S 219179

No. _____

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

SM'OOYGIT NEES HIWAAS, also known as Matthew Hill, on behalf of the SMGYIGYETM GITXAAŁA, AND GITXAAŁA NATION

PETITIONERS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, CHRISTOPHER RYAN PAUL, OLIVER JOHN FRIESEN, GMR GLOBAL MINERAL RESOURCES CORP., and JOHAN THOM SHEARER

RESPONDENTS

PETITION TO THE COURT

TO: Her Majesty the Queen in right of the Province of British Columbia (the "Provincial Crown"), Christopher Ryan Paul, Oliver John Friesen, and Johan Thom Shearer

This proceeding is brought for the relief set out in Part 1 below, by the person named as petitioner in the style of proceedings above.

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

(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.

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: Vancouver Law Courts 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioner is: c/o Ng Ariss Fong, Lawyers Suite 800 – 555 West Georgia St. Vancouver, BC V6B 1Z5 ATT'N: Lisa C. Fong, Q.C. Fax number address for service (if any) of the petitioner(s): n/a E-mail address for service (if any) of the petitioner(s): general@ngariss.com
(3)	The name and office address of the petitioner's lawyers are: Ng Ariss Fong, Lawyers Suite 800 – 555 West Georgia St. Vancouver, BC V6B 1Z5 ATT'N: Lisa C. Fong, Q.C. and West Coast Environmental Law #700 – 509 Richards Street Vancouver, BC V6B 2Z6 ATT'N: Gavin Smith

Claim of the Petitioner

Part 1: ORDERS SOUGHT

1.1 A declaration the Provincial Crown has a duty to consult with Gitxaała (the "Duty to Consult") prior to granting mineral claims in lands over which Gitxaała has asserted aboriginal title (the "Title Lands").

1.2 A declaration the Provincial Crown did not fulfil the Duty to Consult before the chief gold commissioner granted the following mineral claims over Title Lands, and specifically over Banks Island:

a. five claims, consisting of

i. a 96.27-hectare claim, title number 1060541, initially registered on or about May 12, 2018 ("Claim #1");

ii. a 154.03-hectare claim, title number 1060731, initially registered on or about May 24, 2018 ("Claim #2");

iii. a 231.10-hectare claim, title number 1060750, initially registered on or about May 25, 2018 ("Claim #3");

iv. a57.78-hectare claim, title number 1060752, initially registered on or about May 25, 2018 ("Claim #4");

v. a 674.07-hectare claim, title number 1060849, initially registered on or about May 30, 2018 ("Claim #5")

(collectively the "2018 Claims");

b. one 57.96-hectare claim, title number 1064493, initially registered on or about November 15, 2018 (the "Centre Claim"); and

c. one 172.78-hectare claim, title number 1079580, initially registered on or about November 13, 2020 (the "2020 Claim");

(collectively, the "Claims").

1.3 The quashing or setting aside of each of the Claims.

1.4 Further or alternatively, a declaration that the Provincial Crown has failed to implement sections 6.2 and 6.3 of the *Mineral Tenure Act*, R.S.B.C. 1996, c. 292 (the "MTA") in a manner consistent with the honour of the Crown.

1.5 Further or alternatively, for the purposes of, or pursuant to, section 3 of the *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44 (the "DRIPA" or the "Declaration Act"),

a. a declaration that the Provincial Crown's system for granting mineral titles through the combined operation of the MTA, the regulations established under the MTA including the *Mineral Tenure Act Regulation*, BC Reg. 529/2004 (the "Regulation"), and the mineral titles online registry established pursuant to the MTA (the "Registry"), taken together (the "Mineral Grant Regime"), is not consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (the "Declaration"); and/or

b. a declaration that the Provincial Crown has a statutory duty to consult and cooperate with Gitxaała concerning measures necessary to ensure the laws of British Columbia, as they relate to mineral titles within Title Lands, are consistent with the Declaration.

1.6 An injunction, or an order of mandamus or prohibition, relating to s. 6.6(a) of the MTA, suspending the operation of the Registry concerning the granting of mineral titles over the Title Lands, subject to further order of the Court or an agreement between Gitxaała and the Provincial Crown.

1.7 Such further relief that this Honourable Court may deem just.

Part 2: FACTUAL BASIS

The parties

2.1 Gitxaała, also known as *Git lax m'oon*, are the "People of the Salt Water" whose ancient relationship with and inherent title to the Title Lands is set out in the *adaawx* (histories and stories) ("Gitxaała" or "the Gitxaała").

2.2 Gitxaała are an "aboriginal people" for the purposes of section 35(1) of the *Constitution Act*, 1982 ("s. 35").

2.3 Gitxaała Nation is a band under the *Indian Act*, R.S.C. 1985, c. 1-5 ("Gitxaała Nation").

2.4 Gitxaała have an integrated governance system consisting of the elected council of the Gitxaała Nation, and a hereditary table of the Smgyigyet (hereditary chiefs) and high-ranking men and women of the Gitxaała houses that makes decisions regarding Gitxaała territory and resources (the "Hereditary Table"). The Hereditary Table acts on behalf of Gitxaała with respect to aboriginal title and rights, and/or directs the Gitxaała Nation on such matters. The Hereditary Table has authorized Sm'ooygit Nees Hiwaas to act on behalf of the Smgyigyetm Gitxaała to bring this petition acting together with Gitxaała Nation.

