

MAY 28 2018

S-186104

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*
R.S.B.C. 1996, C. 241

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

Petitioners

And

THE MINISTRY OF FORESTS, LANDS, NATURAL RESOURCE OPERATIONS AND
RURAL DEVELOPMENT, and LEONARD MUNT, DISTRICT MANAGER, HAIDA GWAI
NATURAL RESOURCE DISTRICT ON BEHALF OF HER MAJESTY THE QUEEN IN
RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Respondents

PETITION TO THE COURT

ON NOTICE TO:

**The Minister of Forests, Lands,
Natural Resource Operations and
Rural Development on behalf of
Her Majesty the Queen in Right of
The Province of British Columbia**
Room 128, Parliament Buildings
Victoria, BC V8V 1X4

The Attorney General of British Columbia
Ministry of the Attorney General
Legal Services Branch
3rd Floor – 1001 Douglas Street
Victoria, BC V8V 1X4

Husby Forest Products Ltd.
6425 River Road
Delta, BC V4K 5B9

28MAY18 1808726 RISM 200.00
21422 5186104

This proceeding has been started by the petitioners for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition, anywhere else, within 49 days after that service, or,
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is: The Law Courts, 800 Smithe Street, Vancouver, BC

(2) The ADDRESS FOR SERVICE of the petitioners is:
 White Raven Law Corporation
 16541 Upper Beach Road
 Surrey, BC, V3Z 9R6

Fax number address for service (if any) of the petitioner(s): 604-536-5542

E-mail address for service (if any) of the petitioner(s): tlwd@whiteravenlaw.ca

(3) The name and office address of the petitioner's lawyer is:
 G.L. Terri-Lynn Williams-Davidson
 White Raven Law Corporation
 16541 Upper Beach Road
 Surrey, BC V3Z 9R6

Claim of the Petitioners

Part 1: ORDER(S) SOUGHT

- 1. An Interim Order, pursuant to s. 10 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 (the "**JRPA**"), for a stay of the permits (the "**Permits**") authorizing the cutting of trees within cutblock COL409 (within Cutting Permit ("**CP**") 223) and cutblocks COL411, COL419, COL422 and COL794 (within CP224), (collectively "**the Cutblocks**"), pursuant to Part 3, s. 14(1)(e) of the *Forest Act*, R.S.B.C. 1996, c. 157 (the "**Forest Act**") pending the determination of this Petition.
- 2. A Declaration that the Permits, pursuant to Part 3, s. 14(1)(e) of the *Forest Act*, are invalid.

3. In the alternative, an Order setting aside the Permits, pursuant to s. 7 of the *JRPA*.
4. In the further alternative, an Order in the nature of certiorari quashing the issuance of the Permits for the Cutblocks, pursuant to Part 3, s. 14(1)(e) of the *Forest Act*.
5. In the further alternative, an Order, staying the Permits, pursuant to s. 10 of the *JRPA*, until either:
 - a. the completion of the Timber Supply Review and the setting of a new Allowable Annual Cut and a partition for cedar; and
 - b. the agreement of the Parties upon a Cedar Management Strategy for Husby Forest Products in Haida Gwaii; or
 - c. the agreement of the Parties;
6. Costs; and
7. Such further and other relief as this honourable court deems just.

Part 2: FACTUAL BASIS

Overview

1. The Haida Nation have a *prima facie* case for Aboriginal Title and a strong *prima facie* case for Aboriginal Rights to cedar, which requires not only the deepest level of consultation, but also the deepest level of accommodation given the extensive history of logging and its impact upon the long-term supply of cedar for a viable, sustainable economy on Haida Gwaii, and the impacts of unsustainable logging of cedar on the exercise of Haida Aboriginal Rights and Title, including the exercise of these rights through reconciliation agreements for shared and joint management of Haida Gwaii.

Background

2. The Petitioner, the Council of the Haida Nation (“CHN”), is the governing body of the Haida Nation. The Haida Nation includes all people of Haida ancestry. Peter Lantin is the President of the Haida Nation. Pursuant to the Constitution of the Haida Nation, the CHN and Peter Lantin are authorized to, and do represent, the Haida Nation.¹

¹ The First Affidavit of Peter Lantin, made May 17, 2018 (“**Lantin #1 Affidavit**”), para. 1 [CHN Application Record (“**CHN Record**”), Vol. II, Tab 1], and Ex. “A”, Lantin #1 Affidavit [CHN Record, Vol. II, Tab 1-A, p. 14]

