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

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN, THE ATTORNEY GENERAL OF ALBERTA, THE ATTORNEY GENERAL OF QUEBEC, THE ATTORNEY GENERAL OF MANITOBA, TE'MEXW TREATY ASSOCIATION, THE BUSINESS COUNCIL OF BRITISH COLUMBIA, COUNCIL OF FOREST INDUSTRIES, COAST FOREST PRODUCTS ASSOCIATION, MINING ASSOCIATION OF BRITISH COLUMBIA AND ASSOCIATION OF MINERAL EXPLORATION OF BRITISH COLUMBIA, THE ASSEMBLY OF FIRST NATIONS, THE 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, THE HUL'QUMI'NUM TREATY GROUP, THE COUNCIL OF THE HAIDA NATION, THE OFFICE OF THE WET'SUWET'EN CHIEFS, THE INDIGENOUS BAR ASSOCIATION IN CANADA, THE FIRST NATIONS SUMMIT, THE TSAWOUT FIRST NATION, TSARTLIP FIRST NATION, SNUNEYMUXW FIRST NATION AND KWAKIUTL FIRST NATION, THE COALITION OF THE UNION OF B.C. INDIAN CHIEFS, THE OKANAGAN NATION ALLIANCE AND THE SHUSWAP NATION TRIBAL COUNCIL AND THEIR MEMBER COMMUNITIES, THE OKANAGAN, ADAMS LAKE, NESKONLITH AND SPLATSIN INDIAN BANDS, AMNESTY INTERNATIONAL AND CANADIAN FRIENDS SERVICE COMMITTEE, BERNARD CONRAD LEWIS, ON HIS OWN BEHALF ON BEHALF OF ALL OTHER MEMBERS OF THE GITXAALA NATION, THE CHILKO RESORTS AND COMMUNITY ASSOCIATION AND THE COUNCIL OF CANADIANS

INTERVENERS

FACTUM OF THE INTERVENER COALITION OF THE UNION OF BC INDIAN CHIEFS, THE OKANAGAN NATION ALLIANCE AND THE SHUSWAP NATION TRIBAL COUNCIL AND THEIR MEMBER COMMUNITIES, THE OKANAGAN, ADAMS LAKE NESKONLITH AND SPLATSIN INDIAN BANDS

Counsel for the Intervener, the COALITION OF THE UNION OF B.C. INDIAN CHIEFS, THE OKANAGAN NATION ALLIANCE AND THE SHUSWAP NATION TRIBAL COUNCIL AND THEIR MEMBER COMMUNITIES, THE 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 FX: 604.681.0959 louise@mandellpinder.com cheryl@mandellpinder.com	Ottawa Agent: **B.A. Crane, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 ed.vanbemmel@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 FX: 604.879.4934 david@rosenberglaw.ca jay@jaynelsonlaw.com	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600-160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C5 PH: 613.233.1781 FX: 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 Stn. Bentall Ctr Vancouver, BC V7X 1T2 PH: 604.687.5744 FX: 604.687.1415 pfoy@blg.com	Ottawa Agent: **Nadia Effendi** Borden Ladner Gervais LLP 1100 – 100 Queen Street World Exchange Plaza Ottawa, ON K1P 1J9 PH: 613.237.5160 FX: 613.230.8842 neffendi@blg.com

Counsel for the Respondent THE ATTORNEY GENERAL OF CANADA:	
Brian McLaughlin, Jennifer Chow Department of Justice 900 – 840 Howe Street Vancouver, BC V6Z 2S9 PH: 604.666.2715 FX: 604.666.2710 brian.mclaughlin@justice.gc.ca jennifer.chow@justice.gc.ca	Ottawa Agent: **Christopher M. Rupar** Attorney General of Canada Bank of Canada Building, East Tower 234 Wellington Street, Rm 1212 Ottawa, ON K1A 0H8 PH: 613.941.2351 FX: 613.954.1920 christopher.rupar@justice.gc.ca
Counsel for the Intervener, ATTORNEY GENERAL OF SASKATCHEWAN:	
	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 henry.brown@gowlings.com
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 FX: 403.662.3824	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 henry.brown@gowlings.com
Counsel for the Intervener, ATTORNEY GENERAL OF QUEBEC:	
Geneviève Verreault Tremblay, **Sylvain Leboeuf** Procureur général du Québec 1200, route de l'Église 2e étage Québec, QC V1V 4M1 PH: 418.643.1477 FX: 418.646.1696	Agent for the Intervener: **Pierre Landry** Noël & Associés 111, rue Champlain Gatineau, QC J8X 3R1 PH: 819.771.7393 FX: 819.771.5397 p.landry@noelassocies.com

Counsel for the Intervener, ASSEMBLY OF FIRST NATIONS:	
Joseph J. Arvay, Q.C., Catherin J. Boies Parker, Professor Patrick Macklem Arvay Finlay and Underhill, Boies Parker Law Corporation Inc. 1320 – 355 Burrard Street Vancouver, BC V6C 2G8 PH: 604.689.4421 FX: 1.888.575.3281 jarvay@arvayfinlay.com cboiesparker@ubplaw.ca p.macklem@utoronto.ca	Ottawa Agent: **Eugene Meehan, Q.C., Marie-France Major** Supreme Advocacy LLP 397 Gladstone Avenue, Suite 100 Ottawa, ON K2P 0Y9 PH: 613.695.8855 FX: 613.695.8580 emeehan@supremeadvocacy.ca mfmajor@supremeadvocacy.ca
Counsel for the Intervener, TE'MEXW TREATY ASSOCIATION:	
Robert J.M. Janes, Karey Brooks Janes Freedman Kyle Suite 340 – 1122 Mainland Street Vancouver, BC V6B 5L1 PH: 604.687.0549 FX: 604.687.2696 rjanes@jfklaw.ca kbrooks@jfklaw.ca	Ottawa Agent: **Edward J. Van Bemmel** Gowling Lafleur Henderson LLP 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3 PH: 613.786.0212 FX: 613.788.3500 ed.vanbemmel@gowlings.com
Counsel for the Intervener, COUNCIL OF THE HAIDA NATION:	
gid7ahl-gudsllaay **Terri-Lynn Williams-Davidson** White Raven Law Corporation 16541 Upper Beach Road Surrey, BC V3S 9R6 PH: 604.536.5541 FX: 604.536.5542 tlwd@whiteravenlaw.ca	Ottawa Agent: **B.A. Crane, Q.C.** Gowling Lafleur Henderson LLP 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3 PH: 613.786.0212 FX: 613.788.3500
Counsel for the Intervener, HUL'QUMI'NUM TREATY GROUP:	
Robert B. Morales Hul'qumi'num Treaty Group RR #1, 12611B Ladysmith, BC V9G 1M5 PH: 250.245.4660 FX: 250.748.5264 robertm@hulquminum.bc.ca	Ottawa Agent: **Ed Van Bemmel** Gowling Lafleur Henderson LLP 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3 PH: 613.786.0212 FX: 613.788.3500 ed.vanbemmel@gowlings.com

