IN THE SUPREME COURT OF BRITISH COLUMBIA BETWEEN:)) QUENEESH STUDIOS) INCORPORATED))REASONS FOR JUDGMENT PLAINTIFF)) AND:)OF MASTER J. W. HORN) QUENEESH DEVELOPMENTS) INC.)(IN CHAMBERS)) DEFENDANT))

Counsel for the Plaintiff: H.O.
Sweeney Counsel for the Defendant:
M.C. Akey Date and Place of Hearing:
April 30, 1996, at Courtenay, B.C.

1. This is an application by the Comox Band of Indians, pursuant to Rule 15(5)(a)(iii) to be added as a defendant to this action. The application is supported by the defendant and Mr. Akey advised me that if joinder were made, the defendants would be making common cause and would probably be represented by the same solicitor.
2. The plaintiff Queneesh Studios Incorporated (whom I shall refer to as the "Studios") is a one-man company formed by Mr. Richard Krentz, who is an artist and a member of the Sechelt Indian Band. Studios alleges that Krentz has been marketing and selling his and other native art work under the name "Queneesh Studios" since about 1989. The company was incorporated on January 25, 1995, and its sole activity is to continue the marketing activities hitherto conducted by Mr. Krentz in person.
3. Queneesh Developments Inc. (whom I shall refer to as "Developments") was incorporated on September 30, 1976. Studios, in its statement of claim says that Developments opened an art gallery on October 16, 1995, under the name "Queneesh Gallery" or some variation thereof. The gallery is located in the Comox area, which is the same area in which Studios carries on its activities. Developments is a company formed by the Comox Band of Indians and all the directors are members of the band who hold their shares in trust for the band. Since its formation, Developments has undertaken activities for the development of economic opportunities by the band, but it was not until October, 1995, that it became engaged in running an art gallery and gift shop.
4. Soon after the Queneesh Gallery was opened, Studios protested through its solicitor that the name would be confused with Studios name in the minds of the public. Having received no satisfaction, Studios commenced this action. The action is what is commonly known as a "passing off action" and the relief sought is in an injunction restraining the defendant from using the name Queneesh Gallery, Queneesh Gift Shop or any similar use of the word Queneesh that may be confused with Queneesh Studios in the minds of the public. So far this is a simple action between one trader and another to prevent one profiting from the established name of the other. There would seem to be no other persons whose interests could be affected by any order granted for an injunction. The Band, who is its only shareholder, has financial interests which are identical with those of Developments.
5. As yet Developments has not filed a statement of defence and so this application has proceeded in somewhat of a vacuum since I do not know what is in issue between the plaintiff and the defendant. However, the Band has through its solicitor, and by affidavit, set out what issues it wants to raise and these are set out in paragraph 4 of the affidavit of Wendy Holland. Subparagraphs "a" to "d" of paragraph 4 simply set out the commercial relationship between the Band and Developments. In the remaining subparagraphs the allegations can be summarized as follows: that the term "Queneesh" represents a culturally significant legend of the Band and was used in naming Queneesh Developments to publicize the association between Developments and the Band and has been used in this fashion since its incorporation in 1976; that the term "Queneesh" is associated with the Band and has been since time immemorial and the Band has a common-law aboriginal right to the exclusive use of the word. Accordingly, the Band says that it has conferred upon Queneesh Developments the sole right to use the word "Queneesh."
6. The Band says that if it is not joined in this action as a defendant it will initiate its own action against Studios in respect of the use of the word Queneesh and will apply to have the actions heard together. Stripped of its claim to some aboriginal title, the Band's position boils down to this; it says that it has some sort of proprietary right to the word Queneesh which it has conferred upon Developments and that either Studios has no right to use the word or, if it does, it has no right to prevent the company from using the word. But this is a position which the defendant can adequately maintain, it does not require the addition of the Band to raise that defence. So the Band is not a necessary party.
7. Is there between the Band and Studios a question or issue relating to any relief or remedy claimed by the plaintiff or to the subject matter of the proceeding? The subject matter of the proceeding is whether the defendant is passing off itself as or its products as those of the plaintiff. Whether the Band has some sort of proprietary and enforceable interest in the word Queneesh is not, I think, connected with that issue.
8. But even if there is some connection, I do not believe that the issue between the Band and Studios can conveniently be determined at the same time as the issue between Studios and

Developments. If there is any such proprietary and enforceable interest, it cannot, I think, arise out of the English common law. Any such interest is an aboriginal right and the proof of aboriginal rights as a matter of experience has proved peculiarly lengthy and difficult in the past. The plaintiff should not have its litigation tied up in the claim by the Comox Band to an aboriginal right. Much the same problem, though in different circumstances, was addressed by the Court of Appeal in Attorney General of Canada v. Aluminum Company of Canada (1987) 10 B.C.L.R. (2d) 371 and the Court of Appeal refused to allow the question of native rights to be inserted into litigation between the Aluminum Company of Canada and the Federal Crown. At page 379 Seaton, J.A. said this: No matter what answers are given to the question raised in that litigation the rights of Indians will stand up after judgment exactly as they stood before. No decision made will impair the position of the Indians. At page 381 he said there would have to be good reason to impose on the back of the existing litigation a massive piece of litigation that will overwhelm the original litigation. I do not know whether the potential litigation here between the Band and Studios would rightly be described as a massive litigation, but it is certainly a different piece of litigation raising very different issues which may turn into a very lengthy process raising intricate issues of aboriginal rights and, perhaps, constitutional rights. The plaintiff should not be burdened with the task of dealing with these claims in this litigation.

9. Accordingly, the application is dismissed with costs on Scale 3 payable forthwith, since there will now be no cause to be determined between the applicant and the plaintiff.

Signed by: "J.W. Horn" Nanaimo British Columbia May 7, 1996