From: Karl Gustafson <email address removed>
Sent: July 31, 2013 11:33 PM
To: Michaud,Livain [CEAA]
Subject: Filings on Behalf of Taseko

Hi Livain;

During Taseko's closing comments following the completion of the Topic-Specific session on Aquatic Environment, I said that I would file a copy of the Appellant's Factum in the appeal of the William decision to the Supreme Court of Canada. I also said that I would file a summary of cases supporting the proposition that the Panel could proceed to approve the project despite uncertainties that might exist at this early stage. I am not sure whether these were recorded as undertakings. In any case, I attach those materials for filing.

Regards,

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File No. 34986

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

BETWEEN:

ROGER WILLIAM, on his own behalf and on behalf of all other members of the XENI GWET'IN FIRST NATIONS GOVERNMENT and on behalf of all other members of the TSILHQOT'IN NATION

APPELLANT

AND:

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA, THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION and THE ATTORNEY GENERAL OF CANADA

RESPONDENTS

AND:

THE ATTORNEY GENERAL OF SASKATCHEWAN,
THE ATTORNEY GENERAL OF ALBERTA,
THE ATTORNEY GENERAL OF QUEBEC,
and THE ATTORNEY GENERAL OF MANITOBA

INTERVENERS

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PART I – STATEMENT OF FACTS

A. Overview

1. At heart, this appeal calls for the long overdue recognition of the Aboriginal title of the Tsilhqot'in people arising from the "historic occupation and possession of their tribal lands".[1] The Tsilhqot'in people exclusively controlled the lands at issue in this appeal before 1846 and long after, and they fiercely defended their land from incursion by other First Nations and from unauthorized entry by settlers and traders.

2. This Court has held that Aboriginal title exists. At sovereignty, Aboriginal title arose not only from exclusive Aboriginal occupation of village sites and enclosed fields, but also from "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources".[2] The Court has directed that this assessment of Aboriginal occupancy must take into account both the common law and the Aboriginal perspective (including their "systems of law") and "[t]rue reconciliation will, equally, place weight on each".[3]

3. The Trial Judge's decision exemplifies this approach. He carefully delineated Aboriginal title to Tsilhqot'in village sites, to slopes and valleys that the Tsilhqot'in actively cultivated for berries and root plants, and to surrounding hunting, trapping and fishing grounds that the Tsilhqot'in exclusively controlled and returned to, season after season, pursuant to a "highly organized schedule"[4] of land use.

4. By contrast, the B.C. Court of Appeal reframed the test for Aboriginal title to require, in all cases, "intensive presence at a particular site".[5] On this view, Aboriginal title is strictly confined, as a matter of law, to such exceedingly narrow sites as "salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon …"[6]

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[1] *Guerin v Her Majesty the Queen,* [1984] 2 SCR 335 at 376 ["***Guerin***"].
[2] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, para. 149 (underscore added) ["***Delgamuukw***"].
[3] *Delgamuukw*, paras. 147-49 (underscore added).
[4] Exhibit 0224, Dinwoodie Report, at 41 (Appeal Record ["**AR**"] vol. VIII, Tab 45 at 93).
[5] *William v British Columbia*, 2012 BCCA 285 ["**Appeal Decision**"], para. 220 (underscore added) (AR vol. III, Tab 9 at 166).
[6] Appeal Decision, para. 221 (AR vol. III, Tab 9 at 166).

5. The Court of Appeal's test is more inflexible, extreme and restrictive than anything seen at common law, which has never restricted proof of possession to "intensive" use or "particular sites". At the same time, by imposing this rigid standard in every case, it accords no weight (let alone equal weight) to Aboriginal perspectives on occupation or the manner in which the society used the land to live. It has removed the "Aboriginal" from Aboriginal occupation.

6. This is the very definition of the "European template" that this Court warned against in *Marshall; Bernard*. It only serves to perpetuate the historic injustices experienced by Aboriginal peoples at the hands of colonizing powers that regarded Aboriginal cultures as inferior and denied the legitimacy of their laws, their systems of land use, and their claims to the land. This cannot be the way forward.

7. It has been said that a constitution is a mirror held to the soul of a nation.[7] It reflects what we as a nation truly value, what defines us, and what we are not willing to sacrifice. By entrenching certain values as our highest aspirations as a nation, we commit to honour those values – our highest and best selves – rather than succumb to the pressures of expedience and convenience that can sway decisions in the moment.

8. With respect, the Court of Appeal's ruling is one of expedience and convenience. It abandons the very principles that s. 35 is founded on. To reduce the Aboriginal title held by First Nations, by virtue of their original possession of their ancestral lands, to rights of exclusive possession over individual salt licks and particularly effective fishing rocks makes a mockery of Aboriginal title and frustrates the promise of "[t]rue reconciliation" embedded in this doctrine.

9. Reconciliation cannot be founded on denial. It requires recognition. Recognition of Aboriginal title, based equally on Aboriginal and common law perspectives, is the starting point for just and lasting reconciliation. The Appellant submits that after more than 20 years of litigation, and with the benefit of the substantial record below and the clear factual findings of the Trial Judge, the present appeal calls for the long overdue recognition of Tsilhqot'in Aboriginal title, so that the real work of reconciliation can finally begin.

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[7] R Cheffins & R Tucker, *The Constitutional Process in Canada* (Toronto: McGraw-Hill, 1976) at 4.

B. The Facts as Found by the Trial Judge

10. After 339 days of trial, with the benefit of a "very complete record", the late Mr. Justice Vickers (the "**Trial Judge**") delivered a comprehensive trial decision, reflecting "his thorough understanding and careful analysis of the evidence".[8] It is a remarkable tribute to the Trial Judge's achievement that "the parties do not take issue with any significant findings of fact made by the trial judge".[9]

11. The following statement of facts is based entirely on the findings of the Trial Judge.

C. The Xeni Gwet'in and the Tsilhqot'in Nation

12. The Tsilhqot'in people are a distinct Aboriginal group with a homeland in the Chilcotin region of the central interior of British Columbia.[10] Reverence for the land that supports and nourishes them continues to the present generation of Tsilhqot'in.[11]

13. The Tsilhqot'in have continuously occupied the Claim Area for centuries.[12] Indeed, the "Chilcotin region" of British Columbia is named for the Tsilhqot'in people who occupied these lands when Europeans first arrived.[13]

14. Traditionally, the Tsilhqot'in organized themselves into various subdivisions (*e.g.* families, encampments, bands), but they were and remain unified as a Tsilhqot'in people by "the common threads of language, customs, traditions and a shared history".[14]

15. Today, the Tsilhqot'in Nation is comprised of six Tsilhqot'in "bands" under the *Indian Act*,[15] initially established as a "convenience" for the provincial and federal governments.[16]

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[8] Appeal Decision, paras. 24, 26, 29 (AR vol. III, Tab 9 at 106-107).
[9] Appeal Decision, para. 29 (AR vol. III, Tab 9 at 107).
[10] *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 ["**Trial Decision**"], Executive Summary, paras. 29, 437-72 (AR vol. I, Tab 3 at 8-9, 26, 156-167); Appeal Decision, para. 1 (AR vol. III, Tab 9 at 101); Exhibit 0224, Dinwoodie Report, at 1-13, 19-21 (AR vol. VIII, Tab 45 at 53-65, 71-73).
[11] Trial Decision, para. 436 (AR vol. I, Tab 3 at 155). See also para. 418 (AR vol. I, Tab 3 at 150).
[12] Trial Decision, paras. 218, 651, 945, 1268 (AR vol. I, Tab 3 at 85; vol. II, Tab 4 at 32, 121; vol. III, Tab 5 at 33); Exhibit 0145, Matson Report, at 5 (AR vol. VI, Tab 39 at 16).
[13] Trial Decision, paras. 29-30, 673 (AR vol. I, Tab 3 at 36; vol. II, Tab 4 at 39).
[14] Trial Decision, para. 457 (AR vol. I, Tab 3 at 162); see also: 356-63 (AR vol. I, Tab 3 at 131-133).

However, individuals continue to identify as Tsilhqot'in people first, rather than as band members. There are approximately 3,000 Tsilhqot'in people at present. The number of proficient Tsilhqot'in speakers in communities such as Xeni Gwet'in remains "very high".[17]

16. Xeni Gwet'in is the most remote of the six Tsilhqot'in bands and is clearly situated on historical Tsilhqot'in territory. The Xeni Gwet'in are viewed amongst Tsilhqot'in people as caretakers of the lands in and around the Claim Area, including Xeni (the Nemiah Valley) and Tachelach'ed. Xeni Gwet'in people are "charged with the sacred duty to protect the nen (land) of Tachelach'ed and the surrounding nen on behalf of all Tsilhqot'in people".[18]

17. The community of Xeni Gwet'in is remote even today. It was not until the 1970s that the Xeni Gwet'in region was connected by road to the outside world. The first telephone system in the Nemiah Valley was installed in 2000. Electricity from the public grid still has not arrived in Nemiah Valley and the entire community relies upon generators for power.[19]

D. The Claim Area

18. The Claim Area consists of two regions of Tsilhqot'in traditional territory, known as Tachelach'ed (or the "Brittany Triangle") and the Trapline Territory (collectively, the "**Claim Area**"). These two areas are delineated on Map 2, included in Appendix A to the Trial Decision. Map 3 locates Tsilhqot'in sites inside and outside the Claim Area.[20]

19. The Claim Area is situated in the <u>core</u> of traditional Tsilhqot'in territory. It represents a small but critical portion of the much broader territory traditionally used and occupied by the Tsilhqot'in Nation (the Claim Area is roughly 5% of the total traditional territory asserted by the

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[15] Trial Decision, para. 30 (AR vol. I, Tab 3 at 26). In addition, some members of the Ulkatcho First Nation are Tsilhqot'in, though the majority are Dakelh (Carrier): Appeal Decision, para. 3 (AR vol. III, Tab 9 at 101).
[16] Trial Decision, para. 469 (AR vol. I, Tab 3 at 165).
[17] Trial Decision, para. 340 (AR vol. I, Tab 3 at 127); see also paras. 31, 459 (AR vol. I, Tab 3 at 26, 163).
[18] Trial Decision, para. 24 (AR vol. I, Tab 3 at 25); see also paras: 31, 468 (AR vol. I, Tab 3 at 26, 165).
[19] Trial Decision, para. 339 (AR vol. I, Tab 3 at 127); Exhibit 0501.006, Ts'il?os Park photograph (AR vol. VI, Tab 37); Transcript (Chief William), v. 14, pp. 2350:15-27; 2358:12-35 (AR, vol. V, Tab 23).
[20] Trial Decision, para. 46 (AR vol. I, Tab 3 at 30), Appendix A; Maps 2 and 3 (AR vol. XIII, Tabs 58, 59).

Tsilhqot'in Nation). Both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory.[21]

20. The Claim Area is remote and consists mainly of undeveloped land.[22]

21. Tsilhqot'in place names blanket the landscape. Tsilhqot'in place names in and about the Claim Area include prominent mountain peaks, prime resource areas, archaeological sites, sites that relate to specific oral traditions and other significant sites for Tsilhqot'in people. They demonstrate that "Tsilhqot'in people have been in the area for a very lengthy period of time".[23]

22. Private lands and submerged lands in the Claim Area are not at issue in this proceeding.[24] The Claim Area excludes Indian Reserves.[25]

E. Continuous Tsilhqot'in Presence Throughout the Claim Area for Centuries

23. There is no question that Tsilhqot'in people have used and occupied the Claim Area in its entirety from a time before contact with Europeans continuously to the present day:

> In addition, the evidence leads to but one conclusion, namely that <u>Tsilhqot'in people have continuously hunted, trapped and traded throughout the Claim Area</u> and beyond from pre-contact times to the present day.[26]
>
> …
>
> <u>I am satisfied Tsilhqot'in people have continuously occupied the Claim Area before and after sovereignty assertion</u>. There has been a "substantial maintenance of the connection" between the people and the land" throughout this entire period …[27]

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[21] Trial Decision, paras. 621-23 (AR vol. II, Tab 4 at 20-21).
[22] Trial Decision, paras. 31, 330 (AR vol. I, Tab 3 at 26, 122); Appeal Decision, para. 9 (AR vol. III, Tab 9 at 102).
[23] Trial Decision, para. 674 (AR vol. II, Tab 4 at 40); see also paras. 672-73 (AR vol. II, Tab 4 at 39).
[24] The Trial Judge held that he was unable to make a declaration of Aboriginal title in relation to private or submerged lands, on the grounds that no infringements to such lands had been pleaded: Trial Decision, paras. 991-93, 1000, 1051-52 (AR vol. II, Tab 4 at 138-139, 141, 159). The Appellant does not take issue with that ruling.
[25] Trial Decision, paras. 44-45 (AR vol. I, Tab 3 at 30).
[26] Trial Decision, para. 1268 (AR vol. III, Tab 5 at 33) (underscore added).
[27] Trial Decision, para. 945 (AR vol. II, Tab 4 at 121) (underscore added). See also paras. 651, 792 (AR vol. II, Tab 4 at 32, 77).

F. Tsilhqot'in Patterns of Occupation: Settlements, Cultivation and Seasonal Rounds

24. At contact and sovereignty, the Tsilhqot'in used a well-defined network of foot trails, horse trails and water courses to access hunting, fishing and gathering grounds, pursuant to a "clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area".[28]

25. The "harsh environment"[29] of the Chilcotin plateau demanded territorial mobility for survival.[30] Although he described the Tsilhqot'in way of life as "semi-nomadic", the Trial Judge cautioned that this should not be interpreted as "haphazard":

> While the term 'nomadism' generally implies a high degree of territorial mobility and little or no reliance on 'cultivation' in the Lockean sense, it does not mean 'haphazard' or 'unorganized'. Rather, nomadism is properly conceived as a 'way of living' in which individuals or groups are occasionally compelled to alter movements on short notice when conditions demand it, but beyond that inhabit recognizable spaces, know where they can and or cannot go, and whose daily or seasonal patterns of land use tend to follow the same cyclical trajectories over time. Put alternately, nomadism is a form of territoriality …[31]

26. Tsilhqot'in people tended to follow the same seasonal patterns each year.[32] The Trial Judge described them as "semi"-nomadic in the sense that there was a collective regrouping in winter village sites for a portion of each year as a respite from the dark and cold.[33] In the spring, Tsilhqot'in people would disperse again along well-defined trail networks and water courses to harvest resources throughout the Claim Area and beyond.[34]

27. Lhiz qwen yex (pit houses or kigli holes) and niyah qungh (rectangular lodges) were used for shelter back to the time of the ?Esggidam (Tsilhqot'in ancestors before contact). Tsilhqot'in people living today observed the fresh construction of such structures and lived in these

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[28] Trial Decision, para. 948 (AR vol. II, Tab 4 at 122). See also: paras. 380 (AR vol. I, Tab 3 at 140), 679-80, 733, 798, 848, 874, 897, 959-60 (AR vol. II, Tab 4 at 41-42, 60, 79, 93, 100, 107, 125-127).
[29] Trial Decision, para. 436 (AR vol. I, Tab 3 at 155); see also para. 364 (AR vol. I, Tab 3 at 134).
[30] Trial Decision, para. 647 (AR vol. II, Tab 4 at 30).
[31] Trial Decision, para. 646 (AR vol. II, Tab 4 at 29), quoting with approval from Exhibit 0240, Brealey Report (underscore added).
[32] Trial Decision, para. 647 (AR vol. II, Tab 4 at 30).
[33] Trial Decision, para. 647 (AR vol. II, Tab 4 at 30).
[34] Trial Decision, paras. 380 (AR vol. I, Tab 3 at 140), 679-80, 733, 798, 848, 874, 897, 959-60 (AR vol. II, Tab 4 at 41-42, 60, 79, 93, 100, 107, 125-127).

dwellings.[35] The historical record documents Tsilhqot'in communities centred in winter villages of lhiz qwen yex in and around the Claim Area before, at and after 1846.[36]

28. The Trial Judge summarized this traditional pattern of Tsilhqot'in use and occupation of the Claim Area as follows:

> At the time of sovereignty assertion, Tsilhqot'in people living in the Claim Area were semi-nomadic. They moved up and down the main salmon bearing river, the Tsilhqox (Chilko River), in season. They fished the smaller lakes to the east and west of the Tsilhqox, particularly in the spring season. They gathered berries, medicines and root plants in the valleys and on the slopes of the surrounding mountains. They hunted and trapped across the Claim Area, taking what nature had to offer. Then, for the most part, they returned on a regular basis to winter at Xeni (Nemiah Valley), on the eastern shore of Tsilhqox Biny (Chilko Lake), on the high ground above the banks of the Tsilhqox, and on the shores of adjacent streams and lakes, from Naghatalhchoz Biny (Big Eagle Lake) and eastward into Tachelach'ed.
>
> In Tachelach'ed, the area of more permanent use and occupation was from the Tsilhqox corridor east to Natasewed Biny (Brittany Lake) and from there, south to Ts'uni?ad Biny (Tsuniah Lake) and east past Tsanlgen Biny (Chaunigan Lake) and over to the twin lakes, ?Elhghatish Biny (Vedan Lake) and Nabi Tsi Biny (Elkin Lake).
>
> The areas that provided a greater degree of permanency and regular use are the sites where abandoned lhiz qwen yex and niyah qungh are found. The majority of these dwelling sites are not on the reserves set aside for Xeni Gwet'in people ...
>
> In early spring, Tsilhqot'in people would disperse again across the area that is, in part, defined in these proceedings as the Claim Area.[37]

Notably, the Trial Judge's description of the areas where Tsilhqot'in "returned on a regular basis" and the areas "of more permanent use and occupation" correspond to the Proven Title Area, as later delineated in his judgment.

