COURT OF APPEAL FOR BRITISH COLUMBIA

Court of Appeal File No. CA49428

BETWEEN:

Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of the Smgyigyetm Gitxaała, and Gitxaała Nation

APPELLANTS
(Petitioners)

AND:

Chief Gold Commissioner of British Columbia, Lieutenant Governor in Council of British Columbia, Attorney General of British Columbia, Christopher Ryan Paul, and Oliver John Friesen

RESPONDENTS
(Petition respondents)

AND:

British Columbia Civil Liberties Association, First Nations Summit, Union of BC Indian Chiefs, BC Assembly of First Nations, Cheona Metals Inc., BC Human Rights Commissioner and Association for Mineral Exploration

INTERVENERS

Court of Appeal File Nos. CA49430

BETWEEN:

Ehattesaht First Nation and Chief Simon John in his capacity as Chief of the Ehattesaht First Nation on behalf of all members of the Ehattesaht First Nation

APPELLANTS
(Petitioners)

AND:

His Majesty The King in Right of British Columbia, as represented by the Chief Gold Commissioner; Attorney General of British Columbia; Privateer Gold Ltd.; Lieutenant Governor In Council of British Columbia; Andrew Lyons, Calvin Manahan, and Forest Crystal Ltd.

RESPONDENTS
(Petition respondents)

AND:

British Columbia Civil Liberties Association, First Nations Summit, Union of BC Indian Chiefs, BC Assembly of First Nations, Cheona Metals Inc., BC Human Rights Commissioner and Association for Mineral Exploration

INTERVENERS

**FACTUM OF THE INTERVENERS,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION,
FIRST NATIONS SUMMIT, UNION OF BC INDIAN CHIEFS,
AND BC ASSEMBLY OF FIRST NATIONS**

Sm'ooygit Nees Hiwaas, also known as Matthew Hill, on behalf of Smgyigyetm Gitxaala, and Gitxaala Nation

Ng Ariss Fong, Lawyers
800-555 West Georgia Street
Vancouver, BC V6B 1Z5
Telephone: 604-331-1155
Email: general@ngariss.com

Lisa C. Fong, KC
Counsel for Gitxaala appellants

Chief Gold Commissioner of British Columbia, Lieutenant Governor in Council of British Columbia, and Attorney General of British Columbia

Ministry of Attorney General
Indigenous Legal Relations
Natural Resources, Transportation and Indigenous Legal Group
Legal Services Branch
3rd Floor, 1405 Douglas Street
PO Box 9270 Stn Prov Govt
Victoria, BC V8W 9J5
Telephone: 250-356-8892
Email: leah.greathead@gov.bc.ca

Leah Greathead
Counsel for the respondents

Ehattesaht First Nation and Chief Simon John in his capacity as Chief of the Ehattesaht First Nation on behalf of all members of the Ehattesaht First Nation

Ratcliff LLP
500-221 West Esplanade
North Vancouver, BC V7M 3J3
Telephone: 604-988-5201
Email: lglowacki@ratcliff.com

Lisa Glowacki
Counsel for Ehattesaht appellants

Privateer Gold Ltd

Privateer Gold Ltd.
301-38 Fell Avenue
North Vancouver, BC V7P 3S2
Telephone: 604-998-1133
Email: Meredith.sargent@surespan.com

Meredith Sargent
Counsel for the respondent
Privateer Gold Inc.

Calvin Manahan, Andre Lyons, and Forest Crystal Ltd. (collectively "Forest Crystals")

Hunter Litigations Chambers
2100-1040 West Georgia Street
Vancouver, BC V6E 4H1
Telephone: 604-647-3533
Email: deeg@litigationchambers.com

Devin Eeg
Counsel for the respondent
Forest Crystals Ltd.

British Columbia Civil Liberties Association, First Nations Summit, Union of BC Indian Chiefs and BC Assembly of First Nations

Olthuis van Ert
1915-1030 West Georgia Street
Vancouver, BC V6E 2Y3
Telephone: 604-644-5845
Email: gvanert@ovcounsel.com

Gib van Ert and Ramisha Farooq
Counsel for the interveners

BC Human Rights Commissioner

White Raven Law Corporation
16541 Upper Beach Road
Surrey, BC V3Z 9R6
Telephone: 604-536-5541
Email: tlwd@whiteravenlaw.ca
Sarah.Khan@bchumanrights.ca
Eileen.Myrdahl@bchumanrights.ca

Terri-Lynn Williams-Davidson
Counsel for the intervener

Cheona Metals Inc.

Olthuis, Kleer, Townshend LLP
250 University Avenue, 8th Floor
Toronto, ON M5H 3E5
Telephone: 416-981-9330
Email: khille@oktlaw.com
jabell@oktlaw.com

Kevin Hille & Jesse Abell
Counsel for the intervener

Association for Mineral Exploration

Fasken LLP
2900 – 550 Burrard Street
Vancouver, BC V6C 0A3
Telephone: (604) 631 3131
Email: kocallaghan@fasken.com
sgeisterfer@fasken.com

Kevin O'Callaghan
Counsel for the intervener

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OPENING STATEMENT

In November 2021, the Legislature amended the *Interpretation Act* to add s. 8.1. Subsection (3) of that new section requires courts to construe every Act and regulation as being consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

The court below considered s. 8.1(3) of the *Interpretation Act* and purported to give effect to it. Yet the court failed properly to appreciate s. 8.1(3)'s role in British Columbia's ongoing efforts to ensure that the laws of British Columbia are consistent with the Declaration. Properly construed, s. 8.1(3) requires courts to consider relevant articles of the Declaration when interpreting existing laws. Courts must turn their minds to the Declaration's pertinent provisions and form a view of what they require in the context of the law or regulation before them. Having so informed themselves of the Declaration's requirements, courts must attempt to interpret that law or regulation consistently with the Declaration's requirements.

Where the law or regulation being interpreted can be construed consistently with the Declaration, courts must adopt that interpretation. Where, instead, the gulf between the Declaration's requirements and the terms of the enactment at issue is too great to be overcome by judicial interpretation—as is the case with the *Mineral Tenure Act*—courts must make that finding. Doing so will assist the Government and Legislature in their ongoing efforts, pursuant to s. 3 of the *Declaration on the Rights of Indigenous Peoples Act*, to identify inconsistencies between existing laws and the Declaration and remedy those inconsistencies, in cooperation and consultation with Indigenous peoples, through legislative amendments.

PART 1 – STATEMENT OF FACTS

1. The First Nations Summit, the Union of BC Indian Chiefs, the BC Assembly of First Nations, together the First Nations Leadership Council ("FNLC"), and the BC Civil Liberties Association (the "BCCLA") jointly sought leave to intervene in these appeals in order to address the interpretive significance of the United Nations Declaration on the Rights of Indigenous Peoples, UNGA Res 61/295, 2 October 2007 (the "Declaration") to the interpretation of the *Mineral Tenure Act*, RSBC 1996 c 292 ("MTA"), particularly in light of s. 8.1(3) of the *Interpretation Act*, RSBC 1996 c 238 and other statutory reforms aimed at ensuring the consistency of BC laws with the Declaration.

2. The FNLC and BCCLA take no position on the facts at issue in this appeal.

PART 2 – ISSUE ON APPEAL

3. The sole issue advanced by the FNLC and BCCLA in this appeal is: what is the correct interpretation and application of s. 8.1(3) of the *Interpretation Act*? The answer to that question requires s. 8.1(3) to be interpreted consistently with its text, context and purpose.

PART 3 – ARGUMENT

4. Section 8.1(3) of the *Interpretation Act* provides, "Every Act and regulation must be construed as being consistent with the Declaration."

5. Like all statutory provisions, s. 8.1(3) must be interpreted by applying the "modern principle" of statutory interpretation, that is, the words of the provision must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para. 117 quoting *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.

Approach taken by the court below

6. In the decision below, the Supreme Court (at para. 409) described s. 8.1(3) of the *Interpretation Act* as an "overlay" that now applies to statutory interpretation in British Columbia. Mr. Justice Ross held (at para. 416) that s. 8.1 required him "to construe the *MTA* in a manner that upholds (as opposed to abrogating) the Indigenous rights of the petitioners" and "to construe the Act in a manner that is consistent with" the Declaration. The learned judge concluded:

> [418] In my opinion, the application of s. 8.1 in this case does no more, and no less, than provide that overlay. Hence, when I assess whether the *MTA* is constitutionally valid, I must construe it in a manner that upholds the Aboriginal rights enshrined in s. 35 and set out in *UNDRIP*. [...]

