File No. 34986

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

FACTUM OF THE INTERVENERS TSAWOUT FIRST NATION, TSARTLIP FIRST NATION, SNUNEYMUXW FIRST NATION AND KWAKIUTL FIRST NATION

(Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF POSITION

> It is not correct to say that the Indians did not own the land but only roamed over the face of it and used it. The patterns of ownership and utilization that they imposed upon the lands and waters were different from those recognized by our system of law, but were nonetheless clearly defined and mutually respected. Even if they didn't subdivide and cultivate the land, they did recognize ownership of plots used for village sites, fishing places, berry and root patches, and similar purposes. Even if they didn't subject the forests to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food-gathering. Even if they didn't sink mine shafts into the mountains, they did own peaks and valleys for Mountain Goat hunting and as sources of raw materials. Except for barren and inaccessible areas that are not utilized even today, every part of the province was formerly within the owned and recognized territory of one or other of the Indian tribes.[1]

1. Long before Europeans explored and settled North America, Aboriginal peoples were occupying and using this vast expanse of land in organized, distinctive societies with their own social and political structures. Aboriginal interests, including Aboriginal title and customary laws, survived the assertion of sovereignty and were absorbed into the common law as rights.[2]

2. The Crown accepted that the Aboriginal peoples were sovereign Nations who exercised authority over vast territories, although they may not necessarily have physically occupied the lands on a continuous basis. Across Canada, the Crown sought, in accordance with the *Royal Proclamation, 1763*, to acquire vast tracts of lands and resources from those Nations that were occupying them. These pre-existing Aboriginal interests could only be addressed by treaty.[3]

3. In the colony of Vancouver Island, Governor James Douglas applied the policy embodied in the *Royal Proclamation*, entering into fourteen treaties with Aboriginal Nations. These treaties, known as the "Douglas Treaties", recognized the sovereignty of the Nations and were based on a territorial recognition of Aboriginal title that demanded the Crown treat directly with the Aboriginal Nations.[4] These treaties served to reconcile pre-existing

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[1] Wilson Duff, *The Indian History of British Columbia – The Impact of the White Man*, (Victoria: Royal British Columbia Museum, 1997), cited with approval in *Calder v Attorney General of British Columbia*, [1973] SCR 313 at 318-319, per Judson J. **[Book of Authorities "BOA" TAB 39]**

[2] *Mitchell v MNR*, [2001] 1 SCR 911 at paras 9 & 10. **[BOA TAB 17]**

[3] *R v Van der Peet*, [1996] 2 SCR 507 at para 275 **[BOA TAB 21]**; *R v Marshall; R v Bernard*, 2005 SCC 43 at para 39 [*Marshall & Bernard*]. **[BOA TAB 19]**

[4] *R v White & Bob*, (1964) 50 DLR (2d) 613 (BCCA) at 663-664; aff'd 52 DLR (2d) 481 (SCC) [*White & Bob*]. **[BOA TAB 22]**

Aboriginal sovereignty with assumed Crown sovereignty.[5]

4. Upon entering Confederation, British Columbia decided to take a different approach. The Province denied that Aboriginal title existed at all. With the exception of Treaty No. 8, in Northeastern British Columbia, the Federal Crown deferred to the Province's position and chose not to treat with the First Nations. The Province determined that they could acquire most of the land in British Columbia by adverse possession.

5. The British Columbia Court of Appeal decision affirms that the Province's position was correct. Thus, it was unnecessary to treat with the First Nations as their Aboriginal title was limited to "small spots".

6. However, the Court of Appeal decision suffers from several fundamental defects. It fails to account for the historical context and a significant body of Supreme Court of Canada and Privy Council jurisprudence to the contrary; it does not take account of the application of Indigenous laws identified as an independent basis for a finding of Aboriginal title in *Delgamuukw*; and it renders reconciliation an unattainable goal.

