COURT OF APPEAL FILE NO. CA035620
SUPREME COURT FILE NO. 90 0913
SUPREME COURT REGISTRY: VICTORIA

COURT OF APPEAL

ON APPEAL FROM: THE ORDER OF JUSTICE VICKERS OF THE SUPREME COURT OF BRITISH COLUMBIA PRONOUNCED NOVEMBER 20, 2007

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
(Plaintiff)

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
(Defendants)

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THIS INTERVENOR'S PERSPECTIVE

1. The First Nations Summit (the "Summit") is a Provincial Aboriginal organization comprised of a majority of First Nations and Tribal Councils in British Columbia. Since its establishment in 1990, the Summit's primary focus has been to promote and facilitate the reconciliation of the prior existence and rights of First Nations with the sovereignty of the Crown, by supporting and representing the interests of First Nations negotiating treaties, and by addressing issues of common concern throughout the province.

2. A major part of the Summit's work involves the process operating throughout British Columbia for the negotiation of treaties. The Summit played a major role in establishing that process, by convincing the governments of Canada and British Columbia to appoint senior officials to a Joint Three-Party Task Force, whose unanimous Report concluded:

> As history shows, the relationship between First Nations and the Crown has been a troubled one. This relationship must be cast aside. In its place, a new relationship, which recognizes the unique place of aboriginal people and First Nations in Canada, must be developed and nurtured. Recognition and respect for First Nations as self-determining and distinct nations with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship.[1]

3. Based on that Report, the treaty negotiation process was jointly established by the Summit and the governments of Canada and British Columbia, who have continued to work as the "principals" of the process. Canada and British Columbia are parties in these appeals. The Summit has intervened to provide its concerns and perspective as the third principal.

4. Despite the enormous commitments and investments First Nations have made to treaty negotiations, there continue to be problems affecting the process as a whole. From the perspective of the Summit, the most fundamental problems flow from the refusal of Canada and British Columbia to recognize and respect the existence of First Nations' Aboriginal title in and to their respective traditional territories. As a result they have failed to work with First Nations to develop mutually agreeable ways to recognize, protect and accommodate the full range of the First Nations' interests in their territorial lands and resources. Instead, the two governments insist on negotiating based on what Vickers J properly referred to as the "impoverished view of Aboriginal title" advanced by those parties in this case.

5. The Summit believes that the decisions this Court will make about the nature, scope and

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[1] *Report of the British Columbia Claims Task Force,* June 28, 1991, p.16; at http://www.fns.bc.ca/pdf..

operation of Tsilhqot'in Aboriginal title will have a bearing on that problem.

6. The massive, five-year trial in this case was a very significant statement of faith, by the Tsilhqot'in people, in Canada's court system. The trial was the third attempt by a First Nation in British Columbia to win legal recognition for their Aboriginal title. Despite the very substantial effort and resources invested by First Nations, governments and the Courts, declarations of title were not granted in *Calder* in 1973, in *Delgamuukw* in 1997, or in the trial in this case in 2007. From the perspective of the Summit, that record represents a serious failure of the legal system. The Summit's intervention seeks to address the issues in these appeals in ways that could reverse that.

7. The issues in this appeal are not new. From the start, British Imperial policy recognized the Aboriginal Title of the Indian tribes in North America, requiring their consent before the Crown or its agents would allow the sale of land or settlement in their territories. Imperial promises were made to First Nations based on this policy, which made trade and settlement possible, to the great benefit of Britain and the eventual settlers. That policy also resulted in the conclusion of Treaties throughout most of Canada.

8. It is a matter of historic shame that the federal and provincial governments both refused to apply that policy in British Columbia. First Nations in British Columbia were effectively dispossessed and denied the benefit of their traditional relationship to their lands, waters and resources, because they could not rely on the legal force of their Aboriginal title in order to safeguard their most basic rights and interests as Aboriginal peoples. **That is still the case today**. These appeals provide a new opportunity to recognize and affirm Aboriginal title, thereby confirming that it is **a practicable and accessible legal right in British Columbia**. The Summit believes that needs to be the result in this case.

9. That would make it necessary for the governments of Canada and British Columbia to renew their treaty mandates and negotiate in a trust-like way, rather than on the basis of adversarial positions. In turn, that would empower the whole process for negotiating treaties that the three parties created to develop new Crown-First Nation relationships based on recognition and respect. That result would also promote the process of reconciliation that is the fundamental objective of the modern law of Aboriginal and Treaty rights and s. 35 of the *Constitution Act, 1982.*

PART I - STATEMENT OF FACTS

10. This Intervenor accepts the Facts stated by Roger William.

PART II - ISSUES ON APPEAL

11. This Intervenor makes submissions on the following legal issues raised by the Parties:

A. The Pleadings and the Crown's related claims of prejudice;
B. The Aboriginal perspective on the Tsilhqot'in relationship to land, as evidence of possession that supports a Declaration of Aboriginal title to the Claim Area;
C. The relationship between Aboriginal and Crown title, including the applicability of the *Forest Act.*

PART III – ARGUMENT

A. The Pleadings and the Crown's related claims of prejudice

12. This Court's decisions respecting the pleadings and the Crown's related claims of prejudice will affect all First Nations. The Summit supports the position of Roger William on these issues. It is submitted that Vickers J erred by acceding to the Crown's argument that it would be unfairly prejudiced if he granted a Declaration of Tsilhqot'in title to the Opinion Area, because of the Plaintiff's pleadings. This Court should also reject the arguments made by Canada and British Columbia, that would virtually eliminate the Tsilhqot'ins' right to further litigate their claims.

13. Those Crown arguments are extremely adversarial. They are certainly not trust-like. This can be tested by the **legal result** if they are upheld: If the Tsilhqot'in are not entitled to declaratory relief and now cannot litigate their claims, have the asserted rights effectively been extinguished? Would this eliminate Canada's fiduciary duties respecting that title? Would British Columbia's title to the Claim Area become un-encumbered? Would this eliminate the governments' related duties to consult and accommodate based on the honour of the Crown? Would the governments be able to insist that a treaty with the Tsilhqot'in reflect the "impoverished" positions criticized by Vickers, J?

14. The two governments ask the Courts to do what they could not do by legislation or administrative action, in light of section 35. That cannot be right. Aboriginal rights cases need to be pleaded appropriately, and Courts should not grant remedies that would unfairly cause legal prejudice to a party. But these issues should be decided on the basis of appropriate principles.

15. The starting point is the principle in *Solosky,* that the particular form of pleadings should not be a barrier to granting declaratory relief:

> With great respect for the views expressed in the Federal Court of Appeal, I do not think that the important issues raised in these proceedings should be determined by the particular form of wording employed in the prayer for relief, or on the basis that the question is hypothetical.

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.[2]

16. Pleadings should define the issues and give notice of the case to meet,[3] but a rigid approach to pleadings should be avoided, so Courts are not prevented from resolving cases on their merits:

> A lawsuit should be neither an obstacle course nor a trap where the technicalities of pleadings may be used to inhibit or prevent a trial of the action on its merits.[4]

17. Pleadings in aboriginal title cases must be approached with flexibility, because the applicable law is still evolving.[5] To require claimants to plead the precise boundaries that the evidence will prove, and deny relief if they only prove title to part of the area, denies the reality that these boundaries are a construction. The litigation and negotiation processes are both tools to determine boundaries. If those were known at the outset, there would be no need for litigation.

18. In *Delgamuukw*, LaForest J rejected the need to plead precise boundaries:

> …it is self-evident that an aboriginal society asserting the right to live on ancestral lands must **specify** the area which has been continuously used and occupied. That is, the general boundaries of the occupied territory should be identified. I recognize, however, that when dealing with vast tracts of territory it may be impossible to identify geographical limits with scientific precision. Nonetheless, this should not preclude the recognition of a general right of occupation of the affected land. Rather, the drawing of exact territorial limits can be settled by subsequent negotiations between aboriginal claimants and the government.[6]

19. Kent Roach recognized the role of declarations as a basis for negotiations: "Judicial declarations of constitutional rights often set the stage for prompt and good faith attempts at implementation through negotiation."[7] A declaration of title could be a basis to negotiate detailed rights in the claim area or stop specific uses of the area, like logging.[8] It should be a step towards

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[2] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 830-33; see also *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, [46-47]; Declaratory relief is even available where a declaration was not requested in the pleadings – see *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627, [XXVIII-XXXII].

[3] *Canadian Bar Association v. British Columbia*, [2008] B.C.J. 350, [60].

[4] *370866 Ontario Ltd. v. Chizy* (1987), 57 O.R. (2d) 587 at 589 *per* Barr J. (Ont. H.C.J.).

[5] *Delgamuukw v. British Columbia,*[1997] 3 SCR 1010, [75]; *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, [40] *per* McLachlin CJ; [127-41] *per* LeBel J.

[6] *Delgamuukw,* [195] *per* LaForest J.; (emphasis in original); LaForest J's comments about the proper approach to pleading boundaries are echoed in Vickers J's comments on the "artificial" nature of the territorial boundaries at issue in this case – see Trial Decision, Joint Appeal Record, v. II, [641-649]. ["Trial Decision"]**.**

[7] Kent Roach, *Constitutional Remedies in Canada* (Canada Law Book, loose-leaf) at ¶15.85, 15.620, 15.850. ["Roach"]

[8] See discussion of change in approach of federal government to aboriginal claims as a result of *R. v. Calder* in *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1105 per Lamer CJC and LaForest J; See summary of history of the James Bay Agreement in *Quebec (Attorney General) v. Moses*, [2010] 1 S.C.R. 557, [60-62] *per* LeBel and Deschamps J., dissenting in the result; see *Report of the Royal Commission on Aboriginal Peoples* at 221-222; *Delgamuukw,* [195] *per* LaForest J.

reconciliation, but not the end of the process. Declarations are also not enforceable by contempt orders: "Declarations do not require courts to supervise compliance by means of their contempt powers and this allows declarations to be more open-ended and less specific than injunctions."[9] A functional approach should be taken to pleadings, in light of these uses for the relief sought. It follows that a declaration of title does not require geographic limits to be precisely defined.

20. The Crowns' approach to pleading would hinder efforts to resolve claims by negotiation. It also encourages the Crown to persist in its position on the scope of title, because if claimants must plead the exact area they intend to prove, and risk having the claim dismissed with finality if they do not fully succeed, they would be deterred from seeking legal recognition of their s. 35 rights.

21. A flexible approach to pleadings should be used, analogous to the approach to evidence in aboriginal rights cases, where an approach to oral history evidence has been developed to prevent s. 35 rights protected being rendered meaningless, and the goal of reconciliation inhibited.[10] Also, recent judicial comments suggest that civil trials are a better forum for aboriginal rights claims than summary conviction cases.[11] If civil actions become the favoured venue for deciding Aboriginal rights, a rigid approach to pleadings must not make those unworkable for claimants.

22. The Crown's fiduciary relationship with First Nations should constrain its conduct of litigation, just as, by analogy, the Crown has special duties as a prosecutor in criminal cases:

> The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility.[12]

23. The Crown's role as a litigant in aboriginal rights cases should be consistent with the honour of the Crown.[13] The Crown should have approached this case and the pleadings on the basis of the general legal position that First Nations were already here, occupying the land as distinct societies, when the Crown asserted sovereignty. It was appropriate to test the evidence respecting the nature and geographic scope of Tsilhqot'in occupation and possession, and the Crown's pleadings and cross-examination show it was alive to those issues and tested the evidence accordingly.[14] But it was wrong to try to prevent a Declaration of title by arguing prejudice, because it was not

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[9] *Roach,* at ¶12.20 and 12.30; Lazar Sarna, *The Law of Declaratory Judgments*, 2nd ed (Carswell: 1988) at 121, 223.
[10] *Delgamuukw,* [81-87]; see also *R. v. Van der Peet*, [1996] 2 S.C.R. 507, [62], [68] *per* Lamer CJ.
[11] *Marshall/Bernard,* 2005 SCC 43, [142-144] *per* LeBel J.
[12] *Boucher v. The Queen*, [1955] S.C.R. 16 at 23-24 *per* Rand J.
[13] *Sparrow,* at 1108; *Delgamuukw,* [162-163].
[14] Appeal Book, Vol.1, beginning at p. 21, paras. 12(c), 12(d), 13, 17, 21(a), 26 and 27

reasonable to interpret the Plaintiff's pleadings as either seeking title to the entire Claim Area or no title at all.

B. The Aboriginal perspective on the Tsilhqot'in relationship to land, as evidence of possession that supports a Declaration of Aboriginal title to the Claim Area

24. The Summit supports the position of Roger William, that Vickers J was correct to conclude that the evidence supports Tsilhqot'in Title to the Opinion Area, and that he should also have found that the evidence supports a finding that Tsilhqot'in title extends throughout the Claim Area.

25. These issues should be decided in light of decided cases on proof of Aboriginal Title. The majority in *Marshall/Bernard* said that many details of how the principles of aboriginal title apply to particular circumstances still remain to be developed, and that the "court must examine the pre-sovereignty practice from the aboriginal perspective and translate it into a modern legal right."[15]

26. In their concurring Reasons, Justices Lebel and Fish expanded on that:

> … Aboriginal concepts of territoriality, land use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the Aboriginal and common law approaches. Otherwise we might be implicitly accepting the position that Aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights…
>
> The role of the Aboriginal perspective cannot be simply to help in the interpretation of Aboriginal practices in order to assess whether they conform to common law concepts of title… The patterns and nature of Aboriginal occupation of land should inform the standard necessary to prove Aboriginal title… To ignore [nomadic peoples'] particular relationship to the land is to adopt the view that prior to the assertion of Crown sovereignty Canada was not occupied. Such an approach is clearly unacceptable and incongruent with the Crown's recognition that Aboriginal people were in possession of the land when the Crown asserted sovereignty… The nature and patterns of land use that are capable of giving rise to a claim for title are not uniform and are potentially as diverse as the Aboriginal peoples that possessed the land… Taking into account the Aboriginal perspective on the occupation of land means that physical occupation as understood by the modern common law is not the governing criteria. The group's relationship with the land is paramount… If the aboriginal perspective is to be taken into account by a court, then the occupancy requirement cannot be equated to the common law notion of possession amounting to a fee simple.[16]

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[15] *Marshall/Bernard*, [40] and [48].

[16] *Marshall/Bernard,* [127-128] and [130-138]. A failure to consider the Aboriginal perspective underlay British Columbia's historic denial of aboriginal title - Joseph Trutch, Chief Commissioner of Lands and Works in the pre-Confederation colony: "The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them; and I cannot see why they should either retain those lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them..." (J.A.S. Trutch, Letter to the Colonial Secretary, Aug 28, 1867, *Papers on BC Indians Land Question*, p. 42.)

27. Evidence of the Tsilhqot'in relationship to land, considered from the Aboriginal perspective, is the starting point for proving title. But it is useful to first consider the common law concepts of "occupation" and "possession" – not instead of the Aboriginal perspective - but **to understand the potential legal significance of that evidence** for determining the scope of their title. In *Delgamuukw* and *Marshall/Bernard* the Supreme Court of Canada held that aboriginal title is a proprietary interest in land, and distinguished occupation from possession:

> Under common law, the act of **occupation or possession** is sufficient to ground aboriginal title.[17]
>
> It [Aboriginal title] is **established by aboriginal practices that indicate possession** similar to that associated with title at common law.[18]

28. The Tsilhqot'ins' relationship to their lands must be understood in light of the distinction between possession and occupation. Aboriginal title does not exist only where there is sufficient evidence of regular use and occupation. Indeed in *Delgamuukw* when the Crown argued that only physical occupation could ground aboriginal title, Lamer CJC rejected the idea, holding instead that aboriginal law as well as the physical reality are relevant to proving title[19]

29. Title at common law is based on one primary operative concept – the fact of unchallenged possession. Earlier common law used the term 'seisin' - a person was in seisin of land when he or she was "enjoying it **or in a position to enjoy it**."[20] **Possession is a conclusion of law.** It defines the nature and status of a particular relationship of control by a person over land. The key element in possession is "overall territorial control."[21]

> At common law the phenomenon of 'possession' involves much more than a bare physical occupancy of land. Indeed a person may be in 'possession' of land without being in occupation of it at all. Possession is an inherently behavioural phenomenon which incorporates a particular mindset. Far from connoting mere factual presence upon land, possession is constituted by a range of inner assumptions about the power conferred by such presence. The relevant emphasis is on the deliberate, strategic control of land. **Possession is the self-evident state of affairs which prevails where one person is in a position to 'control access to [land] by others and, in general, decide how the land will be used'**.[22] [emphasis added]

30. At common law, possession of land can be attributed to a person if he has both factual

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[17] *Delgamuukw*, [145]
[18] *Marshall/Bernard,* [54]
[19] *Delgamuukw*, [147].
[20] Pollock and Maitland, *The History of English Law* (2nd Ed, London, 1968) Vol. 2, at 34; Kevin Gray and Susan Francis Gray, *Elements of Land Law* (5th Ed., Oxford University Press, 2009), at 2.1.3, p. 151 ["Gray and Gray"].
[21] Gray and Gray, at 2.1.6, p. 153; *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 207, per Toohey J
[22] Gray and Gray, at 2.1.7, p. 153; *Western Australia v. Ward* (2002) 213 CLR 1 at para. 52, per Gleeson CJ.