3. The territory of the Haida Nation relative to Canada's interests is Haida Gwaii.² Haida Gwaii is an archipelago off the northwest coast of British Columbia. The Haida Nation has exclusively occupied Haida Gwaii prior to, and at 1846.³ The Haida Nation asserts and has at all material times, its Aboriginal Title over all of Haida Gwaii.⁴
4. The Haida Nation's assertion of Aboriginal Title over Haida Gwaii is consistent with a substantial body of credible evidence, known to the Province of British Columbia (the "**Province**"), which shows that the Haida Nation has exclusively lived on, occupied and used Haida Gwaii since time immemorial and continue to do so.⁵ The Haida Nation's formal assertions date back to 1913.⁶
5. The Haida Nation's title to Haida Gwaii includes the right to use, harvest, manage and conserve the forest resources and ecosystems, and to make decisions in relation thereto, including decisions to determine the use of the lands and forests.⁷
6. Haida title has never been surrendered or otherwise extinguished and no treaty has been concluded between the Crown and the Haida Nation.⁸
7. An action for a declaration of Haida title to Haida Gwaii is before the Supreme Court of British Columbia.⁹ A trial judge has been assigned and the action is in Case Planning.¹⁰ In its Response to Notice of Civil Claim, the Province (Division 2, para. 1) "acknowledges that aboriginal rights and title exist on Haida Gwaii".¹¹
8. Of particular importance to the Haida Nation is the protection of old growth cedar in Haida Gwaii, the impetus for the *Haida Nation* case decided by the Supreme Court of Canada in 2004.¹² In the period before the *Haida Nation* case (1800-2004), cedar had

² Lantin #1 Affidavit, para. 4 [CHN Record, Vol. II, Tab 1, p. 2].

³ Lantin #1 Affidavit, paras. 5-6 [CHN Record, Vol. II, Tab 1, p. 2].

⁴ Lantin #1 Affidavit, paras. 7-9 [CHN Record, Vol. II, Tab 1, pp. 2-3].

⁵ Lantin #1 Affidavit, para. 9 [CHN Record, Vol. II, Tab 1, pp. 3-4]; see also, *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 ("**Haida Nation v. BC**"), at paras. 64-65.

⁶ Lantin #1 Affidavit, para. 9(a) [CHN Record, Vol. II, Tab 1, p. 3].

⁷ Lantin #1 Affidavit, paras. 8, 14-21 [CHN Record, Vol. II, Tab 1, pp. 3, 5-7].

⁸ Lantin #1 Affidavit, para. 7 [CHN Record, Vol. II, Tab 1, p. 2]; see also, *Haida Nation v. BC*, at para. 69.

⁹ *Haida Nation v. Canada and British Columbia*, BCSC No. L020662, Vancouver Registry. See also, Lantin #1 Affidavit, paras. 12-13, Exs. "D", "E", and "F" [CHN Record, Vol. II, Tab 1, pp. 4-5; 35-48; 49-60; 61-76].

¹⁰ Lantin #1 Affidavit, para. 13 [CHN Record, Vol. II, Tab 1, p. 5].

¹¹ Lantin #1 Affidavit, Ex. "E", Division 2, para. 1 [CHN Record, Vol. II, Tab 1-E, p. 50].

¹² *Haida Nation v. BC*, paras. 2, 65, 69, 70-72. See also, The Second Affidavit Trevor Russ, made 25-May-2018 ("**Russ #2 Affidavit**"), at para. 3 [CHN Record, Vol. III, Tab 6, p. 206].

been targeted for logging and comprised 40% by volume of all logs shipped from Haida Gwaii. The volume of high quality cedar logs had declined by a factor of 10 and was disappearing from the forests of Haida Gwaii.¹³

Reconciliation in Haida Gwaii

9. The CHN has worked hard to negotiate reconciliation and to implement shared and joint decision-making for the entirety of Haida Gwaii. The Haida Nation began implementing interim reconciliation agreements with the government of Canada in 1985; the model has been recognized globally¹⁴ and endorsed by the Federal Court.¹⁵ Utilizing this model, the Haida Nation began implementing interim reconciliation agreements with the government of British Columbia in 2005, as follows:
 - a. CHN began the journey towards reconciliation with the Province through the articulation of a Land Use Vision, “Haida Gwaii *Yah’guudang* (respecting Haida Gwaii)”. The 2005 Haida Land Use Vision (“HLUV”) assessed the damages and changes to the land arising from industrial logging to arrive at a better understanding of interconnected ecological processes and recommendations for restoring and maintaining balance.¹⁶ The HLUV was the foundation for the strategic land use planning process jointly conducted by the Haida Nation and the Province with all of the communities of Haida Gwaii.¹⁷
 - b. In December, 2007, the Haida Nation and the Province entered into a Strategic Land Use Plan Agreement to co-manage the lands and resources of Haida Gwaii and address all immediate land use issues, including the high rate of logging, ecosystem based management, protection of key cultural and environmental values.¹⁸
 - c. In December, 2009, the Haida Nation and the Province entered into the *Kunst’aa guu* – *Kunst’aayah* Reconciliation Protocol (the “Protocol”) for shared and joint management of the lands and natural resources of Haida Gwaii.¹⁹ Pursuant to the