PART II – POSITION WITH RESPECT TO THE APPELLANT'S QUESTIONS

7. The Intervener, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nations and Kwakiutl First Nation (the "Douglas Treaty Nations") are successors to the Douglas Treaties. They are deeply concerned that the Court of Appeal gave no weight to Indigenous laws in its decision. Each of the Douglas Treaty Nations exercise Indigenous laws recognized by the courts that govern their use of the lands and resources in their respective territories.[6]

PART III – STATEMENT OF ARGUMENT

A. Indigenous Law and the Territorial Approach to Aboriginal Title

8. This court explained in *Delgamuukw* that Aboriginal title must be proven by showing that the claimant group occupied the land prior to sovereignty.[7] Proof of Aboriginal title "must

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[5] *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73 at para 20 [*Haida Nation*]. **[BOA TAB 13]**
[6] *R v Morris*, 2006 SCC 59 **[BOA TAB 20]**; *Saanichton Marina Ltd v Claxton,* (1989) 36 BCLR (2d) 79 (BCCA) **[BOA TAB 24]**; *White & Bob, supra* note 4 at 648-649. **[BOA TAB 22]**
[7] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 144 [*Delgamuukw*]. **[BOA TAB 10]**

be understood by reference to both common law and aboriginal perspectives."[8] The common law perspective emphasizes physical occupation, while the Aboriginal perspective involves a consideration of indigenous legal systems pertaining to land – in other words, pre-sovereignty legal occupation.[9] Indigenous laws in relation to land are "relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title."[10] Indigenous legal systems are, therefore, to be accorded equal consideration to physical occupation as evidence in support of Aboriginal title.[11]

9. Subsequent cases have focused on the common law-based physical occupation test, ignoring the consideration of indigenous legal systems as proof of occupation. The Court of Appeal made the same error in the case at bar. It concluded that Aboriginal title should be limited to distinct, intensively used tracts of land,[12] relying in large measure on the analysis of this court in *Marshall & Bernard* which held that "occupation" means "physical occupation".[13] *Marshall & Bernard* did not overrule the proposition from *Delgamuukw* that indigenous laws remain a valid mode for proof of occupation. That issue was simply not considered.[14]

10. In the case at bar, the trial judge made findings of fact as to the existence of Tsilhqot'in indigenous laws respecting land. The Tsilhqot'in were "a rule ordered society, tied by language, kinship and customs," and "[r]everence for the land that supported and nourished them continues to the present generation."[15] The trial judge recognized that the increasing violation of Tsilhqot'in territory by white settlers, miners, and road-builders without compensation contributed to the Chilcotin War of 1864.[16] He held that as a legal principle, the Tsilhqot'in expected payment for the use of their land and the extraction of its resources.[17] When such payment was not provided, the Tsilhqot'in expelled or killed all the

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[8] *Ibid* at para 112. **[BOA TAB 10]**
[9] *Ibid* at paras 146-149. **[BOA TAB 10]**
[10] *Ibid* at para 148. **[BOA TAB 10]**
[11] *Ibid* at paras 148-149. **[BOA TAB 10]**
[12] *William v British Columbia*, 2012 BCCA 285 at para 199 [*William*]. **[BOA TAB 33]**
[13] *Marshall & Bernard, supra* note 3 at para 56. **[BOA TAB 19]**
[14] Further, although limiting its analysis to physical occupation in *Marshall & Bernard*, this Court noted nonetheless that "physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law": *Marshall & Bernard, supra* note 3 at para 70. **[BOA TAB 19]**
[15] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 436 [*Tsilhqot'in*]. **[BOA TAB 31]**
[16] *Ibid* at paras 282 & 284. **[BOA TAB 31]**
[17] *Ibid* at para 282. **[BOA TAB 31]**

white people in their territory.[18]

11. Tsilhqot'in laws had an inherent territorial application prior to sovereignty: they applied to anyone within the area controlled by the Tsilhqot'in.[19] Tsilhqot'in pre-sovereignty jurisdiction, along with the content of their laws, provide a key insight into the Tsilhqot'in perspective on their relationship with the land.

12. The Court of Appeal failed to give any weight to Tsilhqot'in laws. While the Court of Appeal acknowledged that the legal traditions of the Tsilhqot'in were "very different from those of the Mi'kmaq" that were the subjects of *Marshall & Bernard*, it maintained that such differences were "not material to the legal analysis of the case."[20] This suggests that the Court of Appeal saw the test for Aboriginal title as predicated solely on pre-sovereignty physical occupation. To the extent that the Court of Appeal could be said to have considered Tsilhqot'in legal traditions, it appears to have taken a "one-size-fits-all" approach, assuming there to be an "Aboriginal perspective" universal to all First Nations. That is not the case. The "Aboriginal perspective" can only be understood with respect to the specific circumstances of the particular Aboriginal group before the court.

13. The common law is no stranger to territorial control, and there is no legal reason to limit Aboriginal title to a narrow conception of physical possession, thereby rejecting that Aboriginal title can be held on a territorial basis.[21]

14. A territorial approach to Aboriginal title is consistent with Crown sovereignty and with the common law. Although *Delgamuukw* referred to physical occupation as one way to prove possession at law, the common law concept of possession has a broad and flexible definition that depends on the context.[22] Acts of dominion over part of a property are sufficient to demonstrate *de facto* possession of the whole where such use is consistent with the manner in which such property is commonly used.[23] Cutting timber in one part of a forest, for

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[18] *Ibid* at para 277 & 279. **[BOA TAB 31]**
[19] See e.g. *ibid* at paras 427-428 (The Tsilhqot'in applied their laws regarding murder to white colonists). **[BOA TAB 31]**
[20] *William, supra* note 12 at para 226. **[BOA TAB 31]**
[21] As the Court of Appeal did in this case: see *ibid* at para 219. **[BOA TAB 31]**
[22] Bruce Ziff, *Principles of Property Law*, 4th ed (Toronto: Thompson Carswell, 2006) at 117-118. **[BOA TAB 34]**
[23] Frederick Pollock & Robert Samuel Wright, *An Essay on Possession in the Common Law* (Tahmoor, NSW: Law Press, 1990) at 30-32 **[BOA TAB 35]**; *Re Matchless Group Inc,* 2002 NFCA 56 at paras 14-17 **[BOA TAB 23]**; *Bentley v Peppard Estate*, (1903), 33 SCR 444. **[BOA TAB 4]**

example, can be proof of a right to the whole forest.[24] Additionally, intermittent use is sufficient to demonstrate possession where such use is compatible with the nature of the property, such as where a non-winterized cabin is used for only part of the year,[25] or where uncultivated land is shot over only during the shooting season.[26] In all cases, as in the *Delgamuukw* test, occupation must be exclusive in order to establish possession;[27] however, exclusivity merely means occupation sufficient to prevent others from interfering with the occupier's use and enjoyment of the land.[28]

15. International law also recognises that possession may be proven by means other than physical occupation. For example, Denmark established colonies in a small portion of Greenland and enacted legislation that purported to apply to the entire island. The Permanent Court of International Justice ruled that Denmark had established territorial rights to the entire island on the basis of its demonstrated intention to exercise authority over the region, its exercise of actual authority by way of legislation, and the lack of contemporaneous competing claims.[29] Similarly, the International Court of Justice affirmed the territorial right of Honduras to a group of contested islands on the basis that its application of Honduran laws to the islands demonstrated both an intention to and exercise of authority.[30]

16. Prior to sovereignty, the Tsilhqot'in exercised control over their territories according to their laws in a fashion similar to legal control over territories by states recognised under international law and by provinces, municipalities, and First Nations recognised under Canadian domestic law.

17. The recognition of territorial indigenous laws, and consequently of territorial claims to Aboriginal title, is not novel in the common law world. In Australia, Aboriginal title is based not on any particular pattern of use,[31] but on the rights held under a pre-sovereignty

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[24] *Jones v Williams*, (1837), 2 M & W 326, cited in Pollock & Wright, *supra* note 23 at 32. **[BOA TAB 35]**
[25] Ziff, *supra* note 22 at 127**[BOA TAB 34]**; see also *Smith Estate v Beals*, (1990), 99 NSR (2d) 67 (TD).**[BOA TAB 27]**
[26] Pollock & Wright, *supra* note 23 at 31. **[BOA TAB 35]**
[27] Ziff, *supra* note 22 at 128. **[BOA TAB 34]**
[28] Pollock & Wright, *supra* note 23 at 13. **[BOA TAB 35]**
[29] *Legal Status of Eastern Greenland (Denmark v Norway)*(1933),PCIJ(Ser A/B)No 53 at 45-46, 50-51. **[BOA TAB 14]**
[30] *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, [2007] IJC Rep 659 at paras 185, 189, 195 & 321. **[BOA TAB 28]**
[31] *Bodney v Bennell and Others*, [2008] FCAFC 63 at para 162. **[BOA TAB 5]**

legal system.[32] The geographic extent of Aboriginal title is therefore determined by reference to those traditional laws. Where an Aboriginal group's traditional laws grant a territorial interest in land, Aboriginal title is recognized on a territorial basis.[33]

18. New Zealand recognizes the customary interests held by the Maori in accordance with their pre-sovereignty legal norms and values, known as "tikanga Maori".[34] This recognition is based on the common law doctrine of continuity, which holds that private property interests are presumed to survive an acquisition of sovereignty and become enforceable under the law of the new sovereign.[35] As a result, the New Zealand courts look to the tikanga Maori to determine both the nature and the geographic scope of Aboriginal title.

19. In the United States, most Aboriginal title claims were resolved by the Indian Claims Commission ("ICC") between 1946 and 1978. The ICC awarded monetary compensation for Aboriginal title extinguished by the federal government prior to 1946. The test for Aboriginal title in the United States is that the Indians must have had actual, exclusive, and continuous use and occupancy for "a long time" prior to their loss of the land.[36]

20. "Actual" use and occupation is considered not with reference to the common law of possession, but with reference to the habits and modes of life of the Indians: thus, "their hunting grounds were as much in their actual possession as the cleared fields of the whites".[37] Similarly, "[c]ontinuous use does not limit recovery to areas where the tribe had permanent villages, but also includes seasonal or hunting areas over which the Indians had control even though those areas were used only intermittently."[38] Aboriginal title was proven in the United States where the claimant tribe had the ability to exclude other tribes, and where it made use of the lands on a continuous but not necessarily constant basis. The result of this interpretation of Aboriginal title was that the ICC and other American courts

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[32] *Members of the Yorta Yorta Aboriginal Community v Victoria*, [2002] HCA 58 at para 45 **[BOA TAB 15]**; *Native Title Act 1993* (Cth), s 223(1). **[BOA TAB 43]**
[33] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*, [2010] FCA 643 at para 599. **[BOA TAB 1]**
[34] *Attorney-General v Ngati Apa*, [2003] NZCA 117 at para 14. **[BOA TAB 3]**
[35] *Ibid* at paras 13 & 15. **[BOA TAB 3]**
[36] See *The Sac and Fox Tribe of Indians of Oklahoma, et al v The United States*, (1963), 161 Ct Cl 189, 315 F 2d 896 at para 12. **[BOA TAB 29]**
[37] *Mitchel v United States*, (1835), 34 US 711 at 746. **[BOA TAB 16]**
[38] *Confederated Tribes v United States*, (1966), 177 Ct Cl 184 at 194. **[BOA TAB 9]**

recognized title to huge swaths of land.[39]

21. By the end of the ICC's tenure in 1978, more than half the United States had been identified as being formerly subject to Aboriginal title, and many of the identified parcels encompassed millions of acres each.[40] The decisions of the ICC often refer to occupation "in Indian fashion".[41] The test for "actual occupation" is made with reference to the habits and modes of life of the Indians.[42] While this standard does not explicitly adopt indigenous legal systems, it accommodates them. The standard is focused on the result (i.e. exclusivity), not the method (i.e. specific patterns of occupation or methods of enforcement).