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[35] Trial Decision, para. 365 (AR vol. I, Tab 3 at 134); see also paras. 366-78 (AR vol. I, Tab 3 at 135-139).
[36] *E.g.* Trial Decision, paras. 633, 708, 712, 714-16, 719-23, 727, 761-62, 783, 820, 861-63 (AR vol. II, Tab 4 at 24, 51, 53-58, 69, 74, 86, 96-97).
[37] Trial Decision, paras. 953-56 (AR vol. II, Tab 4 at 123-124); see also paras. 380-397 (AR vol. I, Tab 3 at 140-145).

29. Tsilhqot'in elders "vividly described" this seasonal round.[38] Elders traced the seasonal rounds and the activities undertaken on those rounds back to the ?Esggidam (Tsilhqot'in ancestors) in yedanx (the time before contact) and sadanx (legendary period of time long ago).[39] Tsilhqot'in people have maintained these historical patterns of seasonal resource gathering in the Claim Area over time.[40]

G. The Legendary Landscape of the Claim Area

30. The landscape of the Claim Area resonates for Tsilhqot'in people with deep meaning: it is the physical expression of the legends that describe their origins, their laws, and their identity as Tsilhqot'in people.[41] Some of the Claim Area's most distinctive features, such as the towering Ts'il?os (Mount Tatlow), are revered today as living persons with powerful personalities that must be respected.[42]

31. From a time long before 1846, central Tsilhqot'in legends have specifically referenced prominent landmarks **in and around the Proven Title Area**, as delineated by the Trial Judge.

32. For example, the slopes of Ts'il?os (Mount Tatlow) form the southern boundary of the Proven Title Area. His wife, ?Eniyud (Niut Mountain), presides over Talhiqox Biny (Tatlayoko Lake), on the western boundary of the Proven Title Area.[43] According to oral tradition, ?Eniyud sculpted the land to create Xeni (Nemiah Valley) and Ts'uni?ad (Tsuniah Valley); she then travelled to Naghatalhchoz Biny (Big Eagle Lake) to seed Tsimol Ch'ed (Potato Mountain) with the root vegetables that sustained Tsilhqot'in populations for generations[44] – each of these locations falls squarely within the Proven Title Area.

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[38] Trial Decision, para. 381 (AR vol. I, Tab 3 at 141).
[39] Trial Decision, para. 355 (AR vol. I, Tab 3 at 130).
[40] Trial Decision, paras. 612-13, 949 (AR vol. II, Tab 4 at 17, 122), 1268 (AR vol. III, Tab 5 at 33).
[41] Trial Decision, paras. 105, 131, 146, 169, 363, 433-34 (AR vol. I, Tab 3 at 45, 54, 61, 70, 133, 154-155), 653-671, 866-67, 872 (AR vol. II, Tab 4 at 32-38, 98, 99).
[42] Trial Decision, paras. 659-662, 669 (AR vol. II, Tab 4 at 34-35, 38).
[43] Trial Decision, paras. 174 (AR vol. I, Tab 3 at 72), 659-662, 665, 959 (AR vol. II, Tab 4 at 34-35, 37, 125).
[44] Trial Decision, paras. 660-62 (AR vol. II, Tab 4 at 35).

33. Similarly, the Tsilhqot'in creation story of Lhin Desch'osh documents the origins of the Tsilhqot'in as a distinctive people and the creation of their shared homeland.[45] The Lhin Desch'osh legend prominently features additional landmarks that further **define or bound the Proven Title Area**: the Tsilhqox (Chilko River) and Gwetsilh (Siwash Bridge) form the northern corridor of the Proven Title Area; Tsilhqox Biny (Chilko Lake) lies at the heart of the Proven Title Area; and the Dasiqox (Taseko River) provides an eastern boundary.[46]

34. The Lhin Desch'osh legend specifically referenced these distinctive geographical landmarks prior to contact with Europeans (in 1793).[47] Tsilhqot'in elders have continued to recount the Lhin Desch'osh legend to the present day.[48]

H. Historical Narrative

35. In a detailed "historical narrative", the Trial Judge reviewed the history of Tsilhqot'in engagement with European explorers, traders, missionaries, settlers and officials.[49] The following is a brief summary of some key events.

36. Sir Alexander MacKenzie led a British expedition northwest of the Claim Area in 1793, but there is "divided opinion" as to whether that party encountered Tsilhqot'in people.[50]

37. The first documented encounter was in June 1808, when Simon Fraser recorded a visit from "Chilkoetins" who had travelled, on horseback, to meet his party on the banks of the Fraser River, "having never seen white people before". Fraser noted the Tsilhqot'in system of scouts and runners: "[t]hey had the information of our return from the lower parts of the river by messages across the Country".[51]

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[45] Trial Decision, paras. 170, 175 (AR vol. I, Tab 3 at 70, 72), 654-58, 666 (AR vol. II, Tab 4 at 32-34, 37).
[46] Trial Decision, paras. 170 (AR vol. I, Tab 3 at 70), 654-58, 959 (AR vol. II, Tab 4 at 32-34, 125). See also the legend of "salmon boy": para. 663 (AR vol. II, Tab 4 at 35).
[47] Trial Decision, para. 175 (AR vol. I, Tab 3 at 72).
[48] Trial Decision, paras. 170, 175 (AR vol. I, Tab 3 at 70, 72), 654 (AR vol. II, Tab 4 at 32).
[49] Trial Decision, paras. 204-331 (AR vol. I, Tab 3 at 81-122).
[50] Trial Decision, para. 228 (AR vol. I, Tab 3 at 87).
[51] Trial Decision, para. 231 (AR vol. I, Tab 3 at 88); see also para. 916 (AR vol. II, Tab 4 at 112).

38. In January 1822, Hudson's Bay Company ("**HBC**") clerk George McDougall travelled into Tsilhqot'in territory to explore trading opportunities. McDougall recorded several "Chilkotin" families living in "ground lodges" at locations along the Chilko River (Tsilhqox Corridor) and documented their "favourite hunting grounds for Large Animals" east of the river. He was informed by Tsilhqot'in that "there are 6 Large Ground Lodges, about [Chilko] Lake, containing 53 Families … in all along [Chilko] River 29 Lodges containing 131 Families".[52]

39. In December 1825, HBC Chief Factor William Connolly visited Tsilhqot'in territory to assess the feasibility of a proposed Chilcotin Post. Connolly documented Tsilhqot'in pit house villages along the Tsilhqox Corridor to the outlet of Chilko Lake (Tsilhqox Biny).[53]

40. In the winter of 1826 four Talkotin (Carrier) hunters made an excursion into Tsilhqot'in territory – all but one were killed by Tsilhqot'in. War ensued. The Tsilhqot'in rapidly amassed a military force of over 100 Tsilhqot'in warriors and "launched a bloody battle against the Talkotins who were lodged in a fortified house" near Fort Alexandria. As recorded by the HBC traders, "the bloody contest would have lasted much longer and probably to the annihilation of the Talkotins had we not given them [the Talkotins] assistance in Arms and Ammunition".[54]

41. In 1829, the HBC opened the ill-fated Chilcotin Post in Tsilhqot'in territory, about 15 km east of the northern Claim Area boundary. The HBC faced many challenges with the Chilcotin Post, most notably "friction" with the Tsilhqot'in, who continued to favour long-standing trade relations with other Aboriginal groups over trade with the HBC. The Chilcotin Post was closed for the first time in 1830, after it was deemed "unsafe to leave a small establishment amongst a people … of whose audacity we have sufficient proofs".[55]

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[52] Trial Decision, paras. 234-35 (AR vol. I, Tab 3 at 89-90).
[53] Trial Decision, paras. 237 (AR vol. I, Tab 3 at 90), 693, 707 (AR vol. II, Tab 4 at 46, 51).
[54] Trial Decision, para. 238 (AR vol. I, Tab 3 at 91).
[55] Trial Decision, paras. 240-41, 247, 251 (AR vol. I, Tab 3 at 92, 94, 95); see also: Exhibit 0177, Tyhurst thesis, at 147-48, 195 (AR vol. VII, Tab 42 at 32-33, 80); Exhibit 0407, Coates Report, at 47-92 (AR vol. IX, Tab 49 at 117-162).

42. The Post re-opened in 1831 but "met with a very rough reception" as the Tsilhqot'in "behaved with much violence and used some menace towards them". In 1838, Chief Allaw, a Tsilhqot'in Chief, ordered the HBC traders "off from his Lands immediately, so that they might have the pleasure of burning the Fort". The immediate dispute was resolved, but in 1839, Tsilhqot'in people "completely barred the River" downstream from the fort, preventing the HBC employees from catching fish for their survival.[56]

43. The HBC finally closed the Chilcotin Post in 1843, noting that it was "a dead loss to the H.H.B.Co. and risking the lives of People placed at it, who are little better than slaves to the Indians, being unable to keep them in check".[57]

44. In 1845, Father Giovanni Nobili journeyed into Tsilhqot'in territory, including parts of the Claim Area. His letters confirm the presence of Tsilhqot'in people, hunting, trapping and fishing activities, and Tsilhqot'in structures such as ground lodges and bridges along the Tsilhqox Corridor.[58] At Tl'egwated, as one example, Nobili documented "upwards of 120 residents staying in two very large pit houses and additional people in a smaller third pit house".[59]

45. In 1864, an attempt to construct a road from Bute Inlet through Tsilhqot'in territory led to the events known as the "Chilcotin War". Chief Justice Begbie would subsequently describe the contributing factors as follows:

> There has never, since 1858, been any trouble with Indians except once, in 1864, known as the year of the Chilcotin Expedition. In that case, some white men had, under color of the pre-emption act, taken possession of some Indian lands (not, I believe, reserved as such, – the whole matter arose on the west of the Fraser River, where no magistrate or white population had ever been – but *de facto* Indian lands, their old accustomed camping place, and including a much-valued spring of water), and even after this, continued to treat the natives with great contumely, and breach of faith. The natives were few in number, but very warlike and great hunters ...[60]

[56] Trial Decision, paras. 240-45 (AR vol. I, Tab 3 at 92-93).
[57] Trial Decision, para. 250 (AR vol. I, Tab 3 at 95) (underscored added).
[58] Trial Decision, paras. 255, 462 (AR vol. I, Tab 3 at 96, 164), 693, 707, 712, 722 (AR vol. II, Tab 4 at 46, 51, 53, 56).
[59] Trial Decision, para. 722 (AR vol. II, Tab 4 at 56).
[60] Trial Decision, para. 281 (AR vol. I, Tab 3 at 105) (underscore added).

46. The Chilcotin War is discussed in the following section of these submissions. As a direct result of this conflict, the Tsilhqot'in removed the very few white settlers residing in Tsilhqot'in territory (for example, William Manning, who had married a Tsilhqot'in woman).[61]

47. When settlers returned to Tsilhqot'in territory in the 1870s, it was at the sufferance of the Tsilhqot'in people. Two of the first European settlers in the Tsilhqot'in region, Riske and McIntyre, wrote to Lt. Gov. Trutch in June 1872, stating:

> On our coming to this place the Indians here professed themselves friendly and agreeable to our settling here, and on the whole they have acted so far towards us very peaceably. They have always however considered the land theirs, and that we are beholden to them for it, and occupy it on sufferance. We have always avoided arguing it with them till some one in authority could come and explain to them their duties and rights. Our all being invested here, we have been anxious to conciliate them, and to that end we enclosed and ploughed land for them, giving Potatoes to plant and water to irrigate as also Potatoes to many out back, and the privilege of gleaning in the fields in harvest.

Ten years later, Riske and McIntyre continued to describe themselves as "inhabitants of Chilcotin" who were "living here … at their [the Indians'] sufferance".[62]

48. In the late 19th century, several government officials (Peter O'Reilly, Marcus Smith), surveyors (Marcus Smith, George Dawson), missionaries (Father Morice) and anthropologists (James Teit, Franz Boas, Livingston Farrand) travelled through Tsilhqot'in territory and created detailed records of Tsilhqot'in occupation relied upon by the Trial Judge in his reasons.[63]

49. In 1897, Edmund Elkins became the first white settler to attempt to settle in Xeni (Nemiah Valley). Chief ?Achig ordered Elkins to move out of the valley. Elkins refused and a physical altercation between the Chief and Elkins took place. After this struggle, Elkins moved to the end of the valley to a place that is now known as Elkin Creek.[64]

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[61] Trial Decision, para. 279 (AR vol. I, Tab 3 at 104); see also para. 277 (AR vol. I, Tab 3 at 103).
[62] Trial Decision, paras. 939-40 (AR vol. II, Tab 4 at 119-120) (underscore added); see also: Exhibit 0391, Foster Report, at 16-18 (AR vol. IX, Tab 48 at 50-52).
[63] Trial Decision, paras. 292-307 (AR vol. I, Tab 3 at 108-115).
[64] Trial Decision, paras. 308 (AR vol. I, Tab 3 at 115); 771 (AR vol. II, Tab 4 at 71); Exhibit 0174, Affidavit #2 of Mabel William, para. 52 (AR vol. V, Tab 31 at 137-38).

