SCC File No: 41644

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

B E T W E E N:

SKII KM LAX HA, also known as DARLENE SIMPSON, also known as CHIEF SIMPSON, on behalf of herself and, in her capacity as TSETSAUT/SKII KM LAX HA HEREDITARY CHIEF, on behalf of all members of the TSETSAUT/SKII KM LAX HA NATION

APPELLANTS
(Respondents)

– and –

MALII also known as GLEN WILLIAMS, GWAAS HLAAM also known as GEORGE PHILIP DANIELS, LUUXHON also known as DON RUSSELL, GAMLAXYELTXW also known as WILHELM MARSDEN, SINDIHL also known as GRAHAM MORGAN, WATAKHAYETSXW also known as DEBORAH GOOD, GWINUU also known as PHYLLIS HAIZIMSQUE, WII'LITSXW also known as GREGORY RUSH, HAIZIMSQUE also known as VERNA HOWARD, on behalf of themselves and in their capacity as the GITANYOW HEREDITARY CHIEFS and on behalf of all members of the GITANYOW NATION

RESPONDENTS
(Appellants)

– and –

HIS MAJESTY THE KING IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA and THE ATTORNEY GENERAL OF CANADA

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(Respondents)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

[1] The present appeal, which addresses the third party notice brought by the Tsetsaut Skii km Lax Ha Nation within the Gitanyow Hereditary Chiefs' title case ("*Malii* litigation"), must be situated within a new era of Aboriginal rights and title litigation – one involving overlapping claims. In *Delgamuukw*, this Court already signaled that future cases involving overlapping or joint title claims might call for significant doctrinal evolution and that Aboriginal peoples with overlapping claims should have the opportunity to participate in an Aboriginal title case involving a competing claim.[1] Lower courts are now grappling with a range of issues tied to overlapping rights and title claims.[2]

[2] In order for courts to properly address these emerging issues and for the doctrine of Aboriginal title[3] to evolve as needed to respond to situations of overlapping claims, such claims should presumptively be decided together. An approach like that taken by the British Columbia Court of Appeal in the instant case, which siloes off the Tsetsaut Skii km Lax Ha Nation's claim to the same territory as the Gitanyow Hereditary Chiefs,[4] significantly risks stifling and greatly complicating doctrinal development across a new generation of cases.

[3] Furthermore, an approach that presumptively allows for competing Aboriginal claims with respect to the same territory to be dealt with in the same proceeding is consistent with principles of judicial efficiency and consistency, and rooted in existing case law on third party

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[1] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 158-185 [***Delgamuukw***].
[2] See e.g. *Cowichan Tribes v Canada (Attorney General)*, 2016 BCSC 1660 [***Cowichan Tribes***]; *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 [***Thomas and Saik'uz***]; Second Amended Notice of Civil Claim by Dzawada'enuxw First Nation, February 1, 2023, British Columbia Supreme Court, Vancouver Registry No. S-186106, Appellant's Record [**AR**], tab 38, discussed at paragraph 37 below.
[3] "Aboriginal rights and title doctrine (*la théorie en matière de droits et de titres ancestraux*) […] first looks back to the practices of groups that occupied Canadian territory prior to European contact, sovereignty or effective control, and then expresses those practices as constitutional rights held by modern-day successor groups within the Canadian legal order": *R v Desautel*, 2021 SCC 17 at para 22.
[4] *Malii v British Columbia*, 2024 BCCA 406 at paras 112-113, AR, tab 4 [**BCCA**].

claims.[5] Such an approach also promotes the search for finality and reconciliation in the context of overlapping Aboriginal claims.

[4] In the present case, not only do the Tsetsaut Skii km Lax Ha Nation and the Gitanyow Hereditary Chiefs have competing claims, but these claims are largely based on the same collection of oral histories and other historical evidence that speak to the shared history of the Tsetsaut Skii km Lax Ha Nation and at least some of the Gitanyow Hereditary Chiefs, and the use and occupation of the same territory at the relevant times.[6] Moreover, the Gitanyow Hereditary Chiefs have been aware of the overlap since at least 2002;[7] once the Gitanyow Hereditary Chiefs activated their title claims in 2016, the Tsetsaut Skii km Lax Ha Nation first communicated its intention to file a third party claim in 2017 and so filed in 2018, more than four years before a trial date was set.[8]

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[5] *Tyson Creek Hydro Corporation v Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at para 24 [***Tyson Creek***]; *Canfor Pulp Limited Partnership v Siemens Building Technologies Ltd*, 2016 BCSC 2089 at paras 47-49 [***Canfor Pulp***].

[6] Gitanyow Hereditary Chiefs' Fifth Further Amended Notice of Civil Claim, November 12, 2024 at para 12, AR, tab 22; Tsetsaut Skii km Lax Ha Nation's Second Amended Response to Fifth Further Amended Notice of Civil Claim, April 7, 2025 at paras 39-41, AR, tab 27; Tsetsaut Skii km Lax Ha Nation's Third Party Notice, August 19, 2024 at paras 30-32, AR, tab 12; Affidavit #1 of Darlene Simpson filed on May 25, 2018 at paras 90-100 and Exhibits GG, HH (extracts from ethnographic and oral history records) AR, tab 45 [**Simpson Affidavit #1**]; Affidavit #1 of Kenton Storey, filed on November 28, 2023 at Exhibit A (Expert report) at paras 62-78, 159, 186, 257-263, 356, AR, tab 55 [**Storey Affidavit #1**]; Affidavit #1 of Nicoleta Badea filed November 1, 2022 at Exhibit E (Ethnohistoric Report of Brad Cope, Ministry of Attorney General, Legal Services Branch, dated November 29, 2021 [**Cope Report**]) at 104-119, 228-244, 269-283, AR, tab 51 [**Badea Affidavit #1**].

[7] Simpson Affidavit #1 at Exhibits G, H (correspondence exchanged between representatives of Tsetsaut Skii km Lax Ha and the Gitxsan Hereditary Chiefs regarding Chief Simpson's efforts to discuss the overlapping boundaries), AR, tab 45.

[8] *Malii v British Columbia*, 2024 BCSC 1432 at para 79, AR, tab 2 [**BCSC**]; Simpson Affidavit #1 at Exhibit OO (letter from counsel for the Tsetsaut Skii km Lax Ha Nation to counsel for the Gitanyow Hereditary Chiefs requesting consent to be added as a defendant and to file a third party notice, attaching proposed pleadings), AR, tab 45; Tsetsaut Skii km Lax Ha Nation's Original Joinder Application, May 25, 2018, AR, tab 14.

[5] The case management judge's familiarity with the full context of the case allowed him to adopt an approach that would serve to minimize duplication and complexity in the context of competing Aboriginal claims.[9] The Court of Appeal showed no deference towards the case management judge's decision to allow the third party notice; without finding any error of fact or of law, it simply reweighed the factors the judge had considered.[10] The result is a judgment of the Court of Appeal that both betrays a lack of understanding of the procedural context of the case, and runs contrary to principles of judicial efficiency, consistency, finality, and reconciliation.

B. STATEMENT OF FACTS

(1) The Tsetsaut Skii km Lax Ha Nation and the current litigation

[6] The Tsetsaut Skii km Lax Ha Nation is a small First Nation whose territory lies in northwestern British Columbia. The Tsetsaut Skii km Lax Ha Nation asserts Aboriginal rights and title to Tsetsaut Skii km Lax Ha Territory, which includes parts of the Nass River, Skeena River, Bear River, and Stikine River watersheds.[11]

[7] Darlene Simpson is Skii km Lax Ha, the Hereditary Chief of the Tsetsaut Skii km Lax Ha Nation. The chiefly name Skii km Lax Ha was passed to Chief Simpson in 2005, from the former holder of the name, Johnny Wilson.[12] Chief Simpson represents the Tsetsaut Skii km Lax Ha Nation in matters pertaining to Aboriginal rights and title.[13]

[8] Skii km Lax Ha (Johnny Wilson at the time) was a named plaintiff in the case of *Delgamuukw v British Columbia*, claiming on his own behalf and on behalf of the members of Skii km Lax Ha (now referred to as the Tsetsaut Skii km Lax Ha Nation), ownership, jurisdiction,

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[9] BCSC at paras 84-87, AR, tab 2.
[10] BCCA at para 102, AR, tab 4.
[11] Simpson Affidavit #1 at paras 3, 24-26 and Exhibits A, B (maps of the Tsetsaut Skii km Lax Ha Nation's territory), AR, tab 45.
[12] Simpson Affidavit #1 at paras 9-16, AR, tab 45.
[13] Simpson Affidavit #1 at paras 16, 23, 40, AR, tab 45; Affidavit #2 of Darlene Simpson filed on December 27, 2018 at paras 7-11, AR, tab 46; Affidavit #5 of Darlene Simpson filed on November 28, 2023 at paras 7-8 and Exhibit C (declarations signed by the members of Tsetsaut Skii km Lax Ha), AR, tab 53 [**Simpson Affidavit #5**].

and Aboriginal rights to territory known as "Awiijii."[14] The Tsetsaut Skii km Lax Ha Nation's claims in *Delgamuukw* were brought alongside the claims of other independent groups, described as Gitxsan and Wet'suwet'en house groups, each brought by a named Hereditary Chief on behalf of themselves and their house members in relation to distinct territories.[15]

[9] At trial in *Delgamuukw*, then Chief Justice McEachern dismissed the plaintiffs' individual claims for ownership and jurisdiction, concluding that the "evidence, in total, is so contradictory and inconsistent that it would not be safe to make a declaration of exclusive interest for any of [the] many territories".[16] Chief Justice McEachern also found that the evidence disclosed overlapping claims of other Indigenous peoples "along the external boundary, and indeed into the very heartland of the territories claimed by the Gitksan", stating those competing claims were "advanced by Tsimshian, Nishga, Kitwankool [now Gitanyow], Tahltan/Stikine, Tsetsaut, Kaska-Dene, and Carrier-Sekanni peoples."[17] With respect to the internal boundaries of the individual House claims, he also concluded that those boundaries had been based on registered traplines that had begun in the 1920s.[18] There is compelling evidence that the boundaries advanced in *Delgamuukw* for Skii km Lax Ha, in particular, were based on registered trapline boundaries.[19]

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[14] *Delgamuukw v British Columbia*, 1991 CanLII 2372 (BC SC), Schedule 2 at 854 [***Delgamuukw trial decision***]; *Delgamuukw*, Schedule 1 at 1137; Affidavit #3 of Nicoleta Badea filed on January 11, 2023 at Exhibit B (Further Amended Statement of Claim filed on February 8, 1990 in *Delgamuukw*) at para 23, AR, tab 52 [**Badea Affidavit #3**]; Simpson Affidavit #5 at para 22, AR, tab 53.

