COURT OF APPEAL FILE NO. CA49617
Nisga'a Nation v Malii
Intervener's Factum

COURT OF APPEAL

ON APPEAL FROM the order of Justice Stephens of the Supreme Court of British Columbia pronounced on the 17th day of January, 2024

BETWEEN:

NISGA'A NATION as represented by the Nisga'a Lisims Government

APPELLANT
(Applicant)

AND:

MALII also known as Glen Williams, GWAAS HLAAM also known as George Phillip Daniels, LUUXHON also known as Don Russell, GAMLAXYELTXW also known as Wilhelm Marsden, SINDIHL also known as Graham Morgan, WATAKHAYETSXW also known as Deborah Good, GWINUU also known as Phyllis Haizimsque, WII'LITSXW also known as Gregory Rush, HAIZIMSQUE also known as Verna Howard, on behalf of themselves and in their capacity as the GITANYOW HEREDITARY CHIEFS and on behalf of all members of the GITANYOW NATION

RESPONDENTS
(Plaintiffs)

AND:

Delgamuukw also known as George Muldoe, Baskyelaxah / Niist also known as Bill Blackwater, Sr., Djogaslee also known as Ted Mowatt, Luus also known as Roy Wilson, Xhliiyemlaxha also known as John Olson, Gyolugyet also known as Bridie O'Brien, Wii Minosik also known as Larry Skulsh

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TABLE OF CONTENTS

OPENING STATEMENT

The Nisga'a Nation asserts a treaty interest in lands claimed by the Gitanyow to be Aboriginal title lands of the Gitanyow. No relief is sought against the Nisga'a in this action. These interveners are similarly situated to the Gitanyow, having an unresolved land claim to an area of land over which the Nisga'a Nation asserts a similar treaty right.

To the extent that Nisga'a evidence is relevant to determine whether Gitanyow has proven title, such evidence can be put before the court by existing defendants or by a Nisga'a intervention limited to that purpose.

A declaration of title of the Gitanyow does not, by its nature, or standing alone, preclude an ongoing interest of the Nisga'a in respect of some or all of these same lands. To the contrary, a determination of Gitanyow title and its content, is the basis for reconciling the respective interests of both the Gitanyow and the Nisga'a.

The recent recognition by British Columbia of Haida Aboriginal title over fee simple lands on Haida Gwaii demonstrates that reconciliation of Aboriginal title may be achieved even in respect of interests formerly thought to be irreconcilable by their nature.

The courts should, in a s. 35 case, resist expansion of the litigation beyond what is necessary to resolve the issues between existing parties. Such restraint protects Indigenous access to the courts and facilitates reconciliation.

PART 1 - STATEMENT OF FACTS

1. The Interveners take no position on the adjudicative facts of this appeal. The affidavit of Delgamuukw (George Muldoe) does not expand those facts but provides context for the argument made herein.

2. The Interveners are seven Gitxsan Chiefs from northwestern British Columbia, collectively the "Northern Gitxsan Chiefs". These Chiefs, including the deponent Delgamuukw (George Muldoe), represent the Chiefs of all of the Gitxsan huwilp (houses) which hold territories within the Nass River watershed. These territories, like those of the Gitanyow here in issue, largely fall within the boundaries of the Nass Wildlife Area set out in the Nisga'a Final Agreement (the "Nisga'a Treaty").[1]

3. All of the Interveners are successors to hereditary Chiefs who were themselves Plaintiffs in the *Delgamuukw* case which proceeded through the courts in the 1980s and 90s.[2] The Gitxsan territories here in issue were all included in the *Delgamuukw* case which was remitted for retrial in 1997.[3] The case has not returned to trial, but remains alive and a retrial is a real possibility, given the failure to reach a negotiated settlement in the intervening 27 years.

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[1] Affidavit #1 of Delgamuukw, sworn 28 March, 2024, para. 16.
[2] *Delgamuukw v. British Columbia*, 1997 CanLII 302, [1997] 3 SCR 1010.
[3] *Delgamuukw* at para. 184.

PART 2 - ISSUES ON APPEAL

4. Does Aboriginal title represent an exclusive interest of land that cannot be reconciled with other interests or treaty rights, so as to require the addition of the Nisga'a Nation as a defendant in the Gitanyow title case in the event of an overlap between treaty interests asserted by the Nisga'a Nation and the title claim area of the Gitanyow?