2.5 The Smgyigyetm Gitxaała comprises the Chiefs of each one of the twenty-three Gitxaała *waap* (houses), under the authority of their hereditary names (titles or peerages), who hold and govern their respective house territories and who collectively form the hereditary system of Gitxaała governance under the *ayaawx*, or Gitxaała law.

2.6 For the purposes of the Declaration, Gitxaała are an Indigenous people holding inherent rights derived from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.

2.7 The Hereditary Table and the elected council of Gitxaala Nation are "Indigenous governing bodies" for the purposes of the Declaration Act.

2.8 The Respondent, Her Majesty the Queen in right of the Province of British Columbia, and its legal representative, the Attorney General of British Columbia, have an address for service c/o Deputy Attorney General, Ministry of Attorney General, P.O. Box 9290 Stn Prov Govt, Victoria, B.C. V8W 9J7 (the "Provincial Crown").

2.9 The Respondent, Christopher Ryan Paul has a registered mineral titles address at 335-1632 Dickson Ave Kelowna, British Columbia, V1Y 7T2, mineral titles Client ID 269478, and Free Miner Certificate Number 110255847 ("Mr. Paul"). Mr. Paul is a recorded holder of the 2018 Claims.

2.10 The Respondent, Oliver John Friesen has a registered mineral titles address at 14520 Mann Park Cr., White Rock, British Columbia, V4B 3A8, mineral titles Client ID 283562, and Free Miner Certificate Number 110261119 ("Mr. Friesen"). Mr. Friesen is a recorded holder of the 2018 Claims.

2.11 The Respondent, GMR Global Mineral Resources Corp. (BC0877731) has a registered mineral titles address at 715 West 68th Avenue, Vancouver, British Columbia, V6P 2T8 and Free Miner Certificate Number 110264117 ("GMR"). GMR is a recorded holder of the Centre Claim.

2.12 The Respondent, Johan Thom Shearer has a registered mineral titles address at 5-2330 Tyner Street, Port Coquitlam, British Columbia, V3C 2Z1, mineral titles Client ID 124452, and Free Miner Certificate Number 110262871 ("Mr. Shearer"). Mr. Shearer is a recorded holder of the 2020 Claim.

Aboriginal title and other rights relating to Banks Island

2.13 For thousands of years, since before contact with Europeans ("Contact") and since before and at the Imperial Crown's assertion of sovereignty over what is now British Columbia, in or about 1846 ("Asserted Crown Sovereignty"), Gitxaała have exclusively occupied, owned, governed, managed, used and harvested from their land and their marine areas under pre-existing Indigenous sovereignty and pursuant to Gitxaała laws, in the northern coast region that is Gitxaała traditional territory ("Gitxaała Territory" or the Title Lands). **Map A** to this Petition is a map of Gitxaała Territory.

2.14 Asserted Crown Sovereignty is and has always been subject to, *inter alia*, aboriginal rights which are now recognized and affirmed under Section 35, including the aboriginal title of Gitxaała to the Title Lands.

2.15 Gitxaała Territory, or the Title Lands, include Banks Island which is an island in the northern coast region on Hecate Strait, east of Haida Gwaii. The northern tip of Banks Island is located south of Prince Rupert, and just south of the village of Lach Klan (also known as Kitkatla) on Dolphin Island.

2.16 Banks Island has numerous areas of traditional use by and importance to Gitxaała. Such uses include but are not limited to fishing, hunting, trapping, intertidal harvesting, and habitat for culturally important species. Banks Island is known amongst Gitxaała as their "bread-basket" or "table", and its ecosystem is integral to the Gitxaała way of life. Banks Island is also adjacent to marine areas of spiritual significance to Gitxaała.

2.17 Gitxaała has never surrendered or ceded aboriginal title or other rights respecting, inter alia, Banks Island.

2.18 No other Indigenous nation disputes Gitxaała's aboriginal title or governance with respect to Banks Island, or makes a competing claim in that regard.

Crown knowledge

2.19 At all material times, Gitxaała has asserted aboriginal rights and title over Gitxaała Territory including Banks Island, including

a. aboriginal title, which includes rights to minerals and rights to exclusive possession, enjoyment, use and control;

b. aboriginal harvesting rights, which include rights to hunt, trap, and otherwise harvest resources; and

c. aboriginal rights of governance, which include rights to uphold Gitxaała laws

(collectively the "Gitxaała Title and Rights"), over the Title Lands.

2.20 At all material times, the Provincial Crown knew or ought to have known of Gitxaała Title and Rights relating to, *inter alia*, Banks Island. Without limiting the foregoing:

a. From about 1993 to about 2004 as part of the British Columbia treaty process the Tsimshian Tribal Council, of which Gitxaała was a member at that time, asserted aboriginal title and rights over, *inter alia*, Gitxaała Territory including Banks Island on Gitxaala's behalf.

b. The Provincial Crown has acknowledged Gitxaała's assertions of aboriginal title and rights in numerous agreements, including a 2017 Gitxaała Nation Forest & Range Consultation and Revenue Sharing Agreement (the "2017 Forest Agreement"), and the 2006 Sustainable Land Use Planning Agreement (the "2006 Land Use Agreement").