[15] *Delgamuukw* at para 7, Schedule 1 at 1137; Badea Affidavit #3 at Exhibit B (Further Amended Statement of Claim filed on February 8, 1990 in *Delgamuukw*) at para 23, AR, tab 52; BCSC at para 4, AR, tab 2. See also: *The Nuchatlaht v British Columbia*, 2023 BCSC 804 at paras 369-373 [***The Nuchatlaht***].

[16] *Delgamuukw trial decision* at 763-764.

[17] *Delgamuukw trial decision* at 754.

[18] *Delgamuukw trial decision* at 738-740, 778; Simpson Affidavit #5 at Exhibit J (letter from representatives of the Province to Chief Simpson dated August 29, 2023), AR, tab 53, as referred to by the case management judge in BCSC at para 64, AR, tab 2.

[19] Affidavit #3 of Darlene Simpson filed on May 6, 2019 at paras 14-15, 18-19 and Exhibit B (transcripts from the commission evidence of Jessie Sterritt in *Delgamuukw* regarding former Chief Skii km Lax Ha's trapline boundaries), AR, tab 48; Simpson Affidavit #5 at Exhibit J (letter from representatives of the Province to Chief Simpson dated August 29, 2023), AR, tab 53, as

[10] On appeal in *Delgamuukw*, two amalgamated claims were advanced on behalf, respectively, of an asserted Gitxsan collective and an asserted Wet'suwet'en collective, which purported to subsume Skii km Lax Ha's claims within those of the broader asserted Gitxsan collective. This Court held that the amalgamated claims were never properly before the court and remitted the case for retrial, which has never occurred.[20]

[11] Since *Delgamuukw*, the Tsetsaut Skii km Lax Ha Nation has continued to advance its claims as an independent rights-holder under section 35 of the *Constitution Act, 1982*,[21] in accordance with current legal principles and the available ethnohistorical evidence. Indeed, the Province of British Columbia ("Province") itself has recognized that a significant portion of Tsetsaut Skii km Lax Ha Territory was omitted in "error" from the *Delgamuukw* claim because that portion of territory was excluded from trapline registrations for Skii km Lax Ha in the 1920s and 1930s.[22] That portion of territory was excluded from Skii km Lax Ha trapline registrations

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referred to by the case management judge in BCSC at para 64, AR, tab 2; Storey Affidavit #1 at Exhibit A (Expert report) at paras 217-218, AR, tab 55; Badea Affidavit #1 at Exhibit E (Cope Report) at 208-218, AR, tab 51; Affidavit #1 of Peter Grant filed on March 22, 2019 at Exhibit E (questions #62 and #63 of the interrogatories of Chief Skii km Lax Ha in *Delgamuukw*), AR, tab 47.

[20] BCSC at paras 4-6, AR, tab 2; BCCA at paras 10-13, AR, tab 4; *The Nuchatlaht* at para 369.

[21] Simpson Affidavit #1 at paras 49-51, 61-62, 70-71, 72-84 and Exhibits O (map of Tsetsaut Skii km Lax Ha territory submitted to the Province in 2008 on behalf of the Tsetsaut Skii km Lax Ha Nation), T (letter from the Gitxsan Treaty Society dated February 28, 2017 confirming its recognition of the Tsetsaut Skii km Lax Ha Nation as independent from the Gitxsan Nation), Z (letter from the Province dated July 7, 2009 stating the Gitxsan Hereditary Chiefs Office advised the Province it does not represent the Tsetsaut Skii km Lax Ha Nation), AR, tab 45; Badea Affidavit #1 at Exhibit E (Cope Report) at 228, AR, tab 51.

[22] Simpson Affidavit #5 at paras 24-25 and Exhibit J (letter from representatives of the Province to Chief Simpson dated August 29, 2023), AR, tab 53, as referred to by the case management judge in BCSC at para 64, AR, tab 2; Storey Affidavit #1 at Exhibit A (Expert report) at paras 217-218, AR, tab 55; Badea Affidavit #1 at Exhibit E (Cope Report) at 208-218, AR, tab 51.

because it had previously been registered by a non-Indigenous settler.[23] In fairness to counsel for the plaintiffs in *Delgamuukw*, reliance on Skii km Lax Ha's trapline boundaries for the boundaries of its claim at trial may reflect not so much an "error" as lack of doctrinal clarity on the nature of Aboriginal title at the time, which received its first detailed treatment from this Court on appeal in *Delgamuukw*.

[12] Though described as the "House of Skii km Lax Ha" in *Delgamuukw*, the Tsetsaut Skii km Lax Ha Nation has added the word "Tsetsaut" to make explicit in its name its Tsetsaut heritage and identity, both to reclaim that identity in the face of those who have denied it and may continue to deny it and in response to the attempted amalgamation, on appeal in *Delgamuukw*, of independent rights and title claims, including those of the Tsetsaut Skii km Lax Ha Nation.[24] Both the Province[25] and the Gitanyow[26] have acknowledged the Tsetsaut ancestry of the Tsetsaut Skii km Lax Ha Nation.

[13] The Tsetsaut Skii km Lax Ha Nation has tried to resolve its overlapping rights and title claims with the Gitanyow Hereditary Chiefs since at least 2002, when Skii km Lax Ha (Chief Johnny Wilson at the time) and Adii am (Darlene Simpson at the time) sought resolution through the British Columbia Treaty Commission and then directly with the Gitanyow Hereditary Chiefs;

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[23] Simpson Affidavit #5 at paras 24-25 and Exhibit J (letter from representatives of the Province to Chief Simpson dated August 29, 2023), AR, tab 53, as referred to by the case management judge in BCSC at para 64, AR, tab 2; Storey Affidavit #1 at Exhibit A (Expert report) at paras 217-218, AR, tab 55; Badea Affidavit #1 at Exhibit E (Cope Report) at 208-218, AR, tab 51.

[24] Simpson Affidavit #5 at para 29, AR, tab 53.

[25] Simpson Affidavit #5 at para 28 and Exhibit K (Affidavit #1 of Brad Cope made on May 18, 2023 and filed in a judicial review proceeding brought by the Tsetsaut Skii km Lax Ha Nation challenging a decision of the British Columbia Chief Executive Assessment Officer) at para 35, AR, tab 53; Storey Affidavit #1 at Exhibit A (Expert report) at paras 1, 257-258, AR, tab 55; Badea Affidavit #1 at Exhibit E (Cope Report) at 104-119, 228-244, AR, tab 51.

[26] Gitanyow Hereditary Chiefs' Joinder Written Submissions, May 17, 2024 at para 10, AR, tab 21.

the Gitanyow Hereditary Chiefs consistently refused to discuss the overlapping claims with the Tsetsaut Skii km Lax Ha Nation.[27]

[14] The Province has also consistently refused to assist in mediating the Tsetsaut Skii km Lax Ha Nation's and the Gitanyow Hereditary Chiefs' overlapping claims, citing to its long-standing policy of taking "no role in the resolution of competing claims of Aboriginal rights and title advanced by more than one First Nation to the same traditional territory."[28]

[15] Not only do the Tsetsaut Skii km Lax Ha Nation and the Gitanyow Hereditary Chiefs have competing claims, but these claims are largely based on the same collection of oral histories and other historical evidence that speak to the shared history of the Tsetsaut Skii km Lax Ha and

[27] Simpson Affidavit #1 at paras 30-43 and Exhibits D-N (various correspondence exchanged between the Tsetsaut Skii km Lax Ha Nation, the Gitanyow Hereditary Chiefs, the British Columbia Treaty Commission, and others, in which the Tsetsaut Skii km Lax Ha Nation seeks to resolve the overlapping territorial claims through various fora, and responses to those efforts), AR, tab 45.

[28] Badea Affidavit #3 at Exhibit O at 311-312, 330 (letters from representatives from the Province setting out the Province's view of its role in resolving competing claims), AR, tab 52; Simpson Affidavit #1 at Exhibit E, AR, tab 45. See also the Province's response, dated November 27, 2024, to the Nisga'a Nation's application for leave to appeal (41516), AR, tab 42, where it writes: "In circumstances where Indigenous Peoples or groups have indicated overlapping or competing interests, the Province believes it is appropriate that Indigenous Peoples resolve any such disputes internally."

some of the Gitanyow Hereditary Chiefs.[29] Both the Province and the Gitanyow Hereditary Chiefs themselves recognize this shared history.[30]

[16] The Gitanyow claim, first filed in 2003, remained dormant until the Gitanyow Hereditary Chiefs filed an Amended Notice of Civil Claim in 2016.[31] Still, the claim did not advance much for several years.[32]

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[29] Gitanyow Hereditary Chiefs' Fifth Further Amended Notice of Civil Claim, November 12, 2024 at para 12, AR, tab 22; Tsetsaut Skii km Lax Ha Nation's Second Amended Response to Fifth Further Amended Notice of Civil Claim, April 7, 2025 at paras 39-41, AR, tab 27; Tsetsaut Skii km Lax Ha Nation's Third Party Notice, August 19, 2024 at paras 30-32, AR, tab 12; Simpson Affidavit #1 at paras 90-100 and Exhibits GG, HH (extracts from ethnographic and oral history records), AR, tab 45; Storey Affidavit #1 at Exhibit A (Expert report) at paras 62-78, 159, 186, 257-263, 356, AR, tab 55; Badea Affidavit #1 at Exhibit E (Cope Report) at 104-119, 228-244, 269-283, AR, tab 51.

[30] Badea Affidavit #1 at Exhibit E (Cope Report) at 104-119, 228-244, 269-283, AR, tab 51; Storey Affidavit #1 at Exhibit A (Expert report) at paras 257-258, AR, tab 55; Gitanyow Hereditary Chiefs' Joinder Written Submissions, May 17, 2024 at para 10, AR, tab 21; Gitanyow Hereditary Chiefs' Reply to the Tsetsaut Skii km Lax Ha Nation's Second Amended Response to Fifth Further Amended Notice of Civil Claim, April 16, 2025 at para 24, AR, tab 28.

[31] BCCA at paras 14, 17, AR, tab 4; Amended Notice of Civil Claim, April 4, 2016, AR, tab 6.

