Court File No. 40153

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

JIM SHOT BOTH SIDES, ROY FOX, CHARLES FOX, STEVEN FOX, THERESA FOX, LESTER TAILFEATHERS, GILBERT EAGLE BEAR, PHILLIP MISTAKEN CHIEF, PETE STANDING ALONE, ROSE YELLOW FEET, RUFUS GOODSTRIKER, LESLIE HEALY, COUNCILLORS OF THE BLOOD BAND, FOR THEMSELVES AND ON BEHALF OF THE INDIANS OF BLOOD BAND RESERVE NUMBER 148, and BLOOD RESERVE NUMBER 148

Appellants
(Respondents)

-and-

HIS MAJESTY THE KING

Respondent
(Appellant)

-and-

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Interveners

FACTUM OF THE INTERVENERS
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PART I OVERVIEW AND STATEMENT OF THE FACTS

A. Overview

1. The interveners Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, and Halalt First Nation (collectively, the "**Cowichan Nation Alliance**") respectfully submit: (1) any conclusions about whether a treaty right was enforceable prior to 1982 should ensure the distinctions between treaty rights and Aboriginal title are not blurred; (2) this Court's judgment in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, should be applied purposively to further reconciliation as the "grand purpose" of s. 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and ensure a "just settlement for aboriginal peoples";[1] and (3) as limitation periods are substantive law the approach of the Federal Court of Appeal could result in provinces extinguishing s. 35(1) rights before the superior courts, which is contrary to law.[2]

2. The Cowichan (Quw'utsun) have a distinctive collective identity as an Aboriginal people and nation in British Columbia. The Cowichan Nation is comprised today of the members of five *Indian Act*, R.S.C. 1985, c. I-5 bands: Cowichan Tribes, Stz'uminus First Nation, Penelakut Tribe, Halalt First Nation, and Lyackson First Nation. The first four bands are the representative plaintiffs in an Aboriginal title claim that seeks declarations of unauthorized and unjustified Crown infringement relating to the historic sale of Cowichan settlement land subject to Cowichan Aboriginal title, at Tl'uqtinus situated at the south shore of Lulu Island in what is now the City of Richmond (the "**Cowichan Title Claim**").[3] Lyackson First Nation is not participating in the Cowichan Title Claim for financial reasons but authorized the plaintiffs to bring the case on its behalf.[4]

3. For nearly a decade, the Cowichan Nation Alliance has prosecuted its Cowichan Title Claim, which is now in the final stages of a four year trial in the British Columbia Supreme

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[1] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 10; *R v. Sparrow*, [1990] 1 S.C.R. 1075 at 1105-1106, citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100; Respondent's Factum, para. 59.
[2] *Canada v. Jim Shot Both Sides*, 2022 FCA 20, para. 221 [*Appeal Decision*].
[3] *Cowichan Tribes v. Canada (Attorney General)*, 2016 BCSC 1660, paras. 2, 45-48.
[4] *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1645, paras. 13, 28, 38.

Court. This Court's decision about if, and how, limitation periods may apply to Aboriginal treaty claims could have significant ramifications for the Cowichan Title Claim.

4. The Cowichan Nation Alliance brings an Aboriginal title, as opposed to treaty rights, oriented perspective to this appeal. Some defendants in the Cowichan Title Claim, including the Province of British Columbia, have raised a limitations defence and rely on the decision under appeal. In reply, relying in part on *Manitoba Métis,* the plaintiffs say limitation statutes do not bar declaratory relief grounded in s. 35 of the *Constitution Act, 1982*, or Article 13 of the *British Columbia Terms of Union, 1871*, reprinted in R.S.C. 1985, Appendix II, No. 10, and engaging the honour of the Crown. The plaintiffs'alternative arguments include that the continued unlawful possession of Aboriginal title lands by third parties is a continuing breach (trespass), and in any event, that the limitation period only begins to run when the right to judicial recourse crystallizes. In specific reply to British Columbia's reliance on the *Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. 4, c. 27, and *Statute of Limitations*, R.S.B.C. 1897, c. 123, the plaintiffs say these statutes are inapplicable because they purport to extinguish Aboriginal title.[5]

