File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATION 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 MANGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF QUEBEC,
and THE ATTORNEY GENERAL OF MANITOBATE'MEXW TREATY ASSOCIATION,
BUSINESS COUNCIL OF BRITISH COLUMBIA, COUNCIL OF FOREST INDUSTRIES,
COAST FOREST PRODUCTS ASSOCIATION, MINING ASSOCIATION OF BRITISH COLUMBIA
AND ASSOCIATION FOR MINERAL EXPLORATION BRITISH COLUMBIA,
ASSEMBLY OF FIRST NATIONS,
GITANYOW HEREDITARY CHIEFS OF FWASS HLAAM, GAMLAXYELTXW, MALII GWINUU,
HAIZIMSQUE, WATAKHAYETSXW, LUUXHON NAD WII'LITSWX, ON THEIR OWN BEHALF
AND ON BEHALF OF ALL GITANYOW,
HUL'QUMI'NUM TREATY GROUP,
COUNCIL OF THE HAIDA NATION,
OFFICE OF THE WET'SUWET'EN CHIEFS,
INDIGENOUS BAR ASSOCIATION IN CANADA,
FIRST NATIONS SUMMIT,
TSAWOUT FIRST NATION, TSARTLIP FIRST NATION, SNUNEYMUXW FIRST NATION AND
KWAKIUTL FIRST NATION,
COALITION OF THE UNION OF B.C. INDIAN CHIEFS,
OKANAGAN NATION ALLIANGE AND THE SHUSWAP NATION TRIBAL COUNCIL
AND THEIR MEMBER COMMUNITIES, OKANAGAN, ADAMS LAKE, NESKONLITH AND
SPLATSIN INDIAN BANDS,
AMNESTY INTERNATIONAL AND CANADIAN FRIENDS SERVICE COMMITTEE,
BERNARD CONRAD LEWIS, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER
MEMBERS OF THE GITXAALA NATION, and
CHILKO RESORT AND COMMUNITY ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER THE COUNCIL OF THE HAIDA NATION

Counsel for the Intervener, The Council of the Haida Nation

***gid7ahl-gudsllaay*, Terri-Lynn Williams-Davidson**
WHITE RAVEN LAW CORPORATION
16541 Upper Beach Road
Surrey, BC V3S 9R6
Tel.: 604.536.5541
Fax: 604.536.5542
tlwd@whiteravenlaw.ca

Agent for the Intervener,
Brian A. Crane, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.786.0107
Fax: 613.563.9869
brian.crane@gowlings.com

Counsel for the Appellant, 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:

David Rosenberg, Q.C., Jay Nelson
ROSENBERG & ROSENBERG
671D Market Hill
Vancouver, BC V5Z 4B5
Ph: 604.879.4505
Fax: 604.879.4934
david@rosenberglaw.ca
jay@jaynelsonlaw.com

Agent for the Appellants:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 - 160 En Street, PO Box 466, Stn "D"
Ottawa, ON K1P 1C5
Ph: 613.233.1781
Fax: 613.563.9869
henry.brown@gowlings.com

Counsel for the Respondents HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and the REGIONAL MANAGER OF THE CARIBOO FOREST REGION:

Patrick G. Foy, Q.C.
BORDEN LADNER GERVAIS LLP
1200 Waterfront Centre
200 Burrard Street, PO Box 48600
Vancouver, BC V7X 1T2
Ph: 604.687.5744
Fax: 604.687.1415
pfoy@blg.com

Agent for the Respondent:
Nadia Effendi
BORDEN LADNER GERVAIS LLP
1100 – 100 Queen Street
Ottawa, ON K1P 1J9
Ph: 613.237.5160
Fax: 613.230.8842
neffendi@blg.com

Counsel for the Respondent THE ATTORNEY GENERAL OF CANADA:

Brian McLaughlin
DEPARTMENT OF JUSTICE
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Ph: 604.666.2715
Fax: 604.666.2710
brian.mclaughlin@justice.gc.ca

Agent for the Respondent:
Christopher M. Rupar
ATTORNEY GENERAL OF CANADA
234 Wellington Street, Rm 1212
Ottawa, ON K1A 0H8
Ph: 613.941.2351
Fax: 613.954.1920
brian.mclaughlin@justice.gc.ca

Counsel for the Intervener, ATTORNEY GENERAL OF ALBERTA:

Sandra Folkins
ATTORNEY GENERAL OF ALBERTA
17th Floor, Standard Life Building
639 – 5th Avenue SW
Calgary, AB T2P 0M9
Ph: 403.297.3781
Fax: 403.662.3824

Agent for the Intervener:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street, PO Box 466, Stn "D"
Ottawa, ON K1P 1C3
Ph: 613.233.1781
Fax: 613.788.3433
henry.brown@gowlings.com

Counsel for the Intervener, ATTORNEY GENERAL OF SASKATCHEWAN:

Agent for the Intervener:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street, PO Box 466, Stn "D"
Ottawa, ON K1P 1C3
Ph: 613.233.1781
Fax: 613.788.3433
henry.brown@gowlings.com