7. While the court below purported to recognize s. 8.1(3) as a new consideration in statutory interpretation, Ross J's analysis of the questions before him included no consideration of those provisions of the Declaration relevant to the issues advanced by the appellants. In particular, Ross J did not cite, and appears not to have considered, arts. 26, 27, 29(1) and 32(2) of the Declaration, all of which are directly relevant to the appellants' challenges of the BC mineral tenure regime.

8. Article 26 of the Declaration affirms Indigenous peoples' rights to their traditional and currently held lands, territories and resources:

> **Article 26**
>
> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Importantly, this right is not limited to land in the narrow sense but includes land-related resources. Other Declaration provisions make clear that these include mineral resources.

9. Article 27 provides that Canada and other states shall establish and implement processes to recognize and adjudicate Indigenous peoples' rights to lands, territories and resources:

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

The pertinence of this provision for these appeals is that the MTA scheme impugned by the appellants is not one implemented "in conjunction with indigenous peoples", does not give "due recognition to indigenous peoples' laws, traditions, customs and land tenure systems", and does not (on the face of the MTA, at least) provide Indigenous peoples with a "right to participate in [the] process".

10. Article 29(1) affirms the right of Indigenous peoples to conservation and protection of the productive capacity of their lands, territories and resources:

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands and territories and

resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

…

This provision refers to lands, territories and resources generally, without limitation to currently held lands, territories and resources.

11. Finally, article 32(2) requires states to consult and cooperate with Indigenous peoples to obtain their free, prior and informed consent to projects affecting their lands, territories and resources, with specific reference to mineral resources:

Article 32

…

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

This provision makes clear that the state has a positive duty under the Declaration, distinct from and independent of s. 35 of the *Constitution Act, 1982*, to consult and cooperate with Indigenous peoples in respect of mineral exploitation. It also makes clear (in case there were any doubt) that "resources" includes mineral resources.

12. The court below gave no consideration to these provisions of the Declaration in its consideration of the MTA. Yet the court purported to give effect to the Legislature's instruction, in s. 8.1(3), that every Act be construed as being consistent with the Declaration. The FNLC and BCCLA submit that the court below did not, in fact, turn its mind to whether the MTA can be construed consistently with the Declaration. Rather, the court appears to have assumed that the MTA could be so construed, without considering the relevant articles of the Declaration. This was an error of law. Had the court below interpreted and applied s. 8.1(3) according to the modern approach to statutory

interpretation—in particular, had the court considered s. 8.1(3) in the context of s. 2(1)—it would have concluded that the MTA is fundamentally inconsistent with the Declaration.

Text (grammatical and ordinary sense) of s. 8.1(3)

13. The text of s. 8.1(3) is comprehensive ("Every Act and regulation") and imperative ("must be construed"). On its face, s. 8.1(3) is an instruction from the Legislature to the courts to construe laws "as being consistent with the Declaration". There is nothing uncertain or unambiguous about any part of this provision. Its grammatical and ordinary meaning is to require Declaration-consistent judicial interpretations of BC laws.

14. Such interpretations are, of course, impossible without judicial engagement with the Declaration itself. Judges cannot interpret a BC law or regulation consistently with the Declaration without reading the Declaration and forming a view about the meaning of its relevant provisions.

Legislative context of s. 8.1(3)

15. Three aspects of legislative context must be considered. These are: (i) the rest of the *Interpretation Act*, particularly s. 2(1); (ii) other BC laws concerning the Declaration, in particular the *Declaration on the Rights of Indigenous Peoples Act* SBC 2019 c 44 (the "DRIPA"); and (iii) the Declaration itself.

(i) Section 2(1) of the Interpretation Act

16. Section 2(1) of the *Interpretation Act* provides, "Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment".

17. This court has held that the contrary intention referred to in s. 2(1) "need not be found in the express words, but may be inferred from the scheme of the enactment, its legislative history and other circumstances which surround the use of the word in question": *Bank of Montreal v. Gratton* (1987) 45 DLR (4th) 290 (BCCA) at 293, 1987 CanLII 2436 at para. 11.

18. The court below did not cite s. 2(1) and appears to have given no consideration to its interplay with s. 8.1(3). This was an error. Section 8.1(3) must be understood in its entire context, including s. 2(1). The statutory requirement that courts interpret laws consistently with the Declaration cannot be applied without due regard to whether the enactment at issue (here, the MTA) can actually bear that interpretation.

19. Non-compliance with the Declaration should not be too readily inferred. The Legislature's clear intent—consistent with the Province's policy of establishing the Declaration as the foundation for Crown-Indigenous relations and reconciliation in British Columbia—is that the interpretive rules set out in the *Interpretation Act* be given effect by courts wherever possible. That said, s. 2(1) is a legislative recognition of the limits of judicial interpretation. A law that is blatantly inconsistent with the rights of Indigenous peoples as set out in the Declaration cannot be cured through judicial interpretation alone. In the present appeal, the MTA's strident disregard for Indigenous peoples' rights to their lands, territories and resources is significant in the s. 8.1(3) analysis.

20. Courts applying s. 8.1(3) will often be able to achieve Declaration-conforming interpretations of existing laws. Section 8.1(3) expresses the Legislature's strong intent that courts do so. There will be cases, however, where the stark contrast between the law at issue and the Declaration's requirements will make it impossible for courts to reach a conforming interpretation. Where consistent interpretation is not possible, s. 8.1(3), read together with s. 2(1), requires courts to acknowledge the inconsistency and to explain why the statutorily presumed conformity of BC laws with the Declaration is rebutted. The utility of such explanations becomes clear when one considers the next contextual factor, namely the DRIPA.

(ii) The Declaration on the Rights of Indigenous Peoples Act

21. British Columbia was the first Canadian jurisdiction to take legislative steps towards the implementation of the Declaration in domestic law. The first such step was the DRIPA.

22. Section 2 of the DRIPA sets out its purposes as follows:

(a) to affirm the application of the Declaration to the laws of British Columbia;

(b) to contribute to the implementation of the Declaration;

(c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

23. Section 3 of the DRIPA is an especially important contextual consideration for the interpretation of s. 8.1(3). It reads as follows: "In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration." This provision creates a statutory duty on the government to take steps ("all measures necessary") to ensure consistency between BC laws and the Declaration. Since the enactment of the DRIPA, the government has introduced, and the Legislature has passed, several amendments to existing laws aimed at aligning BC statutes with the Declaration's standards.[1] Section 8.1 of the *Interpretation Act* is one such amendment.

24. The Legislature's adoption, in the *Interpretation Act*, of a rebuttable statutory requirement that BC laws be construed consistently with the Declaration serves to advance the larger project, enunciated in DRIPA s. 3, of ensuring consistency between BC laws and the Declaration. By means of s. 8.1(3), the Legislature has appropriately involved the judiciary in this project. It has done so by requiring courts to interpret existing laws consistently with the Declaration where possible and, where consistent interpretation is not possible, to identify laws which cannot be so interpreted and which must therefore be amended pursuant to DRIPA s. 3. Section 8.1(3) gives the executive and legislative branches the benefit of the courts' expertise as interpreters and deciders of legal questions, while also recognizing the limits of the judicial function. In this way, s. 8.1(3)

[1] See, e.g.: Adoption Act RSBC 1996 c 5 and Child, Family and Community Service Act RSBC 1996 c 46 (both amended to be interpreted in accordance with the Indigenous self-government and self-determination rights recognized by the Declaration); Poverty Reduction Strategy Act SBC 2018 c 40 (requiring that the poverty reduction strategy reflect a commitment to the Declaration); Environmental Assessment Act SBC 2018 c 51 (defining the Environmental Assessment Office to include implementation of the Declaration among its responsibilities); Professional Governance Act SBC 2018 c 47 (charging the superintendent of professional governance with Declaration implementation responsibilities).

gives effect to the intention of the Legislature to achieve consistency between BC laws and the Declaration while maintaining an appropriate respect for the differing roles of our executive, legislative and judicial institutions.

(iii) The Declaration

25. The final contextual consideration is the Declaration itself.

26. The Declaration was adopted by the General Assembly of the United Nations in June 2007 following decades of negotiations between states and Indigenous peoples around the world. The Declaration is the latest in a line of UN human rights instruments dating back to the Universal Declaration of Human Rights 1948, GA Res 217 A (III), UN Doc A/810. Many of the rights set out in the Declaration resemble those set out in other UN human rights instruments. Many more, however, are specific to the circumstances, contexts and experiences of Indigenous peoples. Article 43 of the Declaration affirms that the rights recognized in it "constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world".

27. The Supreme Court of Canada has noted that both the Truth and Reconciliation Commission of Canada and the National Inquiry into Missing and Murdered Indigenous Women and Girls called on Canada to fully adopt and implement the Declaration as a framework for reconciliation: *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para. 80. The Government of Canada (the level of government responsible for the conduct of external affairs) affirmed Canada's unqualified support for the Declaration in May 2016. The DRIPA, s. 8.1 of the *Interpretation Act*, and other BC law reforms followed shortly thereafter.

Object and legislative intent of s. 8.1(3)

28. On its face, and when seen in its legislative context, the purpose of s. 8.1(3) is to promote the consistency of BC laws with the Declaration. Such consistency furthers BC's goal of achieving reconciliation with Indigenous peoples. Consistency is also required to ensure BC's performance of the promise Canada made to Indigenous peoples and to the

international community when it announced its unqualified support for the Declaration in 2016.

Conclusion: the effect of s. 8.1(3)

29. The FNLC and BCCLA agree with the conclusion of the court below (particularly at paras. 447, 450, and 463–465) that the Declaration is not yet fully implemented in BC law. Rather, the Government of British Columbia has undertaken, and the Legislature has endorsed, a process for implementing the Declaration in BC law over time.

30. Most of this process will be executive and legislative in nature, i.e., identifying (together with Indigenous peoples) statutes and regulations that require reform to achieve consistency with the Declaration, negotiating those reforms with Indigenous peoples (as per DRIPA s. 3), introducing the resulting bills in the Legislature, and enacting them through the usual legislative process.

31. That said, the effect of s. 8.1(3) of the *Interpretation Act* is to involve the judiciary—in a modest but important way—in this process. This is accomplished by requiring courts, where possible, to interpret existing laws consistently with the Declaration or, where that is not possible, to say so and explain how the law at issue is inconsistent with the Declaration's requirements. This explanation will assist the other branches of British Columbia's constitutional order in the process, required by DRIPA s. 3, of identifying and reforming laws that have yet to be brought into consistency with the Declaration.

32. While s. 8.1(3) does not create a new form of declaratory relief, its operation necessarily involves judicial determinations as to the consistency or inconsistency of BC laws with the Declaration. Where a party relies on the Declaration in the course of statutory interpretation, the court must consider the pertinence of the Declaration to the issue and, where it is pertinent, determine whether the provision at issue is consistent or inconsistent with the Declaration. This will require courts to engage with particular provisions of the Declaration. Over time, BC courts will become increasingly conversant in the Declaration and advance understandings of its provisions which are likely to be influential well beyond the province's borders.

PART 4 – NATURE OF ORDER SOUGHT

33. The FNLC and BCCLA seek no relief against any party and ask that no relief be granted against them.

All of which is respectfully submitted.

Dated at Vancouver this 4 July 2024.

Gib van Ert
Ramisha Farooq
Counsel for the interveners

LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
Bank of Montreal v. Gratton (1987) 45 DLR (4th) 290 (BCCA), 1987 CanLII 2436	5	17
Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42	1	5
Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65	1	5
Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5	8	27
Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27	1	5

ENACTMENTS

INTERPRETATION ACT

RSBC 1996 c 238

Application

2 (1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

Section 35 of Constitution Act, 1982 and Declaration

8.1 (1) In this section:

> "Declaration" has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;
>
> "Indigenous peoples" has the same meaning as in the Declaration on the Rights of Indigenous Peoples Act;
>
> "regulation" has the same meaning as in the Regulations Act.

(2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the Constitution Act, 1982.

(3) Every Act and regulation must be construed as being consistent with the Declaration.

DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT

[SBC 2019] CHAPTER 44

Purposes of Act

2 The purposes of this Act are as follows:

> (a) to affirm the application of the Declaration to the laws of British Columbia;
>
> (b) to contribute to the implementation of the Declaration;
>
> (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.

Measures to align laws with Declaration

3 In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration.