6, 9, 10, 11, 12, 15, 16, 17, and 18 of Part 1 of the Claim are denied, except that Canada admits the following:
 - a. In response to paragraph 16(b), Canada admits that tenures, permits and licenses have been issued to third parties.
 - b. In response to paragraph 16(e), Canada admits that various species of animals and plants have been introduced to Haida Gwaii over time, some through human agency and others through natural processes, some inadvertently and others intentionally, as has been the case in many places throughout the history of the world.
3. The facts alleged in paragraphs 3 and 8 of Part 1 of the Claim are outside the knowledge of the defendant, and Canada puts the plaintiffs to the proof thereof.

Division 2 – Defendant’s Version of Facts

Overview of Canada’s Position

1. The Attorney General must respond to this Claim in accordance with the rules of practice applicable to pleadings in a matter of this nature and consistent with her duties and functions in the conduct of litigation for or against the Crown in right of Canada. The Government of Canada will pursue reconciliation and is committed to a renewed nation-to-nation relationship with Indigenous Peoples based on recognition of rights, respect, co-operation and partnership. Canada remains open to seeking solutions which might harmonize Aboriginal title and Crown title. The Attorney General and the Government of Canada must work in other contexts beyond pleadings to achieve fulfilment of those commitments.

2. The plaintiffs assert that they have Aboriginal title – the right to exclusive use and occupation – to the entirety of the lands of Haida Gwaii, which includes lands owned in fee simple by third parties, as well as lands subject to other Crown-granted interests in favour of third parties, including both the sub-surface and the surmounting air space. The plaintiffs also claim that they have Aboriginal title to all of the submerged lands that surround Haida Gwaii and to the waters above those submerged lands, including all of Dixon Entrance, half of Hecate Strait, half of the area between Haida Gwaii and Vancouver Island, and all of the area to the west of Haida Gwaii for 12 nautical miles (the “Claimed Submerged Lands”). The plaintiffs also claim that they have unspecified Aboriginal rights not only on Haida Gwaii and in the claimed Aboriginal title area, but also within Canada’s Exclusive Economic Zone, which extends from the 12 nautical mile Territorial Sea on the west coast of Haida Gwaii outward to 200 nautical miles into the Pacific Ocean (“Canada’s EEZ”).

3. Should the plaintiffs establish that they have the right to exclusive use and occupation of the terrestrial areas described above, this could have a significant impact on the lands held in common by all citizens and particularly on third party holders of fee simple title and other interests. Further, should the plaintiffs establish that they have the right to exclusive use and occupation of the waters and seabed in the areas described above, this could have a significant impact on public rights of navigation and fishing and on rights and resources that are otherwise held in common by all citizens. It is therefore necessary that the plaintiffs’ Aboriginal title claims be tested.

4. Similarly, although the plaintiffs have not specified which Aboriginal rights they are claiming, since findings of Aboriginal rights may have a significant impact on resources that are otherwise available to all citizens, it is therefore necessary that such Aboriginal rights claims be tested.

Canada's Version of Facts

5. This case is unusual in that considerable evidence has been adduced on behalf of the plaintiffs through the depositions of Haida elders not only prior to trial, but prior to the filing of the Notice of Civil Claim and the Responses to Civil Claim.

Assertion of Sovereignty

6. The Crown asserted sovereignty over the territory now known as British Columbia including all of the areas over which the plaintiffs seek declarations in this litigation. The date on which the Crown asserted sovereignty over those areas will have to be judicially determined.

British Columbia Terms of Union

7. In 1853, the Colony of the Queen Charlotte Islands was established, and in 1865 it became part of the Colony of British Columbia.

8. In 1871, the Colony of British Columbia entered Confederation and became the Province of British Columbia. Pursuant to the British Columbia Terms of Union, (the "*Terms of Union*"), jurisdiction over the lands of Haida Gwaii was generally assumed by the Province of British Columbia.

9. In 1871, under Article 13 of the *Terms of Union*, Canada assumed "[t]he charge of the Indians and the trusteeship and management of the lands reserved for their use and benefit". Article 13 of the *Terms of Union* speaks for itself and should be read in the context of, and as understood by, the drafters of the day in its historical context.

Nuisance Claim re Introduced Species

10. Canada says that the introduction of plants, aquatic species and animals into various ecosystems has occurred over time and throughout the world, either naturally or as a result of human agency. Some introduction of non-native plants, aquatic species and animals to Haida Gwaii was inadvertent, while some was deliberate, including by Haida individuals.