possession and a possessory intent. Factual possession depends on evidence that the claimant has asserted a complete and exclusive physical control over the land. It must be shown that the claimant has been dealing with the land as an occupying owner might have been expected to deal with it and that no one else has done so.[23] Possessory intent is shown by a subjective intention to control use and access of land, and outward conduct reflecting that intention.[24] Possession comprises a comprehensive relationship to land with the manifest intention, as of right, of excluding others from any immediate use of it. Acts of possession are to be viewed cumulatively so the court can determine whether, taken as a whole rather than in isolation, they establish possession.[25]

> Possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient 'physical possession' to give them title to the land, is a question of fact, to be decided in all the circumstances… exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. [26]

31. There is voluminous evidence of Tsilhqot'in possession, including evidence that: (1) they were in factual possession in that they asserted complete and exclusive physical control of the entire Claim Area;[27] (2) they had a subjective intention to control the land and evidence of outward conduct of that intention;[28] (3) they had the ability to exclude and did so;[29] (4) their possession was consistent and transparent;[30] (5) their acts of occupancy and possession were consistent with the nature of the land;[31] (6) they had control over access or activities of strangers;[32] and (7) no others claimed possession of the Claim Area at sovereignty.[33]

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[23] Gray and Gray, at 2.1.9, p. 155.
[24] Gray and Gray, at 2.1.8, p. 154.
[25] Gray and Gray, at 2.1.11, p. 156.
[26] *Marshall/Bernard*, [66] and [70].
[27] For no others in the Claim Area see: Transcripts, Martin Quilt, p. 1184, 3 – p. 1192,19; For the Tsilhqot'in monitoring of European traders, missionaries, settlers and railway surveyors on arrival see: Trial Decision, [938]; For the use of scouts and runners to check for intruders and warn their communities see: Trial Decision, [916].
[28] For Tsilhqot'in wiping out intruders in their territory see: Trial Decision,[932]. For military practices used to instil fear in all who might venture into Tsilhqot'in territory see: Trial Decision, [920].
[29] For Tsilhqot'in use of military powers to exclude others see: Trial Transcripts, Martin Quilt, p. 282, 1 – p. 284, 25. For Tsilhqot'in wiping out intruders see: Trial Decision, [932]. For non-Tsilhqot'in aboriginal guides fearful of entering Tsilhqot'in territory see: Trial Decision, [921].
[30] For the fact that the Tsilhqot'in "maintained exclusive control of a recognized territory and they were conscious of that fact" see: Exhibit #0224, Dinwoodie Report, p. 35.
[31] For need to move around their territory to preserve resources see: Exhibit #0013, Affidavit of Ubill Lulua, [129-130].
[32] For evidence that to be safe non-Tsilhqot'in paid tolls or rents to enter or stay Tsilhqot'in country see: Trial Decision, [917, 919, 935 and 938]. For outsiders permitted to be on land or to pass over land at the sufferance of Tsilhqot'in people see: Trial Decision, [935]; For Tsilhqot'in Chief Allaw ordering HBC employee off "his Lands immediately, so that they [Tsilhqot'in] might have the pleasure of burning the fort" and response by HBC see: Exhibit 0156-1837/10/25.001, Chilcotin Post Journal 1837-9, at 2137967-8; For Tsilhqot'in killing of a white settler (Manning) for occupying an "old and favourite [Tsilhqot'in] camping ground." see: Trial Transcript, Kenneth Brealey, p. 11255, 34 - p. 112566,16; For Tsilhqot'in forcing a white settler (Elkins) to leave Lhiz Bay, but being allowed to reside elsewhere on Tsilhqot'in lands (Elkins Creek) see: Transcript, Roger William, p. 2387,16-28; p. 2391,1-12.
[33] For no others in the Claim Area see: Transcripts, Martin Quilt, p.1184,3–p.1192,19; Trial Decision, [932-934], [941-943].

32. There was substantial evidence of Tsilhqot'in capacity to exclude others from the Claim Area: They had a system of active monitoring[34] and communications;[35] they used military power to defend the territory and exclude others;[36] they had a system of laws that applied throughout the Claim Area, including laws of trespass.[37] The trial judge held that the evidence showed that they exercised effective control over the Opinion Area and that a reasonable inference could be drawn that Tsilhqot'in people could have excluded others.[38]

33. From the Tsilhqot'in perspective, the entire Claim Area is seen as a whole with its individual parts seen in relation to that whole. The parts of the area comprise a **network,** filled with places imbued with Tsilhqot'in activities including spiritual, hunting, fishing, gathering, horticultural, travelling, defending, naming, and narrating activities.[39] That network is a socially constructed environment wherein the Tsilhqot'in shape their relations to each other and to the natural world.[40] The Tsilhqot'in landscape is populated by traditional cultural properties[41] that include unmodified features of the natural landscape such as rock formations[42] or features of human manufacture such as petroglyphs.[43] As David Dinwoodie reported, the Tsilhqot'in have a "cultural relationship with their territory … [that goes] beyond their utilitarian interests in it."[44] They see the Claim Area as a network of interactions between people, plants, animals and sacred places.[45] Those relationships define, constrain and are also the product of, Tsilhqot'in behaviour.[46] The Tsilhqot'in perspective