50. In July 1899, Hewitt Bostock, M.P. for the region, wrote to the Interior Department, requesting that "what is known as Nemaiah Valley in the western end of the Chilcoten country" be made a reserve.[65]

51. In 1899, Indian Reserve Commissioner Vowell travelled to Xeni and laid out four reserves (although they were not formally created for several more years).[66] The Surveyor General later confirmed "several old village sites in the valley".[67] From 1950 to 1956, Canada attempted unsuccessfully to purchase additional lands for reserves for the Xeni Gwet'in.[68]

52. On August 23, 1989, the Xeni Gwet'in issued the Nemiah Declaration, affirming the Nemiah Aboriginal Wilderness Preserve (including the Claim Area) as "the spiritual and economic homeland of our people".[69] British Columbia has acknowledged this fact on the information sign at Ts'il?os Provincial Park, which comprises 39% of the Claim Area, including portions of the Proven Title Area:

> Ts'il?os Park is part of the <u>spiritual and economic homeland</u> of the people of the Nemiah Valley – the Xeni gwet'in … <u>The Tsilhqot'in have steadfastly protected their remote territory through centuries</u> and because of their sustained presence the land has remained relatively unaltered.[70]

I. Tsilhqot'in Defence of Territory

53. As this historical review suggests, before 1846 and long after, the Tsilhqot'in fiercely defended the territorial boundaries of their traditional lands, which included the Claim Area.[71]

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[65] Trial Decision, para. 309 (AR vol. I, Tab 3 at 115).

[66] Trial Decision, paras. 310, 316 (AR vol. I, Tab 3 at 115, 118). Three new reserves were created in Xeni in 1916.

[67] Trial Decision, para. 317 (AR vol. I, Tab 3 at 118).

[68] Trial Decision, para. 320 (AR vol. I, Tab 3 at 119).

[69] Trial Decision, para. 325 (AR vol. I, Tab 3 at 121); for full text of the Declaration, see Trial Decision, para. 59 (AR vol. I, Tab 3 at 34).

[70] Exhibit 0501.006, Ts'il?os Park photograph (AR vol. VI, Tab 37) (underscore added); Trial Decision, paras. 73, 330 (AR vol. I, Tab 3 at 38, 122), 1140 (AR vol. II, Tab 4 at 191).

[71] Trial Decision, paras. 931, 935, 937 (AR vol. II, Tab 4 at 116, 118); see, *e.g.*: Exhibit 0224, Dinwoodie Report, at 36-37, 40 (AR vol. VIII, Tab 45 at 88-89, 92); Exhibit 0443, Dewhirst Report, paras. 25-26 (AR vol. XI, Tab 53 at 159); Exhibit 0166, Hudson Report, at 7-9 (AR vol. VI, Tab 40 at 44-46).

54. The record reveals a litany of conflicts between Tsilhqot'in and other Aboriginal peoples in areas surrounding but outside the Claim Area.[72] Border conflicts helped define areas that everyone accepted as "belonging" to a particular Aboriginal group. It was understood that one did not venture into that area without permission. Absence of permission placed lives at risk.[73]

55. The Tsilhqot'in monitored their territory with a system of scouts and runners to check for intruders and warn their communities.[74] Tsilhqot'in military practices were particularly fierce and "worked to instill fear of Tsilhqot'in people in all who might venture into Tsilhqot'in territory".[75] The historical records document situations where non-Tsilhqot'in Aboriginal peoples or guides refused to enter Tsilhqot'in territory, expressing fear of Tsilhqot'in people.[76]

56. In short, the Tsilhqot'in had both the intention and capacity to control their core traditional lands, including the Claim Area, before, at and long after 1846. The archival records show that "[t]o be safe" in Tsilhqot'in country, "one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down".[77] From the early explorers onwards, Europeans made such payments for precisely this reason.[78]

57. As found by the Trial Judge:

> Tsilhqot'in people were there in sufficient numbers to monitor European traders, missionaries, settlers and railway surveyors on their arrival. There is evidence that each of these groups of new arrivals were aware that Tsilhqot'in people considered this to be their land. Others were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot'in people.[79]

[72] Trial Decision, para. 931 (AR vol. II, Tab 4 at 116); Exhibit 0240, Brealey Report, at 20-21 (AR vol. VIII, Tab 46 at 146-47); "Intertribal Boundaries" Map (AR vol. XIII, Tab 61).
[73] Trial Decision, para. 937 (AR vol. II, Tab 4 at 118).
[74] Trial Decision, para. 916 (AR vol. II, Tab 4 at 112).
[75] Trial Decision, para. 920 (AR vol. II, Tab 4 at 113).
[76] Trial Decision, paras. 182, 293, 295-96 (AR vol. I, Tab 3 at 75, 109, 110), 921 (AR vol. II, Tab 4 at 114); Exhibit 0391, Foster Report, at 21-23 (AR vol. IX, Tab 48 at 55-57).
[77] Trial Decision, para. 917 (AR vol. II, Tab 4 at 112), quoting from Exhibit 0391, Foster Report, at 23 (AR vol. IX, Tab 48 at 57).
[78] Trial Decision, paras. 918-19 (AR vol. II, Tab 4 at 112-113).
[79] Trial Decision, para. 938 (AR vol. II, Tab 4 at 119) (underscore added).

58. The Trial Judge observed that the vast trial record did not "reveal to me the presence of any other Aboriginal group in the Claim Area in the late eighteenth or early nineteenth century".[80] He expressly confirmed that the Proven Title Area was "effectively controlled" by Tsilhqot'in people, at sovereignty and long after.[81]

59. Tsilhqot'in defence of territory is vividly depicted by the events of the Chilcotin War of 1864.[82] In 1864, Tsilhqot'in warriors led by Lha Ts'as?in attacked and killed most of a crew of road-builders attempting to construct a road through Tsilhqot'in territory to service the gold rush.[83] In the ensuing days, Tsilhqot'in warriors attacked a pack-train and a settler living in the region with a Tsilhqot'in woman, thus removing all white people from Tsilhqot'in territory.[84]

60. The causes of these events have been variously described, and it is likely not possible to ascribe the conflict to any one factor.[85] However,

> The entire body of historical evidence reveals a statement by the Tsilhqot'in people that the road would go no farther and that there would be no further European presence in their territory. The use of their land was clearly an issue.[86]

61. Militia forces unsuccessfully pursued the Tsilhqot'in warriors in "Chilcoten country", a region described by Governor Seymour as "almost unknown to white men until recent events".[87] In August 1864, Tsilhqot'in war chiefs "surrendered under circumstances that remain to this day the subject of disagreement and debate" and were tried, convicted and hanged.[88] As part of his final words, Lha Ts'as?in's reportedly stated, "We meant war, not murder!"[89]

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[80] Trial Decision, para. 187 (AR vol. I, Tab 3 at 77); see also: Exhibit 0166, Hudson Report, at 4 (AR vol. VI, Tab 40 at 41).
[81] Trial Decision, paras. 938, 943 (AR vol. II, Tab 4 at 119, 120).
[82] See Trial Decision, paras. 269-86 (AR vol. I, Tab 3 at 100-107); Exhibit 0432, Affidavit #2 of Elizabeth Jeff, paras. 51-56 (AR vol. V, Tab 33 at 188-94); Exhibit 0408, Turkel thesis, at 240-95 (AR vol. XI, Tab 52 at 51-104).
[83] Trial Decision, paras. 271 (AR vol. I, Tab 3 at 101).
[84] Trial Decision, paras. 271-73, 277, 279 (AR vol. I, Tab 3 at 101, 103, 104).
[85] Trial Decision, paras. 281-83 (AR vol. I, Tab 3 at 105-106).
[86] Trial Decision, para. 284 (AR vol. I, Tab 3 at 107) (underscore added); see also paras. 281, 286 (AR vol. I, Tab 3 at 105, 107); Exhibit 0391, Foster Report, at 26-36 (AR vol. IX, Tab 48 at 60-70).
[87] Trial Decision, para. 620 (AR vol. II, Tab 4 at 20).
[88] Trial Decision, para. 278 (AR vol. I, Tab 3 at 104).
[89] Trial Decision, para. 278 (AR vol. I, Tab 3 at 104).

62. The Attorney General for British Columbia subsequently apologized to the Tsilhqot'in people for wrongs done to them during and after the War.[90] In 1999, the Province unveiled a memorial plaque marking the gravesite of five Tsilhqot'in Chiefs executed in the aftermath of the Chilcotin War. In part, the plaque reads:

> This commemorative plaque has been raised to honour those who lost their lives in defence of the territory and the traditional way of life of the Tsilhqot'in and to express the inconsolable grief that has been collectively experienced at the injustice the Tsilhqot'in perceive was done to their chiefs.[91]

J. Background to the Litigation

63. This litigation was "provoked by proposed forestry activities" in the Claim Area.[92] The "initial flashpoint" was clear-cut logging proposed for the Trapline Territory in the early 1980s.[93]

64. As the Trial Judge noted, "logging would have a severe impact on the wildlife and accordingly, on Tsilhqot'in hunting and trapping activities".[94] He had before him evidence that clear cut logging had already devastated many other areas of Tsilhqot'in territory, making the Claim Area even more crucial to the cultural survival of the Xeni Gwet'in and Tsilhqot'in.[95]

65. The Tsilhqot'in people responded with a blockade in May 1992 and two separate legal actions in B.C. Supreme Court asserting Aboriginal rights in the Trapline Territory and Tachelach'ed, respectively, later consolidated into the present action.[96]

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[90] Trial Decision, para. 329 (AR vol. I, Tab 3 at 121).
[91] Trial Decision, para. 331 (AR vol. I, Tab 3 at 122) (underscore added).
[92] Trial Decision, Executive Summary (AR vol. I, Tab 3 at 8).
[93] Trial Decision, para. 1295 (AR vol. III, Tab 5 at 41).
[94] Trial Decision, para. 1295 (AR vol. III, Tab 5 at 41); see also: para. 26 (AR vol. I, Tab 3 at 25); Appeal Decision, para. 313 (AR vol. III, Tab 9 at 190).
[95] See, *e.g.*, Exhibit 0025, Tab 48, HMTQ-2064326 (AR vol. VI, Tab 34); Exhibit 0026, Tab 62, HMTQ-2053859, p. 4 (AR vol. VI, Tab 35); Exhibit 0364, Satellite image (May 5, 1998) (AR vol. XIII, Tab 68); Exhibit 0509, Journal of Chris Schmid, former Manager, Integrated Resource Management, Ministry of Forests (AR vol. VI, Tab 38); Transcript (Chief William), v. 20, pp. 3267:9 - 3269:2, 3301:30 - 3306:29 (AR vol. V, Tab 24).
[96] Trial Decision, paras. 22-27, 64, 69-70, 79, 82 (AR vol. I, Tab 3 at 24-25, 36-38, 40).

66. On May 13, 1992, Premier Harcourt promised the Tsilhqot'in people that there would be no further logging in their traditional territory without their consent.[97] However, starting on January 1, 1997, the Province issued several forest licenses to various forest companies permitting logging within the Trapline Territory and Tachelach'ed.[98]

K. The Trial Decision

67. The trial occupied 339 trial days over a period of five years. Twenty-nine Tsilhqot'in witnesses provided oral history evidence and detailed accounts of personal and ancestral Tsilhqot'in land use.[99] The Trial Judge considered a vast number of historical documents and expert evidence tendered from a wide range of disciplines.[100]

68. The Trial Judge found that the Tsilhqot'in people are a distinct Aboriginal group that has occupied the Claim Area for centuries.[101] He held that the Tsilhqot'in Nation is the proper rights-holder for Aboriginal rights and Aboriginal title and sub-groups of the Tsilhqot'in Nation derive their rights and interests as Tsilhqot'in peoples.[102]

69. The Trial Judge held that the Tsilhqot'in people have an Aboriginal right to hunt and trap birds and animals throughout the Claim Area, including a right to capture and use wild horses for transportation and work. He further affirmed a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.[103]

70. The Trial Judge held that Tsilhqot'in people have continuously exercised these rights throughout the Claim Area from before contact in 1793 to the present day.[104]

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[97] Trial Decision, paras. 70, 328 (AR vol. I, Tab 3 at 38, 121); Appeal Decision, para. 17 (AR vol. III, Tab 9 at 104); see also: *Carrier Lumber Ltd. v British Columbia*, (1999) 47 BCLR (2d) 50 (SC), paras. 111, 336-340.
[98] Trial Decision, paras. 75-76, 78 (AR vol. I, Tab 3 at 39).
[99] Appeal Decision, para. 24 (AR vol. I, Tab 3 at 25).
[100] Trial Decision, Executive Summary (AR vol. I, Tab 3 at 8); Appeal Decision, para. 24 (AR vol. III, Tab 9 at 106).
[101] Trial Decision, Executive Summary (AR vol. I, Tab 3 at 8).
[102] Trial Decision, para. 470 (AR vol. I, Tab 3 at 166).
[103] Trial Decision, Executive Summary (AR vol. I, Tab 3 at 8), paras. 1240, 1265 (AR vol. III, Tab 5 at 25, 32).
[104] Trial Decision, Executive Summary (AR vol. I, Tab 3 at 8), para. 1268 (AR vol. III, Tab 5 at 33).

71. The Trial Judge held that land use planning and forestry activities have unjustifiably infringed Tsilhqot'in Aboriginal rights.[105]

72. The Trial Judge further opined that the evidence established Aboriginal title to certain defined tracts within the Claim Area, but held that he was not able to make a formal declaration because of the manner in which the action had been pleaded (as discussed below).

73. The Trial Judge dismissed the Plaintiff's claim for damages for past infringements of Aboriginal title without prejudice to the right to renew these claims.[106]

L. Advisory Opinion on Tsilhqot'in Aboriginal Title in the Claim Area

74. The Trial Judge considered himself barred by the pleadings from granting a declaration of Tsilhqot'in Aboriginal title. The Plaintiff sought declarations of Aboriginal title to Tachelach'ed and the Trapline Territory but had not explicitly sought, in the alternative, declarations of Aboriginal title to "portions thereof". Because the Plaintiff had not established Aboriginal title to either Tachelach'ed or the Trapline Territory in its entirety, the Trial Judge held that he could not declare Aboriginal title to lesser, included areas.[107]

75. Nonetheless, on the invitation of the parties,[108] the Trial Judge provided his opinion as to the existence and extent of Tsilhqot'in Aboriginal title in the Claim Area.[109]

76. In doing so, the Trial Judge thoroughly reviewed the law concerning proof of Aboriginal title, concluding that this Court's judgment in ***R. v. Marshall; R. v. Bernard*** had "set a high standard, requiring 'regular use or occupancy of definite tracts of land'".[110] He carefully applied

[105] Trial Decision, Executive Summary (AR vol. I, Tab 3 at 8), paras. 1141 (AR vol. II, Tab 4 at 191), 1288, 1294, 1301 (AR vol. III, Tab 5 at 39, 41, 44).
[106] Trial Decision, Executive Summary (AR vol. I, Tab 3 at 8), para. 1336 (AR vol. III, Tab 5 at 58).
[107] Trial Decision, paras. 102-29 (AR vol. I, Tab 3 at 44-53).
[108] Trial Decision, paras. 686, 765, 825, 958 (AR vol. II, Tab 4 at 44, 70, 87, 125).
[109] Trial Decision, paras. 958-61 (AR vol. II, Tab 4 at 125-127).
[110] Trial Decision, para. 583 (AR vol. II, Tab 4 at 5) (underscore added); *R v Marshall; R v Bernard*, 2005 SCC 43 ["***Marshall***"].

this "high standard" to the evidence before him, assessing Tsilhqot'in occupation individually to some 50 discrete tracts of land that together comprise the Claim Area.[111]

77. In the result, the Trial Judge delineated the "definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title" (the "**Proven Title Area**").[112] These six defined tracts are contiguous, comprising roughly 40% of the Claim Area.[113] A visual depiction of the Proven Title Area is provided for reference as Appendix "A" to these submissions.