Counsel for the Intervener, ATTORNEY GENERAL OF MANITOBA:

Agent for the Intervener:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street, PO Box 466, Stn "D"
Ottawa, ON K1P 1C3
Ph: 613.233.1781
Fax: 613.788.3433
henry.brown@gowlings.com

Counsel for the Intervener, ATTORNEY GENERAL OF QUEBEC:

Geneviève Verreault Tremblay
Sylvain Leboeuf
PROCUREUR GENERAL DU QUÉBEC
1200, route de l'Église
2e étage
Québec, QC V1V 4M1
Ph: 418.643.1477
Fax: 418.646.1696
sylvain.leboeuf@justice.gouv.gc.ca

Agent for the Intervener:
Pierre Landry
NOËL & ASSOCIÉS
111, rue Champlain
Gatineau, QC J8X 3R1
Ph: 819.771.7393
Fax: 819.771.5397
p.landry@noelassocies.com

Counsel for the Intervener, AMNESTY INTERNATIONAL AND CANADIAN FRIENDS SERVICE COMMITTEE:

Justin Safayeni
STOCKWOODS LLP
TD North Tower, Suite 4130
77 King Street West, P.O. Box 140
Toronto, Ontario M5K 1H1
Ph: 416.593.7200
Fax: 416.593.9345
justins@stockwoods.ca

Agent for the Intervener:
Michael J. Sobkin
90 boul. de Lucerne, Unit #2
Gatineau, Quebec J9H 7K8
Tel.: 819.778.7794
Fax: 819.778.1740
msobkin@sympatico.ca

Counsel for the Intervener, ASSEMBLY OF FIRST NATIONS:

Joseph J. Arvay, Q.C.
Catherine J. Boies Parker
Patrick Macklem
ARVAY FINDLAY
1320 – 355 Burrard Street
Vancouver, BC V6C 2G8
Ph: 604.689.4421
Fax: 888.575.3281
jarvay@arvayfindlay.com

Agent for the Intervener:
Eugene Meehan, Q.C.
SUPREME ADVOCACY LLP
100- 397 Gladstone Avenue
Ottawa, ON K2P 0Y9
Tel.: 613.695.8855 Ext 101
Fax: 613.695.8580
emeehan@supremeadvocacy.ca

Counsel for the Intervener, BERNARD CONRAD LEWIS, on his own behalf and on behalf of all other members of the GITXAALA NATION:

Tim A. Dickson
FARRIS, VAUGHAN, WILLS & MURPHY LLP
Box 10026, Pacific Ctr. S. TD Bank Tower
25th Floor – 700 Georgia Street West
Vancouver, BC V7Y 1B3
Ph: 604.661.9341
Fax: 604.661.9349
tdickson@farris.com

Agent for the Intervener:
Matthew Eastbrooks
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.233.1781
Fax: 613.563.9869
matthew.eastbrooks @gowlings.com

Counsel for the Intervener, BUSINESS COUNCIL OF BRITISH COLUMBIA, COUNCIL OF FOREST INDUSTRIES, COAST FOREST PRODUCTS ASSOCIATION, MINING ASSOCIATION OF BRITISH COLUMBIA AND ASSOCIATION FOR MINERAL EXPLORATION BRITISH COLUMBIA

Charles F. Willms
FASKEN MARTINEAU DEMOULIN LLP
2900 - 550 Burrard Street
Vancouver, BC V6C 0A3
Ph: 604.631.4789
Fax: 604.631.3232

Agent for the Intervener:
Stephen B. Acker
FASKEN MARTINEAU DUMOULIN LLP
1300 – 55 Metcalfe Street
Ottawa, ON K1P 6L5
Tel.: 613.236.3882
Fax: 613.230-6423
sacker@fasken.com

Counsel for the Intervener, CHILKO RESORTS AND COMMUNITY ASSOCIATION AND COUNCIL OF CANADIANS:

Gregory J. McDade, Q.C.
F. Matthew Kirchner
Kate M. Bloomfield
RATCLIFF & COMPANY
221 West Esplanade, Suite 500
North Vancouver, BC V7M 3J3
Ph: 604.988.5201
Fax: 604.988.1452
gmcdade@ratcliff.com

Agent for the Intervener:
Michael J. Sobkin
90 boul. de Lucerne, Unit #2
Gatineau, Quebec J9H 7K8
Tel.: 819.778.7794
Fax: 819.778.1740
msobkin@sympatico.ca

Counsel for the Intervener, COALITION OF UNION OF BC INDIAN CHIEFS:

Louise Mandell, Q.C.
MANDELL PINDER LLP
422 – 1080 Mainland Street
Vancouver, BC V6B 2T4
Ph: 604.681.4146
Fax: 604.681.0959
louise@mandellpinder.com

Agent for the Intervener:
Brian A. Crane, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.786-0107
Fax: 613.563.9869
brian.crane@gowlings.com

Counsel for the Intervener, FIRST NATIONS SUMMIT:

Maria Morellato, Q.C.
MANDELL PINDER LLP
422 – 1080 Mainland Street
Vancouver, BC V6B 2T4
Ph: 604.566.8563
Fax: 604.681.0959
maria@mandellpinder.com