PART 3 - ARGUMENT

5. Both the Nisga'a Nation and His Majesty the King in Right of the Province of British Columbia ("the Province") assert that the outcome of the present litigation will be determinative of certain interests of the Nisga'a Nation constitutionally guaranteed by their treaty. Because of this, it is an error of law not to add the Nisga'a as Defendants to the trial of this action.[4]

6. The Province says, at para. 49 of their factum:

> Following a declaration that a First Nation holds Aboriginal title – a right to "exclusive use and occupation" – it is difficult to perceive any right of possession that could be consistent with a right of exclusive use and occupation.[5]

7. In a similar vein, Nisga'a Nation says, at para. 7 of the Reply factum:

> It is difficult to envision what sort of "negotiations" could take place in the face of one party having a court declaration of exclusive ownership and control enforceable against the other, which it can "turn on" at its discretion. (emphasis added)[6]

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[4] Nisga'a Nation Factum, paras. 36, 61-64, 75-78, 83, 87-91; BC Factum, paras. 31-33, 41-43, 45, 49-51.

[5] See also BC Factum, paras. 43, 45, 49, 50, 60.

[6] See also Nisga'a Nation Factum, paras. 61-64 and Nisga'a Nation Reply Factum, paras. 5, 8, and 9.

Both of these statements turn on the propositions that a declaration of title in the Gitanyow case is, by its nature, binding against the Nisga'a Nation and that because the interests are mutually incompatible, they are incapable of being reconciled. With respect, both of these propositions are wrong. And both are fundamental to the application to add Nisga'a as a party defendant as opposed to leading evidence contrary to the Gitanyow claim through the Crown, or intervening in the trial solely for the purpose of leading such evidence.

The Province conflates intervention with being added as a party

8. The Province places great weight on comments from *Delgamuukw*, *Marshall/Bernard*, and *Tsilhqot'in* in support of the proposition that persons who stand to be affected by Aboriginal title or rights litigation should be heard if their evidence is relevant.[7]

9. Nothing in any of those cases support the proposition that a party with evidence relevant to the claim before the court should be added as a party to the action.

10. *Delgamuukw* addressed the question of overlaps noting that:

> [i]t may [...] be advisable if those aboriginal nations [with claims overlapping those of the Plaintiffs] intervened in any new litigation. (emphasis added)[8]

11. Indeed, the Nisga'a would be one such nation. There was no suggestion in *Delgamuukw* that the neighbouring Nations to the Gitxsan and Wet'suwet'en First Nations should be added as parties to the retrial of the Delgamuukw action.

12. *Marshall/Bernard* was a criminal trial in which the court had to determine whether a treaty right was a defence to a charge of the unauthorized cutting timber on Crown lands. While

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[7] BC Factum, paras. 7-10 citing *Delgamuukw* at para. 185, *R. v. Marshall; R. v. Bernard,* 2005 SCC 43 at para. 142, LeBel J. concurring, and *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44 at para. 48.

[8] BC Factum, para. 7, citing *Delgamuukw* at para. 185.

concurring with the majority that the treaty offered no defence in this case, LeBel J. stated that it would be preferable that the court does not deal with these kinds of issues in the context of a criminal prosecution. In his view, the criminal charges should be stayed pending a civil action with respect to the treaty issue. His comment, cited by the Province at para. 8, that the claims "may also impact on the competing rights and interests of a number of parties who may have a right to be heard at all stages of the process"[9] was made to illustrate that a civil case would be more appropriate to address the Aboriginal issues at stake. Here again, there is no suggestion that LeBel J. contemplated that "a number of parties" would all be parties to a civil action. Their right to be heard may be accommodated in a number of ways short of giving all of them full rights of conduct of litigation.

13. *Tsilhqot'in* does not speak of potential competing claims at all, nor does it discuss making other persons parties to the litigation. It merely confirms the *Delgamuukw* test of historic exclusivity as an element of proof of Aboriginal title. Indeed, an application to give notice of the litigation to third parties was rejected by the trial judge and not pursued on appeal.[10]

14. The Province does rely[11] on two trial level decisions where Indigenous parties were added as parties to the litigation, but misconceives either the rationale or the circumstances of both.

15. The first of these cases is *Willson*, is cited at para. 18, for the proposition that 33 parties could potentially be added as parties, but the case stands for the opposite proposition to that for which it is cited. In *Willson*, a case was brought against the Crown by 6 of 39 First Nations for a declaration as to the location of the western boundary of the treaty lands.[12] Originally, the six plaintiff Chiefs indicated that they represented all of the First Nations parties to Treaty 8. They subsequently amended the pleadings to allege that they only

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[9] *R. v. Marshall; R. v. Bernard* at para. 142.
[10] *William v. Riverside Forest Products Limited*, 2002 BCSC 1199 at paras. 13-14.
[11] BC Factum, paras. 18-19, 23-25.
[12] *Willson v. British Columbia (Attorney General),* 2007 BCSC 1324 at paras. 2 and 6.

represented their 6 individual First Nations. The issue before the court was who were proper plaintiffs in the matter concerning the treaty boundaries.