78. The Proven Title Area includes lands both inside and adjacent to the Claim Area.[114] On the appeal to this Court, the Appellant seeks a declaration of Aboriginal title to the Proven Title Area within the Claim Area.

79. The Trial Judge found that Aboriginal title had been proven by evidence of village sites, trails and regular use of defined tracts of land as part of a well-established pattern of land use:

> The entire body of evidence in this case reveals village sites occupied for portions of each year. In addition, there were cultivated fields. These fields were not cultivated in the manner expected by European settlers. Viewed from the perspective of Tsilhqot'in people the gathering of medicinal and root plants and the harvesting of berries was accomplished in a manner that managed these resources to insure their return for future generations. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds.[115]

He continued:

> These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title as follows:
>
> - The Tsilhqox (Chilko River) Corridor from its outlet at Tsilhqox Biny (Chilko Lake) including a corridor of at least 1 kilometre on both sides of the river and inclusive of the river up to Gwetsilh (Siwash Bridge);

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[111] Trial Decision, paras. 682-911 (AR vol. II, Tab 4 at 43-110).
[112] Trial Decision, paras. 958-61 (AR vol. II, Tab 4 at 125-127).
[113] Appeal Decision, para. 78 (AR vol. III, Tab 9 at 124).
[114] Trial Decision, paras. 938, 960 (AR vol. II, Tab 4 at 119, 127); Appeal Decision, para. 78 (AR vol. III, Tab 9 at 124).
[115] Trial Decision, para. 959 (AR vol. II, Tab 4 at 125) (underscore added).

- Xeni, inclusive of the entire north slope of Ts'il?os. This slope of Ts'il?os provides the southern boundary, while the eastern shore of Tsilhqox Biny marks the western boundary. Gweqez Dzelh and Xeni Dwelh combine to provide the northern boundary, while Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) marks the eastern boundary.

- North from Xeni into Tachelach'ed to a line drawn east to west from the points where Elkin Creek joins the Dasiqox (Taseko River) over to Nu Natase?ex on the Tsilhqox. Elkin Creek is that water course draining Nabi Tsi Biny (Elkin Lake), flowing northeast to the Dasiqox;

- On the west, from Xeni across Tsilhqox Biny to Ch'a Biny and then over to the point on Talhiqox Biny (Tatlayoko Lake) where the Western Trapline boundary touches the lake at the southeast shore, then following the boundary of the Western Trapline so as to include Gwedzin Biny (Cochin Lake);

- On the east from Xeni following the Dasiqox north to where it is joined by Elkin Creek; and

- With a northern boundary from Gwedzin Biny in a straight line to include the area north of Naghatalhchoz Biny (Big Eagle Lake or Chelquoit Lake) to Nu Natase?ex on the Tsilhqox where it joins the northern boundary of Tachelach'ed over to the Dasiqox at Elkin Creek.[116]

80. The Trial Judge described the core importance of the Proven Title Area for the "security and continuity" of the Tsilhqot'in people:

> It is an area that was occupied by Tsilhqot'in people at the time of sovereignty assertion to a degree sufficient to warrant a finding of Tsilhqot'in Aboriginal title land from three perspectives. First, there are village sites as I have discussed earlier. Second, there are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries. Third, by a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering. This is the land over which they held exclusionary rights of control: *Marshall; Bernard* at para. 77. This was the land that provided security and continuity for Tsilhqot'in people at the time of sovereignty assertion.[117]

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[116] Trial Decision, para. 959 (AR vol. II, Tab 4 at 125) (underscore added).
[117] Trial Decision, para. 960 (AR vol. II, Tab 4 at 127) (underscore added).

81. The Trial Judge confirmed that the Proven Title Area was "effectively controlled" by Tsilhqot'in people, at sovereignty and long after.[118] He further confirmed that the Proven Title Area does not include overlapping territory with any other First Nations.[119]

82. The Trial Judge held that Tsilhqot'in people have continuously occupied the Claim Area from prior to sovereignty assertion to the present day and substantially maintained their connection to these lands throughout that entire period.[120]

83. The Trial Judge stated that if he were wrong on the preliminary pleadings issue, "then my conclusion on Tsilhqot'in Aboriginal title, insofar as it describes land within Tachelach'ed and the Trapline Territory, is binding on the parties as a finding of fact in these proceedings".[121]

84. With respect to the balance of the Claim Area, the Trial Judge concluded that Tsilhqot'in use and occupation, although extensive, was not sufficient to establish Aboriginal title.[122]

M. Consequences of Aboriginal title

85. The Trial Judge proceeded to determine the legal consequences of Tsilhqot'in Aboriginal title, in the event that he had wrongly decided he was barred from granting the declaration.

86. First, he held that the *Forest Act* did not provide statutory authority for provincial officials to grant interests to third parties in the timber situated on Tsilhqot'in Aboriginal title lands.[123] Second, he held that provincial forestry legislation could not apply to authorize the management or disposition of timber on Aboriginal title lands, as this impairs the exclusive core of federal jurisdiction under s. 91(24).[124] Finally, he held that even if the Province had the necessary statutory and constitutional authority, its forestry planning and activities had unjustifiably infringed Tsilhqot'in Aboriginal title.[125]

[118] Trial Decision, paras. 187 (AR vol. I, Tab 3 at 77), 938, 943 (AR vol. II, Tab 4 at 119, 120).
[119] Trial Decision, para. 938 (AR vol. II, Tab 4 at 119).
[120] Trial Decision, para. 945 (AR vol. II, Tab 4 at 121).
[121] Trial Decision, para. 961 (AR vol. II, Tab 4 at 127).
[122] Trial Decision, para. 792, 794, 825, 893 (AR vol. II, Tab 4 at 77, 78, 87, 105).
[123] Trial Decision, paras. 963-81 (AR vol. II, Tab 4 at 128-135).
[124] Trial Decision, paras. 1001 - 1049 (AR vol. II, Tab 4 at 141-158).
[125] Trial Decision, paras. 1053-1141 (AR vol. II, Tab 4 at 159-191).

N. Appeals to the B.C. Court of Appeal

87. The Plaintiff, British Columbia and Canada each appealed the trial decision. Mr. Justice Groberman rendered judgment for the B.C. Court of Appeal, dismissing all three appeals.

88. British Columbia appealed on grounds relating to Tsilhqot'in Aboriginal rights. The Court of Appeal affirmed the Trial Judge's findings of Tsilhqot'in Aboriginal rights and his conclusion that provincial forestry management infringed these Aboriginal rights and could not be justified.[126] British Columbia did not seek leave to appeal these issues to this Court.

89. The Plaintiff appealed the Trial Judge's refusal to declare Aboriginal title to the definite tracts of the Claim Area where Aboriginal title was established on the evidence. The Court of Appeal agreed with the Plaintiff that the Trial Judge erred on the pleadings issue and was not barred from declaring Aboriginal title to lesser, included portions of the Claim Area.[127] The Court further held that the Defendants would not be prejudiced by such findings of Aboriginal title, if the Trial Judge had proceeded on the correct theory of Aboriginal title.[128]

90. However, the Court of Appeal disagreed with the Trial Judge's approach to Aboriginal title. The Court of Appeal fully adopted the test advocated by the Defendants, narrowly confining Aboriginal title to specific, intensively occupied sites:

> … I agree with British Columbia's assertion that what was contemplated were specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis. Examples might include salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps.[129]

91. The Court of Appeal described the standard of occupation required to establish Aboriginal title as "intensive presence at a particular site".[130]

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[126] Appeal Decision, paras. 267, 288, 313, 336 (AR vol. III, Tab 9 at 178, 184, 190, 196).
[127] Appeal Decision, para. 117 (AR vol. III, Tab 9 at 136).
[128] Appeal Decision, para. 107 (AR vol. III, Tab 9 at 132).
[129] Appeal Decision, para. 221(AR vol. III, Tab 9 at 166) (underscore added).
[130] Appeal Decision, para. 220 (AR vol. III, Tab 9 at 166).

92. The Court of Appeal opined that more expansive recognition of Aboriginal title was not required to protect First Nations' traditional cultures. In its view, this goal could be accomplished by recognizing Aboriginal rights (other than Aboriginal title) over broad areas.[131] The Court of Appeal described this as a "practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and the well-being of all Canadians".[132]

93. Justice Groberman directed that the Tsilhqot'in were at liberty to pursue new Aboriginal title claims to specific sites within the Claim Area.[133]

PART II – ISSUES

94. The central issue raised by this appeal is whether the Court will declare Tsilhqot'in Aboriginal title to the lands in the Claim Area where the Trial Judge found that Aboriginal title was proven on the evidence. This requires the Court to determine whether the Court of Appeal erred by creating a new test that would restrict all Aboriginal title claims to <u>particular sites</u>.

95. Additional issues arise concerning the legal consequences of Aboriginal title. The first is whether the *Forest Act* provides <u>statutory</u> authority to manage and dispose of timber assets on Aboriginal title lands. The remaining issues are <u>constitutional</u> questions as stated by this Court:

1. Are the *Forest Act*, R.S.B.C. 1996, c. 157, or the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, or their predecessor legislation, constitutionally inapplicable in whole or in part to Tsilhqot'in Aboriginal title lands, in view of Parliament's exclusive legislative authority set out in s. 91(24) of the *Constitution Act, 1867*?

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[131] Appeal Decision, paras. 231-39 (AR vol. III, Tab 9 at 169-171).
[132] Appeal Decision, para. 239 (AR vol. III, Tab 9 at 171).
[133] Appeal Decision, para. 241 (AR vol. III, Tab 9 at 171).

2. Are the *Forest Act*, R.S.B.C. 1996, c. 157, or the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, or their predecessor legislation, constitutionally inapplicable in whole or in part to Tsilhqot'in Aboriginal title lands to the extent that they authorize unjustified infringements of Tsilhqot'in Aboriginal title, by virtue of ss, 35(1) and 52 of the *Constitution Act, 1982*?

PART III – ARGUMENT

ISSUE #1: PROOF OF ABORIGINAL TITLE

96. The first issue is the proper test for proof of Aboriginal title. This section reviews the historical and modern law of Aboriginal title and its application to the present appeal.

A. The Foundations of Aboriginal Title in Recognition and Respect

97. This Court in *Mitchell v. M.N.R.* traced the genesis of Aboriginal rights to the collision of European and Aboriginal societies and legal systems in North America:

> Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. ... English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation ... At the same time, however, the Crown asserted that sovereignty over the land, and ownership of its underlying title, vested in the Crown …
>
> Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights …[134]

98. The doctrine of Aboriginal title was initially forged from a position of rough equality between Aboriginal and European powers, during an era in which First Nations held profound economic and military significance for vying European states. It consequently developed as a truly unique, negotiated body of law, drawing from both Aboriginal and European legal traditions, but belonging wholly to neither.[135] In its conception, as now, Aboriginal title functioned as a bridge between vastly dissimilar legal cultures.[136]

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[134] *Mitchell v M.N.R.*, 2001 SCC 33, paras. 9-10 (underscore added) ["***Mitchell***"].

[135] *R v Sioui*, [1990] 1 SCR 1025 at 1052-55; B Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osg Hall LJ 101 at 109; B Slattery, "Understanding Aboriginal Rights" (1987), 66

99. As a result, Aboriginal title fostered peaceful relations by prescribing stable ways of handling disputes between Aboriginal and non-Aboriginal people, especially disputes over land. As summarized by the Royal Commission on Aboriginal Peoples,

> … recognition of Aboriginal title fundamentally structured the relationship between Aboriginal and non-Aboriginal people during much of the history of non-Aboriginal settlement and colonization of eastern and central North America. Recognition formed the basis of a pattern of contact that held real value for Aboriginal and non-Aboriginal people alike.[137]

100. British Crown policy regarding Indian peoples was reinforced during the Seven Years' War of 1756-1763, as noted by Norris J.A. in ***R. v. White and Bob***:

> The friendship of the Iroquois had, in certain phases, been a decisive factor in the late war on the side of the British, though their former treatment by the English colonists had all but thrown them into the arms of the French. It was due to the genius of Sir William Johnson, Superintendent of Indian affairs on behalf of the Imperial Government, that their hostility was allayed, so that the British could carry on campaigns through their territory and even gain battles with their help. The promise which won over the warlike Five Nations was that they would enjoy their territory undisturbed, and that no lands were to be taken from them but by formal purchase by His Majesty the King. Thus they would be protected from the dreaded encroachment of colonists …[138]

101. The ***Royal Proclamation of 1763*** codified these British colonial practices with respect to Aboriginal lands and resources, stating in part:

> … [I]t is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.[139]

CBR 727 at 732-34, 744-45 ["**Slattery, *Understanding Aboriginal Rights***"]; Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, v 2 (Ottawa: Supply and Service Canada, 1996) at 466-67, 559-561 ["**RCAP, *Restructuring the Relationship***"].

[136] *Delgamuukw*, para. 81.

[137] RCAP, *Restructuring the Relationship*, at 560 (emphasis added); see also: 465-66.

[138] *R v White and Bob*, [1964] 52 WWR 193 (BCCA) (Norris J.A.) at 219-220 (underscore added).

[139] *Royal Proclamation, 1763*, RSC, 1985, App II, No. 1; RCAP, *Restructuring the Relationship*, at 467.

102. Although the geographical reach of the *Royal Proclamation* remains a matter of academic and judicial debate, this dispute is of little practical import, as the *Proclamation* simply codifies fundamental common law principles that applied uniformly across the country: the recognition of the status of Aboriginal societies as "Nations or Tribes", the affirmation of their right to undisturbed possession of their territories (including their "Hunting Grounds"), and the inalienability of Indian interests except through a valid surrender to the British Crown.[140]

103. This same view of Aboriginal title is reflected in the seminal judgments of Chief Justice Marshall for the U.S. Supreme Court in the early 19th century. Because these judgments are based on the English common law, they are "as relevant to Canada as they are to the United States" in their articulation of general principles.[141] ***Mitchel v. United States*** confirmed that original Indian title (the equivalent of our Aboriginal title)[142] extends to "hunting grounds":

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals ...[143]

104. The Marshall judgments are premised on the "doctrine of discovery", pursuant to which European powers purportedly acquired sovereignty over, and underlying title to, vast territories of North America already in occupation by Aboriginal societies.[144] This Court has similarly

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[140] *Chippewas of Sarnia Band v Canada (Attorney-General)*, [2001] 1 CNLR 56 (OCA), paras. 19, 50-65, 184-205 ["***Chippewas* (OCA)**"]; *Delgamuukw*, para. 200 (La Forest J.); B. Slattery, "The Metamorphosis of Aboriginal Title" (2007) 85 CBR 256 at 260-61 ["**Slattery, *Metamorphosis***"]; Slattery, *Understanding Aboriginal Rights*, at 736-40.

[141] *R v Van der Peet*, [1996] 2 SCR 507, paras. 35-37 ["***Van der Peet***"]; *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823) ["***Johnson***"]; *Cherokee Nation v State of Georgia*, 5 Peters 1 (1831); *Worcester v Georgia*, 31 US (6 Pet) 515 (1832) ["***Worcester***"]; *Mitchel v United States*, 9 Pet 711 at 746 (1835) ["***Mitchel***"].

[142] In the United States, proof of Indian title requires the "showing of actual, exclusive and continuous use and occupancy 'for a long time' …": *Sac & Fox Tribe of Indians of Oklahoma v United States* (1967), 383 F.2d 991 at 998, cert. denied, 389 U.S. 900 ["***Sac & Fox***"]; *Cohen's Handbook of Federal Indian Law*, Nell Jessup Newton ed., 2012 (Albuquerque: American Indian Law Center, 2012) at §15.04[2] ["***Cohen's Handbook of Federal Indian Law***"].

[143] *Mitchel*, at 746 (1835) (underscore added).

[144] *Johnson*, at 572-74; *Worcester,* at 542-549.

stated that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown".[145]

105. The "doctrine of discovery" has come under increasing criticism in recent years as profoundly out of step with modern values and international principles.[146] Indeed, in ***Haida Nation v. British Columbia***, this Court more accurately described Crown control over the lands and resources formerly held by Aboriginal peoples in British Columbia as "*de facto*" (as distinct from "*de jure*"), perhaps signalling a more principled approach to reconciling Crown and Aboriginal sovereignties.[147]

106. However, **even under the "doctrine of discovery"**, the sweeping claims to territorial sovereignty advanced by European states remained subject to the original title of the Aboriginal inhabitants – including title to "hunting grounds" – and this "original Indian title was accorded the protections of complete ownership" unless extinguished, surrendered or abandoned.[148]

107. Professor Slattery has summarized the common law of Aboriginal title at the time the British Crown asserted sovereignty in these same terms:

> The common law of aboriginal title recognized the exclusive title of an indigenous group to the lands it traditionally occupied and controlled. There was no need for aboriginal occupation to conform to the requirements of English property law. In particular, rotating or seasonal use of territories for hunting, fishing, trapping, and gathering was accepted as a sufficient basis for aboriginal title**.** An indigenous group was entitled to use its lands for whatever purpose it saw fit ... Aboriginal title was viewed at common law as co-existing with the ultimate or underlying title of the Crown. It could not be transferred to private parties but could only be ceded to or shared with the Crown by treaty.

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[145] *R v Sparrow*, [1990] 1 SCR 1075 at 1103 ["***Sparrow***"]; see also, Appeal Decision, para. 166 (AR vol. III, Tab 9 at 150).

[146] See, *e.g.*: Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, v 1 (Ottawa: Supply and Service Canada, 1996) at 695-96; Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Addendum: The Situation of Indigenous Peoples in the United States of America*, UN Doc. A/HRC/21/47/Add.1 (30 August 2012), paras. 14-17, 103-05.

[147] *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, para. 32 ["***Haida Nation***"]; *Manitoba Métis Federation Inc. v Canada (Attorney General)*, 2013 SCC 14, para. 66; *Mitchell*, paras. 112-13, 129, 134-35 (Binnie J.); B Slattery, "Aboriginal Rights and the Honour of the Crown" (2005), 29 SCLR 433 at 434-38.

[148] *United States v Alcea Band of Tillamooks, et al* (1946), 329 US 40 at 46 ["***Alcea Band***"]; *Mitchel*, at 713, 745-46; *Cohen's Handbook of Federal Indian Law*, at § 15.04[2] (fn 34 and associated text).

> This, then, was the original form of aboriginal title, as it existed in the period following the Crown's acquisition of factual sovereignty …[149]

108. It is important to revisit this history because, in the intervening years, the doctrine of Aboriginal title fell into disuse. As the military and economic significance of First Nations waned, Aboriginal claims to the land were increasingly ignored. During these years of neglect, the doctrine strayed from its original pillars of recognition, respect and equality.[150]

109. In many ways, British Columbia exemplifies this long era of denial and neglect. In much of eastern and central Canada, the Crown negotiated with First Nations for access to their lands by treaty, pursuant to the fundamental tenets expressed by the *Royal Proclamation*.[151]

110. Despite repeated entreaties by First Nations and the federal government, the colony and then the Province of British Columbia steadfastly ignored the land rights of the original occupants, a position the courts have described as "intransigent".[152] With few early exceptions, confined primarily to Vancouver Island, no attempts were made to negotiate treaties.[153]

B. The Modern Law of Aboriginal Title

111. As a result of long decades of denial, the protection of Aboriginal land rights was often "embarrassingly weak".[154] However, in recent years, this Court has started to reconstruct a modern law of Aboriginal title, in terms that resonate with the historical foundations of Aboriginal title and its initial promise as a "bridge" between disparate legal cultures.

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[149] Slattery, *Metamorphosis*, at 259 (underscore added); see also: *Kent's Commentaries* 14 ed. by Holmes, vol. 3, at 386, note (*a*) ["***Kent's Commentaries***"], quoted in *St. Catharine's Milling & Lumber Co. v R* (1887), 13 SCR 577, at 612-13 (Strong J., dissenting but affirmed by Hall J. in *Calder v A.G. (B.C.),* [1973] SCR 313 at 376-79 ["***Calder***"]).
[150] RCAP, *Restructuring the Relationship*, at 467-68, 559-61; Slattery, *Metamorphosis*, at 261.
[151] *Chippewas* (OCA), paras. 52-64; Slattery, *Understanding Aboriginal Rights*, at 763-64.
[152] *Gitanyow First Nation v Canada*, [1999] BCJ No. 659 (SC), para. 19 ["***Gitanyow***"]; see *Van der Peet*, para. 273 (McLachlin J., dissenting but not on this point).
[153] *Gitanyow*, paras. 12-19; *Haida Nation*, para. 25.
[154] Appeal Decision, paras. 174 (AR vol. III, Tab 9 at 152).

1. *Calder v. British Columbia*

112. When the claim of the Nisga'a Nation came before the courts in the 1960s/70s, British Columbia denied the existence of Aboriginal title as a cognizable right, absent express recognition by the Crown. This position was affirmed by the courts of British Columbia, in part based on the view that the Nisga'a were a "very primitive people with few of the institutions of civilized society".[155] On appeal, in ***Calder v. British Columbia***, this Court deadlocked on the threshold question of whether Aboriginal title survived as a legal interest in British Columbia,[156] or whether it was extinguished in the colonial era.[157]

113. Notably, the three judges in *Calder* that would have declared Aboriginal title, led by Justice Hall, accepted that Aboriginal title was not confined to permanent villages and intensively used sites. Instead, the lands admitted to be in possession of the Nisga'a included tracts of land that they exploited "periodically, seasonally, according to the game and the fishing season".[158] These were the lands controlled by the Nisga'a, and exploited by the Nisga'a in pursuit of their recurrent traditional pattern of survival from the land.[159]

114. In the result, however, a bare majority of the Court (4:3) denied the declaration of Aboriginal title based on a procedural defect: the failure of the Nisga'a Nation to obtain a *fiat* from the Attorney-General.[160]

2. *Delgamuukw v. British Columbia*

115. In 1997, with its landmark decision in ***Delgamuukw v. British Columbia***, this Court finally affirmed Aboriginal title as a valid and existing legal right, capable of competing "on an equal footing with other proprietary interests".[161] The Court described Aboriginal title as a truly

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[155] *Calder v Attorney-General of British Columbia* (1970), 13 DLR (3d) 64 (BCCA) at 66 (Davey C.J.).
[156] *Calder*, at 315-16 (headnote) (Hall J.).
[157] *Calder*, at 314-15 (headnote) (Judson J.).
[158] *Calder*, at 349 (underscore added).
[159] *Calder*, at 363-64.
[160] *Calder*, at 422-27 (Pigeon J.), 345 (Judson J. concurring).
[161] *Delgamuukw*, para. 113; see also paras. 4, 112.

intersocietal body of law, grounded in "the relationship between common law and pre-existing systems of aboriginal law", drawing equally from each.[162]

116. In contrast to other Aboriginal rights, which protect an Aboriginal group's ability to continue specific practices, customs or traditions (*e.g.* fishing or hunting), Aboriginal title confers the exclusive right to the land itself, the right to the economic benefit of the lands and resources, and the right to decide how those lands will be used.[163] Aboriginal title lands may be put to "modern uses" (*i.e.* not confined to traditional activities), subject to the "inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable" with the Aboriginal group's relationship to the land.[164]

117. In *Delgamuukw*, the Court set out "exclusive occupation" as the test for Aboriginal title:

> In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[165]

118. Critically, the assessment of occupation for proof of Aboriginal title must take into account both the common law and the Aboriginal perspective on land, in equal measure:

> … [T]he source of aboriginal title appears to be grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law. It follows that both should be taken into account in establishing the proof of occupancy … "[t]rue reconciliation will, equally, place weight on each".[166]

119. Elaborating on the Aboriginal perspective, Chief Justice Lamer stated that "if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title".[167]

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[162] *Delgamuukw*, paras. 114, 148, 156.
[163] *Delgamuukw*, paras. 140, 166, 169.
[164] *Delgamuukw*, paras. 125, 169.
[165] *Delgamuukw*, para. 143 (underscore added).
[166] *Delgamuukw*, paras. 147-48 (underscore added).
[167] *Delgamuukw*, para. 148 (underscore added).

120. Turning to the common law perspective on occupation, the former Chief Justice stated:

> Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land … Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.[168]

121. Thus, even from the common law perspective, Aboriginal title is not confined to permanent villages and enclosed fields – it also includes "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources". On its face, this standard captures the core hunting, trapping, fishing and gathering grounds that a First Nation exploited at sovereignty, season after season, according to its traditional pattern of land use.

122. Indeed, Chief Justice Lamer confirmed that Aboriginal title can arise from "use of the land as a hunting ground".[169]

123. Mr. Justice La Forest, in his concurring opinion, reiterated the importance of assessing occupancy as "part of the aboriginal society's traditional way of life. In pragmatic terms, this means looking at the manner in which the society used the land to live …"[170] Applying this standard, he concluded that "aboriginal occupancy refers not only to the presence of aboriginal peoples in villages or permanently settled areas" but also to "the use of adjacent lands and even remote territories to pursue a traditional mode of life".[171]

124. Ultimately, however, this Court did not apply the test for Aboriginal title in *Delgamuukw*. Because of a defect in the pleadings and errors by the trial judge, the Court ordered a new trial.

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[168] *Delgamuukw*, para. 149 (underscore added).
[169] *Delgamuukw*, para. 128.
[170] *Delgamuukw*, para. 194 (underscore in original).
[171] *Delgamuukw*, para. 199.

3. ***R. v. Marshall; R. v. Bernard***

125. The Court revisited Aboriginal title in ***R. v. Marshall; R. v. Bernard***.[172] In these companion appeals, Mi'kmaq members asserted Aboriginal title in Nova Scotia and New Brunswick (respectively) as a defence to regulatory prosecutions for harvesting timber. On appeal, the Court considered "whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways".[173]

126. Chief Justice McLachlin's answer to this question, for the majority of the Court, was that it "depends on the evidence" in each case.[174] She reiterated the emphasis in *Delgamuukw* on a generous approach, drawing on both common law and Aboriginal perspectives:

> In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes …[175]

127. The Chief Justice specifically endorsed the approach to assessing Aboriginal occupation established by Lamer C.J. and La Forest J. in *Delgamuukw*; *i.e.* "[i]n considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'". This means "looking at the manner in which the society used the land *to live*".[176]

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[172] 2005 SCC 43.
[173] *Marshall*, para. 66.
[174] *Marshall*, para. 66.
[175] *Marshall*, para. 70 (underscore added).
[176] *Marshall*, para. 49 (underscore added, italics in original).

128. In *Marshall*, the Chief Justice directed the courts to reconcile common law and Aboriginal perspectives by "translating" pre-sovereignty Aboriginal practices into equivalent rights at common law: "[t]he Court's task … is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right".[177]

129. Aboriginal and European perspectives both inform this translation process. The Court considers the nature and extent of the pre-sovereignty practice <u>from the perspective of the Aboriginal people</u>. However, in translating this practice into a modern legal right, the Court also considers <u>the common law perspective</u>: "the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it".[178]

130. However, the Chief Justice stressed, repeatedly, that this translation process "must not be conducted in a formalistic or narrow way". She emphasized that the courts should take a "generous view of the aboriginal practice" and a "generous approach must be taken in matching it to the appropriate modern right". She cautioned the courts against demanding "exact conformity" with the legal parameters of the common law right.[179]

131. The governing question, rather, is "whether the [Aboriginal] practice corresponds to the <u>core concepts</u> of the legal right claimed". "Absolute congruity is not required", she continued, "so long as the [Aboriginal] practices engage the <u>core idea</u> of the modern right". Stated differently, the pre-sovereignty practices must correspond "<u>in some broad way</u> to the modern right claimed".[180] The question in each case is "what modern right best corresponds to the pre-sovereignty aboriginal practice, <u>examined from the aboriginal perspective</u>?"[181]

132. Which Aboriginal practices correspond to title to the land? In *Marshall*, the Chief Justice stated that Aboriginal title "is established by aboriginal practices that indicate <u>possession</u> similar to that associated with title at common law".[182] She emphasized that the hallmark of common

[177] *Marshall*, para. 48; see also para. 51.
[178] *Marshall*, para. 48.
[179] *Marshall*, paras. 48, 50.
[180] *Marshall*, paras. 48, 50 (underscore added).
[181] *Marshall*, para. 52 (underscore added).
[182] *Marshall*, para. 54 (underscore added).

law title is exclusive physical control; in her words, "[t]he right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law".[183]

133. McLachlin C.J. emphasized exclusive physical control as the factor that distinguishes Aboriginal title from other Aboriginal rights:

> It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.[184]

134. The Chief Justice, in this passage, confirmed that regular (including seasonal) exploitation of the land for its resources "may translate into aboriginal title to the land". However, the Chief Justice observed that "more typically" such activities will translate into hunting or fishing rights, because they often lack the necessary, additional element of physical control over the land: "the season over, they left, and the land could be traversed and used by anyone".

135. McLachlin C.J. summarized this essential distinction as follows:

> Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title … They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.[185]

This statement of the law contemplates Aboriginal title extending beyond particular, intensively used sites to "larger areas of land … exploited for agriculture, hunting, fishing or gathering", as defined by the evidence in each case.

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[183] *Marshall*, para. 64.
[184] *Marshall*, para. 58 (underscore added).
[185] *Marshall*, para. 62 (underscore added).

136. In a concurring opinion, LeBel J. (with Fish J.) expressed concern that the test set out by the majority, if applied insensitively, could perpetuate the historical practice of ignoring Aboriginal views of land and property in favour of "Euro-centric conceptions of property rights".[186] LeBel J. stressed the importance of equally weighing Aboriginal and common law perspectives when assessing occupancy:

> If aboriginal title is a right derived from the historical occupation and possession of land by aboriginal peoples, then notions and principles of ownership cannot be framed exclusively by reference to common law concepts. The patterns and nature of aboriginal occupation of land should inform the standard necessary to prove aboriginal title. The common law notion that "physical occupation is proof of possession" remains, but the nature of the occupation is shaped by the aboriginal perspective, which includes a history of nomadic or semi-nomadic modes of occupation.[187]

137. In many ways, Lebel J.'s concurring opinion adds emphasis to the Chief Justice's repeated admonitions, for the majority, that Aboriginal occupancy for proof of Aboriginal title is shaped by "the manner in which the society used the land *to live*" and must take equal and generous account of the Aboriginal perspective on land use.

138. Ultimately, the Court in *Marshall* upheld the trial decisions in both cases dismissing the Mi'kmaq Aboriginal title claims, because the evidentiary record was inadequate to identify areas regularly used by the Mi'kmaq at sovereignty. In both cases, the Defendants appear to have equated mere proof of traditional territory with proof of Aboriginal title[188] and did not lead sufficiently compelling evidence of actual, regular use and occupation of lands.

139. For example, the Defendants in *Marshall* asserted Aboriginal title to the whole of Nova Scotia on the grounds that "Nova Scotia was part of the 'traditional lands' of the Mi'kmaq".[189] To this end, as in *Bernard*, the Defendants led only a single Mi'kmaq witness (Chief Augustine)

[186] *Marshall*, paras. 110, 127.
[187] *Marshall*, para. 131 (underscore added).
[188] *R v Marshall* (2001), 2001 NSPC 2, para. 3 ["***Marshall*** **(NSPC)**"]; *R v Marshall*, 2003 NSCA 105, para. 115; *R v Bernard*, [2000] 3 CNLR 184, (NB Prov Ct), para. 94 ["***Bernard*** **(NBPC)**"]; 2003 NBCA 55, para. 9 (Daigle J.A.) ["***Bernard*** **(NBCA)**"].
[189] *R v Marshall*, 2002 NSSC 57, para. 74 ["***Marshall*** **(NSSC)**"].

who provided only general evidence.[190] No Aboriginal witnesses in *Marshall* or *Bernard* provided oral history evidence of personal or ancestral use of the claimed lands (as compared to the 29 Tsilhqot'in witnesses that provided detailed evidence in the present case).

140. In *Bernard*, no documentary or archaeological evidence spoke directly to Mi'kmaq use and occupation of the Sevogle watershed, and the expert testimony was speculative (again, in stark contrast to this appeal).[191] Further, the trial judge found that Mi'kmaq occupation lacked the critical element of exclusivity: "the Mi'kmaq had neither the intent nor the desire to exercise exclusive control, which … is fatal to the claim for Aboriginal title".[192]

141. In the result, the Court upheld the trial findings dismissing the Aboriginal title claims. Notably, the trial judge in *Marshall* accepted that the Mi'kmaq likely did hold Aboriginal title to "at least nearby hunting grounds" and other areas, but concluded that the evidentiary vacuum before him made it impossible to identify these lands; *e.g.*:

> …
>
> b) On the mainland the Mi'kmaq made intensive use of bays and rivers and at least nearby hunting grounds. The evidence is just not clear about exactly where those lands were or how extensive they were. It is most unlikely all the mainland was included in those lands. There just weren't enough people for that.
>
> c) As for Cape Breton, there simply is not enough evidence of where the Mi'kmaq were and how long they were there to conclude that they occupied any land to the extent required for aboriginal title.
>
> d) In particular, there is no clear evidence that the Mi'kmaq of the time made any use, let alone regular use, of the cutting sites where these charges arose, either on the mainland or in Cape Breton.[193]

142. In his concurring opinion, Justice LeBel agreed that "[t]he record in the courts below lacks the evidentiary foundation necessary to make legal findings on the issue of aboriginal title".[194]

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[190] *Marshall* (NSPC), para. 65; *Bernard* (NBPC), paras. 19, 101; *Bernard* (NBCA), para. 315 (*per* Robertson J.A.).
[191] *Bernard* (NBPC), paras. 100, 106.
[192] *Bernard* (NBPC), paras. 108-10; *Marshall*, para. 81.
[193] *Marshall*, para. 79 (underscore added); see also *Marshall* (NSPC), para. 131; *Marshall* (NSSC), paras. 37, 107; *Bernard* (NBCA), paras. 509-10, 535 (*per* Deschênes J.A).

143. The present appeal stands in stark contrast. Unlike *Marshall*, the costs order in this case ensured a "very complete record".[195] The trial judgment is "organized and comprehensive".[196] The parties do not dispute any significant findings of fact.[197] In short, this appeal "presents a suitable vehicle for development of the law".[198]

C. Errors in the Judgment of the Court of Appeal

144. This Court is presented with two divergent paths for the law of Aboriginal title, each leading to profoundly different outcomes for the Tsilhqot'in people and the future of Crown-Aboriginal relations.

145. The Trial Judge applied this Court's jurisprudence to conclude that Aboriginal title arises not only from Tsilhqot'in occupation of "village sites" and "cultivated fields" (*i.e.* the slopes and valleys of the transition zone that the Tsilhqot'in actively managed for berries and root plants), but also from regular and exclusive Tsilhqot'in occupation of surrounding hunting, trapping and fishing grounds (connected by a well-established transportation network and exploited year after year)[199] pursuant to a "highly organized schedule"[200] of traditional land use. The Appellant submits that the Trial Judge's approach accords fully with the direction of this Court.

146. By contrast, the Court of Appeal held that, notwithstanding the facts or evidence of any particular case, Aboriginal title is restricted as a matter of law to particular, intensively exploited <u>sites</u>. On this view, Aboriginal title can <u>never</u> be established to core hunting or gathering areas.

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[194] *Marshall*, para. 141.
[195] Appeal Decision, para. 26 (AR vol. III, Tab 9 at 106).
[196] Appeal Decision, para. 27 (AR vol. III, Tab 9 at 106).
[197] Appeal Decision, para. 29 (AR vol. III, Tab 9 at 107).
[198] Appeal Decision, para. 165 (AR vol. III, Tab 9 at 149).
[199] Trial Decision, paras. 679-80, 733, 798, 848, 874, 897, 959-60 (AR vol. II, Tab 4 at 41-42, 60, 79, 93, 100, 107, 125-127).
[200] Exhibit 0224, Dinwoodie Report, at 41 (AR vol. VIII, Tab 45 at 93); see also: Exhibit 0443, Dewhirst Report, paras. 27-31 (AR vol. XI, Tab 53 at 169-61); Trial Decision, paras. 380 (AR vol. I, Tab 3 at 140), 948, 959-60 (AR vol. II, Tab 4 at 122, 125-127).

147. In our submission, the Court of Appeal has entrenched an "impoverished view of Aboriginal title"[201] that contradicts not only the clear direction of this Court in *Delgamuukw* and *Marshall*, but also the foundational principles of Aboriginal title carefully established by the Court in those judgments.

1. The Court of Appeal disregarded the clear direction of this Court

148. This Court has never restricted Aboriginal title to specific, intensively used sites. To the contrary, this Court has consistently described Aboriginal title in far more robust terms, *e.g.*:

a. In *Calder*, the lands admitted to be in Nisga'a possession included tracts that they exploited "periodically, seasonally, according to the game and the fishing season";[202]

b. in *Delgamuukw*, Lamer C.J. held that Aboriginal title can be proven by "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources",[203] and confirmed that Aboriginal title can arise from "use of the land as a hunting ground";[204]

c. concurring in *Delgamuukw*, La Forest J. stated that Aboriginal title is not confined to "villages or permanently settled areas" but also includes "the use of adjacent lands and even remote territories to pursue a traditional mode of life",[205]

d. in *Marshall*, the Chief Justice reiterated that "exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land", and stated that Aboriginal title can be established to "larger areas of land which they exploited for agriculture, hunting, fishing or gathering";[206]

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[201] Trial Decision, para. 1376 (AR vol. III, Tab 5 at 75).
[202] *Calder*, at 349.
[203] *Delgamuukw*, para. 149 (underscore added).
[204] *Delgamuukw*, para. 128 (underscore added).
[205] *Delgamuukw*, para. 199 (underscore added).
[206] *Marshall*, paras. 58, 62 (underscore added).

e. in fact, in *Marshall*, the Chief Justice affirmed the findings of the trial judge, who accepted that Aboriginal title can be established to "hunting grounds" but was unable on the evidence to determine the location and extent of such lands;[207] and

f. in *Haida Nation*, this Court unanimously held that "[t]he Haida's claim to title to Haida Gwaii is strong",[208] without any suggestion that Aboriginal title could be asserted only to individual salt licks and village sites.

149. This Court adopted the standard of "regular use of definite tracts" in *Delgamuukw* from Professor McNeil's treatise on common law title.[209] Far from restricting Aboriginal title to particular sites, Professor McNeil concludes,

> … [t]here can be little doubt that a group of hunter-gatherers who habitually and exclusively ranged over a definite tract of land, visiting religious sites and exploiting natural resources in accordance with their own interests and way of life, would be in occupation of that land. Where others asked permission for access to the land, the very fact that permission was asked for and given would be further evidence of the group's exclusive control ... As to the extent of that occupation, it would include not just land in actual use by them at any given moment, but all land within their habitual range, for occupation, once acquired, is not necessarily lost by temporary absence (particularly if seasonal), so long as the intention and capacity to retain exclusive control and return to the land continue, and no one else occupies it in the meantime.[210]

2. The "context-specific nature of common law title"

150. Notwithstanding the above, the Court of Appeal reframed the standard of "regular use of definite tracts of land" to require, in all cases, "an intensive presence at a particular site".[211]

151. This fixed standard does not find support even in the common law, which has never applied such a rigid and inflexible test of occupation, nor restricted possession to intensively exploited sites. As the Chief Justice stated in *Marshall*,

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[207] *Marshall*, para. 79 (underscore added).
[208] *Haida Nation*, para. 7 (underscore added).
[209] *Delgamuukw*, para. 149.
[210] K McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 203-4 (underscore added).
[211] Appeal Decision, para. 220 (AR vol. III, Tab 9 at 166) (underscore added).

> In matching common law property rules to aboriginal practice we must be sensitive to the context-specific nature of common law title, as well as the aboriginal perspective. The common law recognizes that possession sufficient to ground title is a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed: *Powell v. McFarlane* (1977), 38 P. & C.R. 452 (Ch. D.), at p. 471. For example, where marshy land is virtually useless except for shooting, shooting over it may amount to adverse possession: *Red House Farms (Thorndon) Ltd. v. Catchpole*, [1977] E.G.D. 798 (Eng. C.A.). The common law also recognizes that a person with adequate possession for title may choose to use it intermittently or sporadically …[212]

152. In keeping with the above principles, the common law furnishes numerous examples of possession established to tracts of land, especially undeveloped lands, based on occupation that is neither intensive nor limited to a particular site.[213]

153. In ***Red House Farms*** (as noted by the Chief Justice in the above quote), regular shooting over marshy lands for two decades established adverse possession of the land.[214] Similarly, the blazing of lines to mark property on timberland in one case (***Halifax Power***), and the payment of taxes on woodlands in another (***Kirby***) without any other acts in relation to the land, sufficed to establish possession of these tracts of land because this was "the only act of possession of which it appeared capable" (*per Halifax Power*).[215]

154. In an 1825 case, possession was established to a woodland although "[t]he plaintiff himself did not appear to have any other enjoyment of the land than that of shooting the game; he usually came about *August* and remained till *November* ...".[216] The plaintiff authorized another party to take grass from the woodland, but did not otherwise use or authorize use of the land.

155. The result of the Court of Appeal's decision below would be that an individual European could establish possession to a woodland based on four months of hunting annually for sport, but an Aboriginal community that seasonally hunted throughout woodlands for survival, for

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[212] *Marshall*, para. 54 (underscore added); see also: Pollock and Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) at 30-31 ["**Pollock & Wright, *Possession***"]; *J.A. Pye (Oxford) Ltd. v Graham*, [2002] 3 WLR 221 (HL), para. 41 ["***J.A. Pye***"].
[213] In addition to the authorities below, see also: *Curzon v Lomax,* (1803) 170 ER 737 (KB); *Cadija Umma v S. Don Manis Appu*, [1939] AC 136 (PC) at 141-42; *Wuta-Ofei v Danquah*, [1961] 3 All ER 596 (PC) at 600.
[214] *Red House Farms Ltd. v Catchpole* (1976) 244 EG 295 (CA) (*per* Cairns L.J.).
[215] *Halifax Power Co. v Christie* (1915), 48 NSR 264 (CA) at 267-70; *Kirby v Cowderoy*, [1912] AC 599 (PC).
[216] *Harper v Charlesworth* (1825), [1824-34] All ER Rep 66 (KB) at 67-68.

generations, and controlled these lands as against all others, could not establish possession of more than individual salt licks and hunting blinds – if at all. Surely this cannot be correct.

156. Possession at common law is a highly contextual and fact-specific inquiry:

> Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.[217]

157. The Court of Appeal's approach takes what the Chief Justice in *Marshall* described as a "contextual, nuanced concept"[218] and strips it of both context and nuance. Possession is inherently "a matter of fact, depending on all the circumstances, in particular the nature of the land and the manner in which the land is commonly enjoyed".[219] An approach that confines this wide ranging inquiry to a single factor (*i.e.* intensive presence at a particular site) is entirely antithetical to the concept of possession at common law.

3. "Occupation … of the land as part of the aboriginal society's traditional way of life"

158. The context-specific nature of possession is particularly important when assessing Aboriginal occupation. *Marshall* directs that

> [w]hether a nomadic people enjoyed sufficient 'physical possession' to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used".[220]

159. The importance of this principle cannot be overstated. Each judge that wrote in *Delgamuukw* and *Marshall* stressed the need to assess Aboriginal occupation **as part of the traditional way of life of the claimant group**. As summarized in *Marshall*:

> To determine aboriginal entitlement, one looks to aboriginal practices rather than imposing a European template: "In considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed'"

[217] *J.A. Pye*, para. 41 (underscore added); Pollock and Wright, *Possession*, at 30.
[218] *Marshall*, para. 66.
[219] *Marshall*, para. 54.
[220] *Marshall*, para. 66 (underscore added).

(*Delgamuukw*, *per* Lamer C.J., at para. 149). The application of "manner of life" was elaborated by La Forest J. who stated that:

> . . . when dealing with a claim of "aboriginal title", the court will focus on the occupation and use of the land as part of the aboriginal society's *traditional way of life*. In pragmatic terms, this means looking at the manner in which the society used the land *to live*, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc.[221]

160. It is hard to imagine a better description of the task undertaken by the Trial Judge in the present case.

161. Properly considered, the inquiry into whether an Aboriginal group made "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" must be informed by "the manner in which the society used the land *to live*".[222]

162. Indeed, asking whether Aboriginal use of land was "regular" makes no sense without surrounding context. "Regularity" does not refer exclusively (or even primarily) to "intensity" of use. Rather, it describes a pattern, custom or system of use. "Regular" events are those that recur periodically, according to a predictable pattern or system of conduct.

163. In *Marshall*, the Chief Justice contrasted "regular use" of land (which supports a title claim) with use that is "incidental" or "occasional" (which may establish other Aboriginal rights, but not Aboriginal title).[223] These latter phrases suggest uses of land that are not part of a recurring pattern of occupation: *i.e.* "Happening casually or incidentally, incidental … Occurring or met with now and then; irregular and infrequent; sporadic".[224]

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[221] *Marshall*, para. 49 (underscore added, italics in original).
[222] *Marshall*, para. 49 (italics in original).
[223] *Marshall*, paras. 59, 74, 76 (underscore added).
[224] *The New Shorter Oxford English Dictionary* (5th ed.), v 2 (Oxford: Clarendon Press, 2002) at 1973 ("occasional"). See also: "occasionally"; *Marshall*, paras. 74, 81.

164. As stated in *Marshall*,

> … the line separating sufficient and insufficient occupancy for title is between irregular use of undefined lands on the one hand and regular use of defined lands on the other”.[225]

This dichotomy indicates that the proper focus of the court is on whether Aboriginal use of the lands in question was an essential part of a recurring, systematic pattern of land use.

165. Considered in context, “definite tracts” (or “defined lands”) describe the lands that were intimately known to the First Nation; the lands that they relied on season after season for local resources and other values as part of “a highly organized schedule of use”[226] that was essential to cultural survival. This stands in contrast to “undefined” lands that were exploited only opportunistically or occasionally.

166. The Trial Judge’s assessment of Tsilhqot’in occupation reflects an intensely fact-specific understanding of the Tsilhqot’in, their way of life, and how they regularly used the Claim Area lands to live.