Mineral claims under the *Mineral Tenure Act*

2.21 The Mineral Grant Regime provides for acquisition of mineral claims through various legislative provisions including the following:

A mineral registry

a. a chief gold commissioner (the "Commissioner") may be appointed under the *Public Service Act* (pursuant to MTA s. 4(1));

b. the Commissioner must establish and maintain a "mineral titles online registry" (pursuant to MTA ss. 1 and 6.2(1)), and may establish, *inter alia*, requirements for "information that must be supplied to effect a registration", and any other matters or requirements for ensuring "proper functioning of the registry" (pursuant to MTA s. 6.2(2));

The registration of mineral claims

c. any person may, for a nominal fee, apply for and obtain a free miner certificate (pursuant to MTA s. 8(2));

d. a person with a free miner certificate (pursuant to MTA s. 7), meaning a "free miner" (pursuant to MTA s. 1), "may register a [mineral or placer] claim in accordance with the regulations" (pursuant to MTA s. 6.3) or as otherwise authorized by the Commissioner (pursuant to MTA s. 6.9);

e. in the mineral titles online registry established by the Commissioner (meaning the "registry" pursuant to MTA s. 1), registration of a claim may encompass up to 100 adjoining "cells", with each cell being a geographic area shown on a map of British Columbia for the purpose of the Registry (pursuant to Regulation ss. 1 and 4(1) and the *Mineral Title Online Grid Regulation*, B.C. Reg. 530/2004 (the "Grid Regulations"));

f. the Lieutenant Governor in Council may make regulations regarding a broad range of matters (pursuant to MTA s. 65(1), (2) and (2.1)), and the Commissioner may make regulations respecting mineral reserves (pursuant to MTA s. 22(1) and (2));

No requirement for consultation by the Provincial Crown

2.22 At all material times the Provincial Crown has operated the Registry in a manner that permits free miners to automatically acquire mineral claims upon registration online.

2.23 Neither the Commissioner nor the Lieutenant Governor in Council has made consultation with Indigenous peoples like Gitxaała or others a pre-condition for the Commissioner accepting and registering mineral claims over the Title Lands, or other lands over which Indigenous peoples assert aboriginal title or other rights.

The registration of the Claims on Banks Island

2.24 In or about May 2018, the Commissioner accepted and registered the 2018 Claims over Title Lands on Banks Island. In or about 2019 and 2020, the 2018 Claims were transferred to and owned by WEM Western Energy Metals Ltd. In or about February 2021, the 2018 Claims became owned by Mr. Paul and Mr. Friesen.

2.25 In or about November 2018, the Commissioner accepted and registered the Centre Claim over Title Lands on Banks Island. The Centre Claim is currently owned by GMR.

2.26 In or about November 2020, the Commissioner accepted and registered the 2020 Claim over Title Lands over Banks Island. The 2020 Claim was initially registered to, and is currently owned by, Mr. Shearer. **Map B** to this Petition is a map of Banks Island marked with the 2018 Claims, the Centre Claim, and the 2020 Claim.

Rights granted to recorded holders

2.27 The Mineral Grant Regime operates to immediately grant various rights to recorded holders of mineral claims, including mineral property rights, rights to convert their mineral claims into mining leases, and exploration rights:

Grants of mineral ownership rights

a. A person who registers a claim becomes a recorded holder (pursuant to MTA s. 1).

b. A claim expires one year after it is recorded or registered, but a recorded holder may indefinitely continue to hold the claim from year to year by doing exploration and development, or paying fees instead of such activity pursuant to the Regulation (pursuant to MTA s. 29 and Regulation ss. 7-11).

c. Subject to the MTA, a recorded holder of a claim is entitled to

   i. "those minerals or placer minerals… that are held by the government and that are situated vertically downward from and inside the boundaries of the claim" (pursuant to MTA s. 28(1));

   ii. transfer ownership of the claim to another person (pursuant to MTA s. 6.34);

   iii. statutory compensation if the claim is expropriated under the *Park Act*, R.S.B.C. 1996, c. 344 (pursuant to, *inter alia*, MTA s. 17.1); and

   iv. compensation at common law in the event of a taking of a claimholder's rights in the mineral claims in circumstances other than those set out in MTA s 17.1 (*Rock Resources Inc.* v *British Columbia* (2003) 15 BCLR (4^{th}) 20)

(the "Initial Ownership Rights").

d. A recorded holder of a claim immediately receives a right to convert a claim into a mining lease, at their option, subject only to the holder satisfying specific administrative requirements and paying a prescribed fee, after which the Commissioner "must" issue a mining lease pursuant to MTA s. 42(4):

   i. the mining lease may be for an initial term of up to 30 years (pursuant to MTA s. 42(1));

   ii. the recorded holder may renew the mining lease for at least one further term of up to 30 years (pursuant to MTA s. 42(5));

   iii. the lease is "an interest in land and conveys to the lessee the minerals… within and under the leasehold…" together with "the same rights that the lessee held as the recorded holder" (pursuant to MTA s. 48(2)); and

   iv. a person "may not challenge the validity of the lease in any court unless that person establishes that the lease was obtained through fraud" (pursuant to MTA s. 51)

(collectively the "Lease-related Rights").

Grants of exploration rights

e. A recorded holder of a claim immediately receives a right to, *inter alia*,

   i. "use, enter and occupy the surface of a claim or lease for the exploration and development or production of minerals, and all related operations," subject only to a restriction against "mining activity" unless the recorded holder obtains a permit under section 10 of the *Mines Act* (pursuant to MTA s. 14(1) and (2)), and

   ii. produce up to 1,000 tonnes of ore in a year from each cell in a cell claim (pursuant to the Regulation s. 17(1))

(collectively the "Exploration Rights").

f. The Provincial Crown has published guidance that the Exploration Rights, and specifically the exploration activities that may generally be undertaken under the MTA without a permit under the *Mines Act*, include, *inter alia*,

   i. airborne geophysical surveying,

   ii. baseline data acquisition,

   iii. ground geophysical surveying,

   iv. establishment of grid lines,

v. geological and geochemical (soil or rock) sampling conducted using hand-held tools,

vi. pitting, trenching, drilling, or channel cutting using hand-held tools, to create pits and trenches of up to 1.2 metres in depth, and

vii. occupying tents, trailers or campers while undertaking exploration onsite.

Adverse impacts on aboriginal title and/or other aboriginal rights

2.28 Grants of Initial Ownership Rights, or Lease-related Rights, may adversely affect or adversely impact Gitxaała Title and Rights, including aboriginal title over minerals and aboriginal rights of governance or self-determination, by *inter alia*

a. granting, to third persons, mineral rights, and/or options to acquire exclusive mineral rights, inconsistent with

i. future and/or present enjoyment of aboriginal title, including aboriginal ownership of minerals, and rights to exclusive possession, occupation, and enjoyment of Title Lands;

ii. future and/or present enjoyment of aboriginal rights to manage Gitxaała Territory and decide on the uses to which Title Lands are put; and

b. constituting a strategic, higher level decision that, *inter alia*, determines areas of Gitxaała Territory open to mineral exploration, authorizes third person investments in exploration activities, and opens specific areas of Title Lands to further, incremental decision-making by the Provincial Crown that has potentially serious impacts on Gitxaała Title and Rights.

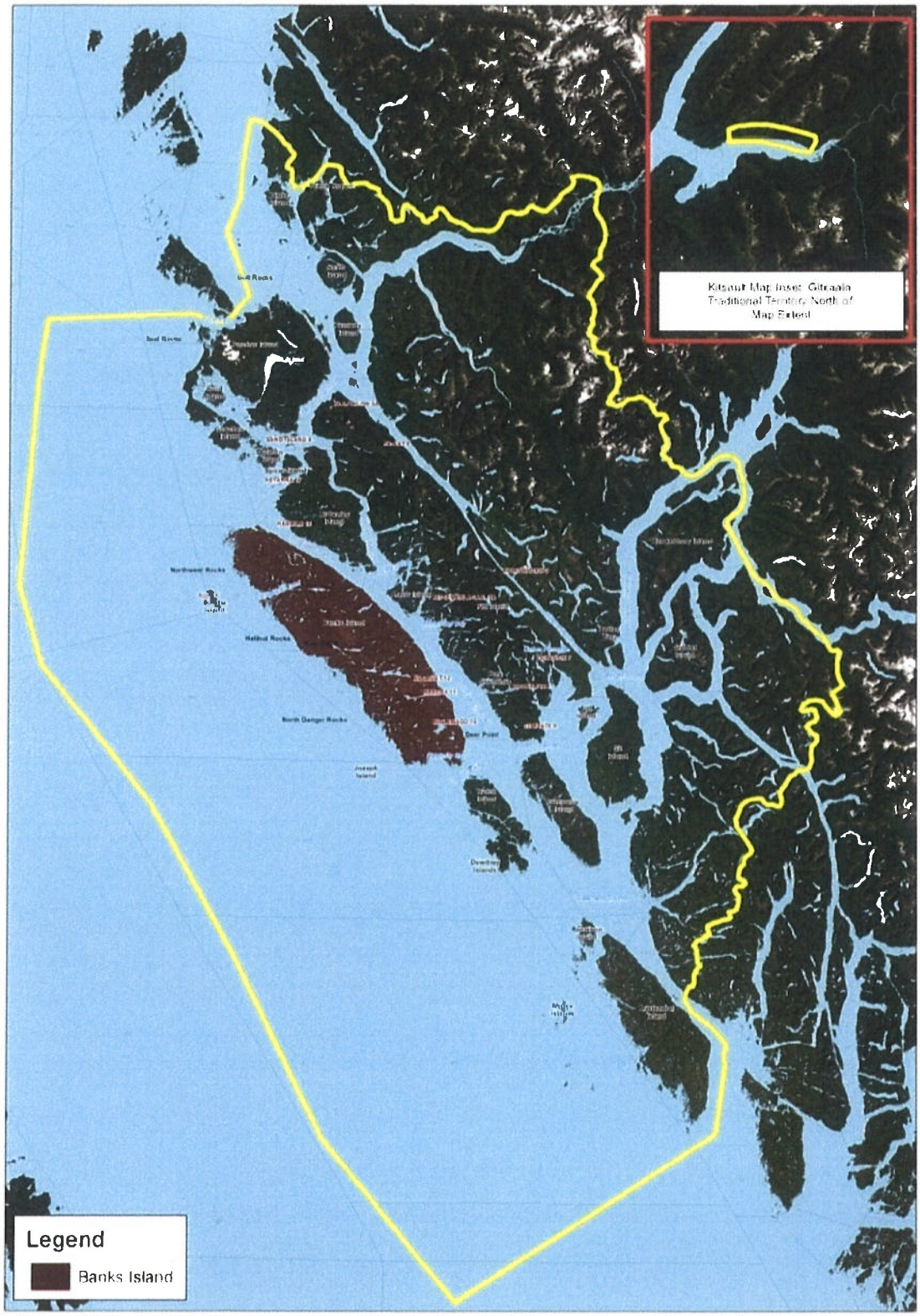
2.29 Grants of Initial Ownership Rights, Lease-related Rights, and Exploration Rights set the stage for further, incremental decision-making by the Provincial Crown, including decisions to allow mining activities respecting minerals subject to mineral claims that may adversely affect or adversely impact Gitxaała Title and Rights, including aboriginal harvesting rights.

2.30 Gitxaała has had past experience, specifically on Banks Island, with adverse impacts arising from Crown decisions relating to mineral claims, and resulting mining operations. In 2014 the Provincial Crown converted a mineral claim into a lease and granted a mining permit to Banks Island Gold Ltd. ("B.I. Gold"), resulting in the operation of the Yellow Giant mine on Banks Island. While operating its Yellow Giant mine in 2015, B.I. Gold discharged effluent and tailings which polluted waterways in Banks Island. After the discharges, Gitxaała identified leachable metal contaminants at mine sites, and Gitxaała refrained from harvesting in surrounding areas.

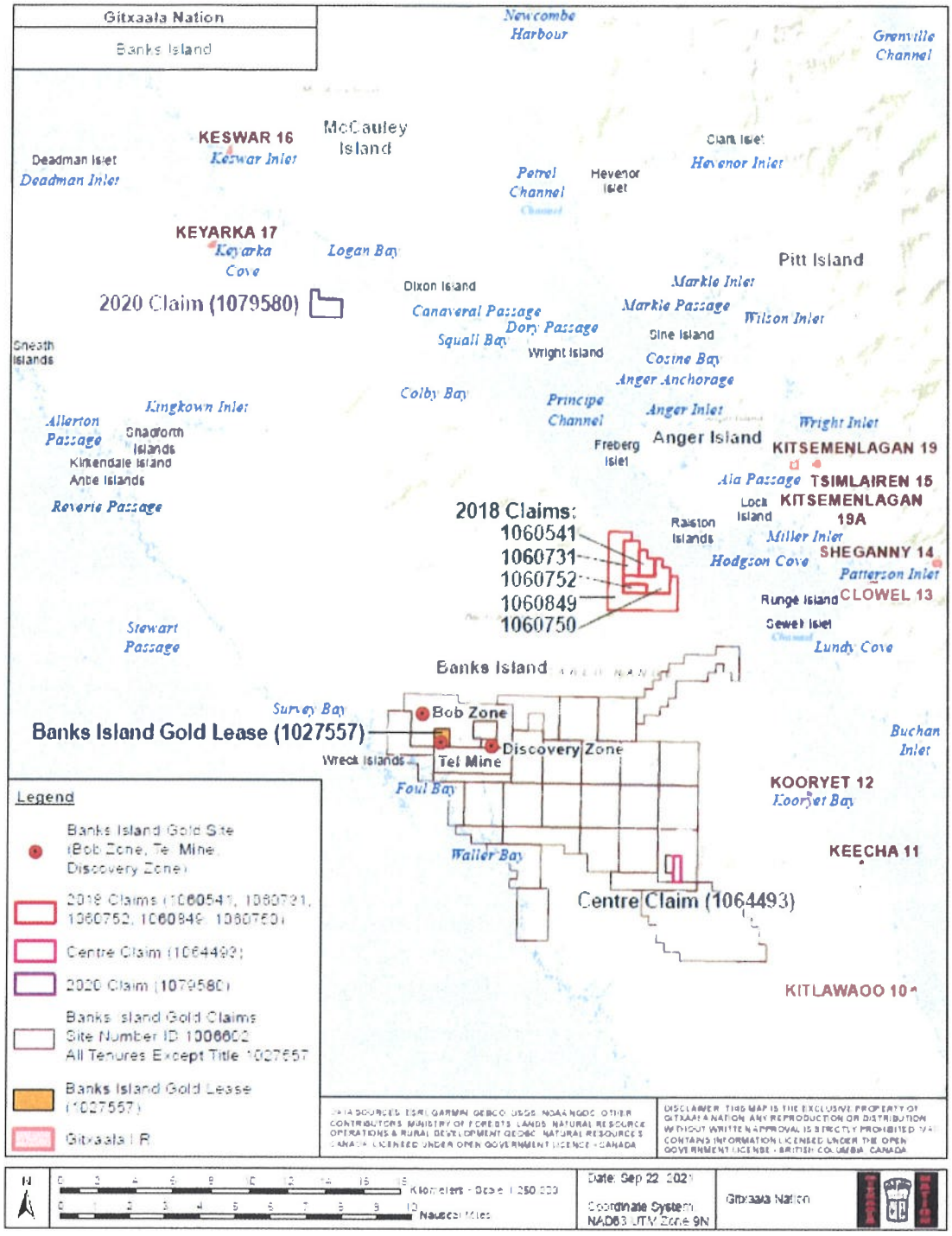
No consultation with Gitxaała

2.31 The Provincial Crown did not consult with Gitxaała prior to granting the Claims.

2.32 Map A and B, which are components of Part 2, follow on the next two pages:



Gitxaala Nation		Prepared For: Gitxaala Environmental Monitoring	Prepared By: MNP
Traditional Territory with Banks Island Emphasized		Date: 04/11/2020	Figure Number: 2
		Map Information:	


Gitxaala Nation
Banks Island
Newcombe Harbour
Grenville Channel
KESWAR 16
Keswar Inlet
McCauley Island
Deadman Islet
Deadman Inlet
Clark Islet
Hevenor Inlet
Petrel Channel
Hevenor Islet
KEYARKA 17
Keyarka Cove
Logan Bay
Pitt Island
2020 Claim (1079580)
Dixon Island
Markle Inlet
Canaveral Passage
Markle Passage
Wilson Inlet
Dory Passage
Squall Bay
Sine Island
Wright Island
Cosine Bay
Sheath Islands
Anger Anchorage
Colby Bay
Principe Channel
Anger Inlet
Wright Inlet
Kingkown Inlet
Allerton Passage
Shadforth Islands
Kitkendale Island
Anbe Islands
Freberg Islet
Anger Island
KITSEMENLAGAN 19
Aia Passage
TSIMLAIREN 15
Lock Island
KITSEMENLAGAN 19A
Reverie Passage
2018 Claims:
1060541
1060731
1060752
1060849
1060750
Raiston Islands
Miller Inlet
Hodgson Cove
SHEGANNY 14
Patterson Inlet
Runge Island
CLOWEL 13
Sewell Islet
Lundy Cove
Stewart Passage
Banks Island
Survey Bay
Bob Zone
Banks Island Gold Lease (1027557)
Discovery Zone
Tel Mine
Wreck Islands
Buchan Inlet
Foul Bay
KOORYET 12
Kooryet Bay
Waller Bay
KEECHA 11
Centre Claim (1064493)
KITLAWAOO 10
Legend
Banks Island Gold Site (Bob Zone, Tel Mine, Discovery Zone)
2018 Claims (1060541, 1060731, 1060752, 1060849, 1060750)
Centre Claim (1064493)
2020 Claim (1079580)
Banks Island Gold Claims Site Number ID: 1006602 All Tenures Except Title 1027557
Banks Island Gold Lease (1027557)
Gitxaala I.R.
DISCLAIMER: THIS MAP IS THE EXCLUSIVE PROPERTY OF GITXAALA NATION. ANY REPRODUCTION OR DISTRIBUTION WITHOUT WRITTEN APPROVAL IS STRICTLY PROHIBITED. IT CONTAINS INFORMATION LICENSED UNDER THE OPEN GOVERNMENT LICENSE - BRITISH COLUMBIA. CANADA
Kilometers - Scale 1:250,000
Nautical Miles
Date: Sep 22, 2021
Coordinate System: NAD83 UTM Zone 9N
Gitxaala Nation

Part 3: LEGAL BASIS

3.1 To the extent any statement in Part 2 of this Petition constitutes a statement of law, or a statement of mixed fact and law, that statement is adopted as also forming a component of Part 3 of the Petition.

A. The Provincial Crown's Duty to Consult

3.2 The Commissioner's grant of the Claims to the initial recorded holders constituted Crown conduct with respect to Title Lands for which the Provincial Crown owed Gitxaała the Duty to Consult about potential adverse impacts of the conduct on Gitxaała Title and Rights.

3.3 By virtue of statutory provisions including but not limited to the following, the Commissioner has discretionary power to ensure or require that the constitutional imperative of consultation and accommodation is carried out prior to the granting of a mineral claim:

a. the Commissioner is mandated and empowered to "establish and maintain a mineral titles online registry for the purposes of registrations respecting claims, leases and notices" – MTA s. 6.2(1);

b. the Commissioner may "establish requirements for information that must be supplied to effect a registration" – MTA s. 6.2(2)(a);

c. the Commissioner may "establish any other matter or requirement in order to ensure proper functioning of the registry" – MTA s. 6.2(2)(b);

d. the Commissioner may suspend functions of the registry if "satisfied that circumstances are such that it is not practicable to provide those functions" – MTA s. 6.6(a);

e. the Commissioner may establish mineral reserves by regulation, "[d]espite any other provision of this Act", which may *inter alia* "prohibit a free miner from registering a mineral title on land covered by the mineral reserve", or "permit the registering of a mineral title under circumstances and subject to the limitations contained in it, despite any provision of this Act";

f. nothing in the MTA or the Regulation imposes a mandatory, non-discretionary duty on the Commissioner to grant a mineral claim.

3.4 The Lieutenant Governor in Council has statutory power to ensure or require that the constitutional imperative of consultation and accommodation is carried out prior to the granting of a mineral claim, by virtue of the power to make regulations respecting matters including but not limited to the following:

a. "methods by which mineral rights are acquired" – MTA s. 65(2)(m);

b. "who is eligible to use the registry to register a claim" – MTA s. 65(2.1)(g);

c. "registration of cell claims" – MTA s. 65(2.1)(h);

d. "the effect of registration" – MTA s. 65(2.1)(k);

e. "information required to effect a registration" – MTA s. 65(2.1)(l);

f. "restrictions and prohibitions on registration" – MTA s. 65(2.1)(p).