16. The disputed area included lands claimed by 13 other First Nations and the proposed boundary overlapped the lands covered by Treaty 11, representing 21 Bands.[13]

17. With respect to the 33 First Nations within Treaty 8 who were not parties to the action, the court held that they were privies of the plaintiffs and would be bound to the outcome of the litigation whether or not they participated in it.[14] In that case, it would be

> [...] manifestly unfair if someone whose interest in a matter is identical to that of a party to litigation over that matter – i.e., a privy – could have their interest finally decided against them without them knowing of the action, or having an opportunity to protect their interest.[15] (emphasis added)

18. As for *res judicata*, the court held that a finding of the western boundary of Treaty 8 would be binding on the parties to the action, but *stare decisis*

> would not prevent any of the other 33 signatories or adherents to Treaty 8 from arguing in fresh proceedings for a different interpretation of the western boundary based on their own evidence and argument.[16]

19. Court holds the decision is *in rem* meaning it is binding on all persons, whether or not parties to the action:

> This makes it important, as a matter of fairness, that those signatories and adherents to Treaty 8, whose interests will be affected by a declaration sought, be given an opportunity to be heard.[17]

20. Finally, the Court turned its attention to First Nations that were not parties to Treaty 8 but whose interests, either treaty rights or Aboriginal title, might be affected by an *in rem*

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[13] *Willson* at paras. 11-15.
[14] *Willson* at para. 22.
[15] *Willson* at paras. 23 and 57.
[16] *Willson* at paras. 33 and 57.
[17] *Willson* at para. 43 and 57.

decision on its western boundary. The Court held that other than signatories or adherents to Treaty 8, no notice should be given:

> [61] The result of this action may affect signatories or adherents to Treaty 11, if the Treaty 11 Bands share the plaintiffs' and Canada's understanding as to the location of the western boundary of Treaty 8 and if the result here differs from that understanding. In that case, it might be argued that the south-western corner of Treaty 11 should follow whatever the result is here.
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> [62] The signatories and adherents to Treaty 11 are not privies of the parties to this action because none would have standing to bring this action seeking a declaration as to the western boundary of Treaty 8.
>
> [63] The signatories and adherents to Treaty 11 may be bound by the result of this action if I am right that the result will be a declaration *in rem*. However, the result of this action, if it is to differ from what the signatories and adherents to Treaty 11 understand to be the place where the western boundary of Treaty 8 intersects the 60th parallel of latitude, would not, in my view, alter the boundaries of Treaty 11. At most, it would raise a question between the Treaty 11 signatories and adherents and governments, that might require negotiation or even litigation to resolve.
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> [64] Notwithstanding that this action might expose the Treaty 11 signatories and adherents to the risk of disruption in their understanding of the scope of the area covered by the treaty, it is neither necessary nor advisable that they be given notice of this action. The action should not be expanded to take in issues related to Treaty 11, as that would be unfair to the existing parties and others of the Treaty 8 signatories and adherents who might become involved. I cannot see how Treaty 11 signatories and adherents could advance this litigation by their participation in any way other than as witnesses, and they do not need to be parties in order to give evidence.
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> [65] While the possibility of adding up to 33 more signatories or adherents to Treaty 8 would not, in my view, make this litigation non-justiciable, the possibility of adding any of the 21 Treaty 11 signatories to this action would make it non-justiciable. Notice to Treaty 11 signatories and adherents is not required.
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> [66] For the reasons given by Vickers J. in Xeni Gwet'in, *supra*, notice need not be given to any who hold or claim to hold other interests in the area between the disputed western boundaries.[18] (emphasis added)

21. In other words, *Willson* does not support the position of the Province. Rather, the parties with the potential to be added are those possessing an identity of interest with the plaintiffs

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[18] *Willson* at paras. 61-66. These passages are cited with approval in *Cowichan Tribes v. Canada (Attorney General),* 2017 BCSC 1575 at para. 21 [***Cowichan #2***].

and who would otherwise have standing to bring this action themselves. In this capacity, they may be added as co-plaintiffs. However, where the issue involves overlap with another treaty area, adherents to that other treaty are not proper parties and may not be added, but they may give evidence in the proceeding. In the event the action results in a boundary to Treaty 8 which conflicts with the present boundary of Treaty 11, the matter can be resolved by negotiation or litigation. The same rationale applies to First Nations whose interest in the boundary is related to Aboriginal title claims rather than treaty claims.[19]

22. Applied to the present case, there are no parties with an identity of interest with the plaintiffs who might be added as co-plaintiffs. Vis-à-vis the Gitanyow, the Nisga'a are in the position of the parties that the court in *Willson* declined to add, presumably as potential defendants.