167. By contrast, the Court of Appeal has created a fixed and inflexible standard that leaves no room to consider this essential context. By reducing the inquiry to a single, decisive factor (*i.e.* intensive presence at a particular site), the Court of Appeal has rendered irrelevant the very circumstances that this Court has said must shape the assessment. It has removed the “Aboriginal” from the assessment of Aboriginal occupation.

4. “The Aboriginal perspective on land … includ[ing] … their systems of law”

168. Restricting Aboriginal title to particular, intensively used sites is contrary to the common law, as reviewed above. At the same time, this approach completely disregards the other source for Aboriginal title: the “aboriginal perspective on land” , including “their systems of law”.

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[225] *Marshall*, paras. 73, 75 (underscore added).
[226] Exhibit 0224, Dinwoodie Report, at 41 (AR vol. VIII, Tab 45 at 93).

169. *Delgamuukw* confirmed that Aboriginal title is

> … grounded both in the common law and in the aboriginal perspective on land; the latter includes, but is not limited to, their systems of law … both should be taken into account in establishing the proof of occupancy …
>
> …
>
> '[t]rue reconciliation will, equally, place weight on each' … As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[227]

170. The Tsilhqot'in Nation was a rule ordered society, governed by *dechen ts'edilhtan* ("the laws of our ancestors").[228] As described by Tsilhqot'in elders, "[t]hese are the teachings that came down from the ?Esggidam, the ancestors, teachings on how to live ... These are the laws that were handed down from the ?Esggidam".[229]

171. Pursuant to the Tsilhqot'in land tenure system, all Tsilhqot'in people were and are entitled to utilize the entire Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community.[230] At the same time, certain Tsilhqot'in families retain customary rights to the land use areas that they rely on season after season for sustenance:

> The places regularly used and occupied by each family in the seasonal round year after year are "customary use areas." … [T]he Tsilhqot'in recognize certain broad areas and specific resource sites as belonging to extended families, who customarily use and control the areas from generation to generation …
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> …
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> … [C]ustomary use areas are linked to families for generations, although other Tsilhqot'ins may also use a customary use area as long as they respect the families who customarily use that area …[231]

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[227] *Delgamuukw*, paras. 147-48 (underscore added). See also *Van der Peet*, paras. 40-42.
[228] Trial Decision, paras. 431-32, 436 (AR vol. I, Tab 3 at 154, 155).
[229] Transcript (Christine Cooper), v. 83, p. 14544:42-45 (AR, vol. V, Tab 25); Exhibit 0366, Affidavit #1 of Gilbert Solomon, para. 20 (AR, vol. V, Tab 32 at 161).
[230] Trial Decision, paras. 359-361, 459 (AR vol. I, Tab 3 at 131-132, 163).
[231] Exhibit 0443, Dewhirst Report, paras. 29, 36 (AR vol. XI, Tab 53 at 161, 163) (underscore added); Trial Decision, paras. 359-361 (AR vol. I, Tab 3 at 131-132).

172. Tsilhqot'in laws of trespass regulated access to, and use of, Tsilhqot'in territory by others:

> The Tsilhqot'in monitored their territory and maintained exclusive control by challenging those who trespassed without permission. Generally speaking people who were not members of specific Tsilhqot'in bands were not allowed to travel, hunt, or otherwise occupy or use Tsilhqot'in territory in any sustained way without the permission of the relevant Tsilhqot'in people.[232]

173. In translating Aboriginal practices to common law rights, the central question is "what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective?"[233] As stated in *Marshall*:

> Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land. It would be wrong to look for indicia of aboriginal title in deeds or Euro-centric assertions of ownership. Rather, we must look for the equivalent in the aboriginal culture at issue.[234]

174. Here, Tsilhqot'in laws of trespass, access, land use and ownership were the equivalent of European title deeds, and at least as effective:

> Both Tsilhqot'in and non-Tsilhqot'in recognized the Claim Area as lying firmly within Tsilhqot'in territory ...[235]
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> …
>
> … [T]he archival records show that "[t]o be safe" in Tsilhqot'in country, "one had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down".[236]
>
> …
>
> … Tsilhqot'in people were there in sufficient numbers to monitor European traders, missionaries, settlers and railway surveyors on their arrival. There is evidence that each of

[232] Exhibit 0224, Dinwoodie Report, at 36 (underscore added), 37, 40 (AR vol. VIII, Tab 45 at 88-89, 92); Exhibit 0166, Hudson Report, at 2, 7-9 (AR vol. VI, Tab 40 at 39, 44-46).
[233] *Marshall*, para. 52 (underscore added).
[234] *Marshall*, para. 61 (underscore added).
[235] Trial Decision, para. 622 (AR vol. II, Tab 4 at 21) (underscore added); Exhibit 0240, Brealey Report, at 20-21 (AR vol. VIII, Tab 46 at 146-47).
[236] Trial Decision, para. 917 (AR vol. II, Tab 4 at 112) (underscore added).

> these groups of new arrivals were aware that Tsilhqot'in people considered this to be their land. Others were permitted to be on that land or to pass over that land at the sufferance of Tsilhqot'in people.[237]

Indeed, the historical record is replete with examples of non-Tsilhqot'in guides refusing to enter Tsilhqot'in territory, expressing fear of Tsilhqot'in reprisals.[238]

175. This is not a situation where "the season over, they left, and the land could be traversed and used by anyone".[239] The Tsilhqot'in enforced their exclusive physical control over the Proven Title Area lands, year round, for generations,[240] pursuant to laws that expressed Tsilhqot'in ownership in no uncertain terms to neighbouring First Nations and then arriving Europeans.

176. In short, the Tsilhqot'in dealt with the Proven Title Area lands as an "occupying owner", the very stamp of possession at common law.[241]

177. This Court has emphasized that "[t]he aboriginal perspective grounds the analysis and imbues its every step".[242] By contrast, the Court of Appeal has reframed the test of Aboriginal title to impose a fixed standard (*i.e.* intensive presence at a particular site) that holds no significance for Aboriginal peoples and leaves no space to consider Aboriginal perspectives on land, including their systems of law.

5. "[O]ne looks to aboriginal practices rather than imposing a European template"

178. The Chief Justice cautioned in *Marshall* that

> … [t]o determine aboriginal entitlement, one looks to aboriginal practices rather than imposing a European template … to insist that the pre-sovereignty practices correspond in

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[237] Trial Decision, para. 938 (AR vol. II, Tab 4 at 119) (underscore added); see also Exhibit 0407, Coates Report, at 47-54 (AR vol. IX, Tab 49 at 117-24).
[238] Trial Decision, paras. 182, 293, 295-96 (AR vol. I, Tab 3 at 75, 109, 110), 921 (AR vol. II, Tab 4 at 114); see also: Exhibit 0391, Foster Report, at 21-23 (AR vol. IX, Tab 48 at 55-57).
[239] *Marshall*, para. 58.
[240] Trial Decision, paras. 187 (AR vol. I, Tab 3 at 77), 938, 943 (AR vol. II, Tab 4 at 119, 120).
[241] *J.A. Pye*, para. 41; Pollock & Wright, *Possession*, at 30; Exhibit 0391, Foster Report, at 23 (AR vol. IX, Tab 48 at 57).
[242] *Marshall*, para. 50.

> some broad sense to the modern right claimed, is not to ignore the aboriginal perspective".[243]

179. The Court of Appeal's test of occupation is the very definition of a "European template". It measures Aboriginal occupation against a narrow European conception of title in a manner that ignores the Aboriginal perspective. (Indeed, as reviewed above, even the English common law itself does not impose such a narrow and restrictive a view of possession).

180. In fact, so extreme is the European template imposed by the Court of Appeal that it would deny title to what the Trial Judge described as the "cultivated fields" of the Proven Title Area:

> … [T]here are cultivated fields, cultivated from the Tsilhqot'in perspective. These were the valleys and slopes of the transition zone used and managed by Tsilhqot'in people for generations that provided them with root plants, medicines and berries.[244]

181. In the face of these findings, the Court of Appeal nonetheless asserted that there was "no evidence of cultivated fields",[245] although "the findings of fact suggest that some localized spots may exist where natural plants were harvested and, to a limited extent, managed".[246]

182. The Court of Appeal's approach denies equality for Aboriginal perspectives as the touchstone of Aboriginal title. Instead, it perpetuates the injustices experienced by Aboriginal peoples at the hands of colonizing powers that regarded Aboriginal cultures as inferior and denied the legitimacy of their laws, their systems of land use, and their claims to the land.

183. *Delgamuukw* confirmed that "a claim to title is made out when a group can demonstrate 'that their connection with the piece of land . . . was of a central significance to their distinctive culture'".[247] To suggest, as does the Court of Appeal, that the Tsilhqot'in attachment to individual salt licks and fishing rocks was more significant for their culture than their connection

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[243] *Marshall*, para. 49 (underscore added); see also: Slattery, *Metamorphosis*, at 268-69.
[244] Trial Decision, para. 960 (AR vol. II, Tab 4 at 127) (underscore added); see also para. 683 (AR vol. II, Tab 4 at 26); Exhibit 0205, Turner Report, at 3-7 (AR vol. VIII, Tab 44 at 40-44).
[245] Appeal Decision, para. 63 (AR vol. III, Tab 9 at 118) (underscore added).
[246] Appeal Decision, para. 216 (AR vol. III, Tab 9 at 165).
[247] *Delgamuukw*, paras. 150-51 (underscore added); see also para. 199 (*per* La Forest J.).

to core hunting, trapping, fishing and gathering areas that sustained their people year after year, for generations, defies both common sense and the facts of this case.[248]

184. The Court of Appeal's ruling would entrench, as an inviolable principle, the view that only those uses of land that reflect the most narrow, Eurocentric notions of occupation (permanent villages, enclosed fields, intensively exploited sites) can be of central cultural significance. This is inaccurate and demeaning. As noted by Professor McNeil:

> Although of a different nature, the connection of hunter-gatherers with the land would be just as integral to their distinctive cultures as that of horticulturalists. Evaluating their connection with the land on the basis of their conditions of life and their own perspectives, they would no doubt be in occupation.[249]

185. In fact, the revered Tsilhqot'in Lha Ts'as?in (later executed for his role in the Chilcotin War) stated this point powerfully, as translated by a visiting missionary:

> We do not want the white man's machines nor do we want to till the soil or sow chappelell [wheat]. Our fisheries and hunting-grounds are very good for us. Our way of life, very good for us. It was good for our fathers, it is good for us. We are not better than our fathers and have no wish to live differently. We want to be let alone to enjoy our country, and our fishing streams, and hunting-grounds. We don't want these paleskins or their ways …[250]

186. European states have frequently invoked Aboriginal differences in land use and occupation to deny or diminish the rights of Indigenous peoples.[251] States relied on the doctrine of *terra nullius* to claim lands occupied by Indigenous peoples pursuant to the fiction that these lands were legally vacant, or the conviction that "Europeans had a right to bring lands into production if they were left uncultivated by the indigenous inhabitants".[252]

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[248] Appeal Decision, paras. 172, 223 (AR vol. III, Tab 9 at 151, 167); Exhibit 0407, Coates Report, at 39-40, 96-98 (AR vol. IX, Tab 49 at 109-10, 166-68).

[249] K McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?", (1997) 36 Alta LR 117 at 127 (underscore added); see also: *Delgamuukw*, para. 199 (La Forest J.).

[250] Exhibit 0156-1873/00/00.001, L Brown, *Klatsassan: A True Story of Colonial and Missionary Life*, at 42 (AR vol. VI, Tab 36) (underscore added), quoted in Exhibit 0407, Coates Report, at 96 (AR vol. IX, Tab 49 at 166).

[251] RH Bartlett, "The Content of Aboriginal Title and Equality Before the Law" (1998), 61 Sask LR 377 at 386.

[252] *Mabo v Queensland [No. 2]* (1992), 175 CLR 1 (HC), para. 33 (Brennan J.) ["***Mabo***"].

187. An "organized society" test similarly denied the interests of Indigenous peoples deemed too "low in the scale of social organization" to hold property rights in their traditional lands.[253]

188. Modern courts have soundly rejected both doctrines as a basis for denying Aboriginal land rights.[254] This Court has rejected these and other outmoded doctrines, echoing the same rationale:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, <u>an unjust and discriminatory doctrine of that kind can no longer be accepted</u>.[255]

189. Like the doctrine of *terra nullius* and the "organized society" test, the Court of Appeal's judgment denies the legitimacy of pre-existing Aboriginal legal orders and systems of land use. It "rubs salt in the wounds"[256] by imposing a "European template" that treats Aboriginal modes of occupation as less legitimate, and creating lesser legal rights, than European modes.

190. With respect, once again, "an unjust and discriminatory doctrine of that kind can no longer be accepted". It is no foundation for a modern law of Aboriginal title.

6. International Law

191. The Court of Appeal's approach is an affront not only to the foundational principles of s. 35, but also the human rights of the Tsilhqot'in people and other Aboriginal groups under international law.[257] Canada has formally endorsed the *United Nations Declaration on the Rights of Indigenous Peoples*, which states that

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[253] *Mabo*, para. 39 (Brennan J.).
[254] *Mabo*, paras. 39-42 (Brennan J.); *Van der Peet*, para. 40; Trial Decision, paras. 453-54 (AR vol. I, Tab 3 at 161).
[255] *R v Côté*, [1996] 3 SCR 139, para. 53 (underscore added) ["***Côté***"], quoting *Mabo*, at 42.
[256] Slattery, *Metamorphosis*, at 282.
[257] International human rights law and Canada's international obligations are directly relevant to the development of the common law and the interpretation of domestic legislation, such as s. 35 of the *Constitution Act, 1982*; see: *R v Hape*, 2007 SCC 26, paras. 35-39, 53-56; *Baker v Canada (M.C.I.)*, [1999] 2 SCR 817 at 861; *Canada (Human Rights Commission) v Canada (Attorney General)*, 2012 FC 445, paras. 350-54, aff'd 2013 FCA 75, paras. 16-17.

> … all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust …[258]

Among other critical provisions, the *Declaration* confirms that "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use …"[259]

7. Historical Foundations of Aboriginal Title

192. Even in 1846, the British common law did not take as "unjust and discriminatory"[260] a view of Aboriginal occupation as the Court of Appeal. In 1835, the U.S. Supreme Court stated,

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites ...[261]

193. Decades later, in 1896, *Kent's Commentaries* continued to state the "laws of all the colonies" in the same terms:

> … [L]ands in possession of friendly Indians were always, under the colonial governments, considered as being owned by the tribe or nation as their common property by a perpetual right of possession; … that possession was considered with reference to Indian habits and modes of life, and the hunting grounds of the tribes were as much in their actual occupation as the cleared fields of the whites, and this was the tenure of Indian lands by the laws of all the colonies.[262]

194. As Aboriginal title is rooted in common law and Aboriginal perspectives, it is significant that both perspectives recognized Aboriginal possession of "their hunting grounds" before, at and after 1846, when Aboriginal title crystallized as a proprietary right in British Columbia.

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[258] Res. 61/295, UN GAOR, 61st Sess., Supp. No. 49 Vol. III, UN Doc. A/61/49 (2007), 4th preambular paragraph (underscore added), see also preambular paras. 2, 5 and Article 40; ["***U.N. Declaration***"]; see also: *International Convention on the Elimination of all forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195, 5 ILM 352 (accession by Canada 14 Oct. 1970), preamble.
[259] *U.N. Declaration*, Article 26 (underscore added); see also Articles 15, 20, 25, 27, 32, 43.
[260] *Côté*, para. 53, quoting *Mabo*, at 42.
[261] *Mitchel*, at 746 (1835) (underscore added); see also: *Cohen's Handbook of Federal Indian Law*, at §18.01; *Sac & Fox,* at 998; *The Confederated Tribes of the Warm Springs Reservation of Oregon v United States* (1966), 177 Ct Cl 184 at 194-95.
[262] *Kent's Commentaries*, vol. 3, at 386, note (*a*) (underscore added).