Agent for the Intervener:
Brian A. Crane, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.786.0107
Fax: 613.563.9869
brian.crane@gowlings.com

Counsel for the Intervener, GITANYOW HEREDITARY CHIEFS OF GWASS HLAAM, GAMLAXYELTXW, MALII, GWINUU, HAIZIMSQUE, WATAKHAYETSXW, LUUXHON AND WII'LITSWX, on their own behalf and on behalf of all GITANYOW:

Peter R. Grant
PETER GRANT & ASSOCIATES
900 - 777 Hornby Street
Vancouver, BC V6Z 1S4
Ph: 604.685.1229
Fax: 604.685.0244

Agent for the Intervener:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.233.1781
Fax: 613.788-3433
henry.brown@gowlings.com

Counsel for the Intervener, HUL'QUMI'NUM TREATY GROUP:

Robert M. Morales
P.O. Box 356
Duncan, BC V9L 3X5
Ph: 250.748.5233
Fax: 250.748.5264

Agent for the Intervener:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.233.1781
Fax: 613.788-3433
henry.brown@gowlings.com

Counsel for the Intervener, INDIGENOUS BAR ASSOCIATION OF CANADA:

David C. Nahwegahbow
NAHWEGAHBOW, CORBIERE
GENOODMAGEJIG
109 - 5884 Rama Road
Rama, Ontario L3V 6H6
Ph: 705.325.0520
Fax: 705.325.7204
dndaystar@nncfirm.ca

Agent for the Intervener:
Guy Régimbald
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Ph: 613.786.0197
Fax: 613.563.9869
guy.regimbald@gowlings.com

Counsel for the Intervener, OFFICE OF THE WET'SUWET'EN CHIEFS:

Peter R. Grant
PETER GRANT & ASSOCIATES
900 - 777 Hornby Street
Vancouver, BC V6Z 1S4
Ph: 604.685.1229
Fax: 604.685.0244

Agent for the Intervener:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.233.1781
Fax: 613.788-3433
henry.brown@gowlings.com

Counsel for the Intervener, OKANAGAN NATION ALLIANCE AND THE SHUSWAP NATION TRIBAL COUNCIL AND THEIR MEMBER COJMMUNITIES, OKANAGAN, ADAMS LAKE, NESKONLITH AND SPLATSIN INDIAN BANDS:

Louise Mandell, Q.C.
MANDELL PINDER LLP
422 – 1080 Mainland Street
Vancouver, BC V6B 2T4
Ph: 604.681.4146
Fax: 604.681.0959
louise@mandellpinder.com

Agent for the Intervener:
Brian A. Crane, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.786.0107
Fax: 613.563.9869
brian.crane@gowlings.com

Counsel for the Intervener, TE'MEXW TREATY ASSOCIATION:

Robert J.M. Janes
JANES FREEDMAN KYLE LAW CORPORATION
340 - 1122 Mainland Street
Vancouver, BC V6B 5l1
Ph: 250.405.3460
Fax: 250.381.8567
rjanes@jfklaw.ca

Agent for the Intervener:
Henry S. Brown, Q.C.
GOWLING LAFLEUR HENDERSON LLP
2600 – 160 Elgin Street
Ottawa, ON K1P 1C3
Tel.: 613.233.1781
Fax: 613.788-3433
henry.brown@gowlings.com

Counsel for the Intervener, TSAWOUT FIRST NATION, TSARTLIP FIRST NATION, SNUNEYMUXW FIRST NATION AND KWAKIUTL FIRST NATION:

John W. Gailus
Christopher G. Devlin
DEVLIN GAILUS
556 Herald Street
Victoria, BC V8W 1S6
Ph: 250.361.9469
Fax: 250.361.9426
jarvay@arvayfindlay.com

Agent for the Intervener:
Eugene Meehan, Q.C.
SUPREME ADVOCACY LLP
100- 397 Gladstone Avenue
Ottawa, ON K2P 0Y9
Tel.: 613.695.8855 Ext 101
Fax: 613.695.8580
emeehan@supremeadvocacy.ca

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PART I: OVERVIEW AND FACTS

1. The Haida are the Indigenous Peoples of Haida Gwaii – an archipelago off the northwest coast of British Columbia which has been their homeland since time immemorial – who do not have a Treaty with the Crown.

2. The British Columbia Court of Appeal ("BCCA") said it sought a practical approach that would clarify the law and lead to progress in negotiations. In a form of judicial legislation, the BCCA determined that reconciliation is achieved by the BCCA finding "a network of specific sites over which title can be proven, connected by broad areas in which various Aboriginal rights can be exercised"; a broad territorial claim for Aboriginal Title is not legally tenable. The BCCA described this as a "practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians… [A]n overly-broad recognition of Aboriginal Title is not conducive to these goals".[1]

3. These conclusions are based on flawed legal principles which cannot lead to reconciliation. To the contrary, significant reconciliation progress has been made in the past several decades by the Haida Nation (the "Haida") and Crown governments which could not have been achieved based on the BCCA's decision. This reconciliation progress has taken place in line with this Court's jurisprudence, with the goal of a mutual recognition and reconciliation of Haida and Crown titles and co-existing jurisdictions, considering the Haida and also the non-Haida residents of Haida Gwaii, the Province and Canada.

PART II: ISSUES

4. The BCCA erred in holding that a territorial claim to Aboriginal Title is legally unsustainable and a barrier to reconciliation.

PART III: ARGUMENT

A. TERRITORIAL TITLE

5. Unlike other property rights recognized by the common law which were brought to North America by the settlers, Aboriginal Title is an inherent, *sui generis* interest in land and embraces legal orders and laws.[2] The law required the Crown to recognize and respect the pre-existing

right to land and the laws of the original inhabitants as legal rights[3] which became part of the common law, by virtue of the doctrine of continuity.[4] Aboriginal Title, based upon aboriginal laws, survived the assertion of Crown sovereignty,[5] has not been extinguished[6] and finds expression in and is protected by s. 35 of the *Constitution Act, 1982*.[7]

6. Laws operate on a territorial basis. In the *Delgamuukw* and *Campbell*[8] cases, Courts affirmed that the legal authority associated with Aboriginal Title is governmental in nature.[9] The essential nexus between laws and legal orders and Aboriginal Title was canvassed in *Delgamuukw*, where this Court held that laws, such as land tenure and trespass laws, are relevant to proving title.[10] Individuals have property; Nations have territory and laws.

7. The BCCA concluded that Aboriginal Rights are sufficient to achieve reconciliation rather than a territorial based title. This goes to the defect in the BCCA's reasoning and to the heart of the difference between Aboriginal Rights and Aboriginal Title. Aboriginal Rights concern customs, practices and activities that were an integral part of a distinctive Aboriginal culture at the time of contact with Europeans.[11] These will be protected, subject to reasonable rights of infringement.[12] The practices are not "frozen"[13] and may be exercised in modern form, but they may not be practices or activities of a different sort than were exercised at the time of contact.[14] Aboriginal Title, on the other hand, is the right to effective ownership of the land for purposes not destructive to the purposes of its original habitation. This is not simply a "bundle" of pre-determined Aboriginal Rights, but something qualitatively larger.[15] There are jurisdictional and economic components to Aboriginal Title,[16] assessed as of the time of the assertion of sovereignty by the Crown.[17] Aboriginal Rights, on the other hand, will have an economic component only when it is proven that they had an economic aspect (in a commercial sense) at the time of contact.[18] Aboriginal Rights look back to ancient practices, still pursued or sought to be pursued. They seek to protect that which has not already been completely taken or destroyed. Aboriginal Title, on the other hand, is forward looking, supporting the unfolding of a viable modern society upon ancestral homelands, with access to resources to build an economy while drawing from the wisdom of ancient laws about sustainable stewardship.

8. The BCCA contends that the Court's interest is in protecting customs and traditions.[19] In the Court's vision, the Tsilhqot'in will be free forever to pursue wild horses and to hunt on their

ancestral lands, but they will never be able to "manage their affairs with both some independence from the remainder of Canadian society and also with honourable interdependence between all parts of the Canadian social fabric".[20] The Crown offers that the Aboriginal Rights of the Tsilhqot'in, as found by the BCCA, are sufficiently robust for them to stop logging in the region to protect the wildlife they wish to hunt.[21] But their needs and demands, as set out by the trial judge[22] and referred to by the BCCA[23] were not simply to stop logging to protect the wildlife, but also to live by their ancient laws, providing an economy, using resources from their territory so that living as Xeni-Gwet'in in the context of a modern society, did not condemn them to impoverishment. The BCCA finds that the law cannot permit such a remedy.

B. RECONCILIATION

9. The Haida narrative of their principled pathway to reconciliation provides this Court with the best evidence both of the error of the BCCA's site specific view of Aboriginal Title, and demonstrates that recognition of a territorial title is a true measure of reconciliation.

10. Notwithstanding the law in 1846 and onwards, requiring recognition of the pre-existing rights to land and systems of laws as legal rights, British Columbia denied Aboriginal Title since Confederation. Many Indigenous Nations, including the Haida, turned to the courts for remedies, and also continued to exercise their own laws which contained responsibilities to protect their territories and adjacent waters. For the Haida, this journey was from confrontation over land uses to negotiations, in an attempt to achieve reconciliation over the whole archipelago, including the oceans surrounding Haida Gwaii.