Counsel for the Intervener, ATTORNEY GENERAL OF MANITOBA:	
	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 henry.brown@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 (direct) FX: 604.681.0959 maria@mandellpinder.com cheryl@mandellpinder.com	Ottawa Agent: **B.A. Crane, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 Ed.VanBemmel@gowlings.com
Counsel for the Intervener, TSAWOUT FIRST NATION, TSARTLIP FIRST NATION, SNUNEYMUXW FIRST NATION, AND KWAKIUTL FIRST NATION (Douglas Treaty Nations):	
John W. Gailus, Christopher G. Devlin Devlin Gailus Suite C-100, Nootka Court 633 Courtney Street Victoria, BC V8W 1B9 PH: 250.361.9469 FX: 250.361.9429 john@devlingailus.com Christopher@devlingailus.com	Ottawa Agent:

Counsel for the Intervener, AMNESTY INTERNATIONAL AND CANADIAN FRIENDS SERVICE COMMITTEE (Quakers):	
Justin Safayeni Stockwoods LLP Barristers TD North Tower 77 King Street West Suite 4130, P.O. Box 140 Toronto-Dominion Centre Toronto, ON M5K 1H1 PH: 416.593.7200 FX: 416.593.9345 justins@stockwoods.ca	Agent for the Intervener: **Michael J. Sobkin** Barrister and Solicitor 2 – 90 Boulevard de Lucerne Gatineau, QC J9H 7K8 PH: 819.778.7794 FX: 819.778.1740 msobkin@sympatico.ca
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, Michael Lee Ross Peter Grant & Associates 900 – 777 Hornby Street Vancouver, BC V6Z 1S4 PH: 604.685.1229 FX: 604.685.0244 Toll Free: 1.800.428.5665 pgrant@grantnativelaw.com	Ottawa Agent:
Counsel for the Intervener, the OFFICE OF THE WET'SUWET'EN CHIEFS:	
Peter R. Grant, Karenna L. Williams Peter Grant & Associates 900 – 777 Hornby Street Vancouver, BC V6Z 1S4 PH: 604.685.1229 FX: 604.685.0244 Toll Free: 1.800.428.5665 pgrant@grantnativelaw.com	Ottawa Agent:

Counsel for the Intervener, INDIGENOUS BAR ASSOCIATION IN CANADA:	
David C. Nahwegahbow I.P.C. Nahwegahbow, Corbiere 5884 Rama Road, Suite 109 Rama, ON L3V 6H6 PH: 705.325.0520 FX: 705.325.7204 dndaystar@nncfirm.ca	Ottawa Agent: **Guy Régimbald** Gowling Lafleur Henderson LLP 2600 - 160 Elgin Street Ottawa, ON K1P 1C3 PH: 613.786.0197 FX: 613.788.3559 guy.regimbald@gowlings.com
Counsel for the Intervener, CHILCO RESORTS AND COMMUNITY ASSOCIATION & THE COUNCIL OF CANADIANS:	
Gregory J. McDade, Q.C., F. Matthew Kirchner, Kate M. Blomfield Ratcliff & Company LLP 500 – 221 West Esplanade North Vancouver, BC V7M 3J3 PH: 604.988.5201 FX: 604.988.1452 mkirchner@ratcliff.com	Agent for the Intervener: **Michael Sobkin** Barrister and Solicitor 2 – 90 Boulevard de Lucerne Gatineau, QC J9H 7K8 PH: 819.778.7794 FX: 819.778.1740 msobkin@sympatico.ca
Counsel for the Intervener, BUSINESS COUNCIL OF BC, COUNCIL OF FOREST INDUSTRIES, COAST FOREST PRODUCTS ASSOCIATION, and MINING ASSOCIATION OF BRITISH COLUMBIA AND ASSOCIATION FOR MINERAL EXPLORATION BRITISH COLUMBIA:	
Charles F. Willms Fasken Martineau DuMoulin LLP 2900 – 550 Burrard Street, Bentall 5 Vancouver, BC V6C 0A3 PH: 604.631.4789 FX: 604.631.3232 cwillms@fasken.com	Ottawa Agent: **Stephen Acker** Fasken Martineau DuMoulin LLP Suite 1300 – 55 Metcalfe Street Ottawa, ON K1P 6L5 PH: 613.236.3882 FX: 613.230.6423 sacker@fasken.com

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 Ctre. S. TD Bank Tower 25th Floor, 700 Georgia Street West Vancouver, BC V7Y 1B3 PH: 604.661.9341 FX: 604.661.9349 tdickson@farris.com	Ottawa Agent: **Matthew Estabrooks** Gowling Lafleur Henderson, LLP 2600 – 160 Elgin Street Ottawa, ON K1P 1C3 PH: 613.786.0211 FX: 613.788.3573 matthew.estabrooks@gowlings.com

TABLE OF CONTENTS

Counsel for the Intervener, the COALITION OF THE UNION OF B.C. INDIAN CHIEFS, THE OKANAGAN NATION ALLIANCE AND THE SHUSWAP NATION TRIBAL COUNCIL AND THEIR MEMBER COMMUNITIES, THE 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 FX: 604.681.0959 louise@mandellpinder.com cheryl@mandellpinder.com	Ottawa Agent: **B.A. Crane, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 ed.vanbemmel@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 FX: 604.879.4934 david@rosenberglaw.ca jay@jaynelsonlaw.com	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600-160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C5 PH: 613.233.1781 FX: 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 Stn. Bentall Ctr Vancouver, BC V7X 1T2 PH: 604.687.5744 FX: 604.687.1415 pfoy@blg.com	Ottawa Agent: **Nadia Effendi** Borden Ladner Gervais LLP 1100 – 100 Queen Street World Exchange Plaza Ottawa, ON K1P 1J9 PH: 613.237.5160 FX: 613.230.8842 neffendi@blg.com

Counsel for the Respondent THE ATTORNEY GENERAL OF CANADA:	
Brian McLaughlin, Jennifer Chow Department of Justice 900 – 840 Howe Street Vancouver, BC V6Z 2S9 PH: 604.666.2715 FX: 604.666.2710 brian.mclaughlin@justice.gc.ca jennifer.chow@justice.gc.ca	Ottawa Agent: **Christopher M. Rupar** Attorney General of Canada Bank of Canada Building, East Tower 234 Wellington Street, Rm 1212 Ottawa, ON K1A 0H8 PH: 613.941.2351 FX: 613.954.1920 christopher.rupar@justice.gc.ca
Counsel for the Intervener, ATTORNEY GENERAL OF SASKATCHEWAN:	
	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 henry.brown@gowlings.com
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 FX: 403.662.3824	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 henry.brown@gowlings.com
Counsel for the Intervener, ATTORNEY GENERAL OF QUEBEC:	
Geneviève Verreault Tremblay, **Sylvain Leboeuf** Procureur général du Québec 1200, route de l'Église 2e étage Québec, QC V1V 4M1 PH: 418.643.1477 FX: 418.646.1696	Agent for the Intervener: **Pierre Landry** Noël & Associés 111, rue Champlain Gatineau, QC J8X 3R1 PH: 819.771.7393 FX: 819.771.5397 p.landry@noelassocies.com