B. Facts

5. The Cowichan Nation Alliance takes no position on the facts.

PART II POSITION ON THE QUESTIONS IN ISSUE

6. The Cowichan Nation Alliance takes no position on the questions raised in this appeal.

PART III STATEMENT OF ARGUMENT

A. Enforceability of Treaty Rights and Aboriginal Title is Distinct

7. As the Federal Court of Appeal expressly acknowledged, Aboriginal title and treaty rights are not the same and conflating or merging the streams of law and authorities is an error.[6] Nevertheless, in deciding whether treaty obligations were enforceable before 1982 and whether they are subject to limitation periods, both Courts below, albeit to different degrees, make

[5] *Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. 4, c. 27, ss. 2, 34 (Cowichan Book of Authorities [BOA], Tab 2); *Statute of Limitations*, R.S.B.C. 1897, c. 123, ss. 16, 41 (BOA, Tab 3).
[6] *Appeal Decision*, paras. 102-103, 106-110.

statements about Aboriginal title.[7] The parties both refer to this *obiter dictum* in their factums.[8]

8. Any conclusion about whether a treaty right was actionable prior to the coming into force of s. 35(1) of the *Constitution Act, 1982* should proceed having regard to the distinctions between treaty rights and Aboriginal title, both in provenance and jurisprudentially, as well as to the unique jurisdictional setting in which the case arises.[9]

9. Aboriginal law jurisprudence has been careful to maintain the distinction between Aboriginal rights, including title, and treaty rights. As the Federal Court of Appeal highlighted, in *R. v. Badger*, [1996] 1 S.C.R. 771, Cory J. observed that there was "no doubt that aboriginal and treaty rights differ in both origin and structure."[10] Aboriginal rights originate from the "historical fact that Aboriginal peoples lived on the land in distinctive societies prior to European settlement" and "flow from the customs and traditions" of Aboriginal peoples.[11] In contrast, treaty rights came into being after Europeans came to Canada and flow from an agreement with the Crown that is of a "very solemn and special, public nature."[12]

10. The difference in origin and structure has implications for the enforceability of the categories of s. 35(1) rights, with the Crown initially considering Aboriginal title legally unenforceable.[13] The date when the right to judicial recourse crystalized will be different for the different categories of s. 35(1) rights with corresponding implications for when limitation periods start to run.

11. Historically, the legal status quo in British Columbia was that Aboriginal title was

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[7] *Jim Shot Both Sides v. Canada*, 2019 FC 789, paras. 360-368; *Appeal Decision*, paras. 163-165.
[8] Appellants' Factum, paras. 120-125; Respondent's Factum, paras. 38-39.
[9] *Appeal Decision*, paras. 18, 102.
[10] *Badger*, para. 76; *Appeal Decision*, para. 106.
[11] *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4, para. 21, citing *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 31; *Badger*, para. 76.
[12] *Badger*, para. 76.
[13] *Appeal Decision*, para. 197. We note there are further jurisprudential distinctions with respect to the enforceability of Aboriginal rights, such as to hunt and to fish, and Aboriginal title to land that have consequences for when the right to judicial recourse crystalized in different parts of Canada, with corresponding implications for when limitation periods start to run.

extinguished prior to 1871. This Court's decision in *Calder et al. v. British Columbia (Attorney-General)*, [1973] S.C.R. 313, left unanswered whether Aboriginal title was extinguished in British Columbia, with the lower courts having concluded it was.[14] The British Columbia Supreme Court in *Delgamuukw v. British Columbia*, 1991 CanLII 2372, 79 D.L.R. (4th) 185, also said Aboriginal title was extinguished in British Columbia.[15]

12. However, this Court's decision in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 determined that unextinguished Aboriginal title did exist at law in British Columbia. Prior to 1997, there was no legal recognition that Aboriginal title in British Columbia continued to exist. Thus, Aboriginal peoples did not have a right to bring an action for a declaration of Aboriginal title and unjustified Crown infringement until at least the date of that judgment.

13. The general principle that a limitation period does not begin to run until a claim is enforceable in law, with a corresponding remedy, therefore, applies differently in the different s. 35(1) rights contexts.[16] In the treaty context, the appellants say the operative date is 1982 with the enactment of s. 35(1). However, in the Aboriginal title context, as noted above, it was only

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[14] The British Columbia Court of Appeal upheld the decision that title was extinguished: (1969) 8 D.L.R. (3d) 59, aff'd (1970) 13 D.L.R. (3d) 64. This Court dismissed the appeal: Judson, Martland, and Ritchie JJ. found title extinguished; Hall, Spence, and Laskin JJ. did not; and Pigeon J., with whom the former agreed on this point, held the action could not succeed because no fiat was granted.