23. A similar result was reached in *Ahousaht*[20] where the Court declined to add as parties First Nations with overlapping claims to Aboriginal title.

24. The second case on which the Province relies[21], the *Cowichan* case[22] is thoroughly discussed in the Gitanyow factum.[23] It is, however, to be noted that before the application to add the Tsawwassen First Nation ("TFN") as a defendant, the Vancouver Fraser Port Authority and the Musqueam First Nation had already been added to the Province and Canada as defendants, creating an already complicated litigation landscape.[24] Cowichan Tribes, unlike the Gitanyow in this case, consented to add as defendants parties who asserted interests overlapping those of the Cowichan. The issue before the court was whether, in fact, there was an overlap between the Cowichan claim and the treaty

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[19] *Willson* at paras. 13 and 66.
[20] *The Ahousaht Indian Band et al. v. The Attorney General of Canada et al.,* 2006 BCSC 646 at paras. 32-33.
[21] BC Factum at paras. 23-25.
[22] *Cowichan Tribes v. Canada (Attorney General),* 2016 BCSC 1660 [***Cowichan #1***].
[23] Gitanyow Factum, paras. 65-72.
[24] *Cowichan #1* at para. 3.

interests of the TFN. The court rejected the view of the Cowichan,[25] determined that there was a potential overlap, and put TFN in the same position as other defendants Cowichan had consented to add. The issue of whether the party was asserting an interest adverse to an Aboriginal title claim was not decided because it was not raised by the Cowichan Tribes.

25. When, subsequently, an application was brought to provide notice of the case to third party rights holders, the court rejected the application, noting that the decision is a discretionary one and relying on and citing the passages from the *Willson* case, discussed above.[26]

Does a Declaration of Aboriginal Title Preclude the Existence of Other Interests by Third Parties in the Title Lands?

26. A positive answer to this proposition is fundamental to the case of the Nisga'a Nation and the Province that the decision of the chambers judge was not simply a discretionary error, but an error of law. Both parties conclude from the description of Aboriginal title in *Delgamuukw* that because it represents an exclusive right to occupation of land, it cannot be reconciled with any other interest in those lands other than, perhaps, an underlying title of the Crown which it burdens.[27]

27. This is a narrow interpretation of Aboriginal title, one which effectively denies that such can be reconciled with other interests. It inexorably leads to a conclusion as to the nature of the Aboriginal title of a particular First Nation without regard to the specifics of the title. It is also incompatible with the consistent case law determining that an Aboriginal title

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[25] *Cowichan #1* at para. 56.
[26] *Cowichan #2* at paras. 7 and 21.
[27] Nisga'a Nation Factum, paras. 61-63; Nisga'a Nation Reply Factum, paras. 5-8; BC Factum, paras. 29, 45, 49-50.

claimant is not required to serve formal notice on fee simple owners.[28] And it effectively supplants the objective of seeking reconciliation through negotiation.

28. It is not helpful to start from a predetermined definition of Aboriginal title in the common law and then to apply it devoid of the factual and legal matrix in which it arises. In the *Uashaunnuat* case, the court emphasized that:

> Aboriginal perspectives shape the very concept of Aboriginal title, the content of which may vary from one group to another. As such, disputes involving title should not be resolved "by strict reference to intractable real property rules" but rather must also be understood with reference to Aboriginal perspectives.[29]

29. This point is amplified by the court in *Tsilhqot'in* when McLachlin, CJC, warns against putting a definitional straightjacket around the elements of proof of title:

> In my view, the concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.[30]

30. The *Tsilhqot'in* decision has sparked a significant discussion as to how to properly characterize Aboriginal title. While the early jurisprudence around Aboriginal title revolved around repudiating the notion that it was simply a "personal and usufructuary right, dependent upon the goodwill of the Sovereign",[31] further elaboration of aboriginal title showed that it comprised a territorial interest, not just a property one and that it included elements of self-government.[32]

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[28] *William v. Riverside Forest Products Ltd,* 2002 BCSC 1199; *The Council of the Haida Nation v British Columbia,* 2017 BCSC 1665; *Cowichan #2.*
[29] *Newfoundland and Labrador (Attorney General) v. Usshaunnuat et al.,* 2020 SCC 4 at para. 31.
[30] *Tsilhqot'in* at para. 32.
[31] *St. Catherine's Milling and Lbr. Co. v. Reg.* (1888) 14 App Cas 46 at p. 54.
[32] *Tsilhqot'in* at paras. 72-76, 94.