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[34] For Tsilhqot'in monitoring strangers on their arrival see: Trial Decision, [938].
[35] For Tsilhqot'in communications network of runners to protect Tsilhqot'in territory see: Trial Decision, [916].
[36] For military engagements to protect Tsilhqot'in territory see: Trial Decision, [920].
[37] Exhibit #0391, Foster Report, January 2005, 5-11.
[38] Trial Decision, [929].
[39] For landmarks as mnemonic devices see: Trial Transcripts, Martin Quilt, p. 1208, 2 – p. 1210, 2; For defending see: Transcripts, Thomas Billyboy, p. 15657,36-43, p. 15629, 21-31, 40, p. 15630, 2; Transcripts, Gilbert Solomn, p.13358, 22 - p.13359, 24; Transcripts, p.10466,17-41. For place names see: Exhibit #0013, Affidavit of Ubill Lulua, sworn November 20, 2002, p. 7-8 paras. 31-32. For fishing & hunting see: Exhibit #0013, Affidavit of Ubill Lulua, sworn November 20, 2002, p. 24 paras. 127-129. For naming see: Transcripts, Roger Williams, p. 2433, 37-45.
[40] For Tsilhqot'in socially constructed landscape see: Transcripts, Martin Quilt, p. 1142, 8 – p. 1149,12.
[41] For relationship between *Ts'il?os* (Mount Tatlow) and *?Eniyud* (Mount Niut) see: Trial Transcripts, Martin Quilt, p. 1142, 8 – p. 1149,12; For caves, lakes and mountain tops that are "among the most sacred and most important sites on the landscape" see: Exhibit #0224, Dinwoodie Report, p. 48-49;For Tsilhqot'in worldview embedded in the land and tied to seasonal usage see: Transcripts, Roger Williams, p. 2401, 19 - p. 2402, 38.
[42] For unmodified land features as important sites see: Transcripts, Martin Quilt, Use of "rock nests" for hunting, p. 1074, 22 - p. 1075, 9; in relation to *Lhin Desch'osh* see: Transcripts, Roger Williams, p. 2405, 6-43; in relation to the legend "Salmon Boy" see: Transcripts, Roger Williams, p. 2453, 2-15.
[43] For petroglyphs in Tsilhqot'in territory see: Transcripts, Morley Eldridge, p. 20785, 41 and p. 20834, 32-37.
[44] Exhibit #0224, Dinwoodie Report, p. 35.
[45] For Tsilhqot'in relations to the natural world as a whole see: Exhibit #0205, Turner Report, p.4-5 ss. 2.1 "The Tsilhqot'in culture is based on their use of and access to their traditional lands in their entirety and over the full course of the year;" For the sacred network see: Transcripts, Roger Williams, p. 2412, 25-27.
[46] For landscape determining seasonal use for generations of Tsilhqot'in see; Transcripts, John Dewhirst, p. 17058, 6 – p. 17059, 29; Transcripts, Roger Williams, p. 2523,9 – p. 2525,4; Martin Quilt, p. 1145, 13 – p. 1150,10.

requires understanding the network.[47]

34. The Tsilhqot'in perspective is also not simply secular. Significant stones (transformation sites) and other landscape features occupy and mark the entire Claim Area.[48] These underpin Tsilhqot'in laws,[49] as sites that are connections to other worlds, and where the worlds of the gods and humans connect.[50] In other words, the Tsilhqot'in paradigm of land use and occupation includes values that are invisible and intangible to Euro-centric eyes.

35. Vickers J thoroughly reviewed the evidence of the Tsilhqot'in relationship to their lands and considered it from the Aboriginal perspective. He used that evidence to describe Tsilhqot'in culture and way of life. However it is respectfully submitted that he did not properly instruct himself on the legal distinction between occupation and possession, and therefore failed to **also** give effect to that evidence as proof of possession. Therefore he focussed on evidence of regular use and occupation as proof of possession. This error did not affect his conclusion that Aboriginal title was proved for the Opinion Area, because there was ample evidence of regular use and occupation. But if he had properly applied all the evidence that proved possession at law, his understanding of the Tsilhqot'in relationship to land would have supported him upholding title to the Claim Area as well.

36. From the Tsilhqot'in perspective, sites that the trial judge found "have a measure of permanency attached to them"[51] cannot be isolated from the network. Despite the seeming permanency of a village site, the Tsilhqot'in could not in the past, or in the future for that matter, sustain themselves as a people by relying only on these discrete sites.[52] From the Tsilhqot'in perspective, places, including their sacred places, are seen in relation to a larger whole; this comes first and defines their perspective on use and occupancy. The difference is not trivial. They needed, and will need in the future, to rely on the Claim Area for their cultural and material well-being.

37. The exercise of effective control **in the service of this reliance** is shown by the evidence and should have been considered as proof of possession, whether or not there was regular use and occupation throughout the Claim Area. The evidence is that the Tsilhqot'in deliberately maintained

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[47] For Tsilhqot'in worldview see: Exhibit #0224, Dinwoodie Report, p. 48-49; Transcripts, Roger Williams, p. 2413,1-10.
[48] For Tsilhqot'in beliefs with respect to sites imbued with spiritual ties see: Exhibit #0224, Dinwoodie Report, p. 48-49.
[49] Exhibit #0391, Foster Report, January 2005, 1; Transcripts, Roger William, September 24, 2003, p. 2977, 42-46.
[50] Exhibit#0224, Dinwoodie Report, p. 48-49
[51] Trial Decision, [947].
[52] For evidence of "the whole traditional area" see: Transcripts, Roger William, October 23, 2003, p. 3691, 13-20.

exclusive control over their entire territory,[53] that their trail networks indicated long term use and occupancy of areas beyond the trails themselves, and showed that the Tsilhqot'in are connected to each other socially throughout their territory,[54] that they had the "idea of customary use to retain" claims to their land,[55] that they had the *dechen ts'edilhtan* (their laws), including laws of trespass,[56] that they regarded themselves as the stewards of the Claim Area,[57] that they had a reverence for the land that supported and nourished them, that the land was a central theme in their lives,[58] that they had place names throughout the Claim Area,[59] that their belief system and legends were rooted in the Claim Area,[60] and that theirs "was a oneness of the earth, of animals and people."[61]

38. Properly considered this evidence shows that the Tsilhqot'in were in possession of the Claim Area. They were in a position to control access to the land they considered their homeland, and expended the resources necessary to exercise that control. They decided how the lands and resources in the Claim Area would be used. They had to do that, because it was their homeland and the basis for their material well-being and their cultural and spiritual identity and sustenance.

39. The law of property is not essentially about things, as much as the relationship of people and property. The idea of property in land is closely associated with a concept of personal and territorial inviolability, which remains deeply imbedded in the history of the common law.

> The obverse of property is disempowerment, disorientation and alienation – the uncomfortable realization that one's presence on the land is either improper or crucially dependent on the sufferance of another.[62]

40. The Tsilhqot'in assert their Aboriginal title to the Claim Area because they continue to resist being disempowered, disoriented and alienated from their own homeland. This is a concept familiar to the common law, and should be the basis for confirming Tsilhqot'in title.

C. The Relationship of Tsilhqot'in and Crown Titles

41. If there is a Declaration of Tsilhqot'in title, there is a reason to define how Crown and Aboriginal titles are related, including whether the *Forest Act* applies to title lands. This Intervenor

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[53] Exhibit #0224, Dinwoodie Report, p. 35.
[54] Exhibit #0443, Dewhirst Report, p. 42, [158].
[55] Exhibit #0443, Dewhirst Report, p. 12, [33].
[56] Exhibit #0391, Foster Report, p. 1.
[57] For stewardship see: Exhibit #0205, Turner Report, p. 4; Transcripts, p. 10145, 23 – 10146, 29.
[58] Trial Decision, [436].
[59] For Tsilhqot'in place names see: Exhibit #0224, Dinwoodie Report, at p. 45-48.
[60] For Tsilhqot'in belief system and legends see: Trial Decision, [653-671].
[61] Trial Decision, [419].
[62] Gray and Gray, p. 106, 1.5.43, ftnt. 2

supports the positions of Roger William on those issues, and makes submissions in the alternative.

42. *Canadian Western Bank* decided that the interjurisdictional immunity doctrine should have limited application, since flexible federalism recognizes that overlapping powers are unavoidable. The doctrine should be used in situations covered by precedent, and applied to prevent provincial laws from **impairing –** rather than just affecting **–** core matters within a federal head of power.[63]

43. There are many precedents preventing the application of provincial laws to matters within "Lands Reserved for the Indians"[64], which would include Aboriginal title lands.[65] If that doctrine is applied on a case by case basis, provincial laws that authorize or regulate the use of land or resources, including the *Forest Act,* **would likely not apply** to such lands, because that would impair the self-determination aspect of title as well as economic and cultural rights it protects.

44. Vickers J was correct to consider applications of the *Forest Act* complained of by the Plaintiffs. If authorized on Tsilhqot'in title lands, those would impair the Tsilhqot'ins' right to determine the uses of that land, as well as economic and cultural interests protected by their title, because the activities would be carried out contrary to ecosystem-based management principles required to sustain the Tsilhqot'in way of life based on those lands.[66]

45. In the alternative, the applicability of such provincial laws to Tsilhqot'in title lands **could be decided more generally** by the application of other Constitutional principles, including principles respecting Aboriginal title, the Crown's related fiduciary obligations, and the application of s. 35.[67]

46. Although the law of Aboriginal title protects proprietary interests, it is part of Canada's constitutional law, with its roots in British and French Imperial policy respecting the **inter-national relationship** between the Imperial powers and the First Nations of North America:

> … [during the mid-18th century] both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations…[68]

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[63] *Canadian Western Bank v Alberta,* 2007 SCC 22 (CanLII), [48]-[49].
[64] *Corporation of Surrey v Peace Arch Enterprises,* (1970) 74 W.W.R. 380 (B.C.C.A.); *Derrickson v Derrickson*, [1986] 1 S.C.R. 285; *Stoney Creek Indian Band v British Columbia,* [1999] 1 CNLR 192 and cases therein.
[65] *Delgamuukw*, [174] – [176].
[66] Trial Decision, [1031-2] and [1097]-[1108].
[67] Aboriginal rights law reflects **constitutional principles: "…**The honour of the Crown speaks to the Crown's obligation to act honourably in all its dealings with aboriginal peoples. It may not lawfully act in a dishonourable way. That is a limitation on the powers of government, not to be found in any statute, that has a constitutional character because it helps to define the relationship between government and the governed." *Chief Joe Hall v Canada*, 2007 BCCA 133,[47-8]; *R. v. Kapp,* 2008 SCC 41,[6].
[68] *R. v Sioui*, 1990 CanLII 103 (S.C.C.) [145-7].

47. Rules respecting the use and disposition of land were central to that policy, and were eventually reflected in the *Royal Proclamation*, which outlawed private purchases of Indian lands and protected the Indian Nations' rights to possession of their lands until voluntary surrender to the Crown by treaty.[69] The policy has become part of our modern law of Aboriginal title:

> In *Calder v A.G.B.C*… this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands … '[the original Indians inhabitants were] admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their discretion…' … That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the *Royal Proclamation of 1763*, nonetheless predates it…[70]

48. The *Proclamation* was not just proclaimed unilaterally. It was made the subject of express undertakings to First Nations whose good will the Crown needed, and that gave rise to agreements:

> … In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some twenty-two First Nations… attended a Grand Council at Niagara. Sir William Johnson, the Crown representative, who was well known to many of the chiefs present, read the provisions of the *Royal Proclamation* respecting Indian lands and committed the Crown to the enforcement of those provisions. The chiefs, in turn, promised to keep the peace and deliver up prisoners taken in recent hostilities… The First Nations chiefs prepared an elaborate wampum belt to reflect their understanding of the Treaty of Niagara. That belt described the relationship between the Crown and the First Nations as being based on peace, friendship and mutual respect. The belt symbolized the Crown's promise to all the First Nations who were parties to the Treaty that they would not be molested or disturbed in the possession of their lands unless they first agreed to surrender those lands to the Crown.[71]

49. McLachlin J has confirmed that these were fundamental principles that apply generally:

> … **The fundamental understanding – the *grundnorm* of settlement in Canada – was that the Aboriginal people could only be deprived of the sustenance they traditionally drew from the land and adjacent waters by solemn treaty with the Crown**, on terms that would ensure to them and their successors a replacement for the livelihood that their lands, forests and streams had since ancestral times provided them…[72] (emphasis added)

50. These common law principles were confirmed and given force by s. 109 of the *Constitution*

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[69] Slattery, B., "First Nations and the Constitution: A Question of Trust, 71 Can. B.R. 261 at pp. 289-293.
[70] *Guerin v The Queen,* [1984] 2 SCR 335 at pp. 377-8.
[71] *Chippewas of Sarnia v Canada (AG),* 2000 CanLII 16991 (O.C.A.),[51-6]; L. Rotman, *Fiduciary Law*, at pp. 526-557.
[72] *R. v Van der Peet,* [272], per McLachlin J dissenting on other issues [275]: "… the common law and those who regulated the British settlement of this country predicated dealings with Aboriginals on two fundamental principles. The first was the general principle that the Crown took subject to existing Aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be a type recognized by British law. The second, which may be viewed as an application of the first, is that **the interests which Aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants**..." (emphasis added)

Act, 1867, which makes British Columbia's proprietary interest in Crown lands **subject to** a First Nation's interests based on Aboriginal title. Therefore the Province may not enjoy the beneficial interest in such lands until the Aboriginal interest is released by agreement. Provincial legislative authority is correspondingly qualified, because it could not authorize dispositions of beneficial interests it does not have, and is also constrained by related fiduciary obligations.[73]

51. These long-standing principles and provisions help define how a declaration of Tsilhqot'in title would be given legal force and effect. The starting point must be the application of the settled principle, reflected in Canadian common law and constitutional instruments, that governments may not authorize the disposition or use of Aboriginal title lands without the consent of the title holders.

52. A declaration of Tsilhqot'in Aboriginal title represents an important step in the reconciliation process. That title reflects the interests the Tsilhqot'in people have always had in the lands and resources that sustained them materially, culturally and spiritually. The common law's legal recognition of Aboriginal title confirms the Crown's commitment to protect those interests. The Tsilhqot'in Aboriginal title must be given legal force, and the first step must be Crown recognition and affirmation of their title as a **historic right.** Nothing less would satisfy s. 35.

53. Tsilhqot'in title must also be understood as an **evolving right,** so their lands will be a secure base for the Tsilhqot'ins' well-being **into the future,** materially, culturally and spiritually. That is required by the Supreme Court of Canada's rejection of a frozen rights approach to s. 35, and the principle that constitutionally protected rights must be defined in ways that promote reconciliation. In a recent article, Brian Slattery suggests that Aboriginal title therefore needs to be defined as a **generative right,** meaning that it can be partially defined by the Courts as a *sui generis* interest in land reflecting historical occupation and possession, but the full definition and implementation of that title, **as a contemporary right**, must be achieved by negotiated modern treaties.[74]

54. The nature of the Tsilhqot'in historic relationship to their lands is the starting point for negotiated agreements to define that title for the future. The Tsilhqot'in relationship to their lands was complex and nuanced, rather than uniform, since various areas were used for diverse purposes with greater or lesser regularity, others grounded the Tsilhqot'in worldview and identity as a people,

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[73] *Delgamuukw*, [175-6]; *Haida Nation v British Columbia*, 2004 SCC 73, [57-9]; see also *Haida Nation v British Columbia,* [1997] CanLII 2009 (B.C.C.A.), [1]-[6] and [40]-[42]; A declaration of title would result in fiduciary responsibilities, not just honour of the Crown duties, as per *Ross River Dena Council Band v Canada,* [2002] 2 SCR 816, [77]; *Haida Nation (S.C.C.),* [17-18]; *Gitanyow First Nation v Canada* [1999] 3 CNLE 126(B.C.S.C.), [47] & [53]various cites….

[74] Brian Slattery, "The Metamorphosis of Aboriginal Title," in Aboriginal Law Since Delgamuukw, 2009, Canada Law Book.

still others were shared on terms, while reliance on the entire network of places underlay Tsilhqot'in stewardship of their homeland. As a generative right, Tsilhqot'in title will continue to be complex and nuanced, as it is redefined through agreements for the future. There are useful examples in modern treaties for achieving this – including provisions defining various categories of lands and resources, mechanisms to provide security for public and third party interests, and ways to sustain the ecological health and integrity of the territory through effective co-management regimes.[75]

55. Similarly, self-government rights related to Tsilhqot'in title will be defined by agreements, for implementation into the future. Self -government has always been an aspect of Aboriginal title, because the right of First Nations to use their lands "according to their discretion" assumes a right of self-determination, as does the rule that First Nations could only release their title to the Crown on terms agreed by their people. The Tsilhqot'in exercised their inherent self-government rights before Crown sovereignty was asserted, through laws respecting use of the lands in their possession, that were enforced internally by social mechanisms and externally by military means. Self-government has also been recognized generally, as an inherent and existing right of Aboriginal peoples,[76] and is part of the constitutional context for defining the relationship between Crown and Aboriginal titles, which must itself be understood as evolving rather than static. Defining that relationship is part of the reconciliation process, as explained in *Haida Nation:*

> Treaties serve to reconcile **pre-existing Aboriginal sovereignty** with **assumed Crown sovereignty**, and to define Aboriginal rights guaranteed by s. 35…"[77]

56. The common law concept of Aboriginal title always required Treaty making. The contemporary recognition of that title gave rise to the negotiation of **modern treaties** in Canada,[78] in the form of land claims and self-government agreements, and those are the vehicles for defining and implementing contemporary rights and title within s. 35, as Peter Hogg has explained**:**

> … Only a treaty can properly structure a rational scheme of co-operative governance for federal, provincial and Aboriginal governments to control, preserve and manage the resources on Aboriginal and adjacent lands. The enormous detail of the thick volume that contains a typical modern land claims agreement testifies to the impossibility of regulating Aboriginal rights through legislation. As well, only a treaty can provide the basis for Aboriginal self-government, including the taxing powers and funding entitlements that will make the Aboriginal Government a true partner with the federal and provincial governments. This is where the real advances for Aboriginal rights will come

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[75] *Quebec (A.G.) v Moses,* 2010 SCC 17; *Report of the Royal Commission on Aboriginal Peoples*, 1992, Vol. 2, Pt 2, p. 720-748.
[76] *Campbell at al v AG BC, AG Canada & Nishga Nation et al*, 2000 BCSC 1123.
[77] *Haida Nation (SCC),* [20]
[78] *Sparrow*, at pp. 177-178.