22. While the tests for proof of Aboriginal title are different in Australia, New Zealand and the United States, it is clear that in these other common law countries, the test used (however it may be articulated) considers to one degree or another the geographic scope of the area in which the particular indigenous group's laws applied as part of the proof of that group's Aboriginal title. Given the express provision for this approach in *Delgamuukw*, the Court of Appeal's categorical rejection of the Tsilhqot'in's indigenous laws, and the territory in which those laws were enforced, is an error of law and cannot stand.

B. The Constitutional Questions

23. The answer to the first constitutional question is yes. The *Forest Act* and the *Forest Practices Code* have no application on Aboriginal title lands, based on the division of powers. Section 91(24) of the *Constitution Act, 1967*, vests the federal government with

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[39] The Seminoles of Florida were found to have had Aboriginal title to almost the whole of Florida, despite patterns of use and occupancy that varied over time with changes in population*: Seminole Indians v United States*, (1964), 13 Ind Cl Comm 326 at 363, aff'd 180 Ct Cl 375 **[BOA TAB 26]**. The Otoe and Missouria people were found to have title to an area that they possessed, on a territorial basis, to the exclusion of other tribes; they had lived a semi-nomadic lifestyle, moving from one village site to the next, but the title area included all village sites in addition to the surrounding hunting grounds they controlled: *Otoe and Missouria Tribe of Indians v US*, 2 Ind Cl Comm 335 (1953) at 336, 360-361 [*Otoe and Missouria*], aff'd 131 Ct Cl 593 (1955), certiorari denied, 350 US 848 (1955) **[BOA TAB 18]**. The Tlingit and Haida Indians of Alaska were found to have Aboriginal title over large areas that included unused barren grounds and mountaintops, where those areas were surrounded by lands used exclusively by the Indians: *The Tlingit and Haida Indians of Alaska v United States*, (1959), 147 Ct Cl 315 **[BOA TAB 30]**. The Alabama-Coushatta tribe was recognized as meeting the actual and continuous use and occupancy requirement with respect to their entire claim area "even though the tribe did not maintain villages in every portion of this area throughout the entire relevant period": *Alabama-Coushatta Tribe v United States*, 2000 US Claims LEXIS 287 at 37 [*Alabama-Coushatta Tribe*] **[BOA TAB 2]**.

[40] See Indian Claims Commission, *Indian Land Areas Judicially Established 1978*, online at: http://www.nps.gov/history/nagpra/DOCUMENTS/JUDICIAL.PDF. **[BOA TAB 36]**

[41] See e.g. *Otoe and Missouria*, *supra* note 39 at 336. **[BOA TAB 18]**

[42] *Alabama-Coushatta Tribe*, *supra* note 39 at 36. **[BOA TAB 2]**

jurisdiction over lands reserved for Indians, which include Aboriginal title lands. Whether one is dealing with Indian Reserve lands or Aboriginal title lands, the interest in the land is the same in both cases.[43]

24. Section 91(24) protects a core of federal jurisdiction from provincial laws of general application through the operation of the doctrine of interjurisdictional immunity. Section 91(24) provides the federal government with responsibility over both persons - "Indians" - and things - "Lands Reserved for Indians".[44]

25. It is misleading to speak only of the "core of Indianness" as it leaves out the second aspect of federal jurisdiction, which is "lands reserved for Indians". Aboriginal title lands form part of this second core aspect of federal jurisdiction. There is no need to engage in mental gymnastics to determine what falls within the core as the various Attorneys General attempt to do.

26. Aboriginal title is a right to the land itself. Aboriginal title encompasses the right to exclusive possession, use and enjoyment of the land and its resources. Subject to limited exceptions, Aboriginal title encompasses the right to choose to what uses land can be put.[45] These uses include the exploitation of the natural resources, including standing timber and oil and gas, on and under the land.[46] Thus, Aboriginal title has both economic and jurisdictional components.