11. Gwaii Haanas is a region where Haida oral history records that the land first came out of the sea, where the ancestors of the Haida's Raven and Eagle Clans first appeared, and where the first tree on Haida Gwaii took root. In 1985, Haida elders were forced, by the refusal of the Crown to recognize any Haida interest in these lands, to exercise their responsibility under Haida laws to stop further industrial logging on Lyell Island. This campaign and the spectacle of police escorting loggers to work while arresting Haida elders for standing to protect their lands caused international attention. Reacting to public sentiment, Canada and BC joined with the Haida to seek a path forward based on mutual respect and recognition. Ultimately what resulted was the Gwaii Haanas Agreement (the "GHA"), wherein Canada, British Columbia and the Haida agreed

to a cooperative resolution. The history of the negotiation of the GHA is set out in the *Moresby Island* case.[24]

12. Ultimately, Crown and Haida governments agreed to a cessation of logging for Gwaii Haanas, covering approximately 150,000 hectares or 15% of Haida Gwaii. The Haida designated Gwaii Haanas a protected area, as did Canada when, in 1992, the *National Parks Act*[25] was amended to add provision for the designation of a "National Park Reserve" in Gwaii Haanas; the legislation provided that this was a step taken pending resolution of the Aboriginal Title dispute.[26] In 1993, Canada and the Haida signed the GHA which recognizes two separate authorities and, without resolving the title dispute, agrees that the lands will be protected and Aboriginal Rights respected. A mechanism for management included the establishment of the Archipelago Management Board (the "AMB"), made up of equal composition of Canada and Haida representatives who make decisions by consensus. In 2010, the area was expanded to include the marine area, extending 10 km off the shore. This area is the first in the world to be managed from mountain top to seafloor, covering nearly 5,000 km^2 of land and sea.

13. Decisions made under the GHA granting licences to non-Haida businesses to operate in Gwaii Haanas have been challenged unsuccessfully. In his Reasons in *Moresby Explorers Ltd. v. Canada (Attorney General)*,[27] Mr. Justice Pelletier commented with approval on the shared decision making model created by the GHA:

> The Gwaii Haanas Agreement is a solution to the problem of competing claims over the same territory. Both Canada and the Haida Nation claim competence to manage the Gwaii Haanas area. Canada relies upon the National Parks Act and the legislation specific to the Gwaii Haanas Park Reserve. The Haida Nation relies upon its claim of aboriginal rights in its ancestral territory. It is in the interests of both parties to join in a structure which permits decisions to be made without having to decide by whose authority they come to be made. The requirement that consensus be sought on all decisions is a device for allowing decisions to be made without allocating jurisdiction for the subject matter of the decision to one party or the other.[28]

14. The success of this shared decision-making model has been recognized by a panel of experts who participated in a survey of protected areas in North America conducted by National Geographic and ranked Gwaii Haanas as the #1 tourism destination in North America.[29] The GHA and its implementation illustrates how Haida laws, which pre-dated and survived the

assertion of Crown sovereignty, found expression in a contemporary model of shared decision making functioning on a territorial basis, in collaboration Crown governments, bringing together the best features of Haida and Crown legal systems, knowledge and cultures.

15. The BCCA said that recognizing a broad territorial claim is the antithesis of reconciliation – pitting "other Canadians" in opposition to the recognition of Aboriginal Title on a territorial basis. This adversarial approach is argued by Crown governments, with British Columbia denying the existence of an Aboriginal veto[30] and Canada referring to the possibility of Aboriginal consent.[31] Rather than competing, the GHA is based on Crown and Haida titles and jurisdiction co-existing, neither one absolute, and completing each other. This Court does not need to choose one of two competing visions, "our way" and "their way". Each way of understanding the world and of living in it has important contributions to make to our common future, whether this understanding involves sharing the land in ways that respect the right of the future generations to healthy forests, streams, rivers and oceans, ecosystems, drawing upon the wisdom of the ancient laws of the land, or the tools of a modern society.

C. THE HAIDA CASE[32]

16. *Delgamuukw* held that Aboriginal Title has not been extinguished in British Columbia;[33] further, that Title is a right in land,[34] with jurisdictional[35] and economic components.[36] Aboriginal Title is not absolute. There are restrictions as to what can be done on Aboriginal Title lands, because of its inherent limit.[37] There are also restrictions on Crown control by virtue of Aboriginal Title.[38] The tool to achieve reconciliation is negotiation "with good faith and give and take on all sides, reinforced by the judgments of this Court…"[39]

17. Yet, notwithstanding *Delgamuukw*, British Columbia granted a multi-year, long-term logging tenure to a company without consulting the Haida. For the purpose of protecting its Aboriginal Title and Rights to the lands and waters under this tenure, the Haida appeared in this Court in 2004, and this Court confirmed that the Province was under a duty to consult and accommodate with the Haida prior to replacing a Tree Farm Licence.[40] In doing so, this Court found that "the Province has had available evidence of the Haida's exclusive use and occupation of some areas of Block 6 '[s]ince 1994, and probably much earlier'"[41] and that the Haida have a *prima facie* case of Aboriginal Title in respect of the lands in issue.[42]

18. This Court did not base its decision on site specific Aboriginal Title to small spots. Indeed the licence in issue encompassed about 241,000 hectares, almost a quarter of Haida Gwaii.[43] The Court's finding of a *prima facie* case to Title was in the context of the Province raising concerns over "the breadth of the Haida's claims", which was title to all of Haida Gwaii and naturally includes the oceans surrounding Haida Gwaii.[44]