[32] In June 2020, the Gitanyow's request for the appointment of a trial judge was rejected (Court Order/Directive dated June 25, 2020, AR, tab 36). In August 2022, the Court directed that the parties could seek trial dates before Justice Stephens (Court Order/Directive dated August 11, 2022, AR tab 37). As of June 2024, when the Tsetsaut Skii km Lax Ha Nation's joinder application was heard, discoveries had not yet occurred and the plaintiffs had only just served most of their expert reports on the Crown defendants, two of the primary reasons the trial was adjourned from October 1, 2024 to March 3, 2025: *Malii v British Columbia*, 2024 BCSC 1062 at paras 5, 12 [***First Adjournment Decision***]. In opposing the Province's adjournment application, the Gitanyow Hereditary Chiefs described the steps taken to prepare for trial, which focused primarily on the taking of deposition evidence under Rule 7-8 of the *Supreme Court Civil Rules*, BC Reg 168/2009 [***BC Supreme Court Rules***] to preserve that evidence (and not necessarily to advance towards trial): see Gitanyow Hereditary Chiefs' Application Response (adjournment), June 7, 2024 at para 1, AR, tab 33. At the time of the hearing for joinder and the third part notice, there was no agreement on staging the trial: Gitanyow Hereditary Chiefs' Notice of Application

[17] In its 2016 response to the Gitanyow Hereditary Chiefs' Amended Notice of Civil Claim, the Province explicitly pleaded (a) that other Aboriginal collectives, including the Tsetsaut Skii km Lax Ha Nation, assert claims of aboriginal title or rights to portions of the Gitanyow Claim Area, and (b) that the Nisga'a Nation, with whom it has a negotiated treaty, has certain treaty rights overlapping with part of the Gitanyow Claim Area.[33] Canada also alleged overlapping claims in its 2016 response.[34]

[18] In its reply to the Province, the Gitanyow Hereditary Chiefs explicitly pled that the Tsetsaut Skii km Lax Ha Nation is estopped from advancing claims different from those advanced in *Delgamuukw*.[35]

[19] In September 2017, the Tsetsaut Skii km Lax Ha Nation sought the Gitanyow Hereditary Chiefs' consent to be added as a defendant and to file a third party notice, providing draft response and third party notice pleadings to inform the Gitanyow Hereditary Chiefs' consideration. The Gitanyow Hereditary Chiefs refused. Later, in May 2018, Chief Simpson, on behalf of herself and the Tsetsaut Skii km Lax Ha Nation, filed an application for joinder as a defendant and to bring a third party notice.[36] The Gitanyow Hereditary Chiefs did not file an application response at that time.

[20] The application was adjourned on consent while the Tsetsaut Skii km Lax Ha Nation brought an application to remove the Gitanyow Hereditary Chiefs' legal counsel from the joinder

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(staging), May 3, 2024, AR tab 30; Province's Application Response (staging), May 14, 2024, AR tab 31; Transcripts of proceedings, June 11, 2024 at 103-104, 109-110, AR, tab 57.

[33] BCCA at paras 16, 27, AR, tab 4; Province's Response to Amended Notice of Civil Claim, August 9, 2016 at paras 27-28, AR, tab 8.

[34] BCCA at para 15, AR, tab 4; Canada's Response to Amended Notice of Civil Claim, August 5, 2016 at para 25, AR, tab 7.

[35] Plaintiffs' Reply to the Province's Response to Amended Notice of Civil Claim, December 20, 2016 at para 18, AR, tab 9.

[36] BCCA at para 23, AR, tab 4; Simpson Affidavit #1 at Exhibit OO (letter from counsel for the Tsetsaut Skii km Lax Ha Nation to counsel for the Gitanyow Hereditary Chiefs requesting consent to be added as a defendant and to file a third party notice, attaching proposed pleadings), AR, tab 45.

application.[37] The Gitanyow Hereditary Chiefs' legal counsel was lead counsel for the plaintiffs in the *Delgamuukw* litigation and now represents the Gitanyow Hereditary Chiefs in asserting in their reply to the Province (and in response to the joinder application) that the Tsetsaut Skii km Lax Ha Nation is estopped from advancing rights and title claims that differ from those advanced in *Delgamuukw*.[38]

[21] The British Columbia Supreme Court dismissed the conflicts of interest application without deciding the Tsetsaut Skii km Lax Ha Nation's status as an independent rights-holding collective. However, the Court noted that the Tsetsaut Skii km Lax Ha Nation's self-identification and territorial claims are grounded in a genuine belief in those claims and in its entitlement to seek the disqualification of the Gitanyow Hereditary Chiefs' legal counsel as its former lawyer in *Delgamuukw* now opposing those claims.[39] While dismissing the application for production of the file of the Gitanyow Hereditary Chiefs' legal counsel, the Court noted that it was "with leave to re-apply".[40] The Court of Appeal dismissed the Tsetsaut Skii km Lax Ha Nation's appeal in 2021.[41] The Tsetsaut Skii km Lax Ha Nation has since reapplied for the production of the file of the Gitanyow Hereditary Chiefs' legal counsel;[42] the Court's decision is pending.

[22] In July 2022, the Tsetsaut Skii km Lax Ha Nation refiled its joinder application, seeking to be added as defendant and reducing the scope of its proposed third party notice to declarations of Aboriginal rights and title only in the territory overlapping with the Gitanyow's claims (rather than to all of the Tsetsaut Skii km Lax Ha Nation's claimed territory).[43] The Tsetsaut Skii km Lax Ha Nation anticipated the application would take two hours.[44] In August 2022, the plaintiffs

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[37] Requisition to adjourn, June 6, 2018, AR, tab 16.
[38] BCCA at para 23, AR, tab 4.
[39] *Malii v British Columbia (Attorney General)*, 2019 BCSC 2060 at para 118 [***Conflict of Interest Decision***], aff'd 2021 BCCA 140.
[40] *Conflict of Interest Decision* at para 114.
[41] *Skii km Lax Ha v Malii*, 2021 BCCA 140.
[42] Tsetsaut Skii km Lax Ha Nation's Amended Notice of Application (production of Mr. Grant's *Delgamuukw* file), May 2, 2025, AR, tab 35.
[43] Tsetsaut Skii km Lax Ha Nation's Joinder Application, July 22, 2022, AR, tab 17; Affidavit #4 of Darlene Simpson, filed on July 22, 2022 at paras 14-17 and Exhibit F (proposed third party notice from 2022), AR, tab 50; Simpson Affidavit #1 at Exhibit FF (proposed third party notice from 2018), AR, tab 45.
[44] Tsetsaut Skii km Lax Ha Nation's Joinder Application, July 22, 2022 at 9, AR, tab 17.

advised they would not be in a position to discuss scheduling the application at the next judicial management conference, and were anticipating the application to require a five-day hearing.[45]

[23] The Gitanyow Hereditary Chiefs filed their application response in January 2023, opposing joinder and the request to file a third party notice, challenging Chief Darlene Simpson's standing to bring a representative proceeding on behalf of the Tsetsaut Skii km Lax Ha Nation, and arguing that the Tsetsaut Skii km Lax Ha Nation should be estopped from advancing claims overlapping with the Gitanyow Hereditary Chiefs because it was an abuse of process to advance claims different from those advanced in *Delgamuukw*.[46]

[24] In order to meet the Gitanyow arguments on standing and abuse of process, the Tsetsaut Skii km Lax Ha Nation had to commission and file an expert report addressing both the Tsetsaut and Gitxsan heritage of the Tsetsaut Skii km Lax Ha Nation. The Tsetsaut Skii km Lax Ha Nation filed the expert report of Dr. Kenton Storey (the "Storey Report") on November 28, 2023. The nearly 300-page Storey Report ultimately went unopposed on the joinder application.

[25] The Storey Report notably concludes that the Tsetsaut Skii km Lax Ha Nation and Luuxhon and Gamlaxyeltxw, two of the Gitanyow Hereditary Chiefs, share a common Tsetsaut ancestry.[47] As detailed in the Storey Report, an expert report from the Province in 2021 reached the same conclusion.[48] After receiving the Storey Report and choosing not to file any expert evidence of their own, the Gitanyow Hereditary Chiefs accepted the following fact as "uncontroversial": "Some of the people once known as 'Tsetsaut' became part of house groups of the Gitxsan, including Skii km Lax Ha, Luuxhon, and Gamlaxyeltxw."[49]

[26] On the joinder application, after a four-day hearing, the case management judge dismissed the Gitanyow's challenge to the Tsetsaut Skii km Lax Ha Nation's standing to advance its

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[45] Badea Affidavit #1 at Exhibit A (letter from counsel for the Gitanyow Hereditary Chiefs to counsel for the Tsetsaut Skii km Lax Ha Nation), AR, tab 51.
[46] Gitanyow Hereditary Chiefs' Application Response, January 11, 2023 at paras 44, 70, AR, tab 18.
[47] Storey Affidavit #1 at Exhibit A (Expert report) at paras 62-78, AR, tab 55.
[48] Storey Affidavit #1 at Exhibit A (Expert report) at paras 257-258, AR, tab 55; Badea Affidavit #1 at Exhibit E (Cope Report) at 104-119, 228-244, 269-283, AR, tab 51.
[49] Gitanyow Hereditary Chiefs' Joinder Written Submissions, May 17, 2024 at para 10, AR, tab 21.

proposed claims and defences. The Gitanyow had put in issue the question of whether the Tsetsaut Skii km Lax Ha Nation was the appropriate successor to the historic rights-bearing collective in arguing that the Tsetsaut Skii km Lax Ha Nation did not have standing; the case management judge rejected the idea that questions of successorship are necessarily part of the analysis of representative standing.[50] The judge also rejected the Gitanyow's argument that the Tsetsaut Skii km Lax Ha Nation's application constituted an abuse of process, given the evolution in the Tsetsaut Skii km Lax Ha Nation's claim since the *Delgamuukw* litigation.[51]

[27] The case management judge then recognized that the Tsetsaut Skii km Lax Ha Nation had a direct interest in the underlying proceeding given the overlapping claims and exercised his discretion to add the Tsetsaut Skii km Lax Ha Nation as a defendant.[52] He also recognized that requiring the Tsetsaut Skii km Lax Ha Nation to pursue its own claims to the overlapping territory in a separate proceeding would result in an inefficient multiplicity of proceedings and risk contradictory findings, and exercised his discretion to permit the Tsetsaut Skii km Lax Ha Nation to file a third party claim against the Province and Canada.[53] The case management judge stated:

> [77] I am cognizant of the impact that adding the TSKLH Nation as a defendant may have on the conduct of this action and its potential complexity: see *Kwikwetlem* at paras. 27, 29. However, in my view, those considerations are outweighed by the strong necessity and the interests of justice in having both the TSKLH Nation's and the plaintiffs' claim to Aboriginal rights and title over the same geographic area determined in the same action: *Delgamuukw* at para. 185.[54]

[28] In April 2024, prior to the hearing of the joinder application, Tsetsaut Skii km Lax Ha Nation filed a separate notice of civil claim against the Province and Canada, seeking declarations of Aboriginal rights and title over all of Tsetsaut Skii km Lax Ha Territory.[55] The Tsetsaut Skii km Lax Ha Nation made clear that, if permitted to file its third party notice in the

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[50] BCSC at paras 45-56, AR, tab 2.
[51] BCSC at paras 65-67, AR, tab 2.
[52] BCSC at paras 72-73, AR, tab 2.
[53] BCSC at paras 84-88, AR, tab 2.
[54] BCSC at para 77, AR, tab 2 [emphasis added].
[55] Tsetsaut Skii km Lax Ha Nation's Standalone Claim, April 16, 2024, AR, tab 40; BCSC at para 9, AR, tab 2.