31. These concepts have given rise to a discussion as to the correct characterization of Aboriginal title. Professor Slattery states:

> In effect, the reason why Aboriginal title cannot be described in traditional property terms is that it is not a concept of *private law* at all. It is a concept of *public law.* It does not deal with the rights of private entities but with the rights and powers of constitutional entitles that form part of the Canadian federation. If we cast about for analogies to Aboriginal title, we discover a close parallel in Provincial title – the rights held by the Provinces to lands within their boundaries.[33]

32. The import of this discussion is not that this Court should weigh in on the debates presently underway, but that the Court should be reluctant to go further than resolve actual disputes presented to it and should resist expanding litigation beyond those narrow limits except where compelled to do so.

33. Faced with the potentially conflicting interest between treaty interests and the public right of navigation, in the *Chippewas* case, the Ontario Court of Appeal rejected a proposition that this could be determined in advance, as a matter of law:

> The concerns of some of the parties and interveners about Aboriginal title to submerged lands and the public right of navigation cannot be addressed until the extent of Aboriginal title, if any, is determined.[34]

34. This illustrates the restraint that has most often accompanied requests that the courts determine matters on the basis of propositions of law, independent of the evidence. The courts repeatedly state that it has not yet been clarified how Aboriginal title interacts with other, possibly contending, interests in land.[35] It is not even clear whether a judicial

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[33] Brian Slattery, "The Constitutional Dimensions of Aboriginal Title", (2015) 71 S.C.L.R. (2d) 45 at 47; see also Ryan Beaton, Robert Hamilton and Joshua Nichols, "Aboriginal Title, Self-Government, and Indigenous Jurisdiction in Canadian Law", (2002) 73 U.N.B.L.J. 94, at 121-124; Douglas Sanderson and Amitpal C. Singh, *Why Is Aboriginal Title Property if It Looks Like Sovereignty?*, (2021) 34:2 Can J.L. & Juris., 417, at 1-2.

[34] *Chippewas of Nawash Unceded First Nation v. Canada (Attorney General),* 2023 ONCA 565 at para. 108.

[35] See for instance *Uashaunnuat* at para. 293, Brown and Rowe JJ., dissenting; *Kwikwetlem First Nation v. British Columbia (Attorney General),* 2021 BCCA 311 at para. 5; *Giesbrecht v. British Columbia*, 2018 BCSC 822 at paras. 79-80.

determination of Aboriginal title is an *in rem* decision.[36] But while courts have been prepared to assume that their decisions are *in rem*, they are not prepared to consider them binding on third parties who were not given notice, whether or not they are Indigenous.[37] And they have, with a great degree of consistency, been inclined to limit the scope of cases before them and resist requests to expand these to other parties and issues.[38] Finally, the courts have repeatedly resorted to principles such as the honour of the Crown to guide their management of these complicated cases.[39]

35. The *Uashaunnuat* case concerned not the addition of parties, but the division of a single case in two because it overlapped provincial boundaries. The Supreme Court of Canada rejected the argument that the decision was, in effect, *in rem* because it affected lands[40] and further advised that considerations such as access to justice, must factor into a decision:

> In the specific context of s. 35 claims that straddle multiple provinces, access to justice requires that jurisdictional rules be interpreted flexibly so as not to prevent Aboriginal peoples from asserting their constitutional rights, including their traditional rights to land [...] [citations omitted]
>
> Moreover, the honour of the Crown requires increased attention to minimizing costs and complexity when litigating s. 35 matters and courts should approach proceedings involving the Crown practically and pragmatically in order to effectively resolve these disputes.
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> Requiring the Innu to bifurcate their claim would undermine the twin constitutional imperatives of access to justice and the honour of the Crown.[41]

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[36] *The Council of the Haida Nation v British Columbia,* 2017 BCSC 1665 at para. 29.
[37] *The Council of the Haida Nation* at para. 29; *The Ahousaht Indian Band et al.* at para. 27; *Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario,* 2023 ONSC 909, para. 13.
[38] See for instance *Calder v. British Columbia (Attorney General),* 1969 CanLII 713 (BC SC) at para. 62; *William v. Riverside Forest Products Ltd.*, 2002 BCSC 1199 at para. 14; *Kwikwetlem First Nation v. British Columbia (Attorney General),* 2021 BCCA 311.
[39] *Uashaunnuat* at paras. 22 and 51.
[40] *Uashaunnuat* at paras. 29-31, 35-36, 45, 50- 51.
[41] *Uashaunnuat* at paras. 50-52.

36. The same, with respect, might be said of requiring the Gitanyow, and perhaps the Northern Gitxsan Chiefs after them, to sue the Nisga'a Nation against whom they seek no relief.

Reconciliation: The Case of the Haida

37. The *Haida* title case, and the decision to exclude third party participation, provides a case in point of the benefits which may flow from resisting the impulse to resolve all questions in a single court case where Aboriginal title is at issue.

38. Like the Gitanyow, the Haida Nation has a title case pending before the courts. Filed in 2002, the Haida case was revived for trial in 2016 after unsuccessful negotiations. The principal claim in that case was for a declaration of title to all of Haida Gwaii, inclusive of fee simple lands. The case is now set for trial in May, 2026 and is in judicial management before Mayer, J.[42]

39. British Columbia and Canada brought motions before Fisher J., as she then was, for orders (British Columbia) that the proceedings be stayed until the plaintiffs either (a) elect not to seek to disturb the tenures, permits and licences of third parties in this or future litigation or (b) join as defendants all third parties against whom they intend to claim; and (Canada) that registered owners of fee simple lands be given notice that their interests may be adversely affected by the declaration of aboriginal title sought by the plaintiffs.[43]

40. Both Crown defendants in *Haida* relied on the same line of reasoning advanced by the Nisga'a Nation and the Province in the present case, "that a declaration of aboriginal title

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[42] *Council of the Haida Nation et al. v. His Majesty the King in Right of the Province of British Columbia and the Attorney General of Canada*, Supreme Court of British Columbia, Action No. L020662, Vancouver Registry.
[43] *The Council of the Haida Nation* at para. 3.

is inconsistent with fee simple title, as both accord the holder a right to exclusive use and occupation".[44]

41. The plaintiffs originally sought remedies against certain third parties holding tenures from the Crown but amended the pleadings in 2017, removing those prayers for relief in the same manner as the Gitanyow have done. The plaintiffs did not, however, commit to not seeking relief against some third parties in subsequent litigation. Nonetheless, there were no claims for relief in this action against any parties other than the Crowns.[45]

42. In response to British Columbia's application to join third parties as defendants, the chambers judge held that, on the basis of the pleadings as they now stand, there is no basis on which to require the plaintiffs to join as defendants any third parties against whom they may wish in the future to make other claims for relief.[46]

43. In response to British Columbia's argument that the decision was *in rem*, and would necessarily affect the rights of third parties, the court noted, relying on *Hughes,*[47] *Cook,*[48] *Willson,*[49] *and Ahousaht*[50], that:

> The law is unsettled as to whether a declaration of aboriginal title is equivalent to a judgment *in rem*, but the principles in these cases support the proposition that such a declaration made in this action would only be binding on non-parties with an interest in the lands affected if they had received formal notice of the claim. In the absence of such notice, third parties would be free to raise all defences should the plaintiffs later elect to make claims against them.[51]

44. Fisher J. as she then was, noted that the plaintiffs said, contrary to the submissions of Canada and British Columbia, that Aboriginal title can co-exist with fee simple title and

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[44] *The Council of the Haida Nation* at para. 6; see also at paras. 32 and 37.
[45] *The Council of the Haida Nation* at paras. 11-14.
[46] *The Council of the Haida Nation* at para. 22.
[47] *Hughes v. Fredericton (City)*, 1998 CanLII 12218 (NBCA) at para. 7.
[48] *Cook et al. v. Saskatchewan et al.,* 1990 CanLII 7817 at para. 18.
[49] *Willson* at paras. 43, 60.
[50] *The Ahousaht Indian Band et al.* at paras. 27, 29.
[51] *The Council of the Haida Nation* at para. 29.

that a fundamental issue in the case concerned the meaning and scope of a declaration of aboriginal title and rights over lands that include those held by private interests.[52] She further noted that the law had not yet clarified the relationship between aboriginal title and fee simple title.[53]

45. While acknowledging the arguments of Canada and the Province that the "exclusive" component of Aboriginal title meant that there could be no co-existence between aboriginal title and fee simple[54], she thought that requiring private parties to join the litigation would impose an arduous burden on them. She added:

> This would also negatively affect the ability of the Haida Nation to effect the kind of reconciliation with the non-aboriginal community that is the fundamental objective of aboriginal rights litigation.[55]

46. Finally, at paras. 39-45, the chambers judge canvassed a number of precedents to conclude that they demonstrate "that requiring notice is rarely ordered"[56] and decided not to require notice to be given to third parties.