19. The BCCA is wrong in concluding that territorial title recognition is a barrier to negotiations about reconciliation. The remedy provided by the Courts in the *Haida Nation* case required Court supervised negotiations[45] which have proved helpful in the completion of a formal Reconciliation Agreement with BC called *Kunst'agaa-Kunst'aayah,* meaning "the Beginning" in Massett and Skidegate dialects. This saw to the implementation of the "Haida Land Use Vision" through a Comprehensive Land Use Planning, which included the Island Community, industry and other stakeholders. Through this plan, a balance was sought between the eco-cultural and socio-economic values. Ultimately this resulted in formal protection of a total of 52% of the land base of Haida Gwaii, or about 500,000 hectares, and shared decision making and management over the rest of the landbase. These negotiations have advanced in large measures due to the prior to proof recognition of the Haida *prima facie* case for Aboriginal Title to the whole of Haida Gwaii, together with the exercise of Title by the Haida protecting their lands, consistent with their perspective and their legal systems.[46]

20. These concrete results could not have been achieved if the state of the law was based upon the law as set out in the BCCA decision.

D. THE ABORIGINAL PERSPECTIVE

21. This Court has said: "Only by fully recognizing the aboriginal legal entitlement can the aboriginal legal perspective be satisfied."[47] The BCCA's brief reference to the Aboriginal perspective is found at para. 233 of the judgment. The Court says: "The connection of the Tsilhqot'in Nation to its traditional territory has both spiritual and temporal aspects that are difficult to convey in the dry words of a judgment." Then the Court became speechless in terms of the Tsilhqot'in concepts of land.

22. The Haida have brought to negotiations their perspective, which is based upon an integrated and seamless land and seascape of watersheds and waterways from sea to mountain

top, populated by many life forms, all of which are interdependent and require a sustainable and healthy ecosystem, and link ancestors with future generations.[48] In stark contrast, seen through the legal lens of the BCCA's judgment, there are sites of Aboriginal Title limited to coastal villages and intensely used places, supplemented by circumscribed Aboriginal Rights to harvest specific resources in the interior. The BCCA's thesis of the relationship between Aboriginal Title and Aboriginal Rights would impose a legal separation of the title of the interior landscape of Haida Gwaii from its coastal environment, and its marine areas from its terrestrial occupation. Far from a being a principled and workable model of reconciliation, it is its antithesis.

23. The importance of identifying and giving effect to the Aboriginal perspective was pointedly addressed by former Chief Justice Finch, who challenged the judiciary and the legal profession in its conceptualizing of Aboriginal Title and Rights and understanding the crucial relevance of indigenous laws.[49] Chief Justice Finch called upon the legal community to attempt "in good faith, and as respectfully as possible, to enter new landscapes: legal, ethical, and cultural"[50] and "find space for ourselves, as strangers and newcomers, within the Indigenous legal orders themselves."[51] In this sense, this Court must reject legal interpretations that define Aboriginal Title in ways that, while paying lip service to Aboriginal law and Aboriginal perspectives, in practice privilege common-law concepts of possession with the result that, under the BCCA's definition of Aboriginal Title, Aboriginal landscapes are reduced to a small percentage of the lands and waters which in Chief Justice Finch's words, are "central to… [their] sense of individual and collective personhood and social organization".[52]

24. In oral argument in *Haida Nation* the Court was shown a photograph taken in 1878 of a Haida village to explain the importance of the forests of Haida Gwaii. The photo dramatically illustrated the prolific use of the forests and the fact that the entire village was brimming over with value-added old-growth cedar. The Court was told of the Haida vision to construct a new economic house – one that sustains the lands, waters resources and culture of Haida Gwaii. This house, like the houses built in 1878, require the entire community to cooperatively work side by side in constructing and raising the house. Unlike the houses built in 1878, today's community extends beyond the Haida community and includes non-Haida actors in the society of Haida Gwaii.[53]

25. Consistent with this Court's jurisprudence, the Haida perspective provides space for both Aboriginal and non-Aboriginal legal orders co-existing; and a mutual recognition of Aboriginal and Crown Titles, both having a jurisdictional and economic component and requiring negotiated accommodations over the lands and waters of Haida Gwaii. The BCCA decision, on the other hand, provides for nothing more than the "reserve system" which has condemned Indigenous Peoples to impoverishment while their territories are unjustly exploited around them. The BCCA decision, if upheld, would reduce this Court's role in reconciliation to something of little practical significance. As stated by Hon. Douglas Lambert in a recent article:

> If the decision were correct, it would tilt the economic balance so far against First Nations that consultation would be virtually meaningless, accommodation an empty gesture, justification for infringement a trivial token, and the treaty process an expensive sham.[54]

26. The Haida prefer that reconciliation be resolved with predictable solutions through good faith negotiations. But in spite of the reconciliation progress the Haida have achieved, the Haida and Crown have not been able to achieve a constitutionally entrenched reconciliation agreement because Crown governments' negotiation mandates about such a reconciliation agreement are in line with their legal position, as endorsed by the BCCA. The Haida have therefore pursued, since 2002 a case seeking declarations of title over Haida Gwaii.[55] The Haida evidence is not the same as that of the Tsilhqot'in. This Court should not foreclose other conceptions of Indigenous orders and forms of social organization in deciding this Appeal.