Counsel for the Intervener, ASSEMBLY OF FIRST NATIONS:	
Joseph J. Arvay, Q.C., Catherin J. Boies Parker, Professor Patrick Macklem Arvay Finlay and Underhill, Boies Parker Law Corporation Inc. 1320 – 355 Burrard Street Vancouver, BC V6C 2G8 PH: 604.689.4421 FX: 1.888.575.3281 jarvay@arvayfinlay.com cboiesparker@ubplaw.ca p.macklem@utoronto.ca	Ottawa Agent: **Eugene Meehan, Q.C., Marie-France Major** Supreme Advocacy LLP 397 Gladstone Avenue, Suite 100 Ottawa, ON K2P 0Y9 PH: 613.695.8855 FX: 613.695.8580 emeehan@supremeadvocacy.ca mfmajor@supremeadvocacy.ca
Counsel for the Intervener, TE'MEXW TREATY ASSOCIATION:	
Robert J.M. Janes, Karey Brooks Janes Freedman Kyle Suite 340 – 1122 Mainland Street Vancouver, BC V6B 5L1 PH: 604.687.0549 FX: 604.687.2696 rjanes@jfklaw.ca kbrooks@jfklaw.ca	Ottawa Agent: **Edward J. Van Bemmel** Gowling Lafleur Henderson LLP 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3 PH: 613.786.0212 FX: 613.788.3500 ed.vanbemmel@gowlings.com
Counsel for the Intervener, COUNCIL OF THE HAIDA NATION:	
gid7ahl-gudsllaay **Terri-Lynn Williams-Davidson** White Raven Law Corporation 16541 Upper Beach Road Surrey, BC V3S 9R6 PH: 604.536.5541 FX: 604.536.5542 tlwd@whiteravenlaw.ca	Ottawa Agent: **B.A. Crane, Q.C.** Gowling Lafleur Henderson LLP 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3 PH: 613.786.0212 FX: 613.788.3500
Counsel for the Intervener, HUL'QUMI'NUM TREATY GROUP:	
Robert B. Morales Hul'qumi'num Treaty Group RR #1, 12611B Ladysmith, BC V9G 1M5 PH: 250.245.4660 FX: 250.748.5264 robertm@hulquminum.bc.ca	Ottawa Agent: **Ed Van Bemmel** Gowling Lafleur Henderson LLP 160 Elgin Street, Suite 2600 Ottawa, ON K1P 1C3 PH: 613.786.0212 FX: 613.788.3500 ed.vanbemmel@gowlings.com

Counsel for the Intervener, ATTORNEY GENERAL OF MANITOBA:	
	Ottawa Agent: **Henry S. Brown, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 henry.brown@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 (direct) FX: 604.681.0959 maria@mandellpinder.com cheryl@mandellpinder.com	Ottawa Agent: **B.A. Crane, Q.C.** Gowling Lafleur Henderson LLP 2600 – 160 Elgin Street P.O. Box 466, Stn "D" Ottawa, ON K1P 1C3 PH: 613.233.1781 FX: 613.788.3433 Ed.VanBemmel@gowlings.com
Counsel for the Intervener, TSAWOUT FIRST NATION, TSARTLIP FIRST NATION, SNUNEYMUXW FIRST NATION, AND KWAKIUTL FIRST NATION (Douglas Treaty Nations):	
John W. Gailus, Christopher G. Devlin Devlin Gailus Suite C-100, Nootka Court 633 Courtney Street Victoria, BC V8W 1B9 PH: 250.361.9469 FX: 250.361.9429 john@devlingailus.com Christopher@devlingailus.com	Ottawa Agent:

Counsel for the Intervener, AMNESTY INTERNATIONAL AND CANADIAN FRIENDS SERVICE COMMITTEE (Quakers):	
Justin Safayeni Stockwoods LLP Barristers TD North Tower 77 King Street West Suite 4130, P.O. Box 140 Toronto-Dominion Centre Toronto, ON M5K 1H1 PH: 416.593.7200 FX: 416.593.9345 justins@stockwoods.ca	Agent for the Intervener: **Michael J. Sobkin** Barrister and Solicitor 2 – 90 Boulevard de Lucerne Gatineau, QC J9H 7K8 PH: 819.778.7794 FX: 819.778.1740 msobkin@sympatico.ca
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, Michael Lee Ross Peter Grant & Associates 900 – 777 Hornby Street Vancouver, BC V6Z 1S4 PH: 604.685.1229 FX: 604.685.0244 Toll Free: 1.800.428.5665 pgrant@grantnativelaw.com	Ottawa Agent:
Counsel for the Intervener, the OFFICE OF THE WET'SUWET'EN CHIEFS:	
Peter R. Grant, Karenna L. Williams Peter Grant & Associates 900 – 777 Hornby Street Vancouver, BC V6Z 1S4 PH: 604.685.1229 FX: 604.685.0244 Toll Free: 1.800.428.5665 pgrant@grantnativelaw.com	Ottawa Agent:

Counsel for the Intervener, INDIGENOUS BAR ASSOCIATION IN CANADA:	
David C. Nahwegahbow I.P.C. Nahwegahbow, Corbiere 5884 Rama Road, Suite 109 Rama, ON L3V 6H6 PH: 705.325.0520 FX: 705.325.7204 dndaystar@nncfirm.ca	Ottawa Agent: **Guy Régimbald** Gowling Lafleur Henderson LLP 2600 - 160 Elgin Street Ottawa, ON K1P 1C3 PH: 613.786.0197 FX: 613.788.3559 guy.regimbald@gowlings.com
Counsel for the Intervener, CHILCO RESORTS AND COMMUNITY ASSOCIATION & THE COUNCIL OF CANADIANS:	
Gregory J. McDade, Q.C., F. Matthew Kirchner, Kate M. Blomfield Ratcliff & Company LLP 500 – 221 West Esplanade North Vancouver, BC V7M 3J3 PH: 604.988.5201 FX: 604.988.1452 mkirchner@ratcliff.com	Agent for the Intervener: **Michael Sobkin** Barrister and Solicitor 2 – 90 Boulevard de Lucerne Gatineau, QC J9H 7K8 PH: 819.778.7794 FX: 819.778.1740 msobkin@sympatico.ca
Counsel for the Intervener, BUSINESS COUNCIL OF BC, COUNCIL OF FOREST INDUSTRIES, COAST FOREST PRODUCTS ASSOCIATION, and MINING ASSOCIATION OF BRITISH COLUMBIA AND ASSOCIATION FOR MINERAL EXPLORATION BRITISH COLUMBIA:	
Charles F. Willms Fasken Martineau DuMoulin LLP 2900 – 550 Burrard Street, Bentall 5 Vancouver, BC V6C 0A3 PH: 604.631.4789 FX: 604.631.3232 cwillms@fasken.com	Ottawa Agent: **Stephen Acker** Fasken Martineau DuMoulin LLP Suite 1300 – 55 Metcalfe Street Ottawa, ON K1P 6L5 PH: 613.236.3882 FX: 613.230.6423 sacker@fasken.com

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 Ctre. S. TD Bank Tower 25th Floor, 700 Georgia Street West Vancouver, BC V7Y 1B3 PH: 604.661.9341 FX: 604.661.9349 tdickson@farris.com	Ottawa Agent: **Matthew Estabrooks** Gowling Lafleur Henderson, LLP 2600 – 160 Elgin Street Ottawa, ON K1P 1C3 PH: 613.786.0211 FX: 613.788.3573 matthew.estabrooks@gowlings.com

TABLE OF CONTENTS

PART I: OVERVIEW AND STATEMENT OF FACTS

1. The Interveners are a coalition of the Okanagan Nation Alliance (the "Okanagan"), and their member community, the Okanagan Indian Band ("OKIB"); and, the Secwepemc (Shuswap) Nation Tribal Council (the "Secwepemc"), and their member communities, the Adams Lake, Neskonlith and Splatsin Indian Bands, involved in the logging cases where this Court granted a cost order (the "Logging Cases");[1] and the Union of BC Indian Chiefs ("UBCIC"). The Okanagan and Secwepemc participated as interveners below. UBCIC's motto is "The Land is Our Culture"; they are the oldest Indigenous organization in BC, formed in response to the 1969 White Paper Policy, Canada's proposal to assimilate Indigenous Peoples by ending the special constitutional status for "Indians and Lands Reserved for the Indians".

2. This appeal is on a path travelled by the ancestors of these Interveners for a century, seeking justice in relation to the Land Question: How did the Province ("BC") gain control of the homelands of the Indigenous Peoples in BC in the absence of Treaty? Notwithstanding the law and the rule of law, since Confederation, BC has denied Aboriginal title at great social, cultural and spiritual cost to Indigenous Peoples. Denial of Aboriginal title and legal orders grounds BC's *de facto* sovereignty assertions over lands and resources. Assuming Aboriginal title would interfere with Crown sovereignty and the well being of all Canadians, led the BC Court of Appeal ("BCCA") to fundamentally alter the Canadian constitutional framework, violating s. 35 by turning it into a sword to attack Indigenous laws, legal orders and title. The doctrine of *terra nullius*, repudiated by this Court and internationally was implicitly invigorated. The BCCA opted for a model of division and finality, denying Indigenous Peoples' territorial relationship with the land and precluding solutions built on legal pluralism - a mutual recognition of co-existing legal orders, which can create enduring relationships and reflect justice.

PART II: POINTS IN ISSUE

3. The BCCA erred in reducing Aboriginal title to small sites over which title can be proven, and determining that rights, not title will provide cultural security.[2]

4. The first Constitutional Question stated by this Court should not be answered because it is properly engaged, not by this Appeal, but by the Logging Cases, left awaiting the outcome of this Appeal. But if it is answered it should be answered affirmatively.

PART III: ARGUMENT

A. BC Severs Aboriginal Title From the Living Tree of the Constitution

5. The BCCA's decision is a marked departure from Canada's constitutional make-up, which is built on the recognition of Indigenous societies who were here first, and whose title to the land and legal orders are woven into the fabric of Confederation, co-existing with, and imposing constraints on, Crown sovereignty. The BCCA decision converts Aboriginal title through a process of site-specific proof, from an inherent legal right, reflected in the Constitution and in cases such as *Calder*,[3] *Guerin*[4] and *Delgamuukw*,[5] to a form of judicial grant to which Indigenous People can aspire if they are able to meet stringent and limiting criteria.

6. Indigenous societies and their legal systems pre-existed and survived the assertion of Crown sovereignty; this is the golden thread of recognition by the common law, woven through Canada's living constitution by the doctrine of continuity, creating a bedrock of legal pluralism.[6] There is no authority for BC's argument that Aboriginal title, before s. 35, extended only to the extent necessary to ground subsistence activities, such as hunting and fishing.[7] Aboriginal title is a unique property right – it is a collective, inherent and pre-existing right in land and governance grounded in "the fact ... that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[8] Aboriginal title does not depend on Crown recognition. It is inalienable except to the Crown[9] - a feature imposing constraints on Crown sovereignty and constitutional obligations, first reflected in the Royal Proclamation of 1763, requiring that Crown Governments recognize Indigenous Peoples' rights to land and legal systems under the common law, and the incremental perfecting of Crown sovereignty through consensual agreements with Indigenous Peoples.[10]

7. These principles are woven into the fabric of the *Constitution Act, 1867* through ss. 91(24) and 109. The *BNA Act* assigned federal jurisdiction under s. 91(24) over "a trust which could [not] conveniently be confided to the local Legislatures", who would be in a conflict of interest over resources until the lands were dealt with by Treaty.[11] The Royal Proclamation is an implied term of s. 91(24),[12] Canada was vested with the primary constitutional responsibility ... "to safeguard one of the most central of Native interests – their interest in their lands"[13]- lands referred to by this Court as "all territorial rights of Indians."[14] Aboriginal Title needs to be safeguarded against Provincial legislative overreach.

8. Through s. 109, Aboriginal title places constraints on Provincial title. In 1888, the Privy Council in *St. Catherine's Milling* held:

> The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, *available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title.*[15]

The converse of this proposition is that, if the estate of the Crown has not been 'disencumbered', – if the Aboriginal title has not been addressed – such lands are not available to the Province 'as a source of revenue'. BC assumed control of the "lands mines minerals and royalties" anyways, denying to Indigenous Peoples the benefits that they would enjoy if their titles were recognized.

9. When the prohibition against litigating the land question was lifted,[16] Indigenous Peoples went to Court to challenge BC's denial of Aboriginal title. Extinguishment, based on the doctrine of *terra nullius*, was BC's defence[17]. Running through all of the Crown's extinguishment arguments from *Calder* to *Delgamuukw*, was a premise that Indigenous Peoples are primitive – without laws, or with insufficient laws – such that their ancestral homelands are *terra nullius*. This premise was argued in declining alternatives: At the time of the assertion of sovereignty, the land was unoccupied; or, if occupied, it was by people who were not really civilized; or, if civilized, they did not have concepts of land ownership; or, if they ever did have title it was extinguished by operation of the Crown's laws which granted tenures inconsistent with the continuation of Aboriginal title. At trial in 1991, the Court in *Delgamuukw* said that pre-contact Gitxsan and Wet'suwet'en societies did not act as they do because of institutions. Rather, they did so "because of survival instincts that varied from village to village".[18] When stereotyping is intertwined with the law, the law does not reflect our higher collective values.

10. The golden thread of recognition of Indigenous legal systems is made of sterner stuff; it protects basic human values, which is the larger pattern woven throughout the rule of law and affirmed by this Court in *Delgamuukw*. This Court held that Aboriginal title has not been extinguished in BC, and is protected in its full form by s. 35; it includes jurisdictional and economic components.[19] Jurisdiction is not exhaustively divided between Crown governments[20]. Laws that emanate from Indigenous societies form part of the Canadian legal landscape and are part of the rick soil that the living tree of Canada's Constitution is rooted.

11. The BCCA disregarded this framework in a decision that renders Aboriginal title an illusory promise of the Constitutional framework. The 30 year territorial extinguishment debate was not about whether Aboriginal title was extinguished over salt licks, fishing stations or reserved village sites. The BCCA brought Indigenous Peoples back in time to a place they stood in 1992 when the trial judge in *Delgamuukw*

held that Aboriginal rights existed over a broad territory, but that Aboriginal title had been extinguished in BC except to village sites and enclosed fields which had been set aside as Indian reserves.[21] It was not open to the BCCA to endorse BC's legal position, dressed as a new test to prove title.

B. Extinguishment by Litigation and the Constitutional Questions

12. The BCCA pulled on the discredited threads of the doctrines of discovery and *terra nullius*, describing Tsilhqot'in harvesting practices as exercised "more or less on an opportunistic basis" and managed "to a limited extent", by Peoples who are "semi-nomadic" and "roam" over their lands.[22] Further, the BCCA assumes the perfection of BC's *de facto* sovereignty assertions, in the absence of any agreement with Indigenous Peoples; whereas Aboriginal title is presumed to be based on occupation that must be proven. If Indigenous Peoples fail to prove occupation (which, under the theory, can only ever be to site-specific intensively used small parcels), the effect is that the land, not proven, becomes the absolute property of BC. The BCCA's decision is a theory of extinguishment by litigation positing that courts can extinguish title when legislative or executive acts clearly and plainly failed to accomplish this. The BCCA's framework reverses the onus on the Crown to prove extinguishment.[23]

13. The BCCA's illogical conclusion is that rather than protecting Aboriginal title, s. 35 entrenches the unjust denial of title that s. 35 was intended to remedy.[24] When the Constitution was being debated, Indigenous Peoples journeyed to Ottawa and London, seeking to stop patriation, fearing Canadian governments' control over their territories. Their very survival was threatened. An earlier draft of s. 35 said that Aboriginal title exists only where it can be proven: "The Aboriginal and treaty rights of the Aboriginal Peoples of Canada **as they have been or may be defined by the Courts** are hereby recognized and affirmed and can only be modified by amendment."[25] The BCCA gave a meaning to s. 35 that the framers of the Constitution rejected. On the eve of patriation, Lord Denning assured Indigenous Peoples that they had nothing to fear since fundamental principles of British justice expressed in the Royal Proclamation are an implied term of s. 35.[26] BC argues that the Royal Proclamation does not apply in BC.[27]

14. The purpose of constitutional protection cannot have been to constitutionally expropriate from Indigenous Peoples the territorial recognition of title essential to their cultural survival.

15. This Court should not answer the first Constitutional Question. In this Appeal, there is no joinder of issue about BC's jurisdiction at trial and before the Appeal Court. Simply because BC asserts jurisdiction to legislate the *Forest Act*, such jurisdiction has not been established in law and should not be assumed. This issue is before the courts in the Logging Cases, where the Okanagan authorized logging under their laws

as an exercise of Title, and BC issued a stop work order ("SWO") under BC's forestry legislation which stated that the land was "Crown land" and the trees were "Crown timber"; and where s. 96 prohibits all persons from cutting Crown timber unless authorized by the Province.[28] BC bears the onus of proving the assertions it makes in its pleadings that the timber is Crown timber and that it has the exclusive jurisdiction it has assumed to apply its forestry legislation on unceded lands.[29]

16. Should this Court answer the first Constitutional Question it should be answered in the affirmative. BC claims jurisdiction over Aboriginal title lands without agreement with Indigenous Peoples, backfilling its case in this forum by advancing a simplistic and unsupported conglomeration of self-serving propositions to support its legislative capacity, and advancing unexplained historical documents in its Factum. BC rests its claim to legislative jurisdiction over Aboriginal title lands on the tattered thread of the 1859 Proclamation, which was specifically interpreted by the BCCA in *Delgamuukw* as doing "no more than declare, perhaps for the benefit of those who would settle on the land, that only the Crown was competent to convey land interests to third parties."[30]

17. Far from having been rendered redundant by s. 35,[31] in the context of provincial legislation that purports to dispose of natural resources on Aboriginal title lands, the principle of inter-jurisdictional immunity is essential to make federal power and responsibility under s. 91(24) effective for the purpose for which it was conferred. Safeguarding Aboriginal title from provincial impairment remains as necessary today as it was when the framers of the constitution included s. 91(24) to protect Indigenous Peoples.

18. Inter-jurisdictional immunity prevents provincial legislation from impairing, or adversely impacting, "that which makes a federal subject or object of rights specifically of federal jurisdiction"[32] or where "essential to make these federal powers effective for the purposes for which they were conferred ..."[33] In *NIL/TU,O*, this Court explained that what falls within the core of "Indianness" is that which is "integrally related to what makes Indians and lands reserved for Indians a fundamental federal responsibility."[34] S. 91(24) is protective of "matters that could be considered absolutely indispensable and essential to their cultural survival".[35] The right to possess Aboriginal title lands is essential to the cultural survival of Indigenous peoples and sits in the core of s. 91(24) along with the right to possess reserve lands and historic treaty rights and relationships. Aboriginal title is a federal responsibility because of BC's conflict of interest, seeking control over Aboriginal title land.

19. BC argues that even if it does not hold the beneficial interest in lands and timber, its jurisdiction extends to Aboriginal title lands and it can rely on its forestry legislation to grant such land and timber to

third parties subject to the justification framework. However, BC's power under s. 92(5) is expressly limited to the management and sale of public lands belonging to the Province, and its powers under ss. 92(13) and 92A(1)(b) are likewise limited by the basic principle that a government cannot exercise its legislative authority in a manner which gives to itself or disposes to others an interest in land or resources which it does not hold.[36] This Court recently applied the *St. Catherine's Milling* case in *Delgamuukw*, holding BC has no power to extinguish title,[37] and in *Haida*, rejecting BC's argument that the honour of the Crown obligations fall to Canada.[38] BC does not hold the beneficial interest in Aboriginal title lands and resources,[39] and therefore cannot rely on its legislative authority to pass legislation to manage forest resources as if that interest belongs to the Province.

20. Canada seeks to distinguish *Morris* on the basis that in that case, the prohibition on night hunting with illumination effectively altered the substance of the treaty right to hunt.[40] The application of the forestry legislation, under which BC prohibits anyone cutting Crown timber without a permit, sets harvest levels and allocates the resource, impairs the key elements of Aboriginal title because it denies to the Tsilhqot'in the right to exercise title, the right to benefit economically and to make decisions about the use of the land.

21. The BCCA's denial of the territorial nature of Aboriginal title (including in its jurisdictional and economic elements), also violates fundamental international human rights principles including the right to self-determination which requires that Indigenous Peoples can freely pursue their economic, social and cultural development.[41] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), recognizes the central importance of Indigenous land rights to the cultural survival of Indigenous Peoples as a fundamental feature of their human rights, and also recognizes the rights Indigenous Peoples have to lands, territories and resources which they have traditionally owned, occupied or otherwise used, including the right to own, use, develop and control them. UNDRIP requires states to give legal recognition and protection to these lands, territories and resources, with due respect to the customs, traditions and land tenure systems of Indigenous Peoples.[42] UNDRIP mandates meaningful involvement of Indigenous Peoples in decision making about lands and resources in order to achieve their free and informed consent, prior to the approval of any project affecting their territories. Far from being seen as derogatory to the interests of all Canadians, recognition of Indigenous Peoples' land rights ensures that Indigenous laws are taken into account to ensure more economically, culturally and environmentally sustainable development for the benefit of all. This Court has held that international instruments, such as UNDRIP, guide domestic law.[43]

C. Cultural (In)Security

22. The BCCA held that Indigenous Peoples' cultures and traditions can exist absent Aboriginal title, thereby separating Aboriginal title from what Indigenous Peoples have always insisted is the source and sustenance of their cultures – their relationship with the land. The Land Question carried forward by Indigenous Peoples for generations is not a quest for recognition of salt licks, fishing stations and narrow defiles. It is a quest for justice through recognition of Aboriginal title, laws and knowledge so that decisions which impact Indigenous Peoples and their territories (lands, waters, resources) are made through processes that allow for their consent and participation, and ensure full opportunities (including for economic development) and fairness to their Peoples. Indigenous cultures and identity are land-based. This is not a mutable characteristic. Maintaining this relationship provides cultural security.

23. The BCCA reverse-engineered the solution they were seeking: To uphold a notion of limited and site specific Aboriginal title in the face of clear direction from this Court that s. 35 has a remedial purpose and reflects a commitment to preserve Indigenous societies and cultures,[44] the BCCA replaced the Aboriginal perspective with its own, and then redefined the Aboriginal "cultures" or "traditions" that they would protect. In articulating a stripped down version of cultural identity, disconnected from the land, the BCCA ignored the ways in which Aboriginal title, in all its aspects, is vital to the survival and cultural continuity of Indigenous Peoples. The BCCA's reasoning stands on the erroneous assumption that Aboriginal title poses an impediment to the Crown and Canadian public, and must be contained.

24. Categorizing the interests of Indigenous Peoples in oppositional juxtaposition to other Canadians, the BCCA pursued Aboriginal title mitigation rather than recognition. To borrow from Rothstein, J.'s caution in *Ipeelee,* the goal of Aboriginal title jurisprudence should not be to "separate Canadians into two camps with two competing interests, but rather to unite them together with the shared goal of 'a just, peaceful and safe society.'"[45] Recognizing the rights of Indigenous Peoples does not diminish Canadian society but rather enriches it. Making room for a legal and constitutional future in which we truly are "all here to stay" requires not the finality of Aboriginal title restriction or mitigation (salt licks, fishing stations, and narrow defiles) but the vitality of constitutional recognition through a just federalism built on legal pluralism which acknowledges not only newcomer, but also Indigenous, legal traditions.

25. The living tree principle of constitutional interpretation reveals that Canadian courts are able to appreciate the manner in which unwritten principles "dictate major elements of the architecture of the Constitution itself and are as such its lifeblood,"[46] and provides a framework to understand and embrace

the law as fluid and organic. It has been argued that this concept defines the constitutional relationship between Indigenous Peoples and Canada, such that constitutional room is made for the recognition of Indigenous jurisdictions.[47] The living tree doctrine more closely accords with the notion of territorial Aboriginal title (animated by Indigenous legal traditions) that the Interveners urge this Court to accept, than it does with the dry and static view of Aboriginal title as site-specific small spots on the land. The limited concept of Aboriginal title forwarded by the BCCA will not animate a future for Indigenous Peoples, quite the contrary: Left undisturbed, the BCCA's theory of Aboriginal title on the ground will erode Indigenous cultures who will be left without the ability to meaningfully participate in decision-making regarding their traditional territories, or to benefit from the very lands that are essential to Indigenous identity. Professor Freund's caution in the context of constitutional interpretation (that courts not "read the provisions of the Constitution like a last will and testament lest it become one")[48] has particular poignancy in the consideration of Aboriginal title. The BCCA posits (in an approach urged on this Court by BC and Canada) that s. 35 rendered Aboriginal title a legal artefact of the past, thereby threatening to convert s. 35 to the last will and testament of Indigenous Peoples and cultures.

26. That limited Aboriginal rights recognition is not sufficient to ensure cultural security is illustrated by the experience of the Logging Cases where the Okanagan and Secwepemc are manoeuvring in a legal landscape in which Aboriginal rights have been admitted, but title and Indigenous legal systems on the land have been denied.[49] In the Logging Cases BC admitted rights - the very solution which is urged on this Court as appropriate to protect Indigenous Peoples' cultures and relationship to the land. The Watersheds at issue in the Logging Cases are the ancestral homelands and classrooms of the Secwepemc and Okanagan. They have sustained cultures, spiritual practices and Indigenous economies for generations; Indigenous laws have mediated a sustainable and mutually beneficial relationship with the lands and resources. BC's limited Aboriginal rights recognition in the Watersheds ignores that history and those relationships, and is a powerful illustration of why the Aboriginal rights -justification/reconciliation framework urged on this Court by BC and Canada is not workable.

27. Despite BC's rights admissions and despite ongoing litigation, the Secwepemc and Okanagan have been left without a meaningful say or involvement in decisions that impact their land base and cultural and spiritual identities. BC has authorized large areas within the Watersheds for clear cutting. Since the Secwepemc Logging Case was stayed as a cost saving measure,[50] BC has authorized logging of 56% of the available timber in the Harper Lake Watershed, which has had a negative impact on water, fish, animals, and culturally important plants, affected traditional areas, disturbed spiritual areas, destroyed

Secwepemc trail markers (which also provide evidence of title), and increased the possibility of flooding.[51] For the Okanagan, the Browns Creek Watershed comprises approximately 25,000 hectares. BC maintains that there would be literally thousands of specific tracts of land which would require site-specific proof. Maintaining that the cutblock and 103 trees, not the Watersheds, are the only site-specific tract of land relevant in the litigation, BC granted extensive forestry interests in the Watersheds to a company while the Okanagan were preserving evidence of occupation, including archaeology and historical trails.[52] The Land Question remains outstanding, rendered more poignant by this experience.

D. Remedy

28. **Indigenous Peoples with Different Social/Cultural Organization:** The Interveners urge this Court to not foreclose other forms of social organization or legal orders by confining the decision to the facts of the case. Many Indigenous Peoples within British Columbia articulate their Aboriginal title and relationship of their legal systems with their territories differently than the evidence in the present case. For example, a different approach has been taken by the Okanagan and Secwepemc in the Logging Cases.

29. **The Declaration:** These Interveners support the declaration for Aboriginal title sought by the Tsilhqot'in based on the findings of fact of the trial judge. S. 35 is intended to be remedial, yet to the present, no Court in Canada has granted a declaration of Aboriginal title. No pleadings have been good enough. There has been a hundred and fifty years of side-stepping the rule of law: unilateral and uncompensated use of the land and resources of the Tsilhqot'in and denial of their rights. They are in need of a remedy to rectify this wrongdoing. Building the institutions of shared decision-making with Indigenous Peoples that Aboriginal title recognition requires, will take hard work and commitment. Settlement in BC was based on Aboriginal title denied; rectifying that situation will generate some discomfort. The difficulty of Aboriginal title recognition does not diminish its necessity. Justice requires the deft and steady hand of territorial Aboriginal title recognition.

30. **The Constitutional Question:** This Court should wait for the proper case to answer the constitutional questions. In the alternative, this Court should answer the questions by declaring that BC's forestry legislation is inapplicable to Tsilhqot'in Aboriginal title lands, for the reasons set out above. As a practical solution, this Court should remit this case to the BC Supreme Court to supervise negotiations about the inter-jurisdictional interplay on issues raised by a determination of the Appellants' Aboriginal title, aided by the reasoning of this Court.

PART IV: ORDER CONCERNING COSTS

31. The Coalition of the Union of BC Indian Chiefs does not seek costs and requests that no costs be awarded against it.

PART V: REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

32. The Coalition of the Union of BC Indian Chiefs respectfully requests that it be provided the opportunity to make oral submissions on behalf of the numerous Indigenous Peoples it represents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2013 at Vancouver, British Columbia.

Louise Mandell, Q.C.

Stuart Rush, Q.C.

Ardith Walkem

Cheryl Sharvit

Nicole Schabus

PART VI: TABLE OF AUTHORITIES

	Cited in Factum Paras.
Cases	
A.-G. Canada v. A.G.-Ontario, [1897] AC 199	19
Bell Canada v. Quebec (Commission de la sante et de la securite du travail), [1988] 1 S.C.R. 749; 51 D.L.R. (4th) 161	18
British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 S.C.C. 23	18
British Columbia (Minister of Forests) v. Adams Lake Band, 2005 BCSC 1312; [2005] BCJ No. 1991	27
British Columbia (Forests and Range) v. Okanagan Indian Band 2010 BCSC 1088	27
British Columbia (Minister of Forests) v. Okanagan Indian Band, 2007 BCSC 1014	27
British Columbia (Minister of Forests) v. Okanagan Indian Band, 2008 BCCA 107	26
British Columbia (Minister of Forests) v. Okanagan Indian Band, [2003] 3 SCR 371, 2003 SCC 71	1
British Columbia (Minister of Forests) v. Westbank First Nation, 2000 BCCA 316; [2000] BCJ No. 997	15
Calder et al. v. Attorney General of British Columbia, [1973] SCR 313	5, 6
Campbell et al. v. AGBC et al., 2000 BCSC 1123, 79 BCLR (3d) 122	10
Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc. [1984] 2 S.C.R. 145	25
Canadian Western Bank v. Alberta, 2007 S.C.C. 22; [2007] 2 S.C.R. 3	18
Daniels v. Canada (Minister of Indian Affairs and Northern Development), 2013 FC 6	7
Delgamuukw v. British Columbia, [1991] BCJ No. 525, 79 DLR (4th) 185 (SC)	9, 11
Delgamuukw v. British Columbia, [1993] BCJ No. 1395, 104 DLR (4th) 470 (CA)	16
Delgamuukw v. British Columbia, [1997] 3 SCR 1010	5, 6, 7, 10, 19, 23
Guerin v. The Queen, [1984] 2 SCR 335	5, 6
Haida Nation v. British Columbia (Minister of Forests), 2004 SCC 73; [2004] 3 SCR 511	19
Jules v. Harper Ranch Ltd., [1989] 3 CNLR 674 (BCSC)	7
NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 S.C.C. 45; [2010] 2 S.C.R. 696	18
Ontario Mining Co. v. Seybold (1900), 31 OR 386	7
R. v. Hape, 2007 SCC 26; [2007] 2 SCR 292	21
R. v. Ipeelee, 2012 SCC 13, [2012] 1 SCR 433	24
R. v. Morris, 2006 SCC 59; [2006] 2 SCR 915	20

	Cited in Factum Paras.
R. v. Van der Peet, [1996] 2 SCR 507	23
R. v. Sparrow, [1990] 1 SCR 1075; [1990] SCJ No. 49	12, 13, 23
Reference re Secession of Quebec, [1998] 2 SCR 217	23, 25
St. Catherine's Milling and Lumber Co. v. R., [1887] 13 SCR 577	7
St. Catherine's Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46 (PC)	6, 8, 19
The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians, [1981] 4 CNLR 86	13
Tolko Industries Ltd. v. Okanagan Indian Band, 2010 BCSC 24	27
William v. British Columbia, 2012 BCCA 285	3, 12
Statutes	
Indian Act, SC 1951, c. 29, s. 123	9
Other Authorities	
1837 Resolution of the Select Standing Committee	7
Article 26 UN Declaration on the Rights of Indigenous Peoples, Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53)	21
International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16)	21
International Covenant on Economic Social and Cultural Rights (ICESCR), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16)	21
J. Borrow, "Indigenous Legal Traditions in Canada", (2005) 19 Journal of Law & Policy 167	6
Paul Freund, *On Understanding the Supreme Court* (Boston: Little, Brown, 1949)	25
L. Mandell, Q.C., "The Ghost", Aboriginal Law Since *Delgamuukw*, ed M Morellato, Q.C. (Aurora: Canada Law Book, 2009)	9
M. Louise Mandell ,Q.C. and Leslie Pinder, "A Constitution Story" presented to the Continuing Legal Education Society of British Columbia Conference: Indigenous Legal Orders and the Common Law, November 2012 at p. 1.1.8; to be published as: Louise Mandell and Leslie Pinder, "On the Rights Track: The Constitutional Express and First Nations Constitutional Struggles Against Patriation" in Patriation and Its Aftermath: Law, Politics and the Constitution in Canada, eds. Lois Harder and Steve Patten. Vancouver: UBC Press	13
Report of the Royal Commission on Aboriginal Peoples, 1996, Vol. 1, 248-249	24
Rupert's Land North-western Territory Order (UK) 23 June 1870, reprinted in RSC 1985, App. II, No. 9, Schedule A	13
Sections 96 and 123 of the *Forest Practices Code of British Columbia Act*, RSBC c 159; now sections 52(1) and 66 of the *Forest and Range Practices Act*, SBC 2002, c. 69	15
Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L. J. 101	25

PART VII: STATUTE, REGULATION, RULE, ORDINANCE OR BY-LAW DIRECTLY AT ISSUE

Tab 1	*Constitution Act, 1867*	paras. 7, 8, 17, 18, 19
Tab 2	*Constitution Act, 1982*	paras. 2. 6, 10, 13, 17, 23, 25 and 29

Endnotes

[1] *British Columbia (Minister of Forests) v. Okanagan Indian Band,* [2003] 3 SCR 371, 2003 SCC 71. [Intervener's Book of Authorities ("IBA") at Tab 8]
[2] *William v. British Columbia*, 2012 BCCA 285 at para. 239 ("*William*"). [Attorney General of Canada's Book of Authorities ("AGBA") at Vol. II, Tab 41]
[3] *Calder et al. v. Attorney General of British Columbia*, [1973] SCR 313 ("*Calder*"). [British Columbia's Book of Authorities ("BCBA") at Vol. I, Tab 6]
[4] *Guerin v. The Queen*, [1984] 2 SCR 335 ("Guerin"). [Appellant's Book of Authorities ("ABA") at Vol. I, Tab 25]
[5] *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 ("*Delgamuukw*"). [ABA at Vol. I, Tab 20]
[6] *Guerin*, *supra* note 4, at p. 378; J Borrows, "Indigenous Legal Traditions in Canada", (2005) 19 Journal of Law & Policy 167. [IBA Tab 27]
[7] Province's Factum, paras. 53, 54, 69.
[8] *Calder*, *supra* note 3, at p. 328; *Guerin*, *supra* note 4 at p. 379.
[9] *Delgamuukw*, *supra* note 5 at para. 113.
[10] *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (PC) at p. 59 ("*St. Catherine's*"). [ABA at Vol. III, Tab 82]
[11] *Jules v. Harper Ranch Ltd.*, [1989] 3 CNLR 674 (BCSC) at para. 89 citing the 1837 Resolution of the Select Standing Committee. [IBA at Tab. 15]
[12] *Ontario Mining Co. v. Seybold* (1900), 31 OR 386 at para. 30 [IBA at Tab 16]; *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2013 FC 6 at para. 539. [IBA at Tab 12]
[13] *Delgamuukw, supra* note 5 at para. 176.
[14] *St. Catherine's Milling and Lumber Co. v. R.*, [1887] 13 SCR 577 at 615 [IBA at Tab 21]
[15] *St. Catherine's*, *supra* note 10 at p. 59
[16] Section 141 of the *Indian Act*, RSC 1927, c. 98 was repealed in 1951 by the *Indian Act*, SC 1951, c. 29, s. 123. [ABA at Vol. V, Tab 102]
[17] L. Mandell, Q.C., "The Ghost", *Aboriginal Law Since Delgamuukw*, ed M Morellato, Q.C. (Aurora: Canada Law Book, 2009). [IBA Tab 28]
[18] *Delgamuukw v. British Columbia*, [1991] BCJ No. 525, 79 DLR (4th) 185 (SC) at pp. 372-373 ("*Delgamuukw BCSC*"). [IBA at Tab 13]
[19] *Delgamuukw, supra* note 5, at paras. 115, 133, 166, 203; *Campbell et al. v. AGBC et al.*, 2000 BCSC 1123, 79 BCLR (3d) 122 at para. 137 ("*Campbell*") [IBA Tab 10]
[20] *Campbell*, *ibid.*, at para. 180
[21] *Delgamuukw BCSC*, *supra* note 18 – the trial judge's proposition was expressly rejected by the Court.
[22] *William*, *supra* note 2 at paras. 216 and 232
[23] *R. v. Sparrow*, [1990] 1 SCR 1075; [1990] SCJ No. 49 at 1099 ("*Sparrow*"). [IBA at Tab 18]
[24] *Sparrow*, *ibid,* at 1103 - 1105
[25] M. Louise Mandell ,Q.C. and Leslie Pinder, *"A Constitution Story"* presented to the Continuing Legal Education Society of British Columbia Conference: Indigenous Legal Orders and the Common Law, November 2012 at p. 1.1.8; to be published as: Louise Mandell and Leslie Pinder, "On the Rights Track: The Constitutional Express and First Nations Constitutional Struggles Against Patriation" in *Patriation and Its Aftermath: Law, Politics and the Constitution in Canada*, eds. Lois Harder and Steve Patten. Vancouver: UBC Press. [IBA at Tab 29]
[26] *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte*: *The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotian Indians*, [1981] 4 CNLR 86 at 91 – 92. [IBA at Tab 22]
[27] Province's Factum, paras. 51 and 57 Note: Regardless of whether the *Royal Proclamation of 1763* applies to British Columbia, this constitutional instrument manifests the "equitable principles" which have uniformly governed the British Crown in its dealings with Aboriginal peoples. (See *Rupert's Land North-western Territory* Order (UK) 23 June 1870, reprinted in RSC 1985, App. II, No. 9, Schedule A. [IBA at Tab 31])
[28] Sections 96 and 123 of the *Forest Practices Code of British Columbia Act*, RSBC c 159; now sections 52(1) and 66 of the *Forest and Range Practices Act*, SBC 2002, c. 69. [ABA at Vol. V, Tab 101]

[29] *British Columbia (Minister of Forests) v. Westbank First Nation*, 2000 BCCA 316; [2000] BCJ No. 997. [IBA at Tab 9]
[30] *Delgamuukw v. British Columbia*, [1993] BCJ No. 1395, 104 DLR (4th) 470 (CA) at paras. 220 – 221. [IBA at Tab 14]
[31] Province's factum at paras. 169 – 170.
[32] *Canadian Western Bank v. Alberta*, 2007 S.C.C. 22; [2007] 2 S.C.R. 3 at para. 48 ("*Canadian Western Bank*") [AGBA at Vol. I, Tab 7]; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 S.C.C. 23; [2007] 2 S.C.R. 868 at para. 42 ("Lafarge") [IBA at Tab 3], *Bell Canada v. Quebec (Commission de la sante et de la securite du travail)*, [1988] 1 S.C.R. 749; 51 D.L.R. (4th) 161 at p. 762. [IBA at Tab 2]
[33] *Lafarge*, ibid., at para. 43.
[34] *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 S.C.C. 45; [2010] 2 S.C.R. 696 at para. 73. [AGBA at Vol. I, Tab 24]
[35] *Canadian Western Bank*, *supra* note 32 at para. 61.
[36] *A.-G. Canada v. A.G.-Ontario*, [1897] AC 199 at 210-211 (PC). [IBA at Tab 1]
[37] *Delgamuukw*, *supra* note 5, at para. 175.
[38] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; [2004] 3 SCR 511 at paras. 57 – 59 ("*Haida*"). [ABA at Vol. I, Tab 26]
[39] *St. Catherine's*, *supra* note 10; *Delgamuukw, supra* note 5. at para. 175; *Haida*, *ibid* note 38, at para. 59.
[40] *R. v. Morris*, 2006 SCC 59; [2006] 2 SCR 915 [ABA at Vol. III, Tab 67]; Canada's Factum at para. 116
[41] International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967) [IBA at Tab 25]; International Covenant on Economic Social and Cultural Rights (ICESCR), GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967) [IBA at Tab 26]. Article 1, para 1, of both covenants set out that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This is confirmed as a foundational right in Article 3 of the UN Declaration on the Rights of Indigenous Peoples, Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53) which contains the same wording specific to Indigenous Peoples.
[42] Article 26 UN Declaration on the Rights of Indigenous Peoples, Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53). [AGBA at Vol. II, Tab 45]
[43] *R. v. Hape*, 2007 SCC 26; [2007] 2 SCR 292 at para. 39. [ABA at Vol. II, Tab 59]
[44] *Delgamuukw, supra* note 5, at para. 153; *Sparrow, supra* note 23, at para. 1103, 1105, 1106 and 1108; *R. v. Van der Peet*, [1996] 2 SCR 507 at para. 22 [IBA at Tab 18]; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para. 82 ("*Quebec Reference*"). [IBA at Tab 20]
[45] *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 SCR 433, where, in dissent, he cautioned against the majority's balancing of interests (protection of society, rehabilitation and reintegration) in sentencing Aboriginal offenders [IBA at Tab 17]. For a further discussion of how false assumptions and stereotypes continue to guide the ways that Indigenous Peoples are perceived see: *Report of the Royal Commission on Aboriginal Peoples*, 1996, Vol. 1, 248-249. [IBA at Tab 30]
[46] *Quebec Reference, supra* note 44, at paras. 54, 57, 64 and 72.
[47] Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall L. J. 101 [Slattery]. [IBA at Tab 24]
[48] Paul Freund, *On Understanding the Supreme Court* (Boston: Little, Brown, 1949), adopted by the SCC in *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.* [1984] 2 S.C.R. 145 at 155. [IBA at Tab 11]
[49] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2008 BCCA 107 at paras. 1 – 19. [IBA at Tab 7]
[50] *British Columbia (Minister of Forests) v. Adams Lake Band*, 2005 BCSC 1312; [2005] BCJ No. 1991 at paras. 12 – 29 ("*Adams Lake*"). [IBA at Tab 5]
[51] *British Columbia (Forests and Range) v. Okanagan Indian Band* 2010 BCSC 1088 at paras. 16, 17, 40 – 45 [IBA at Tab 4]
[52] *Tolko Industries Ltd. v. Okanagan Indian Band*, 2010 BCSC 24, at pars. 5 – 8 [IBA at Tab 23]; *Adams Lake*, *supra* note 50 at paras. 37-42; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2007 BCSC 1014 at paras. 84-92. [IBA Tab 6]