Malii litigation, it would amend its Notice of Civil Claim in the separate action to exclude the overlap with Gitanyow claims.[56] Canada filed its response to the Tsetsaut Skii km Lax Ha Nation's standalone claim on February 28, 2025 and the Province filed its response on April 3, 2025. In their responses, both Canada and the Province point to the overlap between the territory claimed by the Tsetsaut Skii km Lax Ha Nation and the territory claimed by the Gitanyow (as well as competing interests of other Aboriginal collectives) as being a hurdle for the Tsetsaut Skii km Lax Ha Nation's own claims.[57]

[29] Before the hearing on the joinder application, the Province had filed an application for an adjournment in the Gitanyow action,[58] which the case management judge ultimately granted until March of 2025. The case management judge concluded that he was "satisfied this action will not be satisfactorily ready to commence trial on October 1, 2024,"[59] noting important outstanding pre-trial steps, including examinations for discovery, which had not even commenced.[60] The Court noted that the additional time would permit the Court to engage in case management and potentially set due dates and timelines for the remaining pre-trial steps.[61]

[30] The Tsetsaut Skii km Lax Ha Nation filed its Response to the Gitanyow's Fourth Further Amended Notice of Civil Claim and its Third Party Notice in August of 2024, less than two weeks after the case management judge's decision adding the Tsetsaut Skii km Lax Ha Nation as a defendant and permitting it to file its third party claim.[62] In its Reply to the Tsetsaut Skii km Lax Ha Nation's Response, the Gitanyow directly put in issue questions related to Tsetsaut Skii km Lax Ha Nation successorship and the independence of the Tsetsaut Skii km Lax Ha Nation

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[56] Tsetsaut Skii km Lax Ha Nation's Joinder Application Written Submissions, April 19, 2024 at para 263, AR, tab 20; Transcript of proceedings before the BCCA, October 30, 2024 at 91, AR, tab 60.
[57] Canada's Response to Civil Claim, February 28, 2025 at para 37, AR, tab 43; Province's Response to Civil Claim, April 3, 2025 at para 9, AR, tab 44.
[58] Province's Notice of Application (adjournment), May 28, 2024, AR, tab 32.
[59] *First Adjournment Decision* at para 13.
[60] *First Adjournment Decision* at para 12.
[61] *First Adjournment Decision* at para 17.
[62] Tsetsaut Skii km Lax Ha Nation's Response to Fourth Further Amended Notice of Civil Claim, August 19, 2024, AR, tab 11.

from the other Gitxsan plaintiffs in *Delgamuukw*, which remain live issues in the most recent pleadings:[63]

> 9. In reply to Paragraph 12 of the TSKLH Response, the Plaintiffs deny that the term "Laxwiiyip Tsetsaut" refers to a single historical group of defined composition capable of clear identification. "Tsetsaut" is a term used by Tshimsian speakers, such as the Gitxan, Gitanyow and Nisga'a, that has been used to refer to a variety of different Athapascan speaking peoples and the term "Laxwiiyip" was used by Tshimisan speakers as a generic designation also referring to a number of different groups.
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> 10. In further reply to Paragraph 12 of the TSKLH Response, the Plaintiffs say there is no evidence of any connection between many of the groups that have sometimes been identified as Tsetsaut and the Gitxan house of Skii km Lax Ha or any other collective of rights bearers that Darlene Simpson represents.
>
> […]
>
> 13. In further reply to Paragraph 12 of the TSKLH Response, the Plaintiffs deny that members of the TSKLH Nation are the sole remaining descendants of the different peoples that have sometimes been identified as "Laxwiiyip Tsetsaut" to continue collectively to identify with their origins among such peoples.
>
> 14. In reply to Paragraph 13 of the TSKLH Response, the Plaintiffs deny that the term "Laxwiiyip" refers to a clearly defined territory or that it necessarily refers to territory once occupied by ancestors of the Gitxsan house of Skii km Lax Ha or any other collective of rights bearers that Darlene Simpson represents.
>
> 15.In further reply to Paragraph 13 of the TSKLH Response, the Plaintiffs deny that the term "Laxwiiyip Tsetsaut" refers to a single historical group of defined composition capable of clear identification.[64]

[31] These issues relating to the Tsetsaut Skii km Lax Ha Nation's status as a rights-holding collective will thus be addressed at trial, even if the Tsetsaut Skii km Lax Ha Nation participates as a defendant only.

[32] The Gitanyow Hereditary Chiefs appealed the case management judge's decision on all four issues (standing, abuse of process, joinder of the Tsetsaut Skii km Lax Ha Nation as a

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[63] Gitanyow Hereditary Chiefs' Reply to the Tsetsaut Skii km Lax Ha Nation's Second Amended Response to Fifth Further Amended Notice of Civil Claim, April 16, 2025 at paras 9, 10, 13-15, AR, tab 28.

[64] Gitanyow Hereditary Chiefs' Reply to Tsetsaut Skii km Lax Ha Nation's Response to Fourth Further Amended Notice of Civil Claim, October 7, 2024 at paras 9, 10, 13-15, AR, tab 13.

defendant, and leave to file a third party notice). The Court of Appeal allowed the appeal solely with respect to the final issue. It agreed with the case management judge's conclusions on standing and abuse of process,[65] noting that "the issue of standing is different than determining whether an Indigenous collective has proven that it is a successor to title, rights, or practices of a historic rights-bearing group".[66] The Court of Appeal, however, set aside the Tsetsaut Skii km Lax Ha Nation's third party claim, upholding the Tsetsaut Skii km Lax Ha Nation's joinder as a defendant only.[67] Ultimately, Griffin J.A. concluded, for the Court of Appeal (using the abbreviation "TSKLH" for "Tsetsaut Skii km Lax Ha"):

> [112] In my view, the most practical way to balance the prejudice to the Gitanyow Nation and the TSKLH is to permit the TSKLH to be added as a defendant only, and not to permit it to advance a third party claim. This will allow the TSKLH to challenge the Gitanyow Nation's claims and is sufficient to protect the TSKLH's interests in claiming Aboriginal title and rights over the same territory. The action will remain the Gitanyow Nation's action, and ultimately the trial judge will only need to determine whether the Gitanyow Nation's claims are proven. The judge will quite likely not need to determine all the many issues related to the TSKLH's successorship, cultural connection, Indigenous laws and practices, and other matters relevant to establishing its own Aboriginal title and rights claims to the territory. Some of those matters will likely arise, and may require some findings, but their relevance will only be in defence of the Gitanyow Nation's claims.[68]

[33] The Tsetsaut Skii km Lax Ha Nation was granted leave to appeal the Court of Appeal's decision to this Court and the Gitanyow Hereditary Chiefs did not seek leave to cross appeal. The issues of standing, abuse of process, and joinder of the Tsetsaut Skii km Lax Ha Nation as a defendant are therefore not at issue in this appeal; the only matter at issue is that of the Tsetsaut Skii km Lax Ha Nation's third party claim.

(2) The context of a new generation of overlapping Aboriginal rights and title claims

[34] This appeal must be situated in the context of a new generation of overlapping Aboriginal rights and title claims.

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[65] BCCA at paras 54-56, 60-61, AR, tab 4.
[66] BCCA at para 54, AR, tab 4.
[67] BCCA at paras 72, 80-81, 111-113, AR, tab 4.
[68] BCCA at para 112, AR, tab 4.

[35] This Court's judgments providing the foundational doctrine on Aboriginal title (*Delgamuukw*, *Tsilhqot'in*) came in cases that did not involve overlapping claims, at least not at the stage of the appeal before this Court. In *Tsilhqot'in*, there was an overlap claim with respect to a portion of the claim area,[69] but when the trial judge found title, he did not include the area of the alleged overlap; the appeal before this Court in *Tsilhqot'in* then focused only on the area in which the trial judge had found that title had been proven.

[36] In *Delgamuukw*, this Court already signaled that future cases involving overlapping or joint title claims might call for significant doctrinal evolution[70] and that Aboriginal peoples with overlapping claims should have the opportunity to participate in an Aboriginal title case:

> [185] [M]any aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an exclusive right to the use and occupation of land, i.e., to the exclusion of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.[71]

[37] A new generation of title cases is making its way through Canadian courts which raise novel questions about overlapping or joint title claims, and competing Aboriginal interests more broadly, including:

(a) *Dzawada'enuxw*:[72] a claim initially filed for declarations of exclusive title for Dzawada'enuxw over certain territory and of joint title for Dzawada'enuxw over other territory subject to the possibility that other First Nations would subsequently also obtain declarations of joint title over the latter territory.

(b) *Cowichan Tribes*:[73] a claim filed by the Cowichan over territory also claimed by the Musqueam and subject to treaty rights of the Tsawwassen. The case raises questions about

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[69] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 937-938.
[70] See e.g. *Delgamuukw* at para 158.
[71] *Delgamuukw* at para 185 [emphasis in original].
[72] Second Amended Notice of Civil Claim by Dzawada'enuxw First Nation, February 1, 2023, British Columbia Supreme Court, Vancouver Registry No. S-186106, AR, tab 38.
[73] *Cowichan Tribes* at paras 24-25, 41, 51-53.

how the doctrine of Aboriginal title should apply or evolve in situations where one Indigenous people arguably displaced another Indigenous people(s) from the territory at issue around the time of Crown sovereignty assertion.

(c) *Thomas and Saik'uz*: a claim for injunctive relief against a company (Rio Tinto Alcan Inc) for tortious interference with Aboriginal rights and title. The claimants did not seek declarations of Aboriginal title, but did seek findings of fact establishing Aboriginal rights and title for purposes of supporting the claim against Rio Tinto Alcan. The British Columbia Supreme Court (upheld by the British Columbia Court of Appeal) held that it was inappropriate to make those findings of fact without hearing from First Nations with overlapping claims:

> [276] […] the simple fact of the matter is that the sites in respect of which the plaintiffs seek a "finding" of title are subject to overlapping claims by other First Nations who have not been made parties to this litigation and whose evidence has not been heard. No witnesses were called as representatives of the neighbouring title claimants, whether to substantiate their claim or to waive it in favour of the plaintiffs. There is thus no full evidentiary basis to properly determine exclusivity between overlapping claimants and it is possible that a "finding of title" in favour of the plaintiffs would irrevocably and unfairly disentitle another Indigenous group that may have a stronger claim.
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> [277] The two Crown defendants also point out, probably correctly, that as parties to this case, they would be bound by the findings of fact underlying title. They say it is unfair to make "findings of title" without considering the evidence of overlapping claimants. I am inclined to agree.
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> [278] The issue of overlapping claims and previous title litigation by broader Indigenous collectives is expressly raised in the pleadings in this case and has been known to all parties since the outset of the litigation. The plaintiffs, therefore, had ample opportunity to consult with neighbouring First Nations and strategize matters to facilitate their claim, whether through waivers or evidence supporting exclusive or joint title in the plaintiffs' names. This either did not occur or was simply unsuccessful. Either way, in the circumstances I find myself compelled to reject the requested "findings" of title on procedural grounds, namely, the absence of the overlapping title claimants either as parties or witnesses.[74]

[74] *Thomas and Saik'uz* at paras 276-278.

The British Columbia Supreme Court proceeded, in case it was wrong about it being inappropriate to make such findings of fact, to state the findings that it would make.[75] The Court of Appeal held that the lower court should not have proceeded, in the alternative, to make those findings of fact once it had concluded (correctly, according to the Court of Appeal) that such findings were not appropriate in the case.[76]

(d) *Takuhikan c Conseil de la Nation Huronne-Wendat*: a claim for damages against the *Conseil de la Nation Huronne-Wendat*, in which the First Nation Pekuakamiulnuatsh Takuhikan also sought declarations that the *Conseil de la Nation Huronne-Wendat* did not hold any exclusive right or title over the territory. The Conseil de la Première Nation des Innus Essipit was granted full party status (following its "*Acte d'intervention volontaire agressive*" pursuant to s. 185 of the *Civil Code of Procedure*), given that the declaratory relief sought could impact its own rights.[77] In granting the *Conseil de la Nation Huronne-Wendat*'s motion to dismiss, the Superior Court stressed that "*seul un débat au mérite, qui permette de déclarer les droits des deux parties, puisque ces droits se chevauchent sur le territoire en litige, permettra de répondre à la question de savoir si la demanderesse peut aménager des camps dans la Réserve faunique des Laurentides*".[78]

[38] These cases illustrate a sample of the issues the courts will have to work through in the context of overlapping section 35 claims, and competing Indigenous interests more broadly. Together with the present litigation, they represent a new generation of rights and title claims that will require the courts to refine and deepen the current doctrine of Aboriginal rights and title. As noted, this generation of cases and the need for corresponding doctrinal evolution were already broadly anticipated by this Court in *Delgamuukw*.

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[75] *Thomas and Saik'uz* at para 341.
[76] *Thomas v Rio Tinto Alcan Inc*, 2024 BCCA 62 at paras 311-315, leave to appeal to SCC refused, 41241 (10 October 2024).
[77] *Takuhikan c Conseil de la Nation Huronne-Wendat*, 2024 QCCS 109 at para 67.
[78] *Takuhikan c Conseil de la Nation Huronne-Wendat*, 2024 QCCS 4647 at para 24, leave to appeal to the QCCA requested, 200-09-010865-259.

PART II – QUESTIONS IN ISSUE

[39] The appeal of the Tsetsaut Skii km Lax Ha Nation raises the following questions:

A. Should competing Aboriginal claims with respect to the same territory presumptively be dealt with in the same proceeding where a third party claim is at issue?

B. Should the order of the chambers judge granting the Tsetsaut Skii km Lax Ha Nation permission to file a third party notice in the *Malii* litigation be restored?

PART III – STATEMENT OF ARGUMENT

A. Competing Aboriginal claims with respect to the same territory should presumptively be dealt with in the same proceeding

[40] There are at least two possible procedural approaches to the question of competing Aboriginal title claims where a third party claim is at issue. One approach, which was taken by the case management judge in this case, seeks to ensure that competing claims with respect to the same territory are dealt with in the same proceeding. The other approach, adopted by the Court of Appeal, gives priority to deciding the claims of Indigenous collectives in isolation from one another.

[41] An approach that presumptively allows for competing Aboriginal claims with respect to the same territory to be dealt with in the same proceeding is: (1) rooted in existing case law on third party claims and consistent with principles of judicial efficiency and consistency, (2) essential to allow courts to refine the doctrine of Aboriginal title in situations of overlapping claims; and (3) promotes the search for finality and reconciliation in the context of overlapping Aboriginal claims.

(1) An approach that presumptively allows for competing Aboriginal claims with respect to the same territory to be dealt with in the same proceeding is rooted in existing case law on third party claims and consistent with principles of judicial efficiency and consistency

[42] In British Columbia, the "starting point" in addressing a third party claim is avoiding a multiplicity of proceedings.[79] Third party claims allow for "the resolution of related questions, issues or remedies in a single proceeding", "obviate the prospect of inconsistent findings", and "ensure that a defendant does not have to pay a damage award before a third party claim is decided".[80] The central purpose of allowing a third party proceeding "is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings."[81] The concern for multiple proceedings is not merely to safeguard the interests of the parties; it also extends to protect the resources of, and prevent congestion in, the courts.[82]

[43] Except in very narrow circumstances, such as a situation of unexplained or unjustified delay in bringing the third party claim,[83] principles of judicial efficiency and consistency militate in favour of allowing third party claims to proceed.

[44] Such exceptional circumstances are certainly not present in the instant case: after the Gitanyow filed their Amended Notice of Civil Claim in 2016, the Tsetsaut Skii km Lax Ha Nation first communicated its intention to file a third party claim in 2017 and filed in 2018.[84] The

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[79] *Tyson Creek* at para 24; *Canfor Pulp* at para 47.
[80] *Canfor Pulp* at para 48, citing *McNaughton v Baker*, 1988 CanLII 3036 (BC CA) at paras 14, 21 [***McNaughton***].
[81] *McNaughton* at para 14; *Lui v West Granville Manor Ltd*, 1985 CanLII 155 (BC CA) at 18 [***Lui***]; *Chief Joe Hall v Canada Lands Company Limited*, 2014 BCSC 2361 at para 35; *Canfor Pulp* at paras 31-33.
[82] *Lui* at 18; *Canfor Pulp* at para 49.
[83] *Tyson Creek* at paras 25, 29, 35.
[84] BCSC at para 79, AR, tab 2; Simpson Affidavit #1 at Exhibit OO (letter from counsel for the Tsetsaut Skii km Lax Ha Nation to counsel for the Gitanyow Hereditary Chiefs requesting consent to be added as a defendant and to file a third party notice, attaching proposed pleadings), AR, tab 45; Tsetsaut Skii km Lax Ha Nation Original Joinder Application, May 25, 2018, AR, tab 14.

overlap was known by the Gitanyow Hereditary Chiefs since at least 2002, as the Tsetsaut Skii km Lax Ha Nation sought discussions with the Gitanyow to attempt to resolve the overlaps, although the Gitanyow Hereditary Chiefs rebuffed those efforts.[85] Moreover, the trial date was not set until August 2022 for October 2024, at which point the Tsetsaut Skii km Lax Ha Nation had refiled its application to file a third party claim and indicated its intention to proceed to set down that application.[86] In those intervening years, the Tsetsaut Skii km Lax Ha Nation had tried to resolve its concerns that the Gitanyow Hereditary Chiefs' legal counsel was in a conflict of interest in representing the Gitanyow in opposing the Tsetsaut Skii km Lax Ha Nation's joinder on the basis of the Tsetsaut Skii km Lax Ha Nation's participation in *Delgamuukw*, where the Gitanyow's legal counsel acted for the *Delgamuukw* plaintiffs.[87] At that time (2022), little had progressed in the present action. In January 2023, when the Gitanyow Hereditary Chiefs filed their response to the Tsetsaut Skii km Lax Ha Nation's joinder application, they raised two new issues that greatly expanded the joinder application (standing and abuse of process).[88] While the case management judge did note on the joinder application that he was concerned with the passage of time, he did not find that there was unexplained or unjustified delay in bringing the third party claim.[89] On the contrary, the case management judge concluded: "I do not find that the passage of time should result in the consequence of denying the TSKLH Nation's application for this reason".[90]

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[85] Simpson Affidavit #1 at Exhibits G, H (correspondence exchanged between representatives of Tsetsaut Skii km Lax Ha and the Gitxsan Hereditary Chiefs regarding Chief Simpson's efforts to discuss the overlapping boundaries), AR, tab 45; Badea Affidavit #3 at Exhibit O at 343-44 (letter from Chief Simpson, Skii km Lax Ha, to the Gitanyow Hereditary Chiefs and the Gitxsan Treaty Office dated September 21, 2009 regarding the overlapping territorial boundaries), AR, tab 52.

[86] In August 2022, the Court directed that the parties could seek trial dates before Justice Stephens (Court Order/Directive dated August 11, 2022, AR, tab 37); Tsetsaut Skii km Lax Ha Nation's Joinder Application, July 22, 2022, AR, tab 17.

[87] BCSC at para 79, citing *Conflict of Interest Decision*, aff'd 2021 BCCA 140, AR, tab 2; Notice of Application (conflict of interest), December 27, 2018, AR, tab 29.

[88] BCSC at para 10, AR, tab 2; Gitanyow Hereditary Chiefs' Application Response, January 11, 2023, AR, tab 18.

[89] BCSC at para 79, AR, tab 2.

[90] BCSC at para 80, AR, tab 2.

[45] As a general principle, competing Aboriginal claims should be heard together for the very same reasons of judicial efficiency and consistency that apply in the context of all third party claims.

[46] The principle from *Canfor Pulp* that third party claims "ensure that a defendant does not have to pay a damage award before a third party claim is decided"[91] also aptly applies in the present case. If the competing claims in the same territory are not heard together, it would be possible, for instance, for the Gitanyow Hereditary Chiefs to establish rights in an area (say to hunt or to harvest timber or to manage resources more generally) and then in a parallel or later proceeding for the Tsetsaut Skii km Lax Ha Nation to establish the same or a similar rights in the same area. In that case, it would surely be inappropriate for the Crown to have to remedy infringements of the Gitanyow's rights (through, e.g., compensation and/or co-management) before knowing the extent of Tsetsaut Skii km Lax Ha Nation's rights in the same area. Following *Canfor Pulp*, the overlapping claims should be heard together so that the Crown can properly address questions of remedy jointly for the Gitanyow and the Tsetsaut Skii km Lax Ha Nation.

(2) An approach that presumptively allows for competing Aboriginal claims with respect to the same territory to be dealt with in the same proceeding is essential to allow courts to refine the doctrine of Aboriginal rights and title in the context of overlapping claims

[47] The Court of Appeal's decision in this case risks both stifling and greatly complicating doctrinal development across a new generation of cases dealing with overlapping claims. The Court of Appeal concluded that requiring the Tsetsaut Skii km Lax Ha Nation to pursue its own claims in separate proceedings would "quite likely" free the trial judge from having "to determine all the many issues related to the [Tsetsaut Skii km Lax Ha Nation]'s successorship, cultural connection, Indigenous laws and practices, and other matters relevant to establishing its own Aboriginal title and rights claims to the territory".[92] Yet these are precisely the kinds of issues and context that are likely to prove essential to courts as they work out how to refine the doctrine of Aboriginal rights and title in situations of overlapping claims. For instance, the shared Tsetsaut ancestry of Skii km Lax Ha and some of the Gitanyow Hereditary Chiefs may crucially inform the court's analysis of shared Indigenous laws and practices in the region, which in turn might

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[91] *Canfor Pulp* at para 48.
[92] BCCA at para 112, AR, tab 4.

inform the court's analysis of the Gitanyow claim that Tsetsaut people transferred part of the Disputed Territory to the Gitanyow in the 1860s pursuant to Indigenous laws.[93]

[48] With the Province refusing to negotiate in light of the overlap and the Gitanyow refusing to engage with the Tsetsaut Skii km Lax Ha Nation,[94] it is key that the courts provide a forum for adjudicating the overlap.