¹³ Russ #2 Affidavit, Ex. “C” [CHN Record, Vol. III, Tab 6-C, p. 223].

¹⁴ Lantin #1 Affidavit, para. 15 [CHN Record, Vol. II, Tab 1, p. 6].

¹⁵ *Moresby Explorers Ltd. v. Canada (Attorney General)*, [2001] 4 FC 591 at para. 74.

¹⁶ Lantin #1 Affidavit, para. 16 and Ex. “I” [CHN Record, Vol. II, Tab 1, p. 6 and Tab 1-I, p. 103].

¹⁷ Lantin #1 Affidavit, Ex. “I” [CHN Record, Vol. II, Tab 1-I, p. 103].

¹⁸ Lantin #1 Affidavit, para. 17 and Ex. “J” [CHN Record, Vol. II, Tab 1, p. 6 and Tab 1-K, pp. 119-144].

¹⁹ Lantin #1 Affidavit, para. 18 and Ex. “L” [CHN Record, Vol. II, Tab 1, pp. 6-7 and Tab 1-L, pp. 175-192].

Protocol, the Parties agreed to a three-tiered decision-making framework: (1) senior representatives of the Parties; (2) the Haida Gwaii Management Council (“HGMC”) for strategic level decisions for Haida Gwaii; and (3) the Solutions Table for technical support to the HGMC. Both the HGMC and the Solutions Table have equal representation from both Parties.²⁰ One of the responsibilities of the HGMC is the setting of the Allowable Annual Cut (“AAC”) for Haida Gwaii.²¹

- d. The Protocol was adopted by the Haida Nation pursuant to the 2010 *KaayGuu Ga ga Kyah ts’as – Gin ‘inaas ‘laas ‘waadluwaan gud tl’a gud giidaa* (Stewardship Law)²² and by the Province through the 2010 *Haida Gwaii Reconciliation Act* S.B.C. 2010, c. 17. The Parties also act under the independent authority of their respective laws: CHN under the HLUV and the Constitution of the Haida Nation, and the Province under the *Forest Act*.²³
- e. In 2010, the Parties agreed to the Haida Gwaii Land Use Objective Orders (“HGLUOO”).²⁴ Under the HGLUOO, generally in Haida Gwaii, forest companies cannot log old growth monumental cedar trees.²⁵

10. The CHN has also engaged and signed Protocol Agreements with all of the settler communities of Haida Gwaii, recognizing the impact of industrial development and agreeing to work together for a healthy environment and a sustainable islands’ economy.²⁶

Restoring the Balance to Forestry in Haida Gwaii

11. In 2012, the HGMC reduced the AAC on Haida Gwaii by almost 50% after conducting, for the first time, a Timber Supply Review (“TSR”) for the entirety of Haida Gwaii.²⁷

²⁰ The First Affidavit of Trevor Russ, made May 17, 2018 (“**Russ #1 Affidavit**”), para. 2 [CHN Record, Vol. III, Tab 5, p. 2]; *see also*, Lantin #1 Affidavit, “Schedule B: Decision-making Framework” to Ex. “L” [CHN Record, Vol. II, Tab 1, p. 7 and Tab 1-L, pp. 184-187].

²¹ Russ #1 Affidavit, para. 4 [CHN Record, Vol. III, Tab 5, p. 2].

²² Lantin #1 Affidavit, para. 19 and Ex. “M” [CHN Record, Vol. II, Tab 1, p. 7 and Tab 1-M, pp. 193-196].

²³ Russ #1 Affidavit, para. 3 [CHN Record, Vol. III, Tab 1, p. 2].

²⁴ Lantin #1 Affidavit, para. 17 and Ex. “K” [CHN Record, Vol. II, Tab 1, p. 6 and Tab 1-K, p. 145].