11. Other species once found on Haida Gwaii have become extinct, either naturally or through human agency. Oolichan became extinct on Haida Gwaii due to overfishing by the Haida.
12. In the Reply to Request for Particulars dated May 5, 2003, the plaintiffs allege that Canada permitted the introduction of Atlantic salmon, beaver, and mussels to Haida Gwaii.
13. Atlantic Salmon are not known to inhabit the waters surrounding Haida Gwaii. Alternatively, if any Atlantic salmon do inhabit the waters surrounding Haida Gwaii, Canada has no responsibility for their presence.
14. Beaver were introduced to Haida Gwaii by the British Columbia Game Commission, and not by Canada.
15. Mussels are not an introduced species in Haida Gwaii. Further, in the modern era Haida individuals rely upon mussels as a source of food and have attempted to introduce mussels to parts of Haida Gwaii where they do not occur naturally.

Division 3 – Additional Facts

1. Prior to contact with Europeans, the Haida peoples obtained all they needed to sustain themselves from the ocean, the inter-tidal land, and the land immediately adjacent to the shore. The Haida peoples had little or no need to regularly access or use the interior lands of Haida Gwaii.
2. There was no species of animal that the Haida relied upon for food that would require them to travel inland for hunting purposes. Deer did not live on Haida Gwaii, bears were not hunted, and elk were few in number and lived in remote, mountainous areas.
3. Both prior to and after contact with Europeans, the Haida peoples' main mode of transportation was by water, initially by canoe and later by boat. Inland travel between settlements only became of importance after contact.

4. Prior to contact, Haida individuals would have travelled inland upon infrequent occasions, such as when obtaining large trees for use in canoes or houses.
5. Haida settlements were located only at coastal locations that combined necessary criteria, which included a reliable source of fresh water and a suitable beach for landing and launching canoes.
6. Prior to contact with Europeans, and at the assertion of sovereignty, the Haida were frequently at war with other Indigenous people. If Haida peoples had need of a resource that they could not obtain in Haida Gwaii, they would in some cases take it from other Indigenous peoples as a spoil of war.
7. Prior to contact with Europeans, and at the date of the assertion of sovereignty, the Haida peoples had, among other laws, two general laws: never take more resources than were needed to sustain themselves; and share the resources with other people in their clan, especially the elders.
8. Following contact, epidemic diseases resulted in the deaths of the majority of Haida and some Haida groups may have ceased to exist.

PART 2: RESPONSE TO RELIEF SOUGHT

1. Except as specifically admitted herein, Canada puts the plaintiffs to the proof of their claims. In order to put the plaintiffs to the proof of their claims, Canada opposes the granting of the relief sought in paragraphs 1 – 12 of Part 2 of the Claim and asks that those parts of the claim not specifically admitted be dismissed with costs to Canada.

PART 3: LEGAL BASIS

Aboriginal Title Claim

1. In order to make a claim for Aboriginal title, the Indigenous group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to

sovereignty; (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and (iii) at sovereignty, that occupation must have been exclusive.

2. Canada says that for the plaintiffs to establish that they hold Aboriginal title to the claimed lands, the plaintiffs must prove that they, or their ancestors:

- a. physically occupied or used the claimed lands, prior to or at the date of the assertion of Crown sovereignty, with the regularity and exclusivity required to establish Aboriginal title;
- b. exercised exclusive occupation of, or had the intention and capacity to control, the claimed lands prior to or at the date of the assertion of Crown sovereignty, in the manner required to establish Aboriginal title; and
- c. continuously occupied or maintained a substantial connection to the claimed lands since the date of the assertion of Crown sovereignty.

3. Canada admits that at the time of the assertion of sovereignty, the Haida exclusively occupied each of the parcels of land which were later set aside as reserves for the Old Massett Village Council and the Skidegate Band Council (the "Haida Reserves"). Canada further admits that the Haida have continuously occupied or maintained a substantial connection to the Haida Reserves since the date of the assertion of sovereignty. A list of the Haida Reserves is attached as Schedule "A" to the Claim.

4. Canada further admits that at the date of the assertion of sovereignty some or all of the land now known as Gwaii Haanas National Park Reserve of Canada as defined in schedule 2 of the *Canada National Parks Act*, S.C. 2000, c. 32 ("Gwaii Haanas National Park Reserve") was exclusively occupied by the Haida. Canada further admits that the Haida continuously occupied or maintained a substantial connection to some or all of the lands within Gwaii Haanas National Park Reserve since the date of the assertion of Crown sovereignty. Canada puts the plaintiffs to the proof of which part(s) of Gwaii Haanas National Park Reserve were exclusively occupied by the Haida at the assertion of Crown sovereignty.

5. If the plaintiffs can establish Aboriginal title, Canada denies that it infringed such title. In the further alternative, if the plaintiffs can establish that Canada has infringed such title, then Canada says that any such infringement is justified.

Aboriginal Rights Claim

6. In order to make out a claim for Aboriginal rights, the Indigenous group claiming the right must satisfy the following criteria: (i) identification of the precise nature of the claim to an Aboriginal right or rights; (ii) establishment of (a) the existence of the pre-contact practice, tradition or custom advanced in the claim as supporting the right; and, (b) that this practice was integral to the plaintiffs' distinctive pre-contact Aboriginal society; (iii) establish that the claimed modern right is demonstrably connected to, and reasonably regarded as, a continuation of the integral pre-contact practice.

7. The plaintiffs' allegations in the Claim do not sufficiently address these requirements, except as set out in the following paragraphs:

- a. Canada admits that the Haida have an Aboriginal right to fish for food, social and ceremonial purposes in the waters near to Haida Gwaii though the areas where they possess that right to fish are to be determined;
- b. Canada admits that the Haida have an Aboriginal right to harvest cedar for cultural and domestic purposes though the areas where they possess that right to harvest cedar are to be determined; and
- c. Canada admits that the Haida engaged in incidental trade of dried halibut and dried clams with other Indigenous people at or shortly after the time of contact with Europeans, but Canada puts the plaintiffs to the proof of whether the trade of dried halibut and dried clams was integral to the distinctive pre-contact Aboriginal society of the Haida and whether such trade was beyond incidental levels. Canada says further that any trade beyond incidental levels would have conflicted with Haida laws.

8. Canada denies that Canada's conduct, to the extent alleged or at all, constitutes infringement of any Aboriginal right and put the plaintiffs to the proof of the existence of

any claimed Aboriginal rights, except those Aboriginal rights admitted herein, and the infringement thereof.

9. In the alternative, if any interference or infringement has occurred as alleged in paragraphs 15, 16, and 17 of the Claim, which is not admitted, such interference or infringement is justified.

Claims to Exclusive Possession of or Occupation of Navigable Waters

10. Insofar as the Claim asserts that the plaintiffs hold Aboriginal rights or title giving them exclusive possession or use of the seabed or of any navigable body of water, Canada puts the plaintiffs to the proof of those claims. Canada says that such claims of exclusive rights would be inconsistent with public rights of navigation and fishing. A determination of whether such an exclusive Aboriginal right can even exist would require considering the Aboriginal and common law perspective in furtherance of the fundamental objective of reconciliation. The Haida perspective was that land was not owned by them but belonged to *saa' nang iitl 'laagadas* – God - and was for them to take care of and to share, while the common law perspective was that such rights could generally not exist. There has to date been no judicial finding that such rights can exist in the Aboriginal context.

11. Neither before nor after contact or the assertion of sovereignty did the Haida exclude others from use of the open ocean. Neither before nor after contact did any Haida physically occupy any area of the open ocean or the lands beneath it.

12. With regard to navigable waters specifically, it will fall to the Court to determine what resource rights, if any, may flow from the practices of the plaintiffs' pre-contact society. Judicial recognition of a "spectrum" or "continuum" of s. 35 rights establishes that neither – on the one hand – the exclusive use and occupation conferred by Aboriginal title nor – on the other hand – the non-existence of any Aboriginal rights whatsoever, are the only possible outcomes.

13. With respect to the claim for Aboriginal title to the inter-tidal lands and the submerged lands at the mouths of rivers within the Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site, as defined in schedule 2 of the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18, and which are adjacent to the Gwaii Haanas National Park Reserve, Canada says that the Haida could establish that their ancestors exclusively occupied these lands in some locations, specifically at the mouths of rivers where some Haida constructed fishing weirs or where the inter-tidal lands were regularly used and exclusively occupied for the purposes of harvesting marine species. Canada puts the plaintiffs to the proof of the specific locations where they did so, as well as the rights – if any – which flow from such use and occupation.

14. With respect to the claim for Aboriginal title to the remaining Claimed Submerged Lands, there is no basis for this claim. Further, claims for exclusive use and occupation of navigable waters are inconsistent with public rights of navigation and fishing at common, and Canada puts the plaintiffs to the proof of this claim.

15. With respect to the claim for a declaration of an Aboriginal right to fish within Canada's EEZ, which extends from the 12 nautical mile Territorial Sea on the west coast of Haida Gwaii moving outward to 200 nautical miles, Canada says that such a claim has no basis. Canada denies this claim.

16. In the alternative, if the plaintiffs can establish Aboriginal rights or title to the claimed waters and submerged lands, then Canada denies it has infringed such title. In the further alternative, Canada says that if there is any such infringement, then such infringement is justified.

Claim for Trespass and Nuisance

17. Canada denies that it trespassed or committed nuisance as alleged, and Canada says further that its assumption of legislative jurisdiction over Haida Gwaii, and its exercise of such jurisdiction and any acts done in execution of that jurisdiction are constitutional, lawful and justified.

18. Canada did not acquire jurisdiction over or carry out activities within the territory now known as the Province of British Columbia prior to July 20, 1871. On July 20, 1871, Canada acquired exclusive legislative jurisdiction over sea coast and inland fisheries and to the waters surrounding Haida Gwaii, and Canada pleads and relies upon the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 and in particular on ss. 91(12) & 146, and on the *Terms of Union* and in particular on Article 10.

19. From time to time, Canada has enacted laws, including statutes, regulations, and orders which were validly enacted in accordance with the jurisdiction granted by the provisions of the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3 (“Federal Laws”).

20. The issuance of tenures, permits or licences, and the management, conservation or allocation of marine resources was lawful and authorized by these Federal Laws and does not give rise to a right to compensation or a cause of action for trespass or nuisance. Canada relies upon the defence of statutory authority.

21. In its enactment of laws, and in its issuance of tenures, permits and licenses, and in its acquisition of lands, Canada has always acted in pursuit of a compelling public purpose, including:

- a. the defence of Canada;
- b. facilitating transportation to and from Haida Gwaii;
- c. public safety; and
- d. the maintenance of cultural values and of ecological integrity and the preservation of habitat, biodiversity, and other environmental values.

22. In their Reply to Request for Particulars dated May 5, 2003, the plaintiffs claim that Canada introduced beaver, Atlantic salmon and mussels to Haida Gwaii. Canada denies this claim and denies that the claim is justiciable.

Claim for Breach of Fiduciary Duty

23. Canada admits that, generally speaking, the relationship between Canada and the Aboriginal peoples of Canada is a fiduciary relationship, and that, in certain circumstances, the relationship may give rise to or require the performance of specific fiduciary duties, but Canada denies that in the circumstances of this case Canada owes or owed any fiduciary duties constitutional or otherwise - to the plaintiffs.

24. In the alternative, if Canada did owe fiduciary duties to the plaintiffs, then Canada denies having breached those duties and puts the plaintiffs to the proof of their claim.

Claim Barred by Laches and Acquiescence

25. In further answer to the Claims as a whole, except as qualified in paragraphs 26 and 27 herein, Canada pleads laches and acquiescence.

26. In further answer to the Claim for Aboriginal title, Canada pleads laches and acquiescence only to lands held in fee simple by non-Crown landowners, lands allocated to parks, national defence, roads and public infrastructure, and other federal lands. It will fall to the Court to determine whether it would be inequitable and unjust, in all the circumstances of the present case, to grant the plaintiffs the alleged or any relief to these areas.

27. In further answer to the Claim for Aboriginal rights, Canada does not plead laches and acquiescence regarding the establishment of any such rights, but does plead laches and acquiescence with regard to any claim for damages, an accounting, and interest.

28. Throughout the period since the alleged acts and omissions, the plaintiffs or their ancestors have had full knowledge of the facts supporting their claim, or in the alternative, they could have obtained such knowledge by the exercise of reasonable diligence.

29. It will fall to the Court to determine whether the plaintiffs or their ancestors have acquiesced and conducted themselves in such a manner as to have caused Canada to believe that the plaintiffs did not intend to make the claim herein against Canada.

Claim Barred by Statutory Limitations of Actions

30. In the further answer to the claim for damages, an accounting and interest arising from the claim for Aboriginal title and rights, there is no legal basis for this claim. In the alternative, the plaintiffs' right to bring these claims accrued to the plaintiffs more than two years or, alternatively, six years before November 14, 2002. The claim is barred by statute and Canada pleads and relies on sections 3(2) (a) and 3(5) of the *Limitation Act*, R.S.B.C. 1996, c. 266, as amended.

31. In further answer to the claims for trespass, nuisance and breach of fiduciary duty, the plaintiffs' right to bring these claims accrued to the plaintiffs more than two years or, alternatively, six years before November 14, 2002. The claim is barred by statute and Canada pleads and relies on sections 3(2) (a) and 3(5) of the *Limitation Act*, R.S.B.C. 1996, c. 266, as amended.

32. In the further alternative, the plaintiffs' right to bring these claims accrued to the plaintiffs more than 30 years before November 14, 2002. The claim is barred by statute and Canada pleads and relies on section 8(10)(c) of the *Limitation Act*, R.S.B.C. 1996, c. 266, as amended.

33. Canada also pleads and relies on the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as amended and in particular section 8 thereof.

Pecuniary Remedies

34. To the extent that the plaintiffs claim damages for the alleged past infringements of their Aboriginal rights and title, an accounting of monies received by the Crown, and interest, Canada says that any such pecuniary remedies based upon judicial recognition of previously unrecognized s. 35 rights should be neither retroactive nor retrospective and

should not flow from a time prior to the declaration of the existence of any such rights or title.

35. In the alternative, Canada says that any pecuniary remedies based upon judicial recognition of previously unrecognized s. 35 rights should not flow from a time prior to s. 35 becoming law on April 17, 1982.

No Claim Against Canada Under the British Columbia Terms of Union

36. Canada did not assume responsibility for any debts or liabilities associated with Haida Gwaii pursuant to the *Terms of Union*.

37. The relief sought by the plaintiffs in these proceedings was not a debt or liability existing at the time of entry of the Colony of British Columbia in 1871 and, therefore, Canada did not assume any liability or obligations with respect to Haida Gwaii pursuant to Article 1 of the *Terms of Union*.

38. Canada is not the successor to all of the obligations, duties and liabilities of either the British Crown, or the colonies of the British Crown, as pleaded. The situs of the Crown's obligations, duties and liabilities exists only in respect of the Crown against which such obligations, duties and liabilities can be enforced. In the present case, the plaintiffs are asserting a claim for the use and benefit of Haida Gwaii or damages in relation to Haida Gwaii, which lands -subject to the limited exception of those lands which are exclusively under federal administration and control - are and have been, since 1871, subject to the exclusive administration and control of the Province. Thus, the situs of the Crown's obligations, duties or liabilities that may exist in relation to lands which are under provincial administration and control, is the sole responsibility of and enforceable solely against the Province.

39. Canada further says that, in 1871, under Article 13 of the *Terms of Union*, Canada assumed only the trusteeship and management of lands which were set aside as Indian reserve lands at the time of the Colony of British Columbia's entry into Confederation.

40. Further, in respect to any parts of Haida Gwaii which were not set aside as Indian reserve land at the time of the Colony of British Columbia's entry into Confederation, Canada did not assume trusteeship and management of these remaining portions of Haida Gwaii under Article 13 of the *Terms of Union*.

Defendant's address for service:

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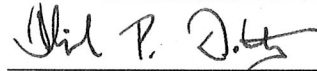
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Dated: November 10, 2016



Solicitor/Counsel for the Defendant, the
Attorney General of Canada

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.

Appendix "A"

Old Massett Village Council #669

No.	Name
07669	AIN 6
07683	COHOE POINT 20
07675	DANINGAY 12
07682	EGERIA BAY 19
07685	GUOYSKUN 22
07665	HIELLEN 2
07677	JALUN 14
07678	KIOOSTA 15
07672	KOSE 9
07674	KUNG 11
07667	LANAS 4
07688	MAMMIN RIVER 25
07664	MASSET 1
07671	MEAGWAN 8
07673	NADEN 10
07686	NADEN 23
07687	OWUN 24
07681	SAOUGHTEN 18
07668	SATUNQUIN 5
07680	SUSK 17
07679	TATENSE 16
07689	TIAHN 27
09534	TLAA GAA AAWTLAAS 28
07666	YAGAN 3
07670	YAN 7
07684	YASITKUN 21
07676	YATZE 13

Skidegate #670

07700	BLACK SLATE 11
07696	CUMSHEWAS 7
07692	DEENA 3
07695	KASTE 6
07693	KHRANA 4
07694	LAGINS 5
07699	NEW CLEW 10
07691	SKAIGHA 2
07697	SKEDANCE 8
07690	SKIDEGATE 1
07698	TANOO 9