Court of Appeal File No. CA 45253

COURT OF APPEAL

IN THE MATTER OF:

The *Constitutional Question Act,* RSBC 1996, c. 68

AND IN THE MATTER OF:

A Reference by the Lieutenant Governor in Council set out in Order in Council No. 211/18 dated April 25, 2018 concerning the constitutionality of amendments to provisions in the *Environmental Management Act*, RSBC 2003, c. 53 regarding the impacts of releases of certain hazardous substances

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CHRONOLOGY

DATE	EVENT
June 29, 2012	The proponent of the Trans Mountain Expansion ("TMX") Project (Trans Mountain Pipeline ULC and Trans Mountain Pipeline L.P., collectively "TM") begins the process of seeking regulatory approval for the TMX Project by applying to the National Energy Board ("NEB") for approval of its tolling methodology.
May 16, 2013	The NEB approves TM's tolling application for the TMX Project.
December 16, 2013	TM applies to the NEB for a Certificate of Public Convenience and Necessity ("CPCN") in relation to the TMX Project.
May 19, 2016	The NEB issues its report and recommendations regarding the TMX Project. The NEB recommends that the TMX Project be approved by the Governor in Council ("GIC").
November 29, 2016	The GIC approves the TMX Project, and directs the NEB to issue a CPCN in relation to the TMX Project.
December 8, 2016	The BC Environmental Assessment Office ("EAO") issues its summary assessment report recommending that an Environmental Assessment Certificate ("EAC") be issued in relation to the TMX Project.
January 10, 2017	The BC Ministers of the Environment and Natural Gas Development issue an EAC in relation to the TMX Project.
April 26, 2018	The AGBC files a requisition with the BC Court of Appeal to commence the present Reference. The Court is asked to opine on the constitutionality of a proposed amendment to BC's *Environmental Management Act* that would prohibit increases of "Heavy Oil" transported or stored in BC without the approval of the BC Government.
May 24, 2018	The BC Supreme Court dismisses applications for judicial review brought in respect of the BC EAO in relation to the TMX Project.
June, 4, 2018	The Haida Nation applies to the Court of Appeal for Interested Party status.

DATE	EVENT
June 18, 2018	Haida Nation receives letter from Court of Appeal notifying them that they are entitled to be heard pursuant to s. 5 of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68.
July 7, 2018	The Court of Appeal notifies the Haida Nation that their factum is due January 31, 2019.
August 30, 2018	The Federal Court of Appeal allows applications for judicial review brought in respect of the GIC's approval of the TMX Project. The GIC is ordered to re-determine the TMX Project application in accordance with the Federal Court of Appeal's reasons.
August 31, 2018	The Government of Canada acquires the TMX Project and the existing Trans Mountain Pipeline System.
September 20, 2018	The GIC orders the NEB to reconsider its environmental assessment of the TMX Project in accordance with the Federal Court of Appeal's reasons.
September 21, 2018	Agreed Statement of Facts is filed by AGC and AGBC.
October 1, 2018	AGBC files the affidavits of *Kil Tlaats'gaa*, Peter Lantin made 25-Sept-2018 and Russ Jones 26-Sept-2018 on behalf of the Haida Nation.
December 5, 2018	The Court of Appeal issues a letter to Interested Parties stating that the factum length is set at a maximum of 20 pages.

OPENING STATEMENT

Cooperative Federalism is not a zero-sum enterprise where power with one government negates the jurisdiction of others. As with the governments of Canada and the provinces, Indigenous Peoples, including the Haida Nation, have responsibility for the protection of land, water and wildlife within their boundaries. The issue in this Reference is how Canadian federalism reconciles both Indigenous and provincial powers and responsibilities with federal jurisdiction over interprovincial transportation undertakings.

Canada asserts exclusive jurisdiction over interprovincial works and undertakings and says that provincial legislation cannot operate to interfere with the exercise of that jurisdiction. Thus, provincial environmental legislation which purports to operate in tandem with federal licensing authority over such a work or undertaking is *ultra vires* and beyond the power of the province.

The Haida Nation argues that federal legislation in relation to an interprovincial undertaking does not necessarily oust either provincial legislation or Indigenous laws and legal orders, both of which have a proper role to play along with federal legislation. Canada's view represents a narrow view of federalism whereby the existence of federal legislation is argued, by necessity, to occupy a field where provincial and Indigenous jurisdictions related to the environment, have no room to operate. Canada's view is contrary to the principles of cooperative federalism. In relation to Indigenous Peoples, it unjustifiably infringes Aboriginal title and rights, and human rights, as set out in the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**") and recognized and affirmed by s. 35(1) of the *Constitution Act, 1982*. Indigenous Peoples, in respect of and within their respective territories, have the power and jurisdiction to enact laws protecting their territories from despoliation. Jurisdictional pluralism strengthens Canada, and is at the heart of cooperative federalism.

PART 1 - STATEMENT OF FACTS

1. The Haida Nation adopts the Agreed Statement of Facts and the statement of facts set out in the factum of Attorney General of British Columbia ("**AGBC**").

Haida Gwaii and the Haida Nation

2. The Haida Nation is the Indigenous Peoples of Haida Gwaii, an archipelago off the northwest coast of British Columbia. Haida Gwaii has been the homeland of the Haida Nation since time immemorial and the Haida Peoples have communally used, occupied and possessed Haida Gwaii and its adjacent waters prior to and since 1846.[1]

3. The Council of the Haida Nation ("**CHN**") is the official governing body of the Haida Nation, which was established in 1974. The Applicant, *Kil Tlaats'gaa,* Peter Lantin, was the President from 2012 to 2018, and *Gaagwiis*, Jason Alsop, is the current President of the Haida Nation. Pursuant to the Constitution of the Haida Nation, CHN and the President are authorized to and do represent the Haida Nation.

4. CHN was established to, and does, protect the land, sea, culture, and Haida title and rights. This mandate is entrenched in the Constitution of the Haida Nation,[2] which acknowledges the interdependence of the people to the land and sea, and vests in the CHN, through the House of Assembly, the authority and jurisdiction to govern, manage, and protect the land, sea and culture, through: the application and upholding of Haida laws; the enactment of legislation; and the establishment of land and resource policies that are consistent with nature's ability to produce. This mandate is subject to a Haida inherent limit to ensure that the land-sea-culture heritage is passed onto future generations.[3]

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[1] Affidavit #1 of *Kil Tlaats'gaa*, Peter Lantin made 25-Sept-2018, ("**Kil Tlaats'gaa #1**"), at para. 3, Reference Record of the AGBC ("**AGBC Record**"), Vol. 1, Tab 1
[2] Kil Tlaats'gaa #1 at Ex. A pp. 4-5, AGBC Record, Vol. 1, Tab 1. *Constitution of the Haida Nation*, 2014, online: http://www.haidanation.ca/wp-content/uploads/2017/03/HN-Constitution-Revised-Oct-2014_official-unsigned-copy.pdf
[3] Kil Tlaats'gaa #1 at para. 3, AGBC Record, Vol. 1, Tab 1

5. Haida Gwaii, meaning the “islands of the people”, is an archipelago of more than 150 islands, extending roughly 250 km from its southern tip to the northernmost point and containing about 4,700 km of shoreline. More than 25 per cent of the archipelago’s “interior” is within 1 km of saltwater, and no place is further than 20 km from the sea.[4] The seamless sea-to-mountaintop connection is an integral part of Haida heritage and cultural identity.[5]

6. The influence of the ocean on the land base of Haida Gwaii is pervasive in Haida life, culture and history. Haida Gwaii is home to some of the richest marine environments on the planet. Its surrounding waters sustain diverse marine habitats, from kelp forests and eelgrass meadows to sand flats, weathered rocky shores and the abyssal ocean depths.[6] All seven species of Pacific salmon are a key source of nutrients transferred from marine food webs to the forest and are a major factor in the high productivity of forest ecosystems of Haida Gwaii. Many of the marine species of Haida Gwaii, including marine mammals, fish and seabirds are vulnerable to the effects of shipping, including oil spills.[7]

7. Sea creatures, from the most common to the supernatural, figure prominently in Haida art, design, and family crests.[8] The sea is also central to Haida oral history, and its bounty is the basis of many Haida foods and medicines.[9]

8. The Haida have always maintained and exercised their rights and title and legal orders.[10] They have delineated their territorial rights to the lands and waters of Haida Gwaii in negotiations with government of British Columbia (“BC”) and the

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[4] Kil Tlaats’gaa #1, at para. 4, AGBC Record, Vol. 1, Tab 1
[5] Kil Tlaats’gaa #1 at para. 5, AGBC Record, Vol. 1, Tab 1
[6] Kil Tlaats’gaa #1 at para. 7, AGBC Record, Vol. 1, Tab 1
[7] Kil Tlaats’gaa #1 at para. 7, AGBC Record, Vol. 1, Tab 1
[8] Kil Tlaats’gaa #1 at para. 6, AGBC Record, Vol. 1, Tab 1
[9] Kil Tlaats’gaa #1 at para. 6, AGBC Record, Vol. 1, Tab 1, and Affidavit #1 of Russ Jones made 26-Sept-2018 (“**Jones #1**”) at para. 6-8, and Ex. B, AGBC Record, Vol. 7, Tab 4
[10] Kil Tlaats’gaa #1 at para. 8, AGBC Record, Vol. 1, Tab 1

government of Canada (“Canada”), in the Haida Nation Constitution, and in litigation.

9. Haida Gwaii is not subject to a treaty, and the Haida Nation has never ceded, surrendered or modified any rights or title.[11] Rather, the Haida have taken every possible step to protect and exercise rights, title and Haida legal orders to strive to achieve a sustainable future.[12]

Formal Notice of a *Prima Facie* Case of Haida Title and Rights to Haida Gwaii

10. For more than a century, the Haida Nation has engaged in political and legal actions, and negotiations to protect their lands, waters and resources.[13] In particular: the Haida Nation made submissions to various federal commissions in respect of title, beginning in 1913;[14] and the Haida Nation was an active participant in Indigenous organizations striving to achieve recognition of Indigenous Rights (the Allied Tribes of British Columbia and its successor organization, the Native Brotherhood of British Columbia).[15]

11. In 1980, the Haida Nation applied and was accepted for negotiation under the federal Comprehensive Claims Process;[16] and in 1993, the Haida Nation submitted a Statement of Intent that was accepted by the Province and Canada through the British Columbia Treaty Commission process.

12. Beginning in 1980, the Haida Nation made land designations to protect areas of cultural, environmental, and historic importance. The first such designation was *Duu Guusd* Tribal Park and the CHN has made a total of 14 land designations, or “Haida Protected Areas”.[17]

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[11] Kil Tlaats’gaa #1 at para. 9, AGBC Record, Vol. 1, Tab 1
[12] Kil Tlaats’gaa #1 at para. 9, AGBC Record, Vol. 1, Tab 1
[13] Kil Tlaats’gaa #1 at para. 10, AGBC Record, Vol. 1, Tab 1
[14] Kil Tlaats’gaa #1 at para. 10, AGBC Record, Vol. 1, Tab 1
[15] Kil Tlaats’gaa #1 at para. 10, AGBC Record, Vol. 1, Tab 1
[16] Kil Tlaats’gaa #1 at para. 10, AGBC Record, Vol. 1, Tab 1
[17] Kil Tlaats’gaa #1 at para. 10, AGBC Record, Vol. 1, Tab 1

13. The Haida Nation filed lawsuits in the Supreme Court of British Columbia in 1996 and 2000, objecting to the Province's replacement and transfer of what was then Block 6 of Tree Farm Licence 39, to first MacMillan Bloedel and later Weyerhaeuser Company Limited.[18]

14. In 2002 CHN filed an action in the Supreme Court of British Columbia (Action L020662, Vancouver Registry) asserting Aboriginal title to the land, airspace and marine areas of Haida Gwaii (the "**Haida Title Case**"). Canada and BC are both parties to the Haida Title Case.[19] This action is presently in case management.

15. The Haida Nation has been willing to enter into good faith negotiations to reach agreements for coexistence with Canada and BC. CHN has been directly and actively involved in implementing reconciliation agreements with the federal and provincial governments.[20]

The Haida Agreements

16. As interim steps towards reconciliation, since 1980 the Haida Nation has negotiated and concluded with Canada and BC a number of agreements creating joint management and jurisdiction of a total of 52% of the land base of Haida Gwaii (about 500,000 hectares), and 3,464 square km of marine spaces, including:[21]

    a. The 1993 Gwaii Haanas Agreement which provides for shared jurisdiction and collaborative management by Canada and the Haida Nation of the Haida Heritage Site and National Park Reserve covering about a quarter of the land area of Haida Gwaii, including the whole of the southern area of the archipelago (the "**Gwaii Haanas Agreement**").[22] This agreement

[18] *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73
[19] Kil Tlaats'gaa #1, Ex. C, D & E, AGBC Record, Vol. 1, Tab 1
[20] Kil Tlaats'gaa #1, at para. 15, AGBC Record, Vol. 1, Tab 1
[21] Kil Tlaats'gaa #1, at para. 15, AGBC Record, Vol. 1, Tab 1
[22] Kil Tlaats'gaa #1, Ex. F at p. 1 and Appendix 1, AGBC Record, Vol. 1, Tab 1

recognizes the dual assertions of sovereignty, jurisdiction, title and ownership by both the governments of Canada and the Haida Nation.

b. The 2010 Gwaii Haanas Marine Agreement, which builds on the Gwaii Haanas Agreement, and expands the responsibilities of the management board to include the cooperative planning, operation, management and use of the marine portion of Gwaii Haanas, designated both as a Haida Heritage Site and later as Canada's first National Marine Conservation Area.[23]

c. A Strategic Land-Use Plan Agreement and the Kunst'aa guu – Kunst'aayah Reconciliation Protocol with the Province of British Columbia for shared and joint jurisdiction and management of a further quarter of the lands and resources, including 74% of the coastline (nearshore and foreshore) and some marine areas.[24]

d. A 2007 Memorandum of Understanding[25] with Canada for the cooperative management and planning of the *sGaan Kinghlas* (Bowie Seamount) area as a marine protected area (for Canada's part, through the *Oceans Act*). The Haida Nation had earlier designated *sGaan Kinghlas* (Bowie Seamount), as a Haida Protected Area, with the Haida name that translates as "Supernatural being looking outwards".[26]

e. In addition to these agreements, collectively "**the Haida Agreements**", the Haida Nation has pursued the reconciliation of Haida title and rights in respect of the marine areas of Haida Gwaii through the negotiation of a Reconciliation Agreement with Canada and British Columbia, including a framework for shared and joint decision-making in oceans and fisheries management, shipping and transportation.[27]

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[23] Kil Tlaats'gaa #1, Ex. G, AGBC Record, Vol. 1, Tab 1
[24] Kil Tlaats'gaa #1, Ex. H, AGBC Record, Vol. 1, Tab 1
[25] Kil Tlaats'gaa #1, Ex. I, AGBC Record, Vol. 1, Tab 1
[26] Kil Tlaats'gaa #1 at para. 15, AGBC Record, Vol. 1, Tab 1
[27] Kil Tlaats'gaa #1 at para. 21, AGBC Record, Vol. 1, Tab 1

Haida Laws

17. The agreements with both Canada and BC acknowledge Haida assertion of title to Haida Gwaii and the fact that the Haida Nation is, in respect of these agreements, acting pursuant to its own legal jurisdiction and authority through the Constitution of the Haida Nation.

18. As an illustration of how the Haida Nation governs through the exercise of Haida laws, we summarize the principal Haida laws for use in marine planning for all of Haida Gwaii, including the management of the Gwaii Haanas Marine Area with the Government of Canada,[28] are:

    a. *Yahguudang or Yakguudang*—Respect. We respect each other and all living things. We take only what we need, we give thanks, and we acknowledge those who behave accordingly.

    b. *'Laa guu ga kanhllns*—Responsibility. We accept the responsibility to manage and care for the land and sea together. We work with others to ensure that the natural and cultural heritage is passed onto future generations.

    c. *Gina 'waadluxan gud ad kwaagiida*—Interconnectedness. Everything depends on everything else. Healthy ecosystems sustain culture, communities, and an abundant diversity of life, for generations to come.

    d. *Giid tll'juus*—Balance. Balance is needed in our interactions with the natural world. Care must be taken to avoid reaching a point of no return and to restore balance where it has been lost. All practices must be sustainable.

    e. *Gina k'aadang.nga gii uu tl' k'anguudang*—Seeking Wise Counsel. Together we consider new ideas, traditional knowledge, and scientific information that allow us to respond to change in keeping with culture, values and laws.

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[28] *Kil Tlaats'gaa* #1 at para. 19 and Ex. J at p. 11 & 12, AGBC Record, Vol. 1-2, Tab 1

f. *Isda ad diigii isda*—Giving and Receiving. Reciprocity is an essential practice for interactions with each other and the natural and spiritual worlds. We continually give thanks for the gifts that we receive.

19. The Haida have also entered into protocol agreements with the local, settler communities in an effort to advance reconciliation further.[29]

Impact of Heavy Oil Spill

20. Oil tanker traffic traversing through the marine portion of the territory of the Haida Nation enroute to Asia places all the environmental risk of an oil spill on the shoulders of the Haida Nation[30] and those who live and rely on the BC North Coast and Haida Gwaii. No amount of compensation would redress the social, economic and cultural loss resulting from a major oil spill.[31]

PART 2 - ARGUMENT

Legal Pluralism

21. In the *Quebec Secession Reference* the SCC stated that:

> Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does anyone principle trump or exclude the operation of any other.[32]

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[29] *Kil Tlaats'gaa* #1 at para. 10f, 15f and Ex. N, AGBC Record, Vol. 1, Tab 1 and Vol. 2, Tab N

[30] See Jones #1, at paras. 9-53 for a discussion of the species and impacts of an oil spill on Haida Gwaii (AGBC Record, Vol. 7, Tab 4)

[31] Jones #1, at para. 53, AGBC Record, Vol. 7, Tab 4

[32] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 49

22. While the present case is presented as dealing with the relationship between sections 91 and 92 of the *Constitution Act, 1867*, the principles of cooperative federalism extend beyond the limits of these two sections. Indigenous Peoples, as well as Canada and BC, are potentially impacted by the possession and transportation of hazardous substances, including but not limited to heavy oil in and through British Columbia. The resolution of the case at bar involves not only Crown jurisdictions, but also the jurisdiction of Indigenous Peoples whose territories and citizens stand to be impacted by the release of such substances.

23. Indigenous Peoples have inherent rights of governance over and in respect of their territories and no resolution of the present matter can be complete without making room for the exercise of these rights.

24. UNDRIP provides that Indigenous Peoples have the right to self-determination, the right to self-government relating to their internal and local affairs, the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.[33] Indigenous Peoples have "the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."[34] States shall give "due recognition to indigenous peoples' laws, traditions, customs and land tenure systems. Finally, Article 29.2 provides:

> States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

25. UNDRIP, adopted by the United Nations in 2007, is a statement of customary international law representing an international consensus on the status of

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[33] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples* : resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295 ("**UNDRIP**"), Articles 3, 4, and 5.
[34] UNDRIP, Article 18; see also Article 26.

Indigenous Peoples. Additionally, it is in the process of being adopted into Canadian domestic law by Bill C-262 which was passed by the House of Commons on 30 May, 2018, and is presently in second reading before the Senate, awaiting Royal Assent.[35]

26. UNDRIP recognizes and codifies principles that have long been established in Canadian law, albeit often neglected in practice. As stated by Prof. Peter Russell, "The right of Indigenous peoples to govern their own societies is no longer a contested right in Canada – or in the world".[36]

27. Similarly, Morales and Nichols state that "In essence, the third order of government has always been here, hiding in plain sight: it is simply that the courts have mistaken it for a municipal order, a creature of statute, when its character is–and has always been–constitutional."[37]

28. The powers of governance are not exhausted by the divisions between federal and provincial jurisdiction established in the *Constitution Act, 1867*.[38] That *Act* merely divided the powers that, prior to its enactment, "had previously belonged to the provinces".[39]

29. In *Mitchell v. Peguis,*[40] Dickson, CJC wrote that "[f]rom the Aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself

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[35] Bill C-262, *An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 1st Session, 42nd Parl, 2018 (second reading 28 November 2018).
[36] Peter H. Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests*, (Toronto: University of Toronto Press, 2017) at p. 428.
[37] Sarah Morales and Joshua Nichols, *Reconciliation Beyond the Box: The UN Declaration and Plurinational Federalism in Canada* (Waterloo: Centre for International Governance Innovation, 2018) at p. 22.
[38] *Campbell et a. v. AG BC/AG CDA & Nisga'a Nation et al*, 2000 BCSC 1123, paras. 71-82
[39] *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] All E.R. 118, citing *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 at 442-2
[40] *Mitchell v. Peguis,* [1990] 2 SCR 85, at 108-09

are internal to itself and do not alter the basic structure of Sovereign-Indian relations."

30. Canadian courts have long recognized the existence of Indigenous legal traditions and have given effect to situations created by Indigenous law.[41]

31. In *Pastion v. Dene Tha' First Nation*, Grammond J. stated that "Indigenous legal traditions are among Canada's legal traditions. They form part of the law of the land".[42]

32. In *Mitchell v. M.N.R.*, Chief Justice McLachlin wrote:

> ... aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them .... Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.[43]

33. Indigenous rights do not depend on a court declaration or Crown recognition for their legal existence, rather: "All that a court declaration or Crown acceptance does is to identify the exact nature and extent of the title or other rights."[44]

34. The capacity of Indigenous Peoples "to make laws concerning matters of leadership and governance are not derived from the *Indian Act* or other statutory power. Rather it is a result of the exercise of the First Nation's aboriginal right to

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[41] See, e.g. *Connolly v Woolrich* (1867), [1867] Q.J. No. 1, 11 LCJ 197, 17 RJRQ 75 (Que SC), aff'd (1869), 17 RJRQ 266, 1 CNLC 151 (Que QB), *Casimel v Insurance Corp of BC* (1993), 106 DLR (4th) 720 (BCCA).
[42] *Pastion v. Dene Tha' First Nation*, 2018 FC 648 at para. 8
[43] *Mitchell v. M.N.R.,* 2001 SCC 33*,* at para 10
[44] *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*., 2015 BCCA 154, 2015 at para 61

make its own laws concerning governance". This jurisdiction is derived from "the common law of aboriginal rights".[45]

Cooperative Federalism

35. The Supreme Court of Canada recently defined the concept of cooperative federalism as an:

> interpretative aid that is used when interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests. . . . Where possible, courts should favour a harmonious reading of statutes enacted by the federal and provincial governments which allows for them to operate concurrently.[46]

36. More generally, cooperative federalism is a consensual arrangement between jurisdictions designed to meet "the related demands of interdependence of governmental policies, equalization of regional disparities, and constitutional adaptation".[47]

37. The Haida Agreements are examples of the practice of cooperative federalism through legal pluralism. Agreements between the Haida Nation and both Canada and British Columbia have provided for complementary jurisdiction. For example, the *Kunst'aa guu – Kunst'aayah Reconciliation Protocol* provides that, in a combined endeavour to manage lands on Haida Gwaii, the Haida Nation "will manage Haida Gwaii in accordance with its laws, policies, customs and traditions".[48]

38. All of the major advances in cooperative federalism are a move to reconciliation. The Haida Agreements have been in the context of environmental protection:

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[45] *Gamblin v. Norway House Cree Nation Band Council,* 2012 FC 1536, at paras. 34, 50; see also *Frank v. Blood Tribe*, 2018 FC 1016, para. 69; *Chiodo v. Doe*, 2018 BCSC 2078, para. 49; *Pastion v. Dene Tha' First Nation*, 2018 FC 648, paras. 20-24
[46] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, at para. 17
[47] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2016). See also *Orphan Wells Association v. Grant Thornton Ltd*., 2019 SCC 5, paras. 105, 111.
[48] Kil Tlaats'gaa #1, Ex. H at p. 1, AGBC Record, Vol. 1, Tab 1

protection of the land, the sea, and the creatures which depend on these. They are precisely the prioritization placed by Indigenous Peoples generally and the Haida in particular that Prof. Borrows has emphasized as vital to reconciliation:

> When the cultures, customs, symbols, and traditions of Indigenous peoples form part of Canadian law, this helps to facilitate two kinds of reconciliation: with the earth, and between humans who occupy particular places on that earth. This [is] why reconciliation with the earth is a vital part of Indigenous peoples' reconciliation with other peoples.[49]

39. The significance of these Agreements in defining and reshaping the relationship between the Haida Nation and the Crown has been considered and upheld by the courts in *Moresby Explorers* and *Haida Nation v. Canada,*[50] as explained below.

40. That cooperative federalism is not limited to federal-provincial relations is acknowledged in the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*[51] which states: "The Government of Canada recognizes that Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government".[52] And further:

> Recognition of the inherent jurisdiction and legal orders of Indigenous Peoples is therefore the starting point of discussions aimed at interactions between federal, provincial, territorial, and Indigenous jurisdictions and laws.

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[49] John Borrows, "Earth Bound: Indigenous Resurgence", in Michael Asch, John Borrows and James Tully, eds, *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, (Toronto: University of Toronto Press, 2018) 49 at 60.
[50] *Moresby Explorers Ltd. v. Canada (Attorney General)*, [2001] 4 FC 591 at para 74; *Haida Nation v. Canada (Fisheries and Oceans)*, 2015 FC 290 at para 53 ("***Haida Nation v. Canada***")
[51] Her Majesty the Queen in Right of Canada, as represented by the Minister of Justice and Attorney General of Canada, *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*, (Ottawa: Department of Justice Canada, 2018), Catalogue No J2-476/2018E-PDF, online at: https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html ("***Principles***").
[52] *Principles*, at p. 9

> As informed by the UN Declaration, Indigenous Peoples have a unique connection to and constitutionally protected interest in their lands, including decision-making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.
>
> Nation-to-nation, government-to-government, and Inuit-Crown relationships, including treaty relationships, therefore include:
>
> - developing mechanism and designing processes which recognize that Indigenous peoples are foundational to Canada's constitutional framework;
> - involving Indigenous peoples in the effective decision-making and governance of our shared home;
> - putting in place effective mechanisms to support the transition away from colonial systems of administration and governance, including, where it currently applies, governance and administration under the Indian Act; and
> - ensuring, based on recognition of rights, the space for the operation of Indigenous jurisdictions and laws.[53]

41. The principle of cooperative federalism includes cooperation between federal and provincial governments beyond a mere schematic division of powers. It calls for cooperation between both federal and provincial governments and Indigenous governments under the same principles.

42. Jurisdiction is not a zero-sum process, and cannot be viewed as an either/or scenario. All governments, including indigenous governments, have an interest and stake in environmental protection and have a corresponding jurisdiction to enforce laws, and no government may act to frustrate environmental measures made within its jurisdiction.

43. Canada's position in this reference is that it has exclusive jurisdiction in respect of an inter-provincial undertaking. This reasoning infringes on the right of Indigenous Peoples, including the Haida Nation, to exercise their constitutionally protected governance rights to manage their territories. This jurisdiction is the oldest root of the living tree of confederation, offering ancient principles–respect, responsibility, balance – to assist in the resolution of environmental challenges

[53] *Principles*, at p. 9

today. The principles of cooperative federalism allows for a more complex and collaborative solution to the protection of the lands and waters.

Reconciliation

44. UNDRIP emphasizes the protection of the environment and Indigenous environmental laws. The Preamble recognizes that "respect for Indigenous knowledge, cultures, and traditional practices contributes to sustainable and equitable development and proper management of the environment."[54] Article 34 states that Indigenous Peoples have the right to promote, develop and maintain their laws.

45. Canada has taken a step forward in the process of seeking reconciliation through the measures it has taken to adopt and implement UNDRIP. In doing so, it has acted to implement Call to Action No. 43 of the Truth and Reconciliation Commission.[55] But words, even legislated words, are not sufficient. It is incumbent upon Canada, and in its absence, this Court, to protect the constitutional jurisdiction of the Indigenous Peoples over the environment and to reject a method of reasoning which, once again, would leave Indigenous Peoples in the cold.

46. The model of collaborative management over Haida Gwaii, reflected in the Haida Agreements, has twice been favourably and substantively considered by Canadian courts:

    a. In *Moresby Explorers Ltd. v. Canada (Attorney General)*, the Court held that the Gwaii Haanas Agreement provided "a structure for consultation with the Haida Nation which has the happy effect of blending competing jurisdiction claims…"[56]

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[54] UNDRIP, Preamble, para. 11
[55] *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, (Ottawa: Truth and Reconciliation Commission of Canada, 2015).
[56] *Moresby Explorers Ltd. v. Canada (Attorney General)*, [2001] 4 FC 591 at para 74

b. In *Council of the Haida Nation et al* v *Canada (Fisheries and Oceans*),[57] due to the Gwaii Haanas Agreement the Court drew a "heightened duty to accommodate the Haida Nation."

47. The Province states that "because of the nature and importance of environmental concerns, courts interpret the Constitution to permit both levels of government "ample means" to protect environmental values central to the health and livelihood of local communities."[58] There is, however, a third layer of protection in Indigenous territories such as Haida Gwaii, which is afforded only through Indigenous legal orders and co-governance agreements.

48. Prof. Borrows recently considered the relationship between reconciliation and the environment and Indigenous laws:

> The point is that living well in the world requires a great deal of work. And it is work of a particular type. Fortunately, Indigenous peoples have long developed practices and principles that inculcate mindfulness and purpose beyond their immediate struggle with their surroundings. These earth-based relationships reveal environment-based laws over which humans have little control. They show us our limits. They help humans see they are not the jurisprudential centre of the universe. Indigenous practices, languages, histories, cultures, and place-based philosophies that recognize and build on these views are keys to reconciliation. When embedded in the law they frequently accentuate an abiding love for the earth.[59]

49. The Haida Nation's on-the-ground success with implementing reconciliation on Haida Gwaii is based on the mutual recognition, and concurrent exercise, of Haida and Crown jurisdiction, titles and laws.

50. The history of collaborative relationship with BC and Canada demonstrates that the reconciliation of Haida title and rights with the Crown's assertion of

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[57] *Haida Nation v. Canada* at para 53
[58] AGBC factum, Opening Statement
[59] Borrows, Earth Bound, at 61. See also p. 64 for a discussion of the inherent limits on its activities related to Indigenous peoples and the environment, and p. 69 for a discussion of revitalization of Indigenous laws and practices.

sovereignty can be ongoing, forward-looking and based on the concept of legal pluralism.

51. This, with respect, is a model for the future that this Court should be reluctant to foreclose with its judgment.

PART 3 - NATURE OF ORDER SOUGHT

52. CHN respectfully requests an Order from this Honourable Court:

    a. To Question #1, “Yes, subject to s. 35 of the *Constitution Act*”, but “no” if there is a failure to uphold indigenous jurisdiction;

    b. To Question #2, “Yes”; and

    c. To Question #2, “No.”

53. The Haida Nation submits that as an Interested Person to the litigation, it should neither pay nor receive costs regardless of the outcome.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of January, 2019.

COUNSEL FOR THE INTERVENOR

_____ _____

GL Terri-Lynn Williams-Davidson David Paterson

_____

Elizabeth Bulbrook

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