[49] The Court of Appeal's siloed approach is neither realistic in practice nor desirable for doctrinal development. It is not realistic in practice because it will likely prove very difficult to hive off the set of issues identified by the Court of Appeal – the Tsetsaut Skii km Lax Ha Nation's "successorship, cultural connection, Indigenous laws and practices"[95] – by restricting the Tsetsaut Skii km Lax Ha Nation, or another group similarly situated, to join litigation as a defendant only. As noted, these are live issues in the present litigation, even with the Tsetsaut Skii km Lax Ha Nation participating as a defendant only.

[50] Moreover, it is telling that in the Tsetsaut Skii km Lax Ha Nation's standalone claim, the Province and Canada are invoking the overlap between the territory claimed by the Tsetsaut Skii km Lax Ha Nation and the territory claimed by the Gitanyow (as well as competing interests of other Aboriginal collectives) as a hurdle for the Tsetsaut Skii km Lax Ha Nation's own claims.[96] Issues tied to the overlap cannot be avoided. The approach adopted by the Court of Appeal would, however, prevent the two overlapping Indigenous claimants from testing, and the court from assessing, the Crown defendants' assertions of overlap in a single proceeding.[97] In each separate proceeding, the Indigenous claimant that is participating as a defendant only would be

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[93] Gitanyow Hereditary Chiefs' Fifth Further Amended Notice of Civil Claim, November 12, 2024 at paras 13, 45, AR, tab 22; Gitanyow Hereditary Chiefs' Response to Demand for Particulars, December 6, 2024 at para 4(a), AR, tab 23.
[94] See paragraphs 13-14 and footnotes 27-28 above.
[95] BCCA at para 112, AR, tab 4.
[96] Canada's Response to Civil Claim, February 28, 2025 at para 37, AR, tab 43; Province's Response to Civil Claim, April 3, 2025 at para 9, AR, tab 44.
[97] As a defendant only, the Tsetsaut Skii km Lax Ha Nation is not fully adverse in interest with the Crown defendants, and thus does not have certain procedural rights vis-à-vis the Crown defendants, including rights of discovery and the right to cross-examine their expert witnesses: *BC Supreme Court Rules*, r 7-2(1), 11-7(3)(b).

limited in its ability to test the Crown's evidence in an adversarial capacity. The Crown would have the advantage of contending with Indigenous claimants one at a time, as it were.

[51] Even if it were possible to silo certain sets of issues (for instance, "successorship, cultural connection, Indigenous laws and practices"[98]), the result in many cases could be multiple parallel proceedings – one for each overlapping claimant as plaintiff, in which the other overlapping claimants participate as defendants. This risks tremendous judicial inefficiency. The Tsetsaut Skii km Lax Ha Nation does not ask this Court to categorically rule out the possibility of parallel proceedings as envisioned by the Court of Appeal in this case. However, it is clearly a task for the case management judge to identify the (likely rare) cases in which parallel proceedings are appropriate. As addressed further in section B, the Court of Appeal's reasons underscore precisely why this is best left to the case management judge: the set of issues the Court of Appeal said the trial judge will "quite likely" not have to decide are live issues in the present litigation, a reality that the case management judge was uniquely well positioned to appreciate.

[52] The Court of Appeal's siloed approach will also undermine doctrinal development. Indeed, courts should have the benefit of hearing competing claims on an equal footing when refining the doctrine of Aboriginal title to the novel contexts of such claims. For instance, in the present case, as noted, the history of the Tsetsaut Skii km Lax Ha Nation and at least some of the Gitanyow Hereditary Chiefs is deeply intertwined.[99] Moreover, the Gitanyow Hereditary Chiefs plead that they acquired a significant portion of the Disputed Territory in a peace settlement with the Tsetsaut in the 1860s.[100] They plead novel positions relating to the date of sovereignty

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[98] BCCA at para 112, AR, tab 4.

[99] Gitanyow Hereditary Chiefs' Fifth Further Amended Notice of Civil Claim, November 12, 2024 at para 12, AR, tab 22; Tsetsaut Skii km Lax Ha Nation's Second Amended Response to Fifth Further Amended Notice of Civil Claim, April 7, 2025 at paras 39-41, AR, tab 27; Tsetsaut Skii km Lax Ha Nation's Third Party Notice, August 19, 2024 at paras 30-32, AR, tab 12; Simpson Affidavit #1 at paras 90-100 and Exhibits GG, HH (extracts from ethnographic and oral history records), AR, tab 45; Storey Affidavit #1 at Exhibit A (Expert report) at paras 62-78, 159, 186, 257-263, 356, AR, tab 55; Badea Affidavit #1 at Exhibit E (Cope Report) at 104-119, 228-244, 269-283, AR, tab 51.

[100] Gitanyow Hereditary Chiefs' Fifth Further Amended Notice of Civil Claim, November 12, 2024 at paras 13, 45, AR, tab 22; Gitanyow Hereditary Chiefs' Reply to the Tsetsaut Skii km Lax Ha Nation's Second Amended Response to Fifth Further Amended Notice of Civil Claim, April 16, 2025 at para 12, AR, tab 28; Gitanyow Hereditary Chiefs' Response to Demand for Particulars, December 6, 2024 at para 4(a), AR, tab 23.

assertion (or, as they prefer, "establishment") and of the effect in Canadian law of the alleged intra-Indigenous peace settlement of the 1860s.[101] In assessing the historical evidence and Gitanyow claims about the legal conclusions that should be drawn from the evidence, the trial court in this case will have to elaborate the doctrine of Aboriginal title to respond to these novel arguments.

[53] In this critical work of elaborating the doctrine of Aboriginal title, the trial court would clearly benefit from hearing fully the arguments of the Tsetsaut Skii km Lax Ha Nation as to why the evidence supports declarations of Aboriginal title and other rights in favour of the Tsetsaut Skii km Lax Ha Nation. If the Court of Appeal's approach is retained, those arguments would be fully fleshed out only in a separate proceeding for the Tsetsaut Skii km Lax Ha Nation's claims (in which the Gitanyow Hereditary Chiefs might participate as defendants). As a result, the competing arguments of the Tsetsaut Skii km Lax Ha Nation and the Gitanyow Hereditary Chiefs – as to the proper application of Aboriginal rights and title doctrine to their deeply intertwined history – would be split across separate proceedings and never fully presented to a single trial judge.

[54] Apart from the serious practical concerns about multiplicity of proceedings and potentially inconsistent outcomes, this splintered approach would hamper doctrinal development by depriving trial courts of a fully formed assessment of competing interests in the novel contexts presented by this new generation of overlapping claims.

(3) An approach that presumptively allows for competing Aboriginal claims with respect to the same territory to be dealt with in the same proceeding promotes the search for finality and reconciliation in the context of overlapping Aboriginal claims

[55] In this case, the Court of Appeal stated:

> [73] There is currently no clear precedent that answers how a court's declaration of Aboriginal title for one Indigenous collective might affect a subsequent lawsuit by a different Indigenous collective claiming Aboriginal title over the same territory. Would the second group be precluded from proving it had exclusive occupation over that area? Would the findings from the first trial bind the Crown as against the second Indigenous collective? Would the second Indigenous collective need to, or be able to, establish that the first Indigenous collective

[101] Gitanyow Hereditary Chiefs' Fifth Further Amended Notice of Civil Claim, November 12, 2024 at paras 44-45, AR, tab 22.

> consented to it sharing title or exercising Aboriginal rights with the territory? Would the first Indigenous collective who succeeds in establishing Aboriginal title or rights have to defend successive litigation brought by other groups claiming Aboriginal title, potentially never achieving any finality?

[56] Section 35 rights, including Aboriginal title, are *sui generis* rights.[102] In *Uashaunnuat*, this Court noted "unique characteristics" of Aboriginal title "that distinguish it from civil law and common law conceptions of property."[103] In particular, "Aboriginal title is inherently collective and exists not only for the benefit of the present generation, but also for that of all future generations."[104] This Court added that "Aboriginal perspectives shape the very concept of Aboriginal title, the content of which may vary from one group to another"[105] and that the "characteristics of Aboriginal title flow from the special relationship between the Crown and the Aboriginal group in question."[106]

[57] Given these unique characteristics of Aboriginal title, this Court concluded in *Uashaunnuat* that for purposes of the *Civil Code of Québec*, "Aboriginal title is properly characterized as neither a personal right nor a real right nor a combination of the two even though it may appear to have characteristics of both real and personal rights."[107]

[58] At the same time, Aboriginal title grants the title-holders the right to exclusive use and occupation of the territory held under Aboriginal title (subject to justifiable Crown infringement) and this Court in *Uashaunnuat* expressly affirmed that the unique characteristics of Aboriginal title co-exist with the characteristics of Aboriginal title flowing from exclusivity:

> Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to

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[102] *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 29 [***Uashaunnuat***].
[103] *Uashaunnuat* at para 30.
[104] *Uashaunnuat* at para 30.
[105] *Uashaunnuat* at para 31.
[106] *Uashaunnuat* at para 32, citing *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 72 [***Tsilhqot'in***].
[107] *Uashaunnuat* at para 34.

> the economic benefits of the land; and the right to pro-actively use and manage the land.[108]

[59] This case presents an opportunity for this Court to clarify that, except in very limited circumstances, a declaration of Aboriginal title is binding on others. The clarification is needed, as made plain by the Court of Appeal's uncertainty in this case: "There is currently no clear precedent that answers how a court's declaration of Aboriginal title for one Indigenous collective might affect a subsequent lawsuit by a different Indigenous collective claiming Aboriginal title over the same territory."[109] In particular, then, this Court should clarify that a declaration of Aboriginal title, except where expressly contemplating the possibility of joint title or in similarly exceptional circumstances, precludes a subsequent declaration of Aboriginal title in favour of a different Indigenous collective over the same territory.

[60] This clarification, together with an approach that presumptively allows for competing Aboriginal claims with respect to the same territory to be dealt with in the same proceeding, will lead to finality with respect to that territory, better promoting proportionality, access to justice, and reconciliation.[110]

[61] The British Columbia Court of Appeal's approach in this case, on the contrary, encourages parallel proceedings with respect to the same territory. In discouraging third party claims, it creates an incentive for Indigenous peoples to be the first to litigate any overlapping claim. If the claims of each overlapping claimant are going to proceed in parallel, every claimant will sensibly be worried that a competing claim might get out of the gates first. This not only risks creating a rush to the court and a multiplicity of parallel proceedings, but also risks short-circuiting negotiation and mediation processes even in cases where those processes are promising.

[62] An approach that presumptively allows for competing Aboriginal claims with respect to the same territory to be dealt with in the same proceeding also better fosters reconciliation.

