File Number:

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

BETWEEN:

Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations Government and on behalf of all other members of the Tsilhqot'in Nation

APPLICANT
(Appellants)

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
(Respondents)

AFFIDAVIT #1 of
GRAND CHIEF STEWART PHILLIP
SWORN SEPTEMBER 19, 2012

I, Grand Chief Stewart Phillip, of R.R. #2, Site 75, Comp. 13, Penticton, British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am the President of the Union of British Columbia Indian Chiefs (the "UBCIC") and as such have personal knowledge of the facts and matters hereinafter deposed to save and except where the same are stated to be based upon information and belief and where so stated I verily believe the same to be true.

2. I was first elected in 1998 and I am currently serving my fifth consecutive term as the President of the UBCIC. As President, I am the Chief Executive Officer of the UBCIC and represent the UBCIC publicly. I am also a member of the UBCIC's Executive Committee, which is composed of the President, Vice-President, and the Secretary-Treasurer.

3. I am a member and former elected Chief of the Penticton Indian Band. I served as the Chief of the Penticton Indian Band for 14 years and previously served as a member of Council for 10 years.

4. I am the current Chair of the Okanagan Nation Alliance ("ONA"). The ONA is a Tribal Council that represents the collective interests of the Okanagan Nation on issues such as the protection of our Aboriginal title and rights.

Importance of the Proposed Appeal in *William v. British Columbia and Canada* (the *"Tsilhqot'in* Case")

5. I am informed by legal counsel that the British Columbia Court of Appeal ("BCCA") in the *Tsilhqot'in* case determined that for "semi-nomadic" peoples such as the Tsilhqot'in, reconciliation is achieved by the Court finding "a network of specific sites over which title can be proven, connected by broad areas in which various Aboriginal rights can be exercised." The Court found that Aboriginal rights, not title, will "safeguard the culture and preserve Indigenous peoples' ability to continue to carry out their traditional practices, activities, traditions and lifestyles." The Court concluded that a broad territorial claim for Aboriginal title is not legally tenable, and adopted a test to prove Aboriginal title, restricting Aboriginal title to specific small sites which were regularly and intensively used, such as village sites, enclosed fields, fishing rocks, salt licks and narrow defiles.

6. If the BCCA decision is allowed to stand, it will not bring peace. I have been present at meetings attended by Indigenous leaders, matriarchs, elders and youth who expressed their outrage and heartbreak about the BCCA decision. Where does the idea come from that Indigenous peoples only relied on salt licks for our existence and survival? It defies common sense. The BCCA decision is a setback of the UBCIC's efforts over the last four decades.

7. The UBCIC was formed in 1969 in response to the *Statement of the Government of Canada on Indian Policy* (the "White Paper"), which was Canada's own final solution to the "Native Problem". The White Paper stated as policy that Indigenous peoples would become "Canadians as all other Canadians". The White Paper sought to formalize the denial of Aboriginal title in British Columbia by Crown governments, in spite of the law reflected in the Royal Proclamation of 1763, which has been passed down from generation to generation amongst Indigenous peoples in B.C. We understand that this law requires Crown governments to recognize and respect our prior rightful occupation of our territories and legal orders which have sustained our cultures well before when Crown sovereignty was asserted in 1846, and the

requirement of Treaty making to achieve terms for peaceful co-existence. In spite of this law, in B.C., for the most part, our Aboriginal title was denied and our lands and resources were appropriated by Crown governments without Treaties. We refer to this as the land question: how could the land and sovereignty claimed by Crown governments be perfected in our territories in the absence of Treaty? Where is the Crown's bill of sale?

8. Since its inception, the UBCIC has sought an honourable resolution of the land question. Our mission is to advance this goal through inter-tribal relationships and common strategies, and to build trust, honour and respect to continue the healing and reconciliation required between Indigenous and Crown governments.

9. The UBCIC is not involved in Treaty negotiations through the British Columbia Treaty Process ("BCTC") because the negotiation mandates that Crown governments bring to the table require the *de facto* extinguishment of Aboriginal title as the basis for the conclusion of Treaty. Instead, the UBCIC has pursued a dream of justice and peaceful resolution of the land question through the Courts. For over 40 years, as part of its efforts to have Aboriginal title and rights recognized and protected, the UBCIC has participated in the development of jurisprudence in a range of issues related to Indigenous peoples in Canada. The UBCIC has contributed to the development of Aboriginal law by participating as an intervenor in a number of appeals including: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550; *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119; *Delgamuukw v. British Columbia*, [1993] 5 C.N.L.R. 1 (B.C.C.A.); *MacMillan Bloedel v. Mullin*, [1985] 61 B.C.L.R. 145 (C.A.); and *Lavell v. Canada (Attorney General)*, [1974] S.C.R. 1349.

10. The last time in my memory that we faced a decision like the BCCA decision in *Tsilhqot'in*, was the trial judgment in the *Delgamuukw* case back in 1991. There is great similarity between the two judgments. The trial judgment in *Delgamuukw* held that Aboriginal rights existed over a broad territory, but Aboriginal title had been extinguished in B.C. except over small areas of intensive occupation from 1846 to the present, such as village sites which were Indian reserves. The BCCA in *Tsilhqot'in* results in the same position. The UBCIC participated as an intervenor in the *Delgamuuk*w case on appeal, and welcomed the Court's considered framework for achieving reconciliation, including the Court's conclusion that

Aboriginal title has not been extinguished in B.C; that title has jurisdictional and economic components; and the promise of reconciliation through negotiations, aided by the decisions of the Court. We appreciated this Court's concluding remarks: "We are all here to stay."

11. Our members' experience is that Crown governments did not agree with the *Delgamuukw* decision and they never implemented it. They turned their efforts to overturning it. Even after this Court clarified in the *Haida* and *Taku* cases that Crown governments have obligations arising from the assertion of sovereignty, including Honour of the Crown Obligations to conclude and honourably implement Treaties and about consultation and accommodation obligations, the Province adopted a narrow, ungenerous understanding of what Aboriginal title means, and confined Aboriginal title to intensively used sites such as villages or fishing rocks. This approach does not advance reconciliation. This is the approach to Aboriginal title adopted by the BCCA.

12. The UBCIC is widely renowned for its Resource Centre, which is a specialized research library and archives holding an extensive collection of books, periodicals, case law and historical materials relating to Indigenous Nations' land rights in British Columbia. As we seek different pathways to resolution for the future, we can be informed by the past, the words of our ancestors, as well as the words of Crown representatives.

13. Our member communities utilize the Resource Centre to gather evidence to establish a *prima facie* case for Aboriginal title presentable to Crown governments in negotiations about consultation and accommodation, and also as evidence in Court when seeking remedies based on Aboriginal title. This research and evidence gathering endeavour is guided by the decisions of the Court. In this regard, we have paid attention to the decision of this Court in *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 3130, especially the Court's conclusion that Aboriginal title is a pre-existing legal right, not dependent on Crown recognition, whose source is "the fact ... that when the settlers came, the Indians were there, organizing in societies and occupying the land as their forefathers had done for centuries."

14. Since the *Delgamuukw* decision, we have also been guided by the test to prove title, which was adopted by the Court in *Delgamuukw,* when a remedy of a declaration is sought. We understand the *Delgamuukw* test provides for proof of exclusive occupation in 1846 through

evidence of physical possession or through laws. The test adopted by the BCCA adds the requirement of "intense use" and fails to mention laws. It is important that these tests be clarified. The vast majority of our members cannot afford the costs of vindicating Aboriginal title through the Courts, especially when the tests appear to be a moving target.

15. The Courts have not granted remedies, and have found against Indigenous claimants on technicalities and pleadings irregularities in every Aboriginal title case from B.C. - *Calder, Delgamuukw* and *Tsilhqot'in.* Now, the BCCA has blocked Indigenous peoples from using the Courts at all for recognition of Aboriginal title to anything more than absurdly small spots, like salt licks and hunting blinds. If Indigenous peoples cannot go to Court under any circumstances to seek full and proper recognition of our Aboriginal title, we will be left to protect the land and our legal orders which safeguard our culture, without access to the Courts.

16. At our most recent UBCIC Annual General Assembly, the UBCIC Chiefs-in-Assembly passed a resolution denouncing the reasons and ruling of the BCCA because: "it denies the legitimacy and equality of Indigenous laws, it belittles Aboriginal people and their cultures and traditions and systems of occupation of traditional lands; it is based on out-moded and discriminatory views of Indigenous systems of land use and occupation and the connection of Indigenous peoples to our lands; after generations of relentless struggle by First Nations for recognition, it would reduce Aboriginal Title to nothing more than specific sites such as permanent settlements, salt licks and hunting blinds; this approach denies First Nations the economic benefit and jurisdictional authority over unceded traditional lands; and, it will lead to increased conflict over land issues and frustrate any prospect of lasting reconciliation for many First Nations".

17. The Chiefs-in-Assembly stated, in this same resolution, that they "do not accept the judgment of the B.C. Court of Appeal as the final statement of the law of Aboriginal Title". A true copy of this resolution, as passed, is attached as Exhibit "**A**" to my Affidavit. Although marked "draft", it is in the form passed at the UBCIC Annual General Assembly.

18. I swear this Affidavit in support of the application by the Tsilhqot'in for leave to appeal. The BCCA said it sought a practical approach that would clarify the law and lead to progress in negotiations. The UBCIC and our member Indigenous Nations want to negotiate Treaties based

on recognition and respect for our Aboriginal title, consistent with the framework for reconciliation provided by this Court in *Delgamuukw*. This framework requires an appreciation of both societies, Aboriginal and non-Aboriginal, and the diverse contributions of the other. The BCCA decision reads our societies out of the relationship; it does not bring justice to the relationship, and it will not bring peace. The issues are important to all peoples of British Columbia.

SWORN BEFORE ME at Vancouver,
in the Province of British Columbia,
this 19th day of September, 2012.

A Commissioner for taking Affidavits within the Province of British Columbia

Grand Chief Stewart Phillip

Louise Mandell, Q.C.
Barrister & Solicitor
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Vancouver, BC
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This is Exhibit " A " referred to in the affidavit of Grand Chief Stewart Phillip sworn before me at Vancouver in in the Province of British Columbia this 19th day of September 20 12

A Commissioner for taking Affidavits for British Columbia

UNION OF B.C. INDIAN CHIEFS
ANNUAL GENERAL ASSEMBLY
SEPTEMBER 12-14, 2012
HARRISON HOT SPRINGS, BC

Draft Resolution no. 2012-33

RE: UBCIC Support for the Tsilhqot'in Nation – *William* Aboriginal Title Appeal

WHEREAS the Tsilhqot'in Nation, building on the efforts of the Nisga'a Nation, the Gitxsan, the Wet'suwet'en and other First Nations in British Columbia, has asserted Aboriginal Title and Rights in the Canadian court system, seeking long overdue recognition of Tsilhqot'in laws and Title to a portion of traditional territory;

WHEREAS the B.C. Supreme Court, after five years of trial, found that the Tsilhqot'in had proven Aboriginal Title to a substantial portion of the claim area and, for the first time by a Canadian court, delineated the area where Aboriginal Title was proven on the evidence, including core Tsilhqot'in hunting, trapping, gathering and fishing areas that were exclusively controlled by the Tsilhqot'in and exploited year after year, season after season, pursuant to the traditional Tsilhqot'in laws and practice;

WHEREAS the B.C. Supreme Court expressly rejected the view of Aboriginal Title advanced by the Governments of British Columbia and Canada, which would confine Aboriginal Title to very specific, intensively used sites, as a "postage stamp" approach and an "impoverished view" of Aboriginal Title that should no longer be allowed to "pervade and inhibit genuine negotiations";

WHEREAS the B.C. Court of Appeal, on appeal of the trial decision, overruled the trial judge, and endorsed the "postage stamp" approach to Aboriginal Title, and confined Aboriginal Title at law to permanent settlement sites, cultivated fields, and intensively used, specific sites such as "salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps";

WHEREAS the Plaintiff Roger William, as representative of the Tsilhqot'in Nation and the Xeni Gwet'in First Nations Government, is seeking leave to appeal this ruling on Aboriginal Title to the Supreme Court of Canada;

WHEREAS First Nations in British Columbia have advocated and struggled for the just recognition by Crown governments of our Aboriginal Title to unceded lands from before the formation of this province to the present day. The resolution of this land question will profoundly impact all First Nations in British Columbia, our relationship to the Crown, and the prospects of a lasting reconciliation;

WHEREAS Article 26(2) of the *United Nations Declaration on the Rights of Indigenous Peoples* provides that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

THEREFORE BE IT RESOLVED the UBCIC Chiefs-in-Assembly fully support the Tsilhqot'in Nation in efforts to overturn the decision of the B.C. Court of Appeal and to denounce the colonial reasoning underpinning this judgment, including in applying for leave to appeal the B.C. Court of Appeal's ruling on Aboriginal Title to the Supreme Court of Canada;

THEREFORE BE IT FURTHER RESOLVED the UBCIC Chiefs-in-Assembly denounce the reasons and ruling of the B.C. Court of Appeal because: it denies the legitimacy and equality of Indigenous laws, it belittles Aboriginal people and their cultures and traditions and systems of occupation of traditional lands; it is based on out-moded and

discriminatory views of Indigenous systems of land use and occupation and the connection of Indigenous peoples to our lands; after generations of relentless struggle by First Nations for recognition, it would reduce Aboriginal Title to nothing more than specific sites such as permanent settlements, salt licks and hunting blinds; this approach denies First Nations the economic benefit and jurisdictional authority over unceded traditional lands; and, it will lead to increased conflict over land issues and frustrate any prospect of lasting reconciliation for many First Nations;

THEREFORE BE IT FURTHER RESOLVED the UBCIC Chiefs-in-Assembly do not accept the judgment of the B.C. Court of Appeal as the final statement of the law of Aboriginal Title;

THEREFORE BE IT FINALLY RESOLVED the UBCIC Chiefs-in-Assembly direct the UBCIC Executive and staff to continue advocating in accordance with this Resolution and to provide political assistance within its means to the Plaintiff Roger William and the Tsilhqot'in Nation in applying for leave to appeal to the Supreme Court of Canada.

Moved: **Chief Hugh Braker, Tseshaht First Nation**
Seconded: **Chief Dan Manuel, Upper Nicola Indian Band**
Disposition: **Carried**
Date: **September 14, 2012**