²⁵ The First Affidavit of Gerry Morigeau made May 20, 2018 (“**Morigeau #1 Affidavit**”), para. 11 [CHN Record, Vol. IV, Tab 8, pp. 63, 65]; HGLUOO, ss. 9(1)-(3), Lantin #1 Affidavit, Ex. “K” [CHN Record, Vol. II, Tab 1, p. 6 and Tab 1-K, pp. 145-169].

²⁶ Russ #2 Affidavit, para. 5, Exs. “D”, “E”, “F” [CHN Record, Vol. III, Tab 6, pp. 206-207]; Lantin #1 Affidavit, para. 10, Ex. “C” [CHN Record, Vol. II, Tab 1, p. 4 and Tab 1-C, p. 29].

²⁷ Russ #1 Affidavit, para. 5 and Ex. “A” [CHN Record, Vol. III, Tab 5, p. 3, and Tab 5-A, pp. 13-76].

The Chief Forester took the overall AAC set by the HGMC and then made individual determinations within the overall AAC.²⁸

12. In the Chief Forester's rationale, he acknowledged that there was a problem with overcutting of cedar in Haida Gwaii, gave clear direction for the maximum amount of cedar that might be cut, set a three-year monitoring period, and said that if there was a failure to log cedar within these limits or in accordance with an approved cedar management strategy, that he would revisit the matter before the next AAC calculation.²⁹
13. In June, 2015, the HGMC raised concerns about the over-estimation of the forest inventory, the concentration of logging in parts of the land base, and the trend of exceeding the cedar limit.³⁰ These concerns were justified, as in the three-year period that ended December 31, 2015, Husby Forest Products ("Husby") had overcut their portion of the Chief Forester's cedar limit by 92%.³¹ No other licensee overcut cedar.³²
14. In 2016, the HGMC began a new TSR to re-determine the AAC; the result of this TSR is expected in 2018.³³
15. In August 2017, the Chair of the HGMC advised the Chief Forester that cedar in the Timber Supply Area ("TSA") (within which the Cutblocks are situated) was being logged at excessive rates.³⁴
16. In response, in October, 2017, the Chief Forester acknowledged that the logging of cedar in the TSA "has exceeded the levels outlined in the chief forester's 2012 management unit AAC determinations" and further noted that the "licensees have not worked with the Council of the Haida Nation (CHN) and the Natural Resource District to develop a cedar management strategy, as requested by the chief forester in the 2012 determinations".³⁵

²⁸ Russ #1 Affidavit, para. 4 [CHN Record, Vol. III, Tab 5, p. 2].

²⁹ Russ #1 Affidavit, para. 9, Ex. "B" [CHN Record, Vol. III, Tab 5, p. 4 and 5-B, pp. 102-110, 124-129].

³⁰ Russ #1 Affidavit, para. 11, Ex. "D" [CHN Record, Vol. III, Tab 5, p. 4 and 5-D, pp. 102-110, 143-144].

³¹ Russ #1 Affidavit, para. 11, Ex. "C" [CHN Record, Vol. III, Tab 5, pp. 4, 141-142]; per the technical information the Parties collated and prepared to brief the Chief Forester.

³² Russ #1 Affidavit, Ex. "C" [CHN Record, Vol. III, Tab 5-C, p. 141]. This cedar harvest report shows Husby's logging within TSA 25 as 45% over limit, Teal Cedar Products within TFL 58 as 59% under their cedar limit, and Taan Forest Products within TFL 60 as 67% under their cedar limit.

³³ Russ #1 Affidavit, para. 6 [CHN Record, Vol. III, Tab 5, p. 3].

³⁴ Russ #1 Affidavit, para. 13 and Ex. "E" [CHN Record, Vol. III, Tab 5, p. 5 and Tab 5-E, pp. 145-146].

³⁵ Russ #1 Affidavit, para. 14 and Ex. "F" [CHN Record, Vol. III, Tab 5, p. 6 and Tab 5-F, pp. 151-153].

Therefore, the Chief Forester established a partition for the TSA, thereby limiting the amount of the cedar that can be cut in the TSA (the “**Cedar Partition**”).