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[108] *Uashaunnuat* at para 33, citing *Tsilhqot'in* at para 73.
[109] BCCA decision at para 73, AR, tab 4. See also *Thomas and Saik'uz* at para 276.
[110] This approach is in line with the British Columbia Supreme Court's decision in *Thomas and Saik'uz*, where the Court declined to make findings of fact establishing Aboriginal title without hearing from First Nations with overlapping claims.

Declaratory judgments are "catalysts for negotiation and reconciliation between the Crown and the Aboriginal groups".[111] This Court has recently emphasized that a "clear statement setting out the Crown's infringement of an Indigenous party's rights may spur reconciliation efforts between the parties to address the wrongs suffered".[112] If a declaration is made in a context where competing interests are heard in the same proceeding, the Crown can then engage in the reconciliation and negotiation process with the competing interests having been heard together, as opposed to entering negotiations with respect to given territory that might, for instance, be subject to a further declaration of title or rights. Indeed, in *Delgamuukw*, this Court encouraged resolution of rights and title claims through negotiations and stressed the need for First Nations with overlapping claims to be present at those negotiations:

> [186] […] By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". [113]

B. The order of the case management judge granting the Tsetsaut Skii km Lax Ha Nation permission to file a third party notice in the *Malii* litigation should have been afforded deference and should be restored

(1) A case management judge's decision to allow a third party claim should be afforded deference

[63] In this case, the Court of Appeal emphasized the heightened degree of deference owed to the case management judge's decision to add the Tsetsaut Skii km Lax Ha Nation to the proceeding and allow it to file a third party claim:

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[111] *Wolastoqey Nations v New Brunswick and Canada, et al*, 2024 NBKB 203 at para 167; *Ontario (Attorney General) v Restoule*, 2024 SCC 27 at para 282, citing *Shot Both Sides v Canada*, 2024 SCC 12 at para 74.
[112] *Shot Both Sides v Canada*, 2024 SCC 12 at para 74.
[113] *Delgamuukw* at paras 185-186 [emphasis added].

> [50] A discretionary decision of a case management judge in a complex case is entitled to a heightened degree of deference: *Kwikwetlem* at para. 22, citing *West Moberly First Nations v. McLeod Lake Indian Band*, 2014 BCCA 283 [*West Moberly*] at para. 19; *Haida Nation v. British Columbia (Attorney General)*, 2018 BCCA 462 [*Haida*] at paras. 20–21, 23. The rationale for this high level of deference is that the case management judge has an "advantageous perspective" on the litigation and the court's ability "to adjust to evolving circumstances and even to re-visit directions when necessary": *West Moberly* at para. 19; *Haida* at para. 21, citing *Robak Industries Ltd. v. Gardner,* 2006 BCCA 395 at para. 13.
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> [51] More specifically, the decision to add a party to a proceeding or to allow a third party claim is discretionary and entitled to deference on appeal: *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.,* 2023 BCCA 95 at para. 16. This Court may only interfere where it concludes the judge erred by self-misdirection, erred in law or principle, failed to give weight, or sufficient weight, to relevant considerations, or if the result is so plainly wrong on the facts as to result in an injustice: *Madadi v. Nichols,* 2021 BCCA 10 at para. 41.[114]

[64] The Court of Appeal cited to its reasons in *Haida*, which emphasize that the test for reviewing discretionary decisions "is even more stringent when the order in question was made by a case management judge", in light of the experience the case management judge has acquired with the intricacies of the litigation, particularly in complex cases, and his ability to adjust to evolving circumstances.[115] In *Director Civil Forfeiture*, relied on in Haida, the Court of Appeal dismissed an appeal from a bifurcation order, commenting that "it is for the judge to consider and assess the issue of efficiency, both as to judicial economy and as to the parties' time and effort that will be expended and potentially will be saved by the proposed manner of proceeding".[116]In *G.W.L. Properties Ltd.*, also relied on in *Haida*, the Court of Appeal emphasized that the case management judge had over a year of experience in that position and would be able to apply that experience to the changing circumstances of the case in giving case management orders and directions.[117]

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[114] BCCA at paras 50-51, AR, tab 4.
[115] *Haida Nation v British Columbia (Attorney General)*, 2018 BCCA 462 at para 21 [***Haida***], citing *Robak Industries Ltd v Gardner*, 2006 BCCA 395 at paras 11-13.
[116] *Director of Civil Forfeiture v Lloydsmith*, 2014 BCCA 72 at para 25, cited in *Haida* at para 22.
[117] *GWL Properties Ltd v WR Grace & Co of Canada Ltd*, 1992 CanLII 1451 (BC CA) at paras 9-10, cited in *Haida* at para 21.

[65] Ultimately, however, in this case, the Court of Appeal applied a criterion of failing to "give weight, or sufficient weight, to relevant considerations".[118] In practice, the Court of Appeal simply reweighed the factors considered by the case management judge, concluding that the importance of limiting duplication and inconsistent findings militated against allowing the Tsetsaut Skii km Lax Ha Nation to file a third party claim, rather than in favour of it.[119]

[66] Reference to the failure to give sufficient weight to relevant considerations as part of the test for appellate intervention in discretionary decisions traces back to this Court's decision in *Friend of the Oldman River Society*, which cited the following statement of *Viscount Simon L.C.* in *Charles Osenton & Co. v. Johnston*, [1942] A.C. 130:

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.[120]

[67] The British Columbia Court of Appeal does not systematically include the criterion of failing to give weight, or sufficient weight, to relevant considerations as part of the test for appellate intervention in the decision to add a new party. Often, the Court formulates the test as follows: "This Court will only interfere with a decision to add a new party if the judge misdirected herself, or erred in law or principle, or if the result is so plainly wrong on the facts as to work an injustice".[121]

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[118] BCCA at para 51, AR, tab 4.
[119] BCCA at para 102, AR, tab 4.
[120] *Friend of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 76 [emphasis added].
[121] *The Owners, Strata Plan KAS 3410 v Meritage Lofts Inc*, 2022 BCCA 109 at para 21. See also *Byrd v Cariboo (Regional District)*, 2016 BCCA 69 at para 33; *Lower v Stasiuk*, 2013 BCCA 389 at para 42; *The Owners, Strata Plan No VIS3578 v John A Neilson Architects Inc*, 2010 BCCA 329 at para 41; *NRI Solutions Ltd v Chohan*, 2024 BCCA 146 at para 24. Contrast with: *Madadi v*

[68] The Nova Scotia Court of Appeal has observed:

> [35] Not much ink has been spilled attempting to explain how these concepts come to be applied whenever a trial judge's well recognized discretion to weigh the evidence ("accept some, none, or all") and decide the facts, is challenged on the basis of the very weight assigned to that evidence by the judge who heard the case. In the face of settled law which has consistently held that "provided the discretion is exercised within acceptable limits, and not arbitrarily, this court will not interfere" (see for example, *Sharpe v. Wakefield et al.*, [1891] A.C. 173; *MacIsaac v. MacIsaac*, 1996 NSCA 128 (CanLII), [1996] N.S.J. No. 185 (C.A.) at ¶ 18) a reasonably informed observer could not be criticized for asking – what is left of a trial judge's discretion if it can be disturbed so easily on appeal?
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> […]
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> [51] […] The decision maker will decide the weight or importance to be assigned to those interests. It is not for us to second guess that discretion-driven adjudicative function or interfere with that process simply because we might have assigned a different level of importance had we heard the motion in first instance. To do so would reduce the notion of deference to hollow, meaningless rhetoric.[122]

[69] The Federal Court of Appeal has emphasized that, since this Court's articulation of appellate standards of review in *Housen*,[123] the language of "sufficient weight" from *Friend of the Oldman River Society* has fallen out of favour:

> [23] With one exception, the Supreme Court has applied the *Housen* standard of review in all civil cases before it. In the one exception, the Supreme Court suggested in a single isolated sentence that, among other things, an appellate court could interfere where the lower court "gives no or insufficient weight to relevant considerations": *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at paragraph 27. However, less than a year later, the Supreme Court dropped "no or insufficient weight to relevant considerations" as a ground to interfere. It reaffirmed that discretionary decisions should be disturbed only if the court "misdirected [it]self" or "came to a decision that is so clearly wrong that it resulted in an injustice": *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at paragraph 83. Misdirection means instructing oneself improperly on the law, in other words an error of law. And a decision that is so clearly wrong that it resulted in an injustice is another way of saying that there has been an obvious error that affects the outcome of the case—in other

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Nichols, 2021 BCCA 10 at para 41; *Smithe Residences Ltd v 4 Corners Properties Ltd*, 2020 BCCA 227 at para 54.

[122] *Aliant Inc v Ellph.com Solutions Inc*, 2012 NSCA 89 at paras 35, 51.

[123] *Housen v Nikolaisen*, 2002 SCC 33.

> words, palpable and overriding error. *Hryniak* expresses the *Housen* standard. Today, the *Housen* standard remains the basis upon which appellate courts can interfere with discretionary decisions.[124]

[70] The Federal Court of Appeal opined that the challenge with allowing a court of appeal to interfere where the first judge has given "insufficient weight to relevant factors" is that it appears to be an invitation for the Court of Appeal to reweigh the evidence and substitute its own opinion for it.[125]

[71] In *Hospira*, the Federal Court of Appeal, sitting as a panel of five judges, explicitly overruled its previous jurisprudence in departing from the standard of "sufficient weight"; it concluded that the *Housen* standards applied to the review of all discretionary decisions.[126] *Hospira* has been consistently reaffirmed by the Federal Court of Appeal.[127]

[72] Reviewing discretionary decisions through the lens of the *Housen* standards of review not only presents advantages of consistency and predictability, but also avoids situations, such as in the instant case, where the notion of deference is made hollow by Courts of Appeal reweighing the factors that the case management judge considered.

[73] Reference to what appears to now be an outdated formulation from *Friend of the Oldman River Society* – such as in the instant case – should not serve to increase appellate intervention in the very decisions requiring the most deference, i.e. discretionary case management decisions, in particular in complex contexts engaging competing Aboriginal title claims.

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[124] *Decor Grates Incorporated v Imperial Manufacturing Group Inc*, 2015 FCA 100 at para 23 [***Imperial Manufacturing***].
[125] *Imperial Manufacturing* at para 26.
[126] *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 69-72, leave to appeal to SCC refused, 39099 (23 December 2020), underscoring the tension with this Court's formulation of the test in *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 at para 95.
[127] See e.g. *McMillan v Canada*, 2024 FCA 199 at para 57.

[74] This Court has recently emphasized, in the context of litigation concerning Aboriginal title, its support for the use of case management to ensure the efficient use of court resources, including for the purpose of avoiding a potential inconsistency in decisions.[128]

[75] Developments in the instant case illustrate why the case management judge, who had more than two years of experience as case management judge in this case and held a four-day hearing on the appropriate approach to litigating these competing Aboriginal claims, should have been afforded proper deference in his order pertaining to the third party notice.

[76] First, the Court of Appeal was concerned with the risk of duplication and contradictory judgments tied to the Tsetsaut Skii km Lax Ha Nation being authorized to file a third party claim in the Gitanyow's proceeding in addition to having its own standalone claim for Aboriginal title for a larger area, encompassing the disputed territory. The Court of Appeal emphasized that the allegations found both in the Tsetsaut Skii km Lax Ha Nation standalone action and in the third party claim would be "strongly contested" by the Gitanyow.[129] Yet, counsel for the Tsetsaut Skii km Lax Ha Nation made clear that, to the extent the Tsetsaut Skii km Lax Ha Nation is permitted to file a third party claim in the Gitanyow's proceeding pertaining to the disputed territory, it would amend its standalone claim to exclude claims pertaining to the overlapping territory.[130] In other words, the Gitanyow would not be defendants in any standalone claim brought by the Tsetsaut Skii km Lax Ha Nation. Claims to the disputed territory as between the Gitanyow and the Tsetsaut Skii km Lax Ha Nation would be resolved definitively in one proceeding (and only the Tsetsaut Skii km Lax Ha Nation's claims outside of the disputed territory would proceed by separate action). In contrast, the Court of Appeal's approach, i.e. deciding competing claims of Aboriginal collectives in isolation from one another, means that the same parties would be litigating multiple actions for Aboriginal title and rights claims with respect to the same territory.

[77] Second, the Court of Appeal was of the view that setting aside the Tsetsaut Skii km Lax Ha Nation's third party claim would limit the complexity of the case and would avoid duplication

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[128] *Saskatchewan (Environment) v Métis Nation - Saskatchewan*, 2025 SCC 4 at para 60.
[129] BCCA at para 106, AR, tab 4.
[130] Tsetsaut Skii km Lax Ha Nation's Joinder Application Written Submissions, April 19, 2024 at para 263, AR, tab 20; Transcript of proceedings before the BCCA, October 30, 2024 at 91, AR, tab 60.

with the Tsetsaut Skii km Lax Ha Nation's standalone action; in particular, the Court of Appeal emphasized that many issues related to Tsetsaut Skii km Lax Ha Nation successorship would not have to be decided in the Gitanyow proceeding.[131] In reality, however, issues of Tsetsaut Skii km Lax Ha Nation successorship and the independence of the Tsetsaut Skii km Lax Ha Nation from the other Gitxsan plaintiffs in *Delgamuukw* had been squarely raised by the Gitanyow Hereditary Chiefs in their pleadings as early as 2016 – before the Tsetsaut Skii km Lax Ha Nation was even a party to the case.[132] The Gitanyow Hereditary Chiefs' 2024 reply to the Tsetsaut Skii km Lax Ha Nation's response confirmed the breadth of the issues related to Tsetsaut Skii km Lax Ha Nation successorship and independence that would require findings in the context of the present proceeding.[133]

[78] Third, the case management judge was familiar with how ready parties were for trial and how to appreciate any delay in adjudicating the third party claim in this context; in fact, the case management judge had already received an adjournment application from the Province before hearing the joinder application.[134] As noted above, on the Province's adjournment application, the case management judge ultimately concluded that he was "satisfied this action will not be satisfactorily ready to commence trial on October 1, 2024,"[135] noting important outstanding pre-trial steps, including examinations for discovery, which had not even commenced.[136] The Court noted that the additional time would permit the Court to engage in case management and potentially set due dates and timelines for the remaining pre-trial steps.[137]

[79] On the joinder application, the case management judge was similarly familiar with how advanced discussions were with respect to staging (at the time of the hearing of the joinder

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[131] BCCA at para 112, AR, tab 4.
[132] Plaintiffs' Reply to the Province's Response to Amended Notice of Civil Claim, December 20, 2016 at para 18, AR, tab 9.
[133] Gitanyow Hereditary Chiefs' Reply to Tsetsaut Skii km Lax Ha Nation's Response to Fourth Further Amended Notice of Civil Claim, October 7, 2024 at paras 9, 10, 13-15, AR, tab 13.
[134] *First Adjournment Decision* at paras 12, 13, 17.
[135] *First Adjournment Decision* at para 13.
[136] *First Adjournment Decision* at para 12.
[137] *First Adjournment Decision* at para 17.

application, including the third party notice, there was no finalized agreement on staging),[138]and with respect to the status of expert evidence (notably, that the Gitanyow Hereditary Chiefs had only just served six of their nine expert reports in April and May 2024, and there was an agreement in principle with respect to deposing only one expert witness, for which there remained significant outstanding issues),[139] facts that the Court of Appeal was not familiar with and ultimately got wrong.[140]

[80] Without finding any overriding and palpable error of fact or any legal error of the case management judge, the Court of Appeal also framed the case as one in which the Tsetsaut Skii km Lax Ha Nation "seeks to join the action belatedly",[141] a characterization that amounts to nothing more than a reweighing of the factors that were before the case management judge. At the hearing on the joinder application, the case management judge was clearly alive to detailed arguments about delay, asking counsel for the Gitanyow Hereditary Chiefs, for instance, whether any further delay from the third party notice would be solely within the control of the Tsetsaut Skii km Lax Ha Nation, or would also require further trial preparation by other parties.[142]

[81] The case management judge's familiarity with the full context of the case allowed him to determine which approach would actually serve to limit duplication and complexity in the context

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[138] Gitanyow Hereditary Chiefs' Notice of Application (staging), May 3, 2024, AR, tab 30; Province's Application Response (staging), May 14, 2024, AR, tab 31; Transcripts of proceedings, June 11, 2024 at 103-104, 109-110, AR, tab 57.

[139] The Gitanyow Hereditary Chiefs had not responded to the Province's request for production of that expert's file (Dr. Galois), which became a barrier to the Province agreeing to the timing for deposing the expert and ultimately required an order from the case management judge: Province's Notice of Application (adjournment), May 28, 2025 at paras 13-16, AR, tab 32; Province's Application Response (to the Gitanyow Hereditary Chiefs' Application to depose Dr. Galois), October 30, 2024, AR, tab 34; Order dated November 1, 2024, AR, tab 41; *First Adjournment Decision* at paras 5-8.

[140] BCCA at para 17, AR, tab 4; Transcript of proceedings before the BCCA, October 30, 2024 at 28-29, 51-56, AR, tab 60.

[141] BCCA at para 1, AR, tab 4.

[142] See also Transcript of Proceedings, June 13, 2024 at 51-52, AR, tab 59.

of competing Aboriginal claims – an "advantageous perspective" the Court of Appeal did not have.[143]

[82] Given the inherent complexity of Aboriginal rights and titled cases, case management judges can also develop a range of strategies to promote efficiency, such as by issuing staging orders.[144] In this case, for instance, the *Malii* litigation is meant to proceed in stages with the first stage dealing with Aboriginal title only.[145] In the *Haida* litigation, the case management judge issued a severance order to try 'Representative Interests' first, concluding that severance would save considerable time and expense and facilitate settlement discussions.[146] In dismissing the Haida Nation's appeal of the specificities of the staging order, the Court of Appeal emphasized the high degree of deference owed to a case management judge in determining how a trial should proceed.[147]

(2) The case management judge's order should be restored

[83] In this case, there is no indication the case management judge forgot, ignored, or misconceived relevant factors or evidence. To the contrary, he refers to the relevant factors, concluding: the claim was neither frivolous nor bound to fail;[148] the claims advanced and relief sought in the third party notice are substantially connected to the questions raised and relief sought in the underlying action;[149] and not permitting the third party claim would result in a multiplicity of proceedings.[150] He also recognized that the Tsetsaut Skii km Lax Ha Nation's joinder would add complexity, and underscored the passage of time, which he said militated

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[143] BCCA at para 50, AR, tab 4.
[144] See also *R v Samaniego*, 2022 SCC 9 at paras 19-26 on trial management powers more broadly.
[145] BCCA at para 26, AR, tab 4; Gitanyow Hereditary Chiefs' Notice of Application regarding phasing, May 3, 2024, AR, tab 30; Order staging the trial of the action dated April 1, 2025, AR, tab 26.
[146] *The Council of the Haida Nation v British Columbia*, 2018 BCSC 277 at paras 30, 32, 49.
[147] *Haida* at paras 51-52.
[148] BCSC at para 84, AR, tab 2.
[149] BCSC at para 84, AR, tab 2.
[150] BCSC at para 85, AR, tab 2.

against joinder.[151] He weighed these factors and found greater injustice and inconvenience would arise from denying the third party notice and having the matter proceed in a separate action.[152]

[84] The Court of Appeal reweighed the factors considered by the case management judge and concluded: "while the judge was correct in wishing to limit duplication and inconsistent findings by judges in multiple actions, he overlooked the problem that allowing the [Tsetsaut Skii km Lax Ha Nation] to bring a third party claim does not avoid that risk and potentially increases it".[153] There is no indication that the case management judge "overlooked" the fact that allowing the Tsetsaut Skii km Lax Ha Nation to file a third party claim would increase the complexity of the Gitanyow proceeding; in fact, the Court of Appeal itself indicates that this issue was an "obvious" one.[154]

[85] As this Court has held, without the "reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion", an appellate court "cannot reconsider the evidence".[155]

[86] The Tsetsaut Skii km Lax Ha Nation respectfully asks this Court to restore the order of the case management judge,[156] thereby allowing this litigation pertaining to overlapping claims to efficiently proceed.

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[151] BCSC at paras 77, 79, AR, tab 2. See also Transcript of Proceedings, June 13, 2024 at 51-52, AR, tab 59, where it is clear the judge appreciated the Province's submissions that the third party claim could result in delay because the Crown defendants would require time to prepare their defences, and was not simply a question of whether the Tsetsaut Skii km Lax Ha Nation was "ready to go".

[152] BCSC at paras 86-87, AR, tab 2.
[153] BCCA at para 102, AR, tab 4.
[154] BCCA at para 101, AR, tab 4.
[155] *Van de Perre v Edwards*, 2001 SCC 60 at para 15.
[156] For examples of this Court restoring the order of a first judge, see: *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para 20; *Hansman v Neufeld*, 2023 SCC 14 at para 122; *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 4.

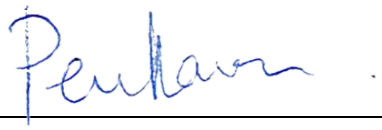
PART IV – SUBMISSION ON COSTS

[87] The Tsetsaut Skii km Lax Ha Nation seeks costs before all levels of court.

PART V – ORDERS SOUGHT

[88] The Tsetsaut Skii km Lax Ha Nation asks this Court to allow the appeal and restore the order of the case management judge granting the Tsetsaut Skii km Lax Ha Nation permission to file a third party notice in the *Malii* litigation, with costs before all levels of court.

Dated this 18th day of July, 2025.



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PART VI – SEALING ORDER

N/A

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