ORAL SUBMISSION OF THE INTERVENOR

THE UNION OF BC INDIAN CHIEFS

[Wednesday, April 28, 2021 – Time Allowed: 20 minutes]

Good day Chief Justice Strathy, and Justices. My Scottish/Irish/Canadian name is Halie Bruce – no relation that I know of to Colonel Bruce referred to throughout this hearing. My ancestral Namgis/Kwakwaka'wakw name is Kwanxwa'logwa which means Woman Thunder.

I am honoured to live and work in Sto:lo Nation territory and to represent the intervenors, the Union of British Columbia Chiefs, which lends the unique perspective of the Indigenous First nations of BC where there have been no historical treaties.

The UBCIC represents over 100 First Nations in BC, many of whom face similar challenges as the parties in this case with respect to interpreting and understanding the promises made by the colonial government and Crown as they sought to settle in our traditional territories, but Unlike

elsewhere in Canada, this was not through the negotiation of treaties, but through the process of reserve creation.

Specific claims arose to address broken promises, reserve cut offs, cutbacks that have eroded the lands reserved and have resulted in hundreds of specific claims.

Specific Claims engage the same kind of interpretive issues as on appeal here (that is, how to understand the meaning and content of the Crown's promises made to the Indigenous Peoples. Specific claims significant nation-wide.

Both ask:

- how promises made by the Crown to Indigenous Peoples are to be honoured or broken?
- how Indigenous laws play in the interpretation of promises?, and
- what are the remedies that flow from the interpretation of the obligations?

Where the UBCIC can contribute today is in our understanding that both Indigenous laws and reconciliation where treaties are concerned are about creating a relationship – **not** about a final deal, and to offer our consideration of the far-reaching adverse consequences of

adopting the appellant's position on this appeal – which prefers a one-sided view – namely the Crown's perspective – in the interpretation of the treaty.

Our submissions will focus on the consideration of Indigenous laws and legal perspectives interpreting the commitments and promises that the Crown made to Indigenous Peoples in the context of reserve creation.

We say the recognition and understanding of Indigenous laws defines Indigenous-Crown relations and that the lower court properly considered Indigenous Peoples perspectives as revealed through Anishanaabe laws.

The questions we need to answer is, what was the purpose of the promise made, (and we assume that the Crown meant to fulfill that promise), and how should the Indigenous perspective of that promise be considered?

From the UBCIC's perspective, which is addressed at paragraph 1 of our factum, Treaties are living obligations that must flourish and grow and should be interpreted to reflect Indigenous perspectives.

Indigenous perspectives are framed by Indigenous laws.

At paragraphs 14 through 17, we say a just resolution of specific claims is an essential part of Canada's national project. The UBCIC submits that, treaty promises must be interpreted in light of the constitutional imperatives of reconciliation and the honour of the Crown and that reconciliation cannot be achieved without reference to Indigenous Peoples' own understanding and the context and meaning of the agreements entered into with colonial governments and the Crown.

We say the lower court properly considered the Indigenous parties understanding of the treaty as revealed through Anishnaabe law, and as we are called upon to do when we look at the TRC Calls to Actions and what the UNDRIP has said, all of which talks about the need for the recognition and understanding of Indigenous laws to define the Indigenous – Crown relations, and to consider the Indigenous laws and legal orders that help to inform us of what was meant by different clauses and agreements, about the reconciliation process that we are a part of, and about Indigenous Peoples own future understanding of their relationships.

The fact that the Crown wasn't in a position to make a larger outright payment, and the Anishinaabe were bound to maintain an ongoing relationship with their territory guided by their knowledge that all of

creation sustains, teaches and heals humans, and so on – resonates with the Indigenous laws, perspectives and principles held by many Indigenous Nations, including many First Nations that the UBCIC represents in BC and who today are engaged in the specific claims process.

Indigenous laws are fundamental to understanding the Indigenous perspective. Reconciliation is about a relationship, and you can see where the Anishnaabe thought about applying their laws, that this ongoing relationship was going to be to the mutual benefit of all people who were sharing their land.

We see that the Anishinaabe were entering into a relationship based on their laws which at its core is generative (forward looking) and relational – grounded in the principles that – we take care of the land and the land takes care of us – so it makes sense that the Anishnaabe were not as concerned about the fact that they were not getting an amount outright then and there - because they understood that together – with their treaty partner, the Crown – that they were entering into an enduring relationship which would take care of the land and the land would be bountiful and it was **that** Indigenous legal

perspective and world view that would inform the future reach of the clause at the heart of this appeal.

We say the dangers of the appellants' approach – besides that it lacks fairness and fails to uphold the honour of the Crown writ large – is that it:

1. Provides a powerful disincentive to reconciliation efforts between Indigenous Peoples and the Crown.

The UBCIC asks:

1. What happens if we adopt Ontario's position?

2. And what are the consequences of doing so for Indigenous Nations in BC?

The First Nations in BC who we represent, and likely Indigenous Nations across the country involved in specific claims, would ask, why would our Indigenous communities bother entering into agreements if enforcing the agreements with the Crown about the promises made to Indigenous peoples will be subject to a one-sided interpretation of the document?

One example of the consequences of adopting the Crown's approach is the passage of time arguments, which we say must be rejected.

As submitted by the respondents, and addressed in our factum, but which is worth repeating, the Supreme Court of Canada cautioned in *Mikisew* that the relationship between Indigenous and non- Indigenous peoples occurs "in the shadow of a long history of grievances and misunderstanding"; where promises to Indigenous Peoples have been easily discounted and manipulated by and to the great benefit of the Crown from the breach of those promises, and that passage of time arguments that rely on the "weight of history" and accumulated benefit on one side to discount legitimate claims of the other side, must be rejected.

Treaty promises must be interpreted in light of the constitutional imperatives of reconciliation and the honour of the Crown.16 Indigenous-Crown agreements can no longer be interpreted with reference to the laws and perspective of the Crown alone.

Reconciliation cannot be achieved without reference to Indigenous Peoples' own understandings of the content and meaning of those agreements.

If the Crown's arguments, which essentially diminish the Indigenous perspective framed by Indigenous laws are allowed to hold sway – and which view the promises and commitments made to the Indigenous Peoples as not enduring or **evolving** solemn relationships – we say this will only **worsen** Indigenous-Crown relations and undermine the reconciliation project that the courts in *Delgamuukw* and *Tsilhqot'in* and the government have addressed, as aptly addressed by the Respondents and Intervenor's submissions.

To this, the UBCIC adds our view that – now as then – reconciliation is an ongoing project; it is a pre-conditioned to a party-to-party relationship – or, as in this case and the claims of the First Nations the UBCIC represents – a sovereign-to-sovereign relationship.

As reflected in our factum, we share the view of offered by Justice Binnie [See Oral Compendium at para. 16]

Treaties are the foundational reconciliation agreements of Canada's legal landscape.19 In Marshall No 1. Justice Binnie noted that the "subtext of the … treaties was reconciliation and mutual advantage."20 The Robinson Treaties reflect agreements about how the Anishinaabe

signatories and the Crown intended to live together on the same lands into the future, and must be read in this context.

Justice Binnie's review of the subtext of the treaties in Marshall No. 1 provides a deeper understanding of reconciliation and highlights the consequences of adopting a position of a one-sided view of what is meant by a "mutual advantage" which does not work, but rather Justice Binnie urges a fulsome consideration of the Indigenous perspective framed by Indigenous laws.

In Marshall No 2, McLachlin CJ noted that breathing life and meaning into the concept of Indigenous Peoples' rights entails asking, "What would a certain practice or event have signified in their world and value system?" Indigenous Peoples' understanding of treaty promises, or understanding of promises to create reserves, are rooted in Indigenous Peoples' own legal contexts.

There can be no treaty or promises accepted without embedding the understanding of the Indigenous Peoples' legal framework. The UBCIC submits that Indigenous legal traditions provide a interpretive lens to both determine the content of Crown obligations and undertakings, and to define the consequences to Indigenous Peoples of the failure to

honour those commitments. Indigenous laws constitute who we are as a country, and what our laws, as Canadians, are.

as described by Professor John Borrows at page 9 of our factum and TAB 7 of Oral Compendium:

The Canadian legal system has its roots in both English and French common law, but also Indigenous laws. Canadian rule of law, and concepts of justice, are rooted in Indigenous legal traditions. As he writes:

> "Canada was largely created through multi-juridical meetings that mediated disparate differences throughout most of the land. Treaties between Indigenous Peoples and the Crown promoted peace and order across cultures and were the basis of the country's formation. This was an early successful example of multijuridicalism. Canadians are fortunate to have historic agreements that provide mutually recognized conventions for the resolution of disputes between peoples that draw on different legal traditions. There is no need to invent new policies or norms to solve challenges relating to difference in Canada. Treaties and other such recognitions of Indigenous traditions provide such a base."26

Others have referred to the principles and ideas of Chief Justice Lance Finch (as he then was) of the BC Court of Appeal who wrote of the duty of the courts to take Indigenous perspectives into account as an obligation that "engages the principle of the rule of law. If the rights of all Canadians, including Aboriginal Canadians, are to be articulated and guarded by the courts, the courts must necessarily be capable of understanding the nature of those interests."27 CJ Finch also cautioned that, "this awareness is not restricted to recognizing simply that there is much we don't know. It is that we don't know just how much we don't know."28

It is **important** for the Court to have knowledge of the understanding of the Indigenous perspective in relation to the relationships entered into and agreements made with the Indigenous Peoples. **What is required, as encouraged and embraced by CJ Finch, is judicial inquiry. Failure to engage in judicial inquiry and to consider the Indigenous perspective threatens the quest of reconciliation, the treaty relationship before this court, and any future agreements between First Nations in BC and the Crown.**

We say, **THIS** is the approach adopted by the Trial Judge, and is the one the UBCIC urges this Court to take. The Trial Judge asked about, and listened to, the perspectives of both the Crown and Indigenous Peoples. She did not know what the Indigenous perspective on the treaty agreements was, and so she considered extensive evidence on this point.

One example of the consequences of the Crown's failure to take into account a full consideration of Indigenous Peoples' perspectives is the significant issues First Nations in BC continue to deal with in BC is the failure of colonial governments and the Crown to take into account Indigenous women's perspectives and laws during the reserve creation era, and how this continues to disproportionately and adversely impacts Indigenous women in the context of specific claims.

In BC, when the reserve commissions came around, they were mainly talking to men and the activities and resource gathering that men were engaged in. This ignored the medicine, plants, resources and laws held by Indigenous women which we are struggling with today as we work towards a just resolution of specific claims in BC. Indigenous Peoples laws/perspectives were not considered or reflected in reserve creation in this BC.

This is one of the consequences of taking the Appellants' position which would prevent this kind of inquiry when you are looking at what areas of land, or resource use, or relationship would find their way into agreements.

In our view, and perhaps one of the greatest consequences of adopting the Appellants' position is that **only <u>one</u> side of the relationship gets to benefit or determine <u>what</u> happens from evolving circumstances.**

We say, the Trial Judge rightly considered the Robinson Treaties as part of a "renewal of the ongoing relationship," between the parties, which would continue to be renewed into the future to account for changing circumstances to the mutual benefit of both parties31

In our view, it cannot be right, as suggested by the Appellants, that there is <u>no</u> evidence that renewal was not a central purpose of either party.

With respect to reconciliation the UBCIC highlights (@ our Para. 28) our position that reconciliation is not static; it is a dynamic and hard-fought process. To argue that renewal should not be read as part of the Crown

obligations in treaties diminishes the purpose of the reconciliation of preexisting Aboriginal societies with assertions of Crown sovereignty.

The commitment to renewal, which the Appellants dismiss, is a commitment to an ongoing relationship. We say, (at Para. 30 of our factum) that the danger of accepting the Appellants position ultimately is that there will be no change, there will be no evolution, and there will be no reconciliation, despite that the frozen rights approach to interpreting Indigenous Peoples rights was rejected by the Supreme Court of Canada, in Van der Peet, in favour of a dynamic rights approach where rights are "interpreted flexibly so as to permit their evolution over time" and which we say is the approach that should be taken in this case.

Today, as in 1850, we live in an evolutionary world. The UBCIC submits that the framers of this agreement could not have intended that the passage of time would extinguish every benefit assured to the Indigenous Peoples, made to them under the treaty, or that every benefit would be self-determined and defined by the Crown.

It ***cannot be*** – given the Indigenous laws perspective that the Indigenous Peoples would have agreed the Crown could dictate what

the benefits could be only from the Crown's perspective – and not include that of the Indigenous Peoples.

In our view, to believe the Indigenous parties would agree only to $4 cap would be to deny the intelligence and humanity of a whole group of people who were generative, forward looking and made decisions based on relational laws which we see as reflected in the Anishinaabe laws, governance and principles before the Court.

We say, for Indigenous Peoples going forward – in the context of negotiations to settle disputes or to enter into new relationships, the UBCIC has observed that reaching an agreement is JUST THE BEGINNING.

The actual content of an agreement is reflected in how the parties keep their word and implement their agreement as part of their ongoing relationship. The renewal obligation is not unlike the commitment that underlies all other human relationships.

Others before you have spoken of the purposive approach. To this the UBCIC adds that **it is necessary and right to consider the relational laws reflected in the Indigenous perspective to determine the relationship and intention of the Indigenous parties**.

We say that, if you accept the Appellant's position, it would undermine the "evolutionary relationship" between the treaty parties (or any agreement).

In conclusion, the UBCIC says that the trial judge rightly assumed when interpreting the annuity clause that the Crown meant to fulfil the promise it made. People are supposed to fulfil the promises they make. The danger of the Appellants' position is that it undermines that assumption, and the consequences of doing so are far reaching. Not only would the First Nations of BC be adversely affected by doing so, the ongoing promise of reconciliation – which continues today as it did then – would be yet another broken and empty promise that sees all the benefits of an agreement in favour of one party to the agreement – the Crown – when the consequences to the Indigenous parties is so great.

We say treaties are living commitments – if not an ongoing relationship – and if the agreement could not be revisited – then there would be no incentive for the First Nations of BC who the UBCIC represents – nor to the many other nations across the country engaged in specific claims – to enter agreements with the Crown because that is the whole basis of creating the relationship.