27. To the extent that provincial laws purport to determine land use decisions on Aboriginal Title lands they are inapplicable. To find otherwise would be to eviscerate the core of federal jurisdiction over lands reserved for Indians to such an extent as to render it virtually meaningless.[47]

28. The *Forest Act* is not the type of legislation contemplated when one speaks of provincial laws of general application. The *Forest Act* and the exclusive rights that it granted to

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[43] *Guerin v The Queen*, [1984] 2 SCR 335 at 379 **[BOA TAB 12]**; *Derrickson v Derrickson*, [1986] 1 SCR 285 at paras 41-42 **[BOA TAB 11]**; *Delgamuukw*, *supra* note 7 at paras 173, 176 & 178. **[BOA TAB 10]**
[44] *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 40 & 61. **[BOA TAB 8]**
[45] *Delgamuukw*, *supra* note 7 at paras 140 & 166 **[BOA TAB 10]**
[46] *Ibid* at paras 117, 119-124 **[BOA TAB 10]**; Kent McNeil, "Judicial Treatment of Indigenous Land Rights in the Common Law World", CLPE Research Paper No. 24/2008 at 14. **[BOA TAB 38]**
[47] *Delgamuukw*, *supra* note 7 at para 181. **[BOA TAB 10]**

Weyerhaeuser were at issue in the *Haida Nation* case.[48] While that case dealt with an asserted claim of Aboriginal title, this court recognized the potential for an infringement of Haida Aboriginal title by licences granted by the Province under the *Forest Act*. To the extent that the *Forest Act* would have more than incidental effects, it strikes at the core of Aboriginal title, which is the right to use and manage the lands as the Nation sees fit.[49] The economic aspect of Aboriginal title would be inconsistent with the Province issuing long-term forest licences over Aboriginal title lands, allowing a third party to clear-cut and obtain the benefits of harvesting over such Aboriginal title lands.[50]

29. Section 88 of the *Indian Act* cannot operate to referentially incorporate provincial laws such as the *Forest Act* that impair this core.[51] Section 88 only speaks to "Indians" and not "Indian Lands" and therefore would have no application in these circumstances.[52]

30. While there is federal legislation dealing with timber located on reserve lands, there is no legislation dealing with Aboriginal title lands. The fact that Parliament has not legislated to the full extent of its powers does not have the effect of transferring to the province the legislative power which has been assigned to Parliament by section 91 of the *Constitution Act, 1867*.[53]

31. In answer to the second question posed by the court, as the province has no jurisdiction to enact legislation that affects the use and enjoyment of Aboriginal title lands, it is unnecessary to consider the question of infringement. As this court held in the *Morris* case, the infringement analysis is only engaged when a government is acting within its constitutionally mandated powers. [54] If the federal government were to enact legislation that affected Aboriginal title lands, the impact of that legislation would be subject to the justification test.

32. These answers to the constitutional questions do not lead to a legislative vacuum. Notwithstanding the division of powers between the provinces and the federal government,

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[48] *Haida Nation, supra* note 5 at para 7. **[BOA TAB 13]**
[49] *Delgamuukw, supra* note 7 at paras 138 & 140. **[BOA TAB 10]**
[50] See e.g. *Forest Act*, RSBC 1996, c 157, ss 13-15 (Forest Licences) & ss 33-36 (Tree Farm Licences). **[BOA TAB 41]**
[51] Kent McNeil, "Aboriginal Title and Section 88 of the Indian Act" (2000) 34 UBC L Rev 159 at 192-193. **[BOA TAB 37]**
[52] *Indian Act*, RSC 1985, c I-5, s 88 **[BOA TAB 42]**; *Sechelt Indian Band v British Columbia*, 2013 BCCA 262 at paras 49 & 51. **[BOA TAB 25]**
[53] *Union Colliery Company v Attorney General for British Columbia*, [1899] AC 580 (PC) at 588. **[BOA TAB 32]**
[54] *R v Morris, supra* note 6 at para 55. **[BOA TAB 20]**

Indigenous laws continue to exist. The Indigenous land laws of the Tsilhqot'in Nation fill any legislative gap that may exist as the result of an Aboriginal Title declaration,[55] at least until such time as Parliament chooses to exercise its legislative powers under s.91(24) to regulate those Aboriginal title lands.

33. It may be unnecessary for Parliament to do so. First Nations are successfully exercising their rights to manage their reserve lands according to their own land laws, without the involvement of either the Federal or Provincial Crown, pursuant to the *First Nations Land Management Act*.[56]

34. As Chief Justice Lamer stated in *Delgamuukw:* "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve...a basic purpose of s.35(1) – the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."[57] This court has a rare opportunity to further that reconciliation and should seize the opportunity. For any hope of reconciliation, the Court of Appeal decision must be overturned.

PART IV – COSTS

35. The Douglas Treaty Nations do not seek costs and ask that no costs be awarded against them.

PART V – REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

36. The Douglas Treaty Nations request permission to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of September, 2013.

John W. Gailus

Christopher G. Devlin

Solicitors for the Intervener, Tsawout First Nation, Tsartlip First Nation, Snuneymuxw First Nation and Kwakiutl First Nation

[55] *Tsilhqot'in, supra* note 15 at paras 426-436 **[BOA TAB 31]**; *Campbell v British Columbia (Attorney General),* 2000 BCSC 1123 at paras 82 & 95. **[BOA TAB 7]**
[56] SC 1999, c 24. **[BOA TAB 40]**
[57] *Delgamuukw, supra* note 7 at para 186. **[BOA TAB 10]**

PART VI – TABLE OF AUTHORITIES

	Case	Cited at Para.
1.	*Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*, [2010] FCA 643	17
2.	*Alabama-Coushatta Tribe v United States*, 2000 US Claims LEXIS 287	20, 21
3.	*Attorney-General v Ngati Apa*, [2003] NZCA 117	18
4.	*Bentley v Peppard Estate*, (1903), 33 SCR 444	14
5.	*Bodney v Bennell and Others*, [2008] FCAFC 63	17
6.	*Calder v Attorney General of British Columbia*, [1973] SCR 313	Overview
7.	*Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123	32
8.	*Canadian Western Bank v Alberta*, 2007 SCC 22	24
9.	*Confederated Tribes v United States*, (1966), 177 Ct Cl 184	20
10.	*Delgamuukw v British Columbia*, [1997] 3 SCR 1010	8, 23, 26, 27, 28, 34
11.	*Derrickson v Derrickson*, [1986] 1 SCR 285	23
12.	*Guerin v The Queen*, [1984] 2 SCR 335	23
13.	*Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73	3, 28
14.	*Legal Status of Eastern Greenland (Denmark v Norway)* (1933), PCIJ (Ser A/B) No 53	15
15.	*Members of the Yorta Yorta Aboriginal Community v Victoria*, [2002] HCA 58	17
16.	*Mitchel v United States*, (1835), 34 US 711	20
17.	*Mitchell v MNR*, [2001] 1 SCR 911	1
18.	*Otoe and Missouria Tribe of Indians v US*, 2 Ind Cl Comm 335 (1953)	20, 21
19.	*R v Marshall*; *R v Bernard*, 2005 SCC 43	2, 9
20.	*R v Morris*, 2006 SCC 59	7, 31
21.	*R v Van der Peet*, [1996] 2 SCR 507	2
22.	*R v White & Bob*, (1965) 50 DLR (2d) 613 (BCCA)	3, 7
23.	*Re Matchless Group Inc*, 2002 NFCA 56	14
24.	*Saanichton Marina Ltd v Claxton*, (1989) 36 BCLR (2d) 79	7

Secondary Sources

Statutes