[15] *Delgamuukw v. British Columbia*, 1991 CanLII 2372, 79 D.L.R. (4th) 185 (BCSC), paras. 25-29. We note the Federal Court of Appeal refers to *Guerin v. The Queen*, [1984] 2 S.C.R. 335, as the first decision that recognized Aboriginal title at common law: *Appeal Decision*, paras. 110, 163-165, 198, 231. However, *Guerin* was about the fiduciary duty in relation to reserve land under the *Indian Act* and does not stand for the proposition that an Aboriginal title claim outside of a reserve was actionable in British Columbia at that time.

[16] Appellants' Factum, paras. 30, 126-136; *Appeal Decision*, paras. 17, 111, 176. See also *Morin v. Canadian Home Assurance Co.*, [1970] S.C.R. 561 at 565; *Méthot v. Commission de Transport de Montréal* (1971), [1972] S.C.R. 387 at 398; *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 971-972 (La Forest J.); *Costello v. Calgary (City)*, 1989 ABCA 194, para. 21; *First National Properties Ltd. v. Northland Road Services Ltd.*, 2008 BCSC 569, paras. 49-51, 55, 57, citing *Workshop Holdings Ltd. v. CAE Machinery Ltd.*, 2003 BCCA 56, and *Workshop Holdings Limited v. CAE Machinery Ltd.*, 2005 BCSC 631.

on December 11, 1997 that *Delgamuukw* held, contrary to prior court decisions, that Aboriginal title was unextinguished in British Columbia. Indeed, it was not until this Court's decision in *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44, that we learned existing Aboriginal title in British Columbia and a modern Crown interference with it could be remedied by corresponding declarations.[17]

14. The Cowichan Nation Alliance provides the above not to encourage the Court to delve into the application of limitation periods in Aboriginal title claims in this appeal, but to illustrate the unique considerations that distinguish those claims from treaty rights claims. Respectfully, care should be taken in this appeal to avoid unintended consequences for the running of limitation periods in the Aboriginal title context without a proper factual foundation. Especially as there are ongoing Aboriginal title trials before the lower courts, like the Cowichan Title Claim, that directly raise this issue in the unique historical setting of the province in which they are brought – which in the Cowichan Title Claim is British Columbia.

B. *Manitoba Métis* Should Be Applied Purposively to Further Reconciliation

15. This Court's judgment in *Manitoba Métis* should be applied purposively to further reconciliation.

16. The respondent Canada raises a question about limitation statutes and Aboriginal claims, including the application of *Manitoba Métis*.[18] Crown defendants in Aboriginal land claims cases, as in this appeal, often advance an impoverished view of *Manitoba Métis*. Crown defendants in Aboriginal claims consistently contend limitation periods apply to all Aboriginal claims unless plaintiffs can squeeze themselves into the specific and exact circumstances of *Manitoba Métis*.[19] And, while primarily distinguishing *Manitoba Métis* on the basis that the

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[17] *Tsilhqot'in Nation v. British Columbia,* 2014 SCC 44, para. 153. Note: as the Crown interference was recent, there was no issue whether a provincial Crown fiat was a prerequisite to the right of action arising: *Crown Proceedings Act*, S.B.C. 1974, c. 24, ss. 2(b), 15, 16 (BOA, Tab 1).

[18] Respondent's Factum, paras. 58-59; Respondent's Response to Application for Leave to Appeal, para. 33.

[19] See e.g., *Samson First Nation v. Canada*, 2015 FC 836, para. 22, aff'd 2016 FCA 223; *Watson v. Canada*, 2020 FC 129, paras. 471, 487-488; *Wesley v. Alberta*, 2022 ABKB 713 (application for summary dismissal), paras. 6, 30, 164.

appellants in this case seek land and damages, the Federal Court of Appeal also emphasized the "unique nature of the grievance" in *Manitoba Métis*.[20]

17. However, *Manitoba Métis* did not merely carve out a limited exception to the application of limitations in the unique circumstances of that case. The case is a significant development in the evolution of this Court's Aboriginal law jurisprudence and recognizes policy rationales underlying limitation periods simply do not apply in some Aboriginal claim contexts.[21]

18. In *Manitoba Métis*, in the context of the claims of Aboriginal peoples engaging the honour of the Crown, this Court held that limitation statutes do not prevent the courts as guardians of the Constitution from issuing declarations on the constitutionality of legislation or, by extension, the constitutionality of Crown conduct, as long as the declarations are not claims for personal or coercive remedies.[22] The "principle of reconciliation demands that such declarations not be barred", especially where such declarations would assist Aboriginal people "in extra-judicial negotiations with the Crown in pursuit of the overarching constitutional goal of reconciliation that is reflected in s. 35 of the *Constitution Act, 1982*."[23]

19. *Manitoba Métis* emphasizes "reconciliation must weigh heavily in the balance"; "many of the policy rationales underlying limitations statutes simply do not apply in an Aboriginal context"; and "despite the legitimate policy rationales in favour of statutory limitations periods, in the Aboriginal context, there are unique rationales that must sometimes prevail."[24]

20. This is not a discretion to waive limitation periods, but rather a recognition that the "courts [as] the guardians of the Constitution… cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter."[25] Thus, this Court provided principled guidance for when limitation statutes will not bar the courts from exercising their discretion to grant declaratory relief in Aboriginal claims, <u>without closing the categories of Aboriginal claims to which this exception applies</u>.

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[20] *Appeal Decision*, para. 227.
[21] *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, paras. 140-141.
[22] *Manitoba Métis*, paras. 134-135, 137, 140, 143.
[23] *Manitoba Métis*, paras. 137, 143.
[24] *Manitoba Métis,* para. 141.
[25] *Manitoba Métis,* para. 140.

21. While the unfulfilled promise made to all Métis people in Manitoba in *Manitoba Métis* caused a "rift in the national fabric", specific and localized grievances have been just as "destructive of the process of reconciliation as some of the larger and more explosive controversies."[26] The "grand purpose" of s. 35 of the reconciliation of "Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship" requires attention to these grievances.[27] Indeed, subsequent to *Manitoba Métis* this Court has recognized that "[a]s the curtain opens wider and wider on the history of Canada's relationship with its Indigenous peoples, inequities are increasingly revealed and remedies urgently sought."[28]

22. A narrow interpretation that declaratory relief is only available in the unique circumstances of *Manitoba Métis* is not in line with the reasoning of this Court, which was grounded in the principle of constitutionality; the Crown's unique relationship with Aboriginal peoples; the honour of the Crown; and the process of reconciliation – matters at stake in s. 35(1) rights claims, as well as those based on other historical constitutional commitments relating to Aboriginal peoples.[29]

23. In its *Directives on Civil Litigation Involving Indigenous Peoples*, British Columbia expressly recognizes courts cannot be barred by statutes from issuing declarations on fundamental constitutional matters such as reconciliation between the Crown and Indigenous peoples, and specifically, statutes of limitations do not apply in an Indigenous context where declarations are sought to give effect to the honour of the Crown.[30]

24. Contrary to the arguments of Crown defendants, some lower courts have declined to confine the application of *Manitoba Métis* only to cases having exactly the same elements of that case.[31] Even where personal and coercive remedies are pleaded and time barred, courts have granted declaratory relief to give effect to the honour of the Crown where it can be issued

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[26] *Manitoba Métis*, para. 140; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, para. 1; *Watson*, para. 502.
[27] *Little Salmon/Carmacks*, para. 10.
[28] *Daniels v. Canada (Indian Affairs and Northern Development),* 2016 SCC 12, para. 1.
[29] *Manitoba Métis*, paras. 140-141.
[30] Directives on Civil Litigation involving Indigenous Peoples (Attorney General), (2022) BC Gaz I, 211 at Litigation Directive #14 (ep 16).
[31] *Watson*, paras. 471-474, 487-490, 493, 497, 499-502; *Wesley*, paras. 25, 163-166.

separately and independently from a claim for compensation.[32] For example, in *Watson v. Canada*, 2020 FC 129, although the declaration spoke to historical wrongs (the unlawful action of more than 135 years ago), the Court was satisfied the declaration was not merely ancillary to compensatory relief and hoped it would "provide a foundation for negotiation to determine how to address the issue within the community."[33]

25. Section 35 "provides the constitutional framework for both acknowledging the historical fact that Aboriginal peoples lived on the land in distinctive societies prior to European settlement and reconciling that fact with Canadian sovereignty."[34] It calls for a "just settlement for aboriginal peoples."[35] In the case of Aboriginal peoples that have yet to reconcile their claims with the assertion of sovereignty by the Crown through negotiated treaties, the "honour of the Crown requires that these rights be determined, recognized and respected."[36]

26. A claim for declaratory relief is an "appropriate means to ask courts to determine rights under s. 35(1)",[37] and declaratory relief may, in some cases, be the only way to give effect to the honour of the Crown.[38] The right to access the courts for declaratory relief thus necessarily flows from the recognition and affirmation of the rights in s. 35(1), and is essential to holding the Crown to the "national commitment" of s. 35 and to providing the foundation for effective negotiation in the furtherance of reconciliation.[39]

27. The respondent Canada advocates for consideration of alternative avenues for recourse.[40] However, the timeliness and constraints of alternative avenues should be weighed in the context of Aboriginal peoples' claims where reconciliation hangs in the balance. The ability to access the courts for declaratory relief can "clarify the path of reconciliation" where negotiations have

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[32] *Watson*, paras. 474, 478, 490, 493.
[33] *Watson*, paras. 478, 495.
[34] *Uashaunnuat*, para. 21, citing *Van der Peet*, para. 31.
[35] *Sparrow* at 1105-1106, citing Noel Lyon, "An Essay on Constitutional Interpretation" (1988), 26 Osgoode Hall L.J. 95 at 100.
[36] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 25.
[37] *R. v. Desautel*, 2021 SCC 17, paras. 89-90.
[38] *Manitoba Métis*, para. 143.
[39] *R. v. Marshall*, [1999] 3 S.C.R. 533, para. 45*; Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 186; *Yahey v. British Columbia,* 2020 BCSC 278*,* paras. 40-42, 53; *Sparrow* at 1109-1110; *Haida*, para. 32.
[40] Respondent's Factum, para. 59.

reached an impasse or where positions are entrenched.[41]

C. Limitation Periods are Substantive Law

28. The Federal Court of Appeal said limitation periods are constitutionally sound because they do not extinguish rights but merely bar remedies based on those rights.[42] The basis for the Court's conclusion was the premise that limitation periods are procedural and not substantive in nature. The Cowichan Nation Alliance submits this proposition is wrong in law generally and wrong as applied to historical Aboriginal title claims.

29. Limitation periods are substantive, not merely procedural. In *Tolofson v. Jensen*, [1994], 3 S.C.R. 1022, this Court concluded limitation periods are substantive in nature and must be treated as such.[43] Limitation periods have the effect of cancelling the substantive rights of plaintiffs and vesting a right in defendants not to be sued.

30. While some lower courts since *Tolofson* have held limitation periods are substantive in nature only in the conflicts of laws situation,[44] nothing in *Tolofson*, or this Court's subsequent decisions in *Castillo v. Castillo*, 2005 SCC 83, and *Markevich v. Canada*, 2003 SCC 9, supports this conclusion.[45] Indeed, in *Markevich*, consistent with its decision in *Tolofson*, this Court held limitation periods extinguish the right to an underlying debt, even though traditionally they were understood only to bar the creditor's remedy:

> … Limitation periods have traditionally been understood to bar a creditor's remedy but not his or her right to the underlying debt. In my view, this is a distinction without a difference. For all intents and purposes, the respondent's federal tax debt is

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[41] *Yahey*, para. 53.
[42] *Appeal Decision*, para. 221; see also *Samson*, para. 129.
[43] *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1071-72; see also *Castillo v. Castillo*, 2005 SCC 83, paras. 7, 15, 24-25, 28, 34-39; *Markevich v. Canada*, 2003 SCC 9, para. 41.
[44] *Ravndahl v. Saskatchewan*, 2007 SKCA 66, para. 17, aff'd on other grounds 2009 SCC 7 (constitutional claim for damages); *Johnson v. Johnson*, 2012 SKCA 87, para. 26 (division of family assets); *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2014 SKQB 327, paras. 138-146, aff'd in part on other grounds 2016 SKCA 124 (breach of fiduciary duty); *Samson*, paras. 129-136 (breach of fiduciary duty).
[45] See e.g. *Chalupiak & Associates Accounting Services Inc. v Piapot First Nation*, 2018 SKQB 13, paras. 93-98; *Aucoin v. Murray*, 2013 NSSC 37, paras. 14-31. No court has concluded that provincial limitation periods apply to claims for declarations of Aboriginal rights and title, and unjustified infringement.

extinguished.[46]

31. In the specific context of a claim for declaratory relief relating to existing Aboriginal title, to bar a remedy necessarily has a substantive effect. As the right of possession is fundamental to the bundle of rights that make up Aboriginal title, if there is no remedy, then the entire underlying Aboriginal title is extinguished. "To take away forever the right to regain exclusive possession which is at the core of [Aboriginal title] is not simply to abrogate or abridge or infringe or suspend or diminish or regulate or circumscribe or abate those rights."[47] Thus, barring a remedy via a limitation statute bars Aboriginal peoples' opportunity for judicial recognition of their land interests and effectively extinguishes their constitutionally protected right.[48] It precludes the possibility of this peaceful and orderly pathway to further reconciliation.

32. Crown infringement of Aboriginal title claims can be historical. Therefore, to conclude a limitation act applies to an Aboriginal title claim before the superior courts would mean that, with the passage of time and the application of the provisions of the limitations act, a province could effectively extinguish Aboriginal title, which is contrary to law.[49]

PART IV SUBMISSIONS ON COSTS

33. The Cowichan Nation Alliance does not seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of August, 2023.

David M. Robbins

Colleen Bauman, Agent, on behalf of
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[46] *Markevich*, para. 41.
[47] *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1999] O.J. No. 1406 (Sup. Ct. J.), paras. 463-464, var'd but not on this point 2000 CanLII 16991, 195 D.L.R. (4th) 135 (ONCA), paras. 228-229.
[48] *Chippewas of Sarnia Band* (Sup. Ct. J.), paras. 460, 463-464; see also *Chippewas of Saugeen First Nation v. South Bruce Peninsula (Town) et al.*, 2023 ONSC 2056, paras. 626-633.
[49] *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, para. 1329, and generally paras. 1311-1329; *Delgamuukw,* paras. 172-181; *Paul v. British Columbia (Forest Appeals Commission)*, 2003 SCC 55, para. 28; *Thomas v. Rio Tinto Alcan Inc.*, 2022 BCSC 15, para. 237.

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17.	*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010	12, 13, 26, 32
18.	*First National Properties Ltd. v. Northland Road Services Ltd.*, 2008 BCSC 569	13
19.	*Guerin v. The Queen*, [1984] 2 S.C.R. 335	11
20.	*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73	25, 26
21.	*Jim Shot Both Sides v. Canada*, 2019 FC 789	7
22.	*Johnson v. Johnson*, 2012 SKCA 87	30
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33.	*R. v. Badger*, [1996] 1 S.C.R. 771	9
34.	*R. v. Desautel*, 2021 SCC 17	26
35.	*R. v. Marshall*, [1999] 3 S.C.R. 533	26
36.	*R. v. Sparrow*, [1990] 1 S.C.R. 1075	1, 25, 26
37.	*Samson First Nation v. Canada*, 2015 FC 836	16, 28, 30
38.	*Thomas v. Rio Tinto Alcan Inc.*, 2022 BCSC 15	32
39.	*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022	29, 30
40.	*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700	32
41.	*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44	13
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45.	*British Columbia Terms of Union, 1871*, reprinted in R.S.C. 1985, Appendix II, No. 10, art. 13	4
46.	*Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35 (Français)	4, 8, 18
47.	*Crown Proceedings Act*, S.B.C. 1974, c. 24, ss. 2(b), 15, 16 [BOA, Tab 1]	13
48.	*Indian Act*, R.S.C. 1985, c. I-5	2, 11
49.	*Real Property Limitation Act, 1833* (U.K.), 3 & 4 Will. 4, c. 27, ss. 2, 34 [BOA, Tab 2]	4

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50.	*Statute of Limitations*, R.S.B.C. 1897, c. 123, ss. 16, 41 [BOA, Tab 3]	4
	Secondary Sources	
51.	Directives on Civil Litigation involving Indigenous Peoples (Attorney General), (2022) BC Gaz I, 211	23