E. REMEDY

27. The Haida propose that the findings of fact made by the trial judge about Aboriginal Title be restored and the decision of the BCCA, that a declaration based on such findings was not barred by the pleadings or otherwise, be upheld.

28. The remedy provided by this Court in the *Haida Nation* case proved helpful in achieving agreements about the area embraced by the TFL 39. The Haida propose that the Court adopt a similar approach with respect to a remedy about the constitutional questions. Having decided the existence and reach of Tsilhqot'in Aboriginal Title, this Court should remit to a Justice of the Supreme Court of British Columbia the issue of determination of an on-the-ground remedy. That Justice would be charged with adjudicating a court-supervised negotiation to take place

within one year, during which time this Court will retain jurisdiction. The object of the negotiations will be to settle the parties' interests and jurisdiction over and with respect to the area to which the declaration of Aboriginal Title applies.

PART IV: COSTS

29. The Council of the Haida Nation does not seek costs and request that none be awarded against it.

PART V: ORDERS SOUGHT

30. The Applicant requests an order of this Court, pursuant to Rules 55 to 59 of the Rules of the Supreme Court of Canada, that:

a. the Applicant be granted leave to make oral submissions at the hearing of this appeal; and

b. any further or other order that the Court may deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2013.

LOUISE MANDELL, Q.C.

STUART RUSH, Q.C.

"Michael Jackson"

MICHAEL JACKSON, Q.C.

gid7ahl-gudsllday, TERRI-LYNN WILLIAMS-DAVIDSON

"David Paterson"

DAVID PATERSON

ANGELA D'ELIA

PART VI: TABLE OF AUTHORITIES

CASES	**Cited in factum at paragraph**
Calder v. British Columbia (Attorney-General), [1973] S.C.R. 313	5
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Moresby Explorers Ltd. v. Canada (Attorney General), 2006 FCA 144	11
R. v. Sparrow, [1990] 1 S.C.R. 1075	7
R. v. Van der Peet, [1996] 2 S.C.R. 507	7, 21
Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700	8
William v. British Columbia, 2012 BCCA 285	2, 8, 15
STATUTES AND RULES	**Cited in factum at paragraph**
Canada National Parks Act (S.C. 2000, c. 32), s. 41	12

ENDNOTES

[1] *William v. British Columbia*, 2012 BCCA 285 ("*William*") at paras. 238 and 239.
[2] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 ("*Delgamuukw*") at para. 112.
[3] *Guerin v. Canada*, [1984] 2 S.C.R. 335 ("*Guerin*") at para. 89 and 97; *Delgamuukw, supra* at para. 114.
[4] *Guerin, supra* at paras. 86-89; *Delgamuukw, supra* at paras. 126 and 152-153. See also Mark D. Walters, "The Golden Thread of Continuity: Aboriginal Customs at common Law and under the *Constitution Act*, 1982" (1999) 44 McGill L.J. 711; Kent McNeil and David Yarrow, "Has Constitutional Recognition of Aboriginal Rights Adversely Affected Their Definition?" (2007) 37 Supreme Court L. Rev. (2nd) 177 at 203 – 11.
[5] *Delgamuukw, supra* at para. 114. See also *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313.
[6] *Delgamuukw, supra* at paras. 172 and 175.
[7] *Delgamuukw, supra* at paras. 133-134.
[8] *Campbell v. British Columbia (Attorney General)*, 2000 BCSC 1123.
[9] *Delgamuukw, supra* at paras. 114 and 126; *Campbell, supra* at paras. 114, 134-135.
[10] *Delgamuukw, supra* at paras. 147-148.
[11] *R. v. Van der Peet*, [1996] 2 S.C.R. 507 ("*Van der Peet*") at para. 46.
[12] *R. v. Sparrow*, [1990] 1 S.C.R. 1075 ("*Sparrow*") at paras. 61-65 and 70.
[13] *Sparrow, supra* at para. 27.
[14] *Sparrow, supra* at para. 27.
[15] *Delgamuukw, supra* at paras. 110-111 and 119. In *Delgamuukw*, Lamer, C.J.C. at para. 117 said that "aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, cultures and traditions which are integral to distinctive aboriginal cultures..." At para. 118, he expressly rejected the proposition that such title was restricted to "the right to engage in activities which are aspects of aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures of the aboriginal group claiming the right..."
[16] *Delgamuukw, supra* at paras. 115, 133-134, 137, 166 and 169.
[17] *Delgamuukw, supra* at para. 145.
[18] *Van der Peet, supra* at paras. 76-80.
[19] *William, supra* at paras. 171-173.
[20] *Delgamuukw v. British Columbia (B.C.C.A.)*, 30 BCAC 1 at para. 669.
[21] Respondent's Factum on Behalf of the Attorney General of Canada at paras. 54 and 57.
[22] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 25.
[23] *William, supra* at para. 12.
[24] *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2005 FC 592; *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2006 FCA 144.
[25] *Canada National Parks Act* (S.C. 2000, c. 32).
[26] *Canada National Parks Act, supra*, section 41.
[27] *Moresby Explorers Ltd. v. Canada (Attorney General)*, 2001 FCT 780 ("*Moresby Explorers, 2001*"). In 1996, the AMB established a business licensing system for commercial tour operators based on the imposition of user quotas or allocations of user day/nights. The Policy reserved some of the commercial quota for the Haida, whether they used it or not ("Haida Allocation Policy"). A licence was issued to Mr. Gould, who challenged the decision made under the GHA, granting his company a commercial business licence, objecting to the Haida Allocation Policy, being discriminatory and inconsistent with the equality guarantee provided by s. 15(1) of the Charter.
[28] *Moresby Explorers, 2001, supra* at para. 67. See also para. 68.
[29] The survey of 55 national parks in the U.S. and Canada was organized by the National Geographic Sustainable Destinations Resource Center, and solicited anonymous findings from 300 expert panelists. Gwaii Haanas might seem to rate its excellent 88 due simply to light traffic: Fewer than 3,000 visitors a year make it to the park in the soggy, remote Queen Charlotte Islands. But there's more: A unique partnership between Parks Canada and the native Haida people. As noted in the article: "One of the most spectacular parks in all of Canada—unique in the co-management with the Haida Nation and their well-development watchman programs." ... "Perhaps one of the best examples in Canada of a mutually beneficial relationship between the government and local indigenous peoples—the Haida Nation."... "The strong co-management of the park with the Haida people has significantly improved the management of this park, and it largely retains its wilderness character and cultural significance. Tourists undertake some cultural education before they enter the area." Author Unknown, "National Park Destinations Rated:

Western/Pacific U.S. and Canada" (July/August 2005) *National Geographic Traveler Magazine*, online: http://traveler.nationalgeographic.com/2005/07/destinations-rated/western-text.

[30] Factum of the Respondents Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region at para. 183.

[31] Respondent's Factum on Behalf of the Attorney General of Canada at para. 121(f).

[32] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 ("*Haida Nation*").

[33] *Delgamuukw*, *supra* at paras. 133, 172 and 175.

[34] *Delgamuukw*, *supra* at paras. 111 and 119.

[35] *Delgamuukw*, *supra* at paras. 115, 133-134 and 137.

[36] *Delgamuukw*, *supra* at paras. 166 and 169.

[37] *Delgamuukw*, *supra* at paras. 111 and 125-128.

[38] *Delgamuukw*, *supra* at para. 145.

[39] *Delgamuukw*, *supra* at para. 186.

[40] *Haida Nation*, *supra*, at para. 76.

[41] *Haida Nation*, *supra*, at para. 65.

[42] *Haida Nation*, *supra*, at para. 71.

[43] *Haida Nation*, *supra*, at para. 73.

[44] *Haida Nation*, *supra*, at para. 66.

[45] *Haida Nation v. British Columbia (Minister of Forests)*, 2002 BCCA 462 at para. 104.

[46] Formal Agreements (over and above the GHA) include:

(a) Protocol Agreements with all of the local communities of Haida Gwaii, one of which, the Village of Port Clements, intervened in support of the Haida in the 2004 case in this Court;

(b) a Strategic Land-Use Plan Agreement with BC in 2007, and the 2009 *Kunst'aa Guu-Kunst'aayah* Reconciliation Protocol to move forward with shared management of lands and resources for a quarter of the land area in the northern part of Haida Gwaii, including 74% of the coastline and the near shore areas;

(c) an agreement to jointly manage the marine portion of the Gwaii Haanas area, with a size of 3,464 km^2, with Canada as a Haida Heritage Site and National Marine Conservation Area Reserve;

(d) a memorandum of agreement to jointly manage the *sGaan Kinghlaas* (Bowie Seamount) area with Canada as a Haida Heritage Site and marine protected area; and

(e) Block 6 from TFL 39 was transferred to a new TFL 60, and the economic arm of the Haida Nation, HaiCo purchased TFL 60 in 2012.

[47] *Van der Peet*, *supra* at para. 313.

[48] Affidavit of Peter Lantin, sworn on July 3, 2013 ("Lantin Affidavit"), at paras. 4-6 and 8.

[49] Hon. L. Finch, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice", presented at the Continuing Legal Education of British Columbia Conference *Indigenous Legal Orders and the Common Law* (Vancouver, British Columbia, 15 November, 2012).

[50] Finch, "The Duty to Learn", *supra* at para. 39.

[51] Finch, "The Duty to Learn", *supra* at para. 44.

[52] Finch, "The Duty to Learn", *supra* at para. 29.

[53] See M. Jackson, "A Reimagined and Transformed Legal Landscape", presented at the Continuing Legal Education of British Columbia Conference *Indigenous Legal Orders and the Common Law* (Vancouver, British Columbia, 15 November, 2012).

[54] D. Lambert, "The Tsilhqot'in Case" (November 2012) 70 *The Advocate* 819 at 819.

[55] *Council of the Haida Nation et al. v. Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of Canada*, Action No. L020662, Vancouver Registry, (Statement of Claim of the Haida Nation, filed on November 14, 2002).