47. While the *Haida* case concerned fee simple interests and the present case concerns treaty interests, both cases advance an argument based on the proposition that since Aboriginal title is exclusive, any declaration of title must override other potential interests in the lands and cannot co-exist or be reconciled with those interests. To this extent, the differences between the interest competing with Aboriginal title being treaty lands or fee simple are immaterial This is because either interest runs afoul of the "exclusive possession" definition of Aboriginal title. The court in *Willson* would not permit the joinder as defendants of potentially overlapping interests based either on treaty or Aboriginal title rights.[57]

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[52] *The Council of the Haida Nation* at paras. 7-8, 30 and 32.
[53] *The Council of the Haida Nation* at para. 33, 52.
[54] *The Council of the Haida Nation* at para. 32.
[55] *The Council of the Haida Nation* at para. 32.
[56] *The Council of the Haida Nation* at para. 47.
[57] *Willson at* paras. 12-13 and 64-66.

48. Subsequent to the *Haida* decision, the parties to that action entered into negotiations which resulted in the *Gaayhllxid – Giihlagalgang* "Rising Tide" Haida Title Lands Agreement ("Rising Tide") which agreement contemplated and gave rise to the *Haida Nation Recognition Amendment Act*, 2024, SBC 2024, c. 23 ("the Act").

49. The Act, which received Royal Assent on 16 May, provides:

> 4.1 (1) The government of British Columbia recognizes that the Haida Nation has aboriginal title within the meaning of section 35 of the *Constitution Act, 1982* to land on Haida Gwaii, as described in the Schedule to this Act.
>
> (2) For certainty, the recognition in subsection (1) engages the honour of the Crown.

50. The Schedule referred to in s. 4.1(1) is:

> All the land, including foreshore and land covered by water, outlined in blue on the map attached as Appendix B to the Gaayhllxid – Giihlagalgang "Rising Tide" Haida Title Lands Agreement.

That Appendix[58] is a map showing the entirety of the land base of Haida Gwaii including the foreshore. Neither fee simple lands nor lands held by the federal Crown are excluded from this broad recognition of title.

51. The Act further provides:

> 4.2 The government of British Columbia acknowledges that the Haida Nation has consented, if and as necessary, in the Gaayhllxid – Giihlagalgang "Rising Tide" Haida Title Lands Agreement, to the measures set out in this Division.
>
> 4.3 The following interests in and rights in relation to land on Haida Gwaii, whether arising before or after this section comes into force, are confirmed and continued:
>
> (a) an estate in fee simple;

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[58] Appendix B to Gaayhllxid – Giihlagalgang "Rising Tide" Haida Title Lands Agreement, p. 11, as referred to in the Schedule to the *Haida Nation Recognition Amendment Act,* 2024, SBC 2024, c. 23.

> (b) an interest in or right in relation to land that derives from, burdens or otherwise relates to an estate in fee simple.
>
> 4.5 Despite section 14(2) of the *Interpretation Act*, this Act binds the government of British Columbia in relation to land on Haida Gwaii.

52. When the Nisga'a Nation and the Province insist that Aboriginal title, because of its exclusive nature, cannot co-exist with other interests in land, they demonstrate a paucity of imagination. This is particularly disconcerting coming from the Province which has demonstrated this proposition to be false through its own recognition of Haida Aboriginal title and fee simple co-existing on the same land.

53. The Haida agreement and legislation demonstrate the wisdom of the repeated exhortations of the courts to resolve Aboriginal rights and title claims through negotiation[59] – which provides a much larger toolbox for the parties than is available in the courts.

54. Through negotiation, the Haida Nation and the Province have achieved a reconciliation which, according to the Province in 2017, as well as the Province's position in this case, was conceptually impossible. The parties have recognized that the Haida Nation's Aboriginal title may co-exist with other interests as broad as fee simple. At the same time, the Haida Nation has agreed, in respect of certain of those lands, to recognize and continue existing fee simple interests.

55. The concept of Aboriginal title has evolved from *Delgamuukw* where it was seen as fundamentally a property interest, through *Tsilhqot'in* where it was seen as having a territorial and jurisdictional component. The Haida have exclusive Aboriginal title to Haida Gwaii and have elected, in order to achieve reconciliation, to recognize possessory interests of third parties. This is an exercise, not a diminution of the Aboriginal title of the Haida Nation.

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[59] *Delgamuukw* at para. 186.