3.5 The Petitioner expressly pleads and relies on common law precedents and principles relating to the honour of the Crown and the duty to consult of *inter alia* the Provincial Crown, including but not limited to the following principles:

a. the honour of the Crown is a foundational principle that arises from the Crown's assertion of sovereignty over Indigenous peoples, and recognizes that the tension between the Crown's assertion of sovereignty and the pre-existing sovereignty, rights and occupation of Indigenous peoples creates a "special relationship" that requires the Crown to act honourably in its dealings (e.g., *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40 ("*Mikisew Cree*") at para. 21);

b. the honour of the Crown recognizes that, "Aboriginal peoples were here first, and they were never conquered" and that when the Crown claimed sovereignty over Canadian territories, it did so in the face of pre-existing aboriginal sovereignty and territorial rights (e.g., *Manitoba Metis Federation Inc. v. Canada (Attorney General),* 2013 SCC 14 ("*Manitoba Metis*") at para. 67);

c. the "underlying purpose" of the honour of the Crown is to facilitate reconciliation, for example by promoting just settlements (*Mikisew Cree* at para. 22), which "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty" (e.g., *Haida Nation v. British Columbia (Minister of Forests),* 2004 SCC 73 ("*Haida Nation*") at para. 20);

d. the honour of the Crown is always at stake in its dealings with aboriginal peoples and binds the Crown *qua* sovereign (e.g., *Haida Nation* at para. 16; *Mikisew Cree* at para. 22);

e. the honour of the Crown is a constitutional principle (e.g., *Mikisew Cree* at para. 24; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 ("Beckman") at para. 42);

f. the honour of the Crown gives rise to different duties in different circumstances (e.g., *Haida Nation* at para. 18);

g. the honour of the Crown requires that potential rights embedded in claims by aboriginal peoples be determined, recognized, and respected, pursuant to s. 35 of

the Constitution Act, 1982 (e.g., *Haida Nation* at para. 25; *Manitoba Metis* at para. 76);

h. the honour of the Crown gives rise to the duty to consult and accommodate, which arises when, *inter alia*, "the Crown has knowledge, real or constructive, of the potential existence of the aboriginal right or title and contemplates conduct that might adversely affect it" (e.g., *Haida Nation* at para. 35);

i. aboriginal title includes mineral rights (e.g., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 122; *Ross River Dena Council v. Government of Yukon*, 2012 YKCA 14 ("*Ross River 2012*") at para. 32);

j. transferring mineral rights to third parties is Crown conduct "that is inconsistent with the recognition of aboriginal title" (e.g., *Ross River 2012* at para. 32); and

k. "[s]tatutory regimes that do not allow for consultation and fail to provide any other equally effective means to acknowledge and accommodate aboriginal claims are defective and cannot be allowed to subsist" (*Ross River 2012* at para. 38).

B. The Provincial Crown's failure to fulfil the Duty to Consult

3.6 Neither the Commissioner, nor the Lieutenant Governor in Council, have used their statutory powers to ensure or require that the constitutional imperative of consultation and accommodation be carried out prior to the Provincial Crown granting mineral claims. Rather, at all material times the Provincial Crown has operated the Registry in a manner that permits free miners to automatically acquire mineral claims upon registration online.

3.7 The Provincial Crown failed to fulfil the Duty to Consult prior to granting the Claims over Title Lands.

C. The Provincial Crown's conduct is inconsistent with the honour of the Crown

3.8 The Duty to Consult arises from the honour of the Crown, which mandates, *inter alia*, consultation with Gitxaała before the Crown grants mineral claims in Title Lands. By operating the Registry in a manner that permits free miners to automatically acquire mineral claims, the Provincial Crown failed to implement sections 6.2 and 6.3 of the MTA in a manner consistent with the honour of the Crown, and thereby granted mineral claims over Title Lands, including Initial Ownership Rights, Lease-related Rights, and/or Exploration Rights, without the Provincial Crown having first fulfilled the Duty to Consult.

D. The registration of the Claims and associated grants must be quashed

3.9 On the basis that the Provincial Crown granted the Claims without having fulfilled the Duty to Consult, the grant of each of the Claims must be quashed or set aside.

E. The honour of the Crown is informed by rights under the Declaration

3.10 The honour of the Provincial Crown, which defines the content of the Duty to Consult, was informed by the rights set out in the Declaration at all material times, and further or alternatively, at all times after the Provincial Crown enacted the Declaration Act on or about November 28, 2019.

3.11 The Petitioners plead and rely on the Declaration Act, which provides in part as follows:

> Interpretation
>
> 1 … (4) Nothing in this Act is to be construed as delaying the application of the Declaration to the laws of British Columbia.
>
> 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.

3.12 The Petitioners plead and rely on, *inter alia*, s. 8 of the *Interpretation Act*.

3.13 The phrase, "laws of British Columbia" includes the common law of British Columbia, including how the common law interprets the content of the honour of the Provincial Crown.

F. The Mineral Grant Regime is inconsistent with the Declaration

3.14 The Petitioners plead and rely on the Declaration, which is also included as the Schedule to the Declaration Act. Pursuant to Preambular paragraph 7, the United Nations General Assembly has proclaimed the Declaration in part to recognize "the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources." Pursuant to Article 43 of the Declaration, the rights recognized therein constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world,

including the inherent rights of Indigenous peoples to their lands, territories and resources and to self-determination.

3.15 The Mineral Grant Regime is inconsistent with various articles and precepts of the Declaration, including *inter alia*:

a. Preambular paragraph 4, which affirms "that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust," in that the Crown's asserted rights to minerals in Title Lands and asserted authority to grant them to third parties is based in whole or in part upon outdated doctrines such as the principle or doctrine of discovery as applied to North America, under which "discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession", and pursuant to which "the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency": *Johnson v. M'Intosh*, 21 U.S. 543 (1823) at 573, applied in *Guerin v. Canada*, [1984] 2 S.C.R. 335 at para. 88.

b. Articles 3 and 4, which provide *inter alia* that, "Indigenous peoples have the right to self-determination," and in exercising that right, "have the right to autonomy or self-government in matters relating to their internal and local affairs," in that the Mineral Grant Regime fails to uphold Gitxaała's right to self-determination and by virtue of that right, their right to freely pursue their economic, social and cultural development.

c. Article 8 (2) which provides *inter alia* that, "States shall provide effective mechanisms for prevention of, and redress for: … (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources", in that the Mineral Grant Regime not only fails to prevent, but specifically enables action, namely the registration of mineral claims, which has the aim or effect of dispossessing Gitxaała of their lands, territories or resources, and in particular rights to minerals in Title Lands.

d. Article 12(1), which provides *inter alia* that, "Indigenous peoples have… the right to maintain, protect, and have access in privacy to their religious and cultural sites", in that the Mineral Grant Regime, in conjunction with a recorded holder's right to enter lands under MTA section 11, fails to uphold Gitxaała's right to maintain, protect, and have access in privacy to their religious and cultural sites.

e. Article 18, which provides *inter alia* that, "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights…", in that the Mineral Grant Regime purports to grant Initial Ownership Rights, Lease-related Rights and Exploration Rights in the Title Lands without participation of Gitxaała.

f. Article 19, which provides that, "States shall consult and cooperate with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them", in that the Provincial Crown established and continues to implement the Mineral Grant Regime without consultation or cooperation with Indigenous peoples concerned such as Gitxaała.

g. Article 23, which provides *inter alia* that, "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development," in that the Mineral Grant Regime adversely affects Gitxaała's right to determine and develop priorities and strategies for exercising their right to development, including to develop or not develop their mineral resources.

h. Article 26, which provides that,

> "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"; and
>
> "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";

in that the Mineral Grant Regime:

i. purports to dispossess Gitxaała of their rights to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired;

ii. undermines or limits the right of Gitxaała 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; and

iii. fails to give legal recognition and protection to the lands, territories and resources of Gitxaała.

i. Article 29, which provides *inter alia* that, "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources", in that the Mineral Grant Regime, in conjunction with section 14(5) of the MTA:

i. exempts Title Lands subject to mineral claims from certain existing or future provincial conservation measures; and

ii. undermines or limits Gitxaała's ability to implement conservation measures in Title Lands

contrary to the right of Gitxaała to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.

j. Article 32, which provides *inter alia* that,

> "1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources"; and
>
> "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 and exploitation of mineral, water or other resources";

in that the Mineral Grant Regime

i. adversely affects the right of Gitxaała to determine and develop priorities and strategies for the development or use of their lands or territories and other resources; and

ii. enables the acquisition of mineral claims in Title Lands without consultation or cooperation with, or consent of, Gitxaała.

k. Article 46, which provides inter alia, that,

> "2. … The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society",

in that the Mineral Grant Regime is not *inter alia* strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3.16 The Petitioners seek a declaration that the Mineral Grant Regime is inconsistent with the Declaration for purposes of section 3 of the Declaration Act.

3.17 The Petitioners plead and rely on the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 (the "Federal Declaration Act"), including the following provisions or aspects of the Federal Declaration Act:

a. Pursuant to section 4(a), the Federal Declaration Act affirms the Declaration as "a universal international human rights instrument with application in Canadian law".

b. Pursuant to Preambular paragraph 2, Parliament confirms that "the rights and principles affirmed in the Declaration constitute the minimum standards for the survival, dignity and well-being of Indigenous peoples of the world, and must be implemented in Canada."

c. Pursuant to Preambular paragraph 7, Parliament confirms that Indigenous peoples have suffered historic injustices as a result of, among other things, colonization and dispossession of their lands, territories and resources.

d. Pursuant to Preambular paragraph 9, Parliament confirms that the doctrines of discovery and terra nullius "are racist, scientifically false, legally invalid, morally condemnable and socially unjust".

H. A statutory duty to consult under the Declaration Act

3.18 Section 3 of the Declaration Act requires, in the event of any inconsistency between the laws of British Columbia and the Declaration, consultation and cooperation by the provincial government with the Indigenous peoples of British Columbia, including Gitxaała, to ensure the laws of British Columbia are consistent with the Declaration.

3.19 The Petitioners seek a declaration that the Provincial Crown has a statutory duty to consult and cooperate with Gitxaała concerning measures necessary to ensure the laws of British Columbia, as they relate to mineral titles within Title Lands, are consistent with the Declaration.

Part 4: MATERIALS TO BE RELIED ON

4.1 Affidavit #1 of Nees Hiwaas, also known as Matthew Hill, made October 21, 2021;

4.2 Affidavit #1 of Sm'ooygit Inta'Wii Waap, also known as Larry Bolton, made October 21, 2021;

4.3 Affidavit #1 of Jeannette Moody, made October 21, 2021;

4.4 Affidavit #1 of Samantha Wagner, made October 21, 2021;

4.5 Affidavit #1 of Dr. Charles Menzies, made October 25, 2021;

4.6 Affidavit #1 of Germaine Conacher, made October 21, 2021;

4.7 Affidavit #1 of Michael Lee Ross, made October 20, 2021;

4.8 Such further materials of which counsel may advise.

The petitioner estimates that the hearing of the petition will take 2 days.

October 25, 2021
Date

Signature of
[ ] petitioner [X] Lawyer for petitioner

Ng Ariss Fong, Lawyers

fn Per: Lisa C. Fong, Q.C.

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