17. The Province has failed to give legal effect to the Cedar Partition through a Ministerial Order, although the CHN has advocated for this to occur.³⁶

Logging at *St’alaa Kun* (Collison Point)

18. The Cutblocks are in an area known as *St’alaa Kun* or Collison Point. This is an area within the TSA with high concentration of cedar—estimated as high as 85%.³⁷ *St’alaa Kun* is the largest area with mature, commercially available cedar on Haida Gwaii.³⁸
19. Since 2010, Husby has logged about 93% of the 2,490 hectares that have been logged at *St’alaa Kun*.³⁹ Husby’s rate of logging of cedar far exceeds what is sustainable: Husby logs about 5-7 times the sustainable rate of cedar at *St’alaa Kun*⁴⁰ which greatly exceeds the rate and abundance that cedar naturally grows in the forests.⁴¹
20. Husby has logged 86,000m³ of cedar within the last seven months and plans to log approximately an additional 24,936m³ of cedar under the Cutblocks.⁴² The Province recently estimated Husby’s portion of the Cedar Partition to be 73,142m³ and therefore, Husby has already exceeded its portion of the amount of cedar that can be logged under the Cedar Partition by about 12,858m³.⁴³ If Husby logs the Cutblocks, they will exceed their portion of the Cedar Partition by about 37,794m³,⁴⁴ or about 152%. At Husby’s present and proposed rate of logging, the cedar supply at *St’alaa Kun* may be depleted in about 18-20 years.⁴⁵

³⁶ Lantin #1 Affidavit, paras. 30-32 [CHN Record, Vol. II, Tab 1, p. 10]; Russ #1 Affidavit, para. 17 [CHN Record, Vol. III, Tab 5, p. 7].

³⁷ Affidavit #1 of Nicholas Reynolds, made on May 18, 2018 (“**Reynolds #1 Affidavit**”), paras. 18, 21, 25, and Ex. “C” [CHN Record, Vol. IV, Tab 6, pp. 6-8 and Tab 5-F, p. 19].

³⁸ Reynolds #1 Affidavit, para. 25 [CHN Record, Vol. IV, Tab 6, p. 8]; *see also*, the First Affidavit of John Broadhead, para. 3, Ex. “A” [CHN Record, Vol. IV, Tabs 7, 7-A, pp. 51 and 53].

³⁹ Reynolds #1 Affidavit, paras. 20, 22, and Ex. “B” [CHN Record, Vol. IV, Tab 6, pp. 6-7 and Tab 5-F, pp. 17-18].

⁴⁰ Reynolds #1 Affidavit, para. 20 [CHN Record, Vol. IV, Tab 6, p. 7].

⁴¹ Reynolds #1 Affidavit, para. 15 [CHN Record, Vol. IV, Tab 6, p. 5], about 36% of the timber harvesting land base, regardless of age.

⁴² The First Affidavit of Tyler Bellis, made on May 24, 2018 (“**Bellis #1 Affidavit**”), paras. 16-17 [CHN Record, Vol. IV, Tab 10, pp. 281-282].

⁴³ Bellis #1 Affidavit, paras. 16-17 [CHN Record, Vol. IV, Tab 10, pp. 281-282].

⁴⁴ Bellis #1 Affidavit, paras. 16-17 [CHN Record, Vol. IV, Tab 10, pp. 281-282].

⁴⁵ Reynolds #1 Affidavit, paras. 20, 22, and Ex. “B” [CHN Record, Vol. IV, Tab 6, pp. 6-7 and Tab 5-F, pp. 17-18].

21. There are relatively small amounts of forests with cedar trees 20-140 years old in Haida Gwaii.⁴⁶ Restocking, or planting cedar seedlings has not reversed the amount of historical logging.⁴⁷ Cedar is slow growing, and assuming a rotation cycle of 100-150 years, there will follow a period of several decades in which there is no cedar available for commercial logging on Haida Gwaii.⁴⁸
22. The Solutions Table failed to reach consensus in respect of the Cutblocks due to the impending contribution of these Cutblocks to the overcutting of cedar.⁴⁹ In particular, the Haida members of the Solutions Table have repeatedly opposed such approvals since 2016.⁵⁰ The CHN senior representative and the Decision Maker discussed the absence of consensus at the Solutions Table in relation to these Cutblock applications; the CHN decision was to defer approval of the Cutblocks and road permits until Husby had issued a Cedar Management Strategy.⁵¹
23. Nonetheless, the District Manager approved CP223 in November, 2017 and CP224 in February, 2018.⁵² After these approvals, and very recently, Husby submitted a draft Cedar Management Strategy which has not yet gone to the Solutions Table. The draft does not align with the direction of the Chief Forester and has several shortcomings including a failure to mitigate a mid-term shortage of cedar.⁵³
24. The Vice President of Husby advised CHN that logging of the Cutblocks is imminent. CHN estimates that Husby will commence falling trees in the Cutblocks at or around the end of May, 2018.⁵⁴

Monumental Cedar

25. The CHN recently reviewed and audited the monumental cedar trees that Husby logged within cutblock Bil801, which is within CP223.⁵⁵ Husby identified only 11 monumental

⁴⁶ Reynolds #1 Affidavit, para. 14 [CHN Record, Vol. IV, Tab 6, p. 5].

⁴⁷ *Ibid.*

⁴⁸ Reynolds #1 Affidavit, paras. 20 and 24 [CHN Record, Vol. IV, Tab 6, pp. 6 and 8]. *See also*, the Chief Forester's rationale about the cedar falldown in Haida Gwaii, at p. 26 [CHN Record, Vol. III, Tab 5, p. 104].

⁴⁹ Russ #1 Affidavit, paras. 21-22 [CHN Record, Vol. III, Tab 5, pp. 7-8].

⁵⁰ *Ibid.*

⁵¹ Russ #1 Affidavit, paras. 29 [CHN Record, Vol. III, Tab 5, p. 9].

⁵² Russ #1 Affidavit, paras. 26, 28 [CHN Record, Vol. III, Tab 5, p. 9].

⁵³ Reynolds #1 Affidavit, paras. 32, 34-41 [CHN Record, Vol. IV, Tab 6, pp. 10-13].

⁵⁴ Russ #1 Affidavit, paras. 33-34 and Ex. "S" [CHN Record, Vol. III, Tab 5, pp. 11, 203, 204].

⁵⁵ Morigeau #1 Affidavit, paras. 14-24, 27, 29 [CHN Record, Vol. IV, Tab 8, pp. 67-77, 79, 81].

cedar trees.⁵⁶ The audit revealed that Husby had logged an additional 99 monumental cedar trees,⁵⁷ and possibly more to be confirmed when the audit is completed.⁵⁸ In addition, there are likely further monumental cedar trees logged in other recently logged cutblocks and other cutblocks slated for logging, which must be confirmed with an audit.⁵⁹

26. The HGLUOO contains a few exceptions for when monumental cedar trees can be cut,⁶⁰ but none of those exceptional circumstances have been met for the monumental cedar trees CHN identified in their audit of Bil801.⁶¹

The Province's Disrespect for Reconciliation

27. The CHN belief is that the Province's disregard for and disrespect of the spirit of the Protocol will undermine the good will and forward progress towards reconciliation between the Haida and the Province made over the last 17 years.⁶²
28. The CHN have consistently advocated for an amendment to the Protocol to provide a dispute resolution mechanism to deal with non-consensus applications.⁶³
29. It is CHN's view that should BC continue to approve applications unilaterally, without putting in the good faith and challenging work needed to reach consensus, their collaborative decision making and relationship will end.⁶⁴

⁵⁶ Morigeau #1 Affidavit, para. 15 [CHN Record, Vol. IV, Tab 8, p. 67].

⁵⁷ Morigeau #1 Affidavit, para. 29 [CHN Record, Vol. IV, Tab 8, p. 81].

⁵⁸ Morigeau #1 Affidavit, para. 29 [CHN Record, Vol. IV, Tab 8, p. 81].

⁵⁹ Morigeau #1 Affidavit, paras. 32-34 [CHN Record, Vol. IV, Tab 8, pp. 83, 85].

⁶⁰ Morigeau #1 Affidavit, para. 11 [CHN Record, Vol. IV, Tab 8, pp. 63, 65].

⁶¹ Morigeau #1 Affidavit, paras. 14, 32 [CHN Record, Vol. IV, Tab 8, pp. 67 and 83].

⁶² Lantin #1 Affidavit, para. 35 [CHN Record, Vol. II, Tab I, p. 11].

⁶³ Russ #2 Affidavit, paras 7-8 [CHN Record, Vol III, Tab 6, pp.207-208].

⁶⁴ Russ #2 Affidavit, paras 7-8 [CHN Record, Vol III, Tab 6, p. 209].

Part 3: LEGAL BASIS

The islands of Haida Gwaii are heavily forested. Spruce, hemlock and cedar abound. The most important of these is the cedar which, since time immemorial, has played a central role in the economy and culture of the Haida people. It is from cedar that they made their ocean-going canoes, their clothing, their utensils and the totem poles that guarded their lodges. The cedar forest remains central to their life and their conception of themselves.⁶⁵

The Haida's claim to title to Haida Gwaii is strong. . . .⁶⁶

1. The Haida assert title over the lands and waters of Haida Gwaii. An action for a declaration of title is presently before the BC Supreme Court.⁶⁷ A trial judge has been appointed, but a trial date has not been set.

2. A duty to accommodate asserted aboriginal rights and title arises prior to the judicial determination of those rights and that title.⁶⁸

Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.⁶⁹

3. The degree of consultation and accommodation is determined by an assessment of the strength of the assertion of title and the significance of the potential infringements of the right.⁷⁰ Where, as here, “a claim is particularly strong—for example, shortly before a court declaration of title—appropriate care must be taken to preserve the Aboriginal interest pending final resolution of the claim”.⁷¹
4. The Supreme Court of Canada found that the Haida Nation has a “*prima facie* case in support of Aboriginal title, and a strong *prima facie* case for the Aboriginal right to harvest red cedar”,⁷² and that “the strength of the case for both the Haida title and the Haida right to harvest red cedar, coupled with the serious impact of incremental strategic

⁶⁵ *Haida Nation*, para. 2.

⁶⁶ *Haida Nation*, para. 7.

⁶⁷ *Haida Nation v. British Columbia and Canada*, Action No. L020662, Vancouver Registry.

⁶⁸ *Haida Nation*, para. 38.

⁶⁹ *Haida Nation*, para. 50.

⁷⁰ *Haida Nation*, para. 43.

⁷¹ *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, para. 91; see also *Haida Nation*, para. 38.

⁷² *Haida Nation*, para. 71.

decisions on those interests, suggest that the honour of the Crown may well require significant accommodation to preserve the Haida interest pending resolution of their claims”.⁷³

5. The facts in this case are similar to that in the *Haida Nation v. Canada (Fisheries and Oceans)*. In that case, the Crown also recognized the scarcity of the resource in question (herring) but failed to delay extraction pending a recovery plan for the resource. The Federal Court reviewed the Haida reconciliation agreements, and the dual assertions of sovereignty, title and ownership of Haida Gwaii (which are also contained in the Protocol) and concluded that the Crown owed a heightened duty to the Haida Nation that was breached by the unilateral decisions of the Crown:

In my opinion, there is a heightened duty for DFO and the Minister to accommodate the Haida Nation in negotiating and determining the roe herring fishery in Haida Gwaii, given the existing Gwaii Haanas Agreement, the unique Haida Gwaii marine conservation area, the ecological concerns, and the duty to foster reconciliation with and protection of the constitutional rights of the Haida Nation. ... Canada’s unilateral implementation of the roe herring fishery in Haida Gwaii for 2015 compromises, rather than encourages, the mandated reconciliation process.⁷⁴

6. The approval of the Permits is in breach of the Province’s obligations to the Haida Nation, and unjustifiably infringes the Aboriginal Title and Rights of the Haida Nation, through the logging of cedar at a rate that is unsustainable and which risks damaging for generations the capacity of the forests to support the Haida Nation and the communities of Haida Gwaii.⁷⁵
7. The law recognizes that the Crown may undertake, “in the discharge of its public law duty, obligations ‘in the nature of a private law duty’ towards aboriginal people”.⁷⁶ Those duties may arise, not only in relation to reserve lands, but also “to include

⁷³ *Haida Nation*, para. 77.

⁷⁴ *Haida Nation v. Canada (Fisheries and Oceans)* 2015 FC 290, at paras. 53-54, citing *Canada (Public Works and Government Services) v. Musqueam First Nations*, 2008 FCA 214; leave to appeal refused [2008] SCC No. 374 at para 52; *Platinex v. Kitchenuhmaykoosib Inninwing First Nation*, [2006] 4 CNLR 152 at paras 79-80.

⁷⁵ Reynolds #1 Affidavit, para. 24 [CHN Record, Vol. IV, Tab 7, p. 8].

⁷⁶ *Wewaykum Indian Band v. Canada*, 2002 SCC 79, para. 74 (“*Wewaykum*”).

protection of the aboriginal people's pre-existing and still existing aboriginal and treaty rights within s. 35 of the *Constitution Act, 1982*".⁷⁷

8. The content of the Crown's fiduciary duty towards Indigenous peoples varies with the nature and importance of the interest sought to be protected.⁷⁸

In a substantive sense, the imposition of a fiduciary duty attaches to the Crown's intervention the additional obligations of loyalty, good faith, full disclosure appropriate to the matter at hand and acting in what it reasonably and with diligence regards as the best interest of the beneficiary."⁷⁹

9. The process whereby permits are issued over the objections of the Haida Nation and without the concurrence of the Solutions Table, the HGMC, or the Parties senior representatives, falls short of meeting the fiduciary obligations of the Crown in dealing with the cedar forests at *St'ala'a Kun*. While the Crown is obligated to take into account the interests of third parties,⁸⁰ it "could not, merely be invoking competing interests, shirk its fiduciary duty".⁸¹ Nor can the Crown delegate its responsibilities to third parties, hide behind legislation as a reason for failing to meet its obligations to the Haida Nation or delay protection of Aboriginal Rights and Title to provide industry with an opportunity to increase their activities.
10. There is a larger concern given the unique circumstances of Haida Gwaii, which is the consideration of the public interest in reconciliation achieved through negotiation and accommodation agreements as the preferred way to address the exercise and protection of Aboriginal rights. The Federal Court considered the *Haida Nation* case and said:

"[R]econciliation benefits the public interest.

To ignore or disregard such Court declarations and directions is not only to ignore the obligation to follow Courts' direction with respect to addressing Aboriginal rights, but also to lower the standing of the Courts in public regard by the disregard for such declarations and directions".⁸²

⁷⁷ *Wewaykum*, para. 78.

⁷⁸ *Wewaykum*, para. 86.

⁷⁹ *Wewaykum*, para. 94.

⁸⁰ *Wewaykum*, para. 96.

⁸¹ *Wewaykum*, para. 104.

⁸² *Ahousaht Indian Band et al. v. Minister of Fisheries and Oceans*, 2014 FC 197, at paras. 31-32.

11. In the case at bar, the Crown failed to satisfy its obligations to the Haida Nation by:
 - a. delaying the implementation of the Cedar Partition;
 - b. failing to limit the logging of cedar at *St' alaa Kum* to a sustainable level;
 - c. failing to give appropriate weight to both the need for the Solutions Table to reach consensus regarding the Permits and the significance of the Haida Nation's opposition to these Permits until an approved cedar management strategy is in place;
 - d. failing to adequately monitor the logging of Husby, in particular when it became clear in 2015 that Husby was logging cedar in excess of sustainable limits and established guidelines and further, that Husby was logging monumental cedars contrary to the HGLUOO and Husby's Forest Stewardship Plan.

12. The Province has disregarded and failed to respect the agreements it concluded with CHN, breached its commitments to reconciliation and a new relationship contained in the *Haida Gwaii Reconciliation Act*, and the *Kunst'aa guu-Kunst'aayah* Reconciliation Protocol; failed to accommodate the Haida's rights to a long-term supply of cedar, and failed to uphold the honour of the Crown and the trust-like or fiduciary duty owed by the Province to the Haida Nation.

13. The Haida Nation relies on the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, ss. 2, 3, 7 and 10; the *Haida Gwaii Reconciliation Act*, S.B.C. 2010, c. 17; the *Forest Act*, R.S.B.C. 1996, c. 157; and the *Constitution Act, 1982*, s. 35.

Part4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Peter Lantin, made on 17/May/2018
2. Affidavit #1 of Trevor Russ, made on 17/May/2018
3. Affidavit #1 of Nicholas Reynolds, made on 18/May/2018
4. Affidavit #1 of John Broadhead, made on 19/May/2018
5. Affidavit #1 of Gerry Morigeau, made on 20/May/2018
6. Affidavit #1 of Tyler Bellis, made on 24/May/2018
7. Affidavit #2 of Trevor Russ, made on 25/May/2018
8. Such further Affidavits that the Petitioners may rely upon.

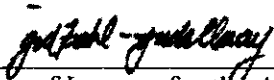
The petitioner(s) estimate(s) that the hearing of the petition will take one day.

This matter is not within the jurisdiction of a master.

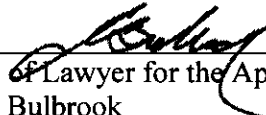
Dated: 28 - May - 2018



Signature of Lawyer for the Applicant
David Paterson, Paterson Law Corp.



Signature of Lawyer for the Applicant
G.L. Terri-Lynn Williams-Davidson
White Raven Law Corporation



Signature of Lawyer for the Applicant
Elizabeth Bulbrook
White Raven Law Corporation

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition

with the following variations and additional terms:

.....

.....

.....

Date: _____

Signature of Judge Master

The Lawyers for the Applicant are:

WHITE RAVEN LAW CORPORATION, whose office address and address for delivery is
16541 Upper Beach Road, Surrey, BC V3Z 9R6 Telephone 604.536.5541 Fax 604.536.5542.

PATERSON LAW OFFICE, whose office address and address for delivery is 316 – 15225 – 104
Avenue, Surrey, BC V3R 6Y8, Telephone 604.498.4001.

APPENDIX**THIS APPLICATION INVOLVES THE FOLLOWING:**

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/ change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other