> from: by converting them into treaty rights, which are agreed to by all parties, which are sufficiently detailed to provide guides to action, which provide for the cooperation of all three levels of government in the management of the resources, and which provide self-government powers and stable financing for the Aboriginal level of government.[79]

57. Fiduciary obligations will apply, as will the Honour of the Crown, in developing a new relationship between Tsilhqot'in and Crown titles. The historic fiduciary relationship between the Crown and Aboriginal peoples, empowered by section 35, is well suited to guide this work:[80]

> The fiduciary relationship between the Crown and Aboriginal Peoples in Canada arose as a result of the unique interaction between the parties. Mutual needs and wants created the basis for ongoing associations between the groups… **The interdependent nature of this interaction resulted in a situation whereby each of the parties reposed trust in the other and cared for the trust placed in them by the other. This mutual trust, mutual obligation scenario is what created the incipient, or inchoate, fiduciary relationship** described above.[81]

58. Thus the Crown-Aboriginal fiduciary relationship is not essentially a guardian-ward relationship, nor does it simply reflect vulnerability and an imbalance of power. The fiduciary relationship was rooted in a historical situation characterized by interdependence, mutuality and trust. Those should inform the Crown's duties respecting reconciliation, which represents a commitment to a fair and just Crown-Aboriginal relationship having those same characteristics.

59. The generative rights approach to defining Tsilhqot'in title could operate effectively. There is considerable experience in British Columbia now, with consultations and related accommodation negotiations. This Court encouraged such negotiations when it suspended the transfer of the UBC golf for two years because the Crown had breached its consultation obligations, "in order to afford [the parties] proper opportunity for consultation with a view to reaching some *modus vivendi* on appropriate accommodation." The result was a very substantial agreement that accommodated related interests of all affected parties, and was given effect by legislation.[82] Since then, Courts in British Columbia have done the same in numerous cases. Agreements have been the result in some of those cases, while in others the Courts have provided guidance, required further negotiations or

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[79] Peter Hogg, "The Constitutional Basis of Aboriginal Rights," in *Aboriginal Law Since Delgamuukw,* p. 16.
[80] "…the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined n light of this historic relationship." – in *R. v Sparrow* at p. 1108.
[81] L.I. Rotman, *Fiduciary Law*, 2005, p. 527
[82] *Musqueam Indian Band v British Columbia (Minister of Sustainable Resource Management),* (2005) 251 DLR (4th) 717 (B.C.C.A.); and see *Musqueam Reconciliation, Settlement and Benefits Agreement Implementation Act*, Bill 12 – 2008.

even guided the process.[83]

60. This experience suggests the practicability of a declaration of Tsilhqot'in title understood as a generative right. There will doubtless be new issues and disagreements among the parties, as that title is given operational force and Crown title is reconciled with it. The Courts will need to play their critically important role in defining and balancing constitutional rights and obligations pursuant to s. 35, as they have also done in other aspects of public life in Canada.[84]

61. The evidence in this case, properly applied, supports a Declaration that the Tsilhqot'in Nation have Aboriginal title to the Claim Area. It is submitted that should be the result.[85]

PART IV – NATURE OF ORDER SOUGHT

62. It is submitted that, because Vickers J intended his factual findings to be given effect if he erred on the pleadings issue,[86] if this Court concludes that he did err in that respect, the Plaintiff's appeal should be allowed and the Court should grant a Declaration that the Tsilhqot'in Nation has existing Aboriginal title to the Opinion Area.

63. Respecting the rest of the Claim Area, if this Court concludes that Vickers J wrongly instructed himself on the law and therefore failed to properly apply the evidence of the Tsilhqot'in relationship to land as proof of possession, the record is sufficient to enable this Court to grant a Declaration of Aboriginal title to the rest of the Claim Area.[87] In the alternative, if this Court concludes that it would not be appropriate to decide the merits of that issue because reconsideration is required of one or more issues, it is submitted that a new trial should **not** be ordered, in light of the excellent quality and comprehensive nature of the trial evidence, together with the enormous investment of faith, time and resources already made by the Tsilhqot'in people. Instead, the appropriate mechanism would be the exercise of the Court's power to order a **rehearing** before a judge of the Supreme Court of British Columbia based on the evidence at trial, pursuant to s. 9 of the *Court of Appeal Act*, and rules 23-1(10) to 23-1(12) of the *Supreme Court Civil Rules*.

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[83] *Squamish Nation et al v Minister of Sustainable Resource Management,* 2004 BCSC 1320; *Gitanyow First Nation v British Columbia (Minister of Forests),* 2004 BCSC 1734; *Wii'litswx v British Columbia (Minister of Forests),* 2008 BCSC 1139; *Ke-Kin-Is-Uqs v British Columbia (Minister of Forests),* 2008 BCSC 1505.
[84] *Mahe v Alberta,* 1990 CanLII 133 (S.C.C.); *Re Manitoba Language Rights,* [1985] 1 SCR 7121; *Doucet-Boudreau v Nova Scotia (Minister of Education,)* 2003 SCC 62.
[85] See *MacMillan Bloedell*, [1985] 2 CNLR 58, at p. 73, per Seaton, JA – "there is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that…"
[86] Trial Decision, [959-961].
[87] *R. v. Adams*, [1996] 3 S.C.R. 101, [39].

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 13, 2010

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Table of Authorities

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COURT OF APPEAL

ON APPEAL FROM: THE ORDER OF JUSTICE VICKERS
OF THE SUPREME COURT OF BRITISH COLUMBIA
PRONOUNCED NOVEMBER 20, 2007

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 (Plaintiff)

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 (Defendants)

FACTUM OF THE INTERVENOR FIRST NATION SUMMIT

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