56. In effect the parties have redefined Aboriginal title as not just a property interest, but a sovereign interest where there is exclusivity as a jurisdictional interest rather than an interest in occupation of property. This reinvention of Aboriginal title has other important consequences. The possessory interest in land (fee simple) may be alienated by the Haida without surrender to the Crown. Surrender would only be required if the Haida proposed to abandon their jurisdictional interest in lands. Also, lands which are escheated or forfeited to the Crown will revert to the Haida.

57. Scholars and jurists will determine over time whether the governing principle at work is that the Haida have replaced the Crown as the holders of the allodial title, or whether Haida title lies above the allodial title of the Crown, but underneath fee simple interests on Haida Gwaii.

58. What is not debatable is that the Haida and the Province have done what the Province, in this case, insists is impossible. They have taken up the spirit of repeated requests by the Supreme Court, to design their own relationship on the basis of the unique circumstances, history and laws of the Haida Nation. And they have done it in a way that would, because of its innovations, likely have been impossible to achieve in the Courts.

59. It is respectfully submitted that:

    a. Nothing in the Gitanyow action affects the Nisga'a in such a way as to require their participation in the Gitanyow title case with full rights of a party. Such a step would hijack the Gitanyow case and would be contrary to the objective of reconciliation.

    b. The preferred method for reconciliation of interests between the Gitanyow and the Nisga'a is negotiation.

    c. Joining the Nisga'a Nation as a Defendant to this proceeding will be an impediment to such negotiations and will assign to the courts, with their limited toolbox, the task of determining the respective rights of the Gitanyow and the Nisga'a vis-à-vis each other.

    d. A proper reconciliation of the treaty interests of the Nisga'a and the title interests of the Gitanyow requires a determination of the extent of the Gitanyow

title before it can be resolved. This may, as with the Haida, be by agreement, or it may be by litigation which would be binding as between the Gitanyow and the Crowns, but not between the Gitanyow and the Nisg̲a'a.

e. To the extent it is relevant to a determination of the interests of the Gitanyow to present evidence of historic uses of the lands in issue by the Nisg̲a'a, this can be achieved without adding the Nisg̲a'a Nation as a defendant.

PART 4 - NATURE OF ORDER SOUGHT

60. The intervener seeks an Order:

a. That the appeal be dismissed; and

b. No costs for or against the interveners.

61. All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, this 31st day of May 2024.

David Paterson
Counsel for the Interveners
Delgamuukw et al

APPENDICES: LIST OF AUTHORITIES

Authorities	**Page # in factum**	**Para # in factum**
Ahousaht Indian Band et al. v. The Attorney General of Canada et al., 2006 BCSC 646	11, 14-15, 17	23, 34, 43
Calder v. British Columbia (Attorney General), 1969 CanLII 713 (BC SC)	14-15	34
Chippewas of Nawash Unceded First Nation v. Canada (Attorney General), 2023 ONCA 565	14	33
Cook et al. v. Saskatchewan et al., 1990 CanLII 7817	17	43
Cowichan Tribes v. Canada (Attorney General), 2016 BCSC 1660 [*Cowichan* #1]	11-12	24
Cowichan Tribes v Canada (Attorney General), 2017 BCSC 1575 [*Cowichan* #2]	9–10, 12, 12-13	20, 25, 27
Delgamuukw v. British Columbia, 1997 CanLII 302, [1997] 3 SCR 1010	5, 7, 20	2, 3, 8, 10, 53
Giesbrecht v. British Columbia, 2018 BCSC 822	14–15	34
Hughes v. Fredericton (City), 1998 CanLII 12218 (NBCA)	17	43
Kwikwetlem First Nation v. British Columbia (Attorney General), 2021 BCCA 311	14-15	34
Newfoundland and Labrador (Attorney General) v. Usshaunnuat et al., 2020 SCC 4	13, 14–15, 15	28, 34, 35
R. v. Marshall; R. v. Bernard, 2005 SCC 43	7, 8	8, 12
St. Catherine's Milling and Lbr. Co. v. Reg. (1888) 14 App Cas 46	13	30

Six Nations of the Grand River Band of Indians v. The Attorney General of Canada and His Majesty the King in Right of Ontario, 2023 ONSC 909	14-15	34
The Council of the Haida Nation v British Columbia, 2017 BCSC 1665	12-18	27, 34, 39, 40, 41, 42, 43, 44, 45, 46
Tsilhqot'in Nation v. British Columbia, 2014 SCC 44	7, 13	8, 29, 30
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Legislation		
Haida Nation Recognition Act, SBC 2023, c. 24	19	48
Haida Nation Recognition Amendment Act, SBC 2024, c. 23	19	48, 49, 50