195. These were not merely rights of user, existing at the discretion of the Crown. Aboriginal title conferred "exclusive enjoyment in their own way and for their own purposes … until they abandoned them, made a cession to the government, or an authorized sale to individuals".[263] Absent such measures, or unilateral extinguishment by the sovereign, "original Indian title was accorded the protections of complete ownership".[264]

196. As noted, in negotiating treaties across much of Canada, including portions of Vancouver Island in the early 1850s, the Crown set out to extinguish Aboriginal title to vast tracts of land (not simply villages and intensively exploited sites), typically in exchange for reserves and the right to continue engaging in traditional practices, among other treaty entitlements.[265] In fact, James Douglas stressed the importance of obtaining the "full consent of the proprietary tribes", by "purchase", prior to the settlement of any district.[266]

197. Yet if the Court of Appeal is correct, Aboriginal peoples never held title to more than villages and intensively exploited sites. Everything else was the Crown's for the taking. This is a view that renders the entire historical process of treaty-making largely superfluous from a legal perspective.[267]

198. As stated by Hall J. in *Calder*:

> Surely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve? If they were not intended to extinguish the Indian right, they were a gross fraud and that is not to be assumed.[268]

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[263] *Mitchel*, at 713 (1835) (underscore added).
[264] *Alcea Band*, at 46 (underscore added); *Johnson*, at 574; *Cohen's Handbook of Federal Indian Law*, at §15.04[2], citing *U.S. v Shoshone Tribe*, 304 US 111 at 118 (1938); *United States ex rel. Chunie v Ringrose*, 788 F 2d 638 at 642 (9th Cir 1986).
[265] See, generally: JTS McCabe, *The Law of Treaties Between the Crown and Aboriginal Peoples* (Markham: LexisNexis Canada Inc., 2010) at 2-14.
[266] British Columbia, *Papers Connected with the Indian Land Question, 1850-1975* (1875) Victoria: Government Printers at 5, 15, 19-20; *R v Bartleman*, 1984 CanLII 547 (BCCA), paras. 16-18.
[267] D Lambert, "The Tsilhqot'in Case" (November 2012) 70 *Advocate* 819 at 828-29 ["Lambert, ***Tsilhqot'in Case***"].
[268] *Calder*, at 394.

8. "Cultural preservation" as a Justification for Diminishing Aboriginal Title

199. Finally, the Court of Appeal justified its restriction of Aboriginal title to particular sites by arguing that recognition of Aboriginal rights over broader areas will suffice for a First Nation to "preserve its culture and allow members of the group to pursue a traditional lifestyle".[269]

200. With respect, Aboriginal peoples cannot be denied their legitimate rights as the original possessors of land based on a narrow conception of what is required today to maintain a "traditional lifestyle".

201. Aboriginal title is a valid proprietary right, not *largesse* from the Crown or the courts: it is grounded in the recognition that exclusive possession of land (both at common law and pursuant to pre-existing legal orders) confers more than the right to use the land for a specific purpose – it establishes the right to the land itself, including the economic benefit of that land and the right to choose how that land will be used.

202. The Court in *Delgamuukw* rejected British Columbia's efforts to reduce Aboriginal title to nothing more than a "bundle of rights" to carry out traditional activities on the land.[270] Where an Aboriginal group has established exclusive possession of land, the Court refused to limit the use of such land to traditional practices, observing that such a restriction "would be a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land".[271]

203. The Court of Appeal's decision cannot be reconciled with the defining features of Aboriginal title as described by this Court in *Delgamuukw*. Of what value is the "economic component"[272] of salt licks and narrow defiles between cliffs? Similarly, an Aboriginal group's collective "right to choose to what uses land can be put" becomes meaningless in practice if it is nothing more than the authority to put a fishing rock or a buffalo jump to "modern uses".[273]

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[269] Appeal Decision, para. 231 (AR vol. III, Tab 9 at 169).
[270] *Delgamuukw*, para. 110.
[271] *Delgamuukw*, para. 132 (underscore added).
[272] *Delgamuukw*, para. 166.
[273] *Delgamuukw*, paras. 166 (underscore in original), 169.

204. Clearly this Court had a more robust vision for Aboriginal title in mind in *Delgamuukw*. By restricting Aboriginal title to particular sites, the Court of Appeal has effectively hollowed out the defining content of Aboriginal title. It has replaced the economic and decision-making rights held by Aboriginal peoples as the original possessors of the land with a vague entitlement to maintain a "traditional lifestyle".

205. To narrowly construe s. 35 as protecting no more than a "traditional lifestyle" risks condemning over time – rather than preserving – the cultural survival and continuity of Aboriginal groups like the Tsilhqot'in.

206. The Court of Appeal's approach effectively "freezes" Aboriginal cultures in their pre-contact form, offering some protection for traditional practices but little else. Protecting traditional practices is critical for First Nations, but insufficient for many to ensure their survival as distinctive cultures in modern times.

207. Only Aboriginal title provides flexibility to use the land for modern purposes while maintaining the underlying cultural connection to the land. It offers an essential degree of autonomy and self-determination in charting the future of the lands and the communities that they sustain.[274] Such protection is crucial in the face of intensifying pressures to develop First Nations' lands in ways that profoundly affect their communities and their distinctive cultures.

208. Aboriginal rights simply do not provide these vital components for cultural survival. While Aboriginal rights protect traditional activities, they do not confer any rights to, or decision-making authority over, the lands and resources that sustain these activities.[275] As a result, First Nations are constantly on the defensive, often with grossly inadequate resources, in the face of unrelenting pressures from the Crown and third parties to develop these same lands.

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[274] RCAP, *Restructuring the Relationship*, at 557.
[275] *R v Sappier; R v Gray*, 2006 SCC 54, [2006] 2 SCR 686, para. 21.

209. Indeed, it was the Province denying the Tsilhqot'in people a meaningful voice in the future of their lands, and an economic benefit from their use, that triggered the conflict in this case:

> Tsilhqot'in people were frustrated and angry. What they considered "their wood" was leaving the community without any economic benefit to Tsilhqot'in people. Over 40 families were on the Xeni Gwet'in housing wait list. The wait for housing was upwards to 25 years on Tsilhqot'in Reserves. There was also high unemployment. Forestry provided very few jobs for Tsilhqot'in people and the profits from harvesting the wood did not flow to their communities.[276]

210. In most cases, First Nations simply lack the resources needed to engage the Crown on every development proposal that impacts their Aboriginal rights – let alone litigate every breach of the Crown's duties.[277] *Haida Nation* has established a much needed and productive framework for engagement (assuming Aboriginal title is not reduced at law to pinpoint sites), but even where First Nations can participate fully, such engagement is directed at an interim "compromise"[278] that may offer some mitigation but does not squarely address the relentless, piecemeal erosion of their traditional land base as one approval issues after another.

211. In short, without a real and meaningful voice in the future of their core land base, Aboriginal groups face growing cultural insecurity and further dispossession of the lands and natural resources they require to sustain their distinctive societies over time.

212. Like any other society, Aboriginal or otherwise, the Tsilhqot'in people cannot build their future on salt licks, fishing rocks and hunting blinds. As observed by the Trial Judge, it is only by recognizing Aboriginal title to the Proven Title Area, the lands that "ultimately defined and sustained them as a people", that these lands can continue to provide "cultural security and continuity" for the Tsilhqot'in people, in the modern era and for future generations.[279]

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[276] Trial Decision, para. 25 (AR vol. I, Tab 3 at 25) (underscore added); *Tsilhqot'in Nation v Canada (Attorney General),* 2002 BCCA 434, para. 133.
[277] Trial Decision, para. 1138 (AR vol. II, Tab 4 at 190).
[278] *Haida Nation*, paras. 45, 49-50.
[279] Trial Decision, paras. 1376-77 (AR vol. III, Tab 5 at 75).

D. This case must be decided on its facts as found by the Trial Judge

213. As this Court stated in ***Kruger v. the Queen***,

> Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis …[280]

214. In *Marshall*, the Court similarly stated that whether "nomadic and semi-nomadic peoples" hold Aboriginal title "depends on the evidence" in each case and is "a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used …"[281]

215. As reviewed above, the Court of Appeal has taken this highly fact-specific inquiry and replaced it with a global standard (intensive presence at a particular site) that applies without regard to the particular circumstances of any case.

216. Rather than apply the law to the facts as found by the Trial Judge, the Court of Appeal appears to draw on unstated assumptions and stereotypes of "semi-nomadic" peoples. The Court of Appeal described Tsilhqot'in occupation of the Proven Title Area in dismissive terms that directly contradict the Trial Judge's factual findings, *e.g.*:

> As the defendants contend, the evidence and findings suggest that hunting, trapping and fishing occurred at many places in the Claim Area, more or less on an opportunistic basis. Gathering activities also appear to have been widespread …[282]
>
> …
>
> In the case before us, it is not clear what precise test the judge applied in determining whether Tsilhqot'in occupancy of the Claim Area was sufficient to found title. While he divided the Claim Area into regions where there was sufficient occupation and regions where there was not, he did not describe the threshold for differentiating between the two.
>
> While the judge did not articulate any clear test for sufficiency of occupation, it is evident that he considered that occupation could be determined on a regional or territorial basis …

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[280] *Kruger and al. v The Queen*, [1978] 1 SCR 104 at 109 (underscore added).
[281] *Marshall*, para. 66.
[282] Appeal Decision, para. 216 (AR vol. III, Tab 9 at 165) (underscore added).

> As I have discussed, the case law does not support the idea that title can be proven based on a limited presence in a broad territory ...[283]

217. In fact, the Trial Judge thoroughly reviewed *Delgamuukw* and *Marshall*, observing that this Court had "set a high standard, requiring 'regular use or occupancy of definite tracts of land'".[284] He explicitly rejected a "territorial" approach to Aboriginal title.[285] He confirmed that "occasional" or "irregular" use of land did not support Aboriginal title.[286] He correctly invoked this key direction from *Marshall* as his litmus test for title:

> …the line separating sufficient and insufficient occupancy for title is between irregular use of undefined lands on the one hand and regular use of defined lands on the other. "Settlements constitute regular use of defined lands, but they are only one instance of it".[287]

218. The Trial Judge's findings leave no doubt as to the regularity with which the Tsilhqot'in exploited defined lands within the Proven Title Area as an essential feature of their traditional pattern of occupation at sovereignty:

> … Tsilhqot'in people tended to follow the same seasonal patterns in ways that accommodated their kinship based society. They were semi-nomadic in the sense that there was a collective regrouping in one location each year as a respite from the dark and cold of winter ...[288]
>
> …
>
> … I considered the use and occupation of the Claim Area from a land use perspective. What emerged from that analysis was a clear pattern of Tsilhqot'in seasonal resource gathering in various locations in the Claim Area … [T]he historical pattern of seasonal resource gathering in various locations in the Claim Area has continued over time.[289]
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> …

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[283] Appeal Decision, paras. 228-30 (AR vol. III, Tab 9 at 168) (underscore added).
[284] Trial Decision, para. 583 (AR vol. II, Tab 4 at 5).
[285] Trial Decision, paras. 523-24, 530, 554 (AR vol. I, Tab 3 at 183-185, 192).
[286] Trial Decision, paras. 583, 614 (AR vol. II, Tab 4 at 5, 17).
[287] Trial Decision, para. 682 (AR vol. II, Tab 4 at 43) (underscore added). See also para. 614 (AR vol. II, Tab 4 at 17).
[288] Trial Decision, para. 647 (AR vol. II, Tab 4 at 30) (underscore added).
[289] Trial Decision, para. 948-49 (AR vol. II, Tab 4 at 122) (underscore added).

> … [B]y a well defined network of trails and waterways, Tsilhqot'in people occupied and used the land, the rivers, the lakes, and the many trails as definite tracts of land on a regular basis for the hunting, trapping, fishing and gathering …[290]

219. These conclusions are well supported by detailed testimony about the "seasonal semi-nomadic round … vividly recounted by Tsilhqot'in elders".[291] Tsilhqot'in witnesses described how they and their ancestors would typically return to the same resource harvesting areas season after season, year after year, for generations, *e.g.*:

> When I [Ubill Lulua] was young I lived in pretty much the same way that Tsilhqot'in people lived a long time ago. My family would move around to live and get food in different places at different times of the year. We would go back to the same places every year, and each winter we went back to live in a cabin.[292]

The expert evidence was to the same effect, *e.g.*:

> A key aspect of each family's seasonal round was its regular visits to the same main resource harvesting areas year after year ... At the end of the yearly cycle families wintered at the same site year after year.
>
> …
>
> The places regularly used and occupied by each family in the seasonal round year after year are "customary use areas." … [T]he Tsilhqot'in live in families, each with its own hunting ground, fishing ground and other resource procurement areas, to which families move in a seasonal round throughout the year. The Tsilhqot'in have a number of fixed or regularly used places at these resource grounds that are occupied year after year.[293]

220. The Trial Judge's rigour in assessing occupation is illustrated by the roughly 60% of the Claim Area where he did not find Aboriginal title, notwithstanding extensive Tsilhqot'in use and occupation. Describing Tachelach'ed, he stated:

> As semi-nomadic people, there is no doubt that Tsilhqot'in people have derived subsistence from every quarter of Tachelach'ed. They have hunted, fished and moved about this area since before first contact with Europeans …[294]

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[290] Trial Decision, para. 960 (AR vol. II, Tab 4 at 127) (underscore added).
[291] Trial Decision, para. 381 (AR vol. I, Tab 3 at 141).
[292] Exhibit 0013, Affidavit #1 of Ubill Lulua, para. 59 (AR vol. V, Tab 28 at 44) (underscore added).
[293] Exhibit 0443, Dewhirst Report, paras. 28-29, 31 (AR vol. XI, Tab 53 at 160-61) (underscore added); Exhibit 0224, Dinwoodie Report, at 41 (AR vol. VIII, Tab 45 at 93).
[294] Trial Decision, para. 792 (AR vol. II, Tab 4 at 77) (underscore added).

> …
>
> … The evidence does not lead to a finding of sufficient use and occupation throughout Tachelach'ed.[295]

He similarly described Tsilhqot'in use and occupation of the Trapline Territory:

> … The entire area of the Western Trapline does not qualify for a declaration of Tsilhqot'in Aboriginal title. While there is no doubt that there was a Tsilhqot'in presence in the entire area at the time of sovereignty assertion, much of the area was not occupied to the extent required to ground a declaration of Tsilhqot'in Aboriginal title ...[296]
>
> …
>
> I am satisfied Tsilhqot'in people were present in the Eastern Trapline Territory at the time of first contact. The area has been used by Tsilhqot'in people since that time for hunting, trapping, fishing and gathering of roots and berries. I am not able to find that any portion of the Eastern Trapline Territory was occupied at the time of sovereignty assertion to the extent necessary to ground a finding of Tsilhqot'in Aboriginal title.[297]

221. To suggest that the Trial Judge based his findings of Aboriginal title on "opportunistic" use of the land by the Tsilhqot'in, or a "limited presence" in the region, does not do justice to the cautious application of the law by the Trial Judge.

222. The same is true of the Court of Appeal's account of the Trial Judge's analysis of the occupancy evidence. Using the Tsilhqox Corridