

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

No. L020662  
Vancouver Registry



In the Supreme Court of British Columbia

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

### **RESPONSE TO NOTICE OF CIVIL CLAIM**

**Filed by:** The defendant, Her Majesty the Queen in right of the Province of British Columbia  
(the "Province")

#### **PART 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS**

##### **Division 1 – Defendant's Response to Facts**

1. Except as expressly admitted, the Province denies each and every allegation of fact in the Notice of Civil Claim (the "Civil Claim") and puts the Plaintiffs to the strict proof thereof.
2. The facts alleged in paragraphs 1, 2, 3, 4, 6, 7, 13 (second sentence), 14 of Part 1 of the Civil Claim are admitted.
3. The facts alleged in paragraphs 5, 8, 9, 10, 11, 12, 13 (first sentence), 15, 16, 17, 18 of Part 1 of the Civil Claim are denied.

4. The facts alleged in paragraphs NIL of Part 1 of the Civil Claim are outside the knowledge of the Province.

## **Division 2 – Defendant’s Version of Facts**

### Overview of the Position of the Province

1. The Province acknowledges that aboriginal rights and title exist on Haida Gwaii. In response to the asserted claims of aboriginal title and rights, the Province has; (a) endeavored to engage in treaty negotiations with the Plaintiffs and remains ready and willing to do so; (b) has entered into a number of agreements aimed at fostering reconciliation; and (c) fulfilled its obligations of consultation and accommodation and continues to make good faith efforts to fulfill its obligations.

2. In response to paragraph 5, the Province says that British Imperial Crown lawfully acquired sovereignty and underlying title to Haida Gwaii by 1846.

3. In response to paragraph 8, the Province acknowledges the acquisition of sovereignty to Haida Gwaii by the British Imperial Crown did not extinguish aboriginal rights recognized at common law.

4. In response to paragraphs 9 to 11, the Province says that members of the Haida Nation did not sufficiently, exclusively, and continuously occupy all of Haida Gwaii *circa* 1846, and the Province puts the Plaintiffs to the strict proof of those parts of Haida Gwaii that were so occupied. Rather than disregard their prior occupation, the Province has recognized occupation of some areas within Haida Gwaii by the establishment of reserves and by other measures.

5. In response to paragraph 12, the Province,

- (a) admits that separate and autonomous groups of people identifying as Haida (“Haida ancestral groups”) fished for food and ceremonial purposes in specific areas and that such practices were integral to their culture at the date of contact;

- (b) admits that Haida ancestral groups harvested trees, including cedar trees, at specific areas for domestic uses and that such practices were integral to their culture at the date of contact; and,
- (c) puts the Plaintiffs to the strict proof of the specific areas used for fishing and harvesting practices.

6. In further response to paragraph 12, the Province admits that in the past, and presently, some members of the Plaintiffs may:

- (a) fish for food and other aquatic species from the sea and the inland waters of Haida Gwaii, for food, or social and ceremonial purposes, and,
- (b) may utilize trees, including old-growth cedar from the forested areas of Haida Gwaii, for social and ceremonial purposes,

from time to time but say that the precise nature and location of those parts of Haida Gwaii which were and continue to be used for such purposes are not known by the Province.

7. In further response to paragraph 13, the Province has endeavored to engage in treaty negotiations with the Plaintiffs and remains willing to do so, and admits that it has entered into the agreements referred to, and other reconciliation agreements, and has enacted legislation intended to foster reconciliation in response to the Plaintiffs' asserted aboriginal title and rights.

8. In response to paragraphs 15 to 17, the Province has the statutory and constitutional authority to, *inter alia*, issue tenures, manage the lands and resources of Haida Gwaii, and collect profits, taxes, stumpage dues, royalties, and other revenues, and the Province has exercised this authority in a lawful manner.

9. In further response to paragraphs 15 to 17, the particular facts of such alleged interference with, or infringement of, the aboriginal rights and title claimed by the Plaintiffs are not set out in the Civil Claim in a manner permitting the Province to respond, and the Province puts the Plaintiffs to the strict proof thereof.

10. In response to paragraph 18, the Province admits that it owes a legal duty, grounded in the honour of the Crown, to consult with and, where appropriate, accommodate the Plaintiffs when it has knowledge of the potential existence of aboriginal rights or title and contemplates conduct that might adversely affect such rights or title.

11. In further response to paragraph 18, and the whole of the Civil Claim, the Province has fulfilled its obligations of consultation and accommodation, and continues to make good faith efforts to fulfil its obligations of consultation and accommodation.

### **Division 3 – Additional Facts**

1. In further answer to paragraph 13, and the whole of the Civil Claim, the Province's actions since 1871 as government and owner of the underlying title to the lands and resources of Haida Gwaii have been for the benefit of the people of British Columbia, including the Plaintiffs. In particular, the Province has pursued policies and undertaken actions throughout the Province, including Haida Gwaii, which have, directly or indirectly, developed agriculture, forestry, mining, the economy generally, regulated wildlife harvesting, protected the environment and endangered species, established and maintained public services including a justice system, land and sea transportation, health care, education and social welfare for the benefit of the people of British Columbia, including the Plaintiffs. From time to time, the Plaintiffs, their ancestors and those they represent have enjoyed and accepted the benefits of those actions, policies and services, the cumulative effects of which have been to justify infringements, if any, of established aboriginal rights and title.

2. In further answer to paragraph 13(a) of the Civil Claim, the Province has been prepared to negotiate with the Plaintiffs through the British Columbia Treaty Commission, and otherwise, to achieve a lasting and honourable reconciliation in regard to the claims of the Haida Nation, and Crown sovereignty and in 2003 proposed a treaty settlement for the resolution of lands claims which was summarily rejected by the Haida Nation.

3. The Imperial Crown established the Colony of the Queen Charlotte Islands on July 9, 1853 under the governorship of James Douglas. On June 30, 1865 the Colony of the Queen Charlotte Islands became part of the Colony of British Columbia.

4. On July 20, 1871, the Colony of British Columbia entered into Confederation with the Dominion of Canada by Imperial Order in Council dated May 16, 1871 upon the terms and conditions attached as a Schedule to that Order in Council, and subsequently designated the “British Columbia Terms of Union” by Schedule to the *Constitution Act, 1982* (the “Terms of Union”). The Province of British Columbia came into being upon Confederation with the jurisdiction and responsibilities as provided for by the Terms of Union and the *Constitution Act, 1867*.

5. From the date of Confederation in 1871, the Terms of Union, and the *Constitution Act, 1867* have governed the ambit of Federal and Provincial jurisdiction and responsibilities. Pursuant to section 91 Canada had and continues to have exclusive jurisdiction for, “Sea Coast and Inland Fisheries” and “Indians, and lands reserved for Indians”.

## **PART 2: RESPONSE TO RELIEF SOUGHT**

1. The Province opposes the granting of the relief sought in Part 2 of the Civil Claim, and asks that the Civil Claim be dismissed with costs to the Province.

## **PART 3: LEGAL BASIS**

### Unproven Aboriginal Rights and Title Claims

1. Aboriginal rights and title exist in British Columbia. The Province acknowledges that it has a legally enforceable obligation to consult and, in some circumstances, accommodate for adverse impacts on unproven claims of aboriginal rights and title. On their part, First Nations are required to participate in consultation processes.

2. The courts have encouraged the Crown and First Nations to advance reconciliation by negotiations, and through the process of consultation, in preference to litigation. The Province

is committed to reconciliation approaches with the Plaintiffs at many levels including government-to-government relationship negotiations, policies and laws, fiscal relations and decision-making.

Proven Rights and Aboriginal Title Claims

3. In answer to paragraph 1 of Part 3 of the Civil Claim, proof of aboriginal title requires the Haida Nation establish that they, or their ancestors:

- (a) were politically organized or a unified aboriginal collective that existed at or before the time of contact with persons of European ancestry (the “Date of Contact”), or existed at or before the time of the British Crown assumed sovereignty over the lands and minerals at issue in this claim (the Date of Sovereignty), which the Province says was 1846;
- (b) were politically organized or a unified aboriginal collective that existed at the Date of Contact or Date of Sovereignty that was responsible for the management of all, or portions of, Haida Gwaii;
- (c) physically occupied the entirety of Haida Gwaii, or portions thereof, to the extent of regularity and exclusivity sufficient to establish aboriginal title;
- (d) exercised exclusive occupation of all, or portions of, Haida Gwaii, or had the capacity or intention to obtain exclusive occupation of Haida Gwaii or portions thereof; and,
- (e) continuously occupied or maintained a substantial connection to all, or portions of, Haida Gwaii, since 1846.

4. In further response to paragraph 1 of Part 3 the Province says that the Plaintiffs’ claims of aboriginal title to submerged lands, and to the sea-bed below the low tide mark, are inconsistent with rights held on behalf of the public either by the Crown in right of Canada or by the Crown in right of British Columbia.

5. In further answer to paragraph 1 of Part 3 of the Civil Claim, aboriginal rights are area and content specific and require that particular practices, customs and traditions must

have been carried out on specified tracts of land and in a manner integral to the distinctive aboriginal claimant's culture at the time of European contact, and not be the result of non-aboriginal influences or of practices common to all societies.

6. To establish particular aboriginal rights the Haida Nation, must:
  - (a) Identify the precise nature of the claim to aboriginal rights, which claims are not set out with sufficient clarity in the Civil Claim for the Province to know the case to be met (except as admitted above);
  - (b) Establish,
    - i. the existence of the pre-contact practice, tradition or custom advanced in the Civil Claim as supporting the claimed right, and
    - ii. that the practice was integral to the distinctive pre-contact aboriginal society of the Plaintiffs,
  - (c) Establish that the claimed modern right has a reasonable degree of continuity with the integral pre-contact practice.
7. The Plaintiffs' allegations in the Civil Claim do not sufficiently or clearly address these requirements and do not permit the Province to respond to the claims as to the locations where aboriginal rights are exercised within Haida Gwaii, nor permit the court to make a declaration as to the existence of such rights.
8. In the alternative to paragraph 1 of Part 3 of the Civil Claim, if the Haida ancestral groups held aboriginal title to Haida Gwaii, the co-existence of that title is displaced by the estate of any inconsistent Crown-granted tenure.
9. In further response to paragraphs 1, 2, 4 and 5 of Part 3 of the Civil Claim, the Province has the statutory and constitutional authority to issue tenures, manage lands within British Columbia, and to collect taxes and revenues, and has exercised this authority in a lawful manner.
10. To the extent that the Plaintiffs assert unjustified interference from, and unlawful issuance of, tenures, permits and licences and infringements of aboriginal title and rights, the

Province says that it cannot properly respond to such claims as they have not been adequately described in the Civil Claim.

11. In the alternative, the Province says that any claim that tenures, permits and licences are unlawful is barred by the doctrine of collateral attack and is an abuse of process.

12. In the further alternative, in response to paragraph 2 of Part 2, and paragraphs 1 to 5 of Part 3, and to the whole of the Civil Claim, the Province says that Canada, as the legal successor to the Imperial Crown, the Colony of the Queen Charlotte Islands, and the Colony of British Columbia, was, and is, solely responsible for any liabilities arising from acts prior to Confederation, and thereafter within their jurisdiction and responsibilities pursuant to the Terms of Union and the *Constitution Act, 1867*.

13. In response to paragraph 5 of Part 3 of the Civil Claim, and in the alternative, the Province denies that its exercise of jurisdiction, use, or management of Haida Gwaii, or any other actions of the Province with respect to Haida Gwaii, has interfered with or infringed the Plaintiffs' claimed aboriginal rights and title, or otherwise caused harm to the Plaintiffs.

14. In further and alternative response to paragraph 6 of Part 3 of the Civil Claim, the Province says that any interference with, or infringement of, the Plaintiffs' claimed aboriginal title or aboriginal rights have been justified on the basis that the relevant governmental actions or decisions had been made in pursuance of pressing and substantial objectives related to the conservation of natural resources, protection of the environment, the development of forestry and mining, the economic development and settlement of the Province, including Haida Gwaii, and the building of infrastructure.

15. In answer to paragraphs 3 and 7 of Part 3 of the Civil Claim, the Province denies that it owes or owed a fiduciary duty to the Plaintiffs as alleged.

16. In further answer to paragraph 7 of Part 3 of the Civil Claim, and the whole of the Civil Claim, the Province says that in accordance with the laws of Canada it has fulfilled its legal obligations to consult with and, where appropriate, accommodate the Haida Nation in



respect of their claims, and accommodate their interests appropriately, and continues to make good faith efforts to consult with and accommodate the Plaintiffs where it contemplates conduct which might adversely affect their claimed rights and interests. The UN Declaration on the Rights of Indigenous Peoples is an international instrument that is not a legally binding document, does not reflect customary international law, and does not change Canadian law nor give rise to any substantive rights in Canada.

17. In response to paragraphs 2 to 8 and 10 of Part 2 of the Civil Claim, and to the extent the Plaintiffs claim damages and associated relief for the alleged past infringements of their aboriginal rights and title, the Province says that any such remedies based upon judicial recognition of previously unrecognized section 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.

18. In further response to paragraphs 2 to 8 and 10 of Part 2 of the Civil Claim, and in the alternative, the Province says that any pecuniary remedies based upon judicial recognition of previously unrecognized section 35 rights should not flow from a time prior to section 35 becoming law on April 17, 1982.

#### Limitations, Laches and Crown Immunity

19. In answer to the Civil Claim as a whole, the Province says that the Plaintiffs' claims are statute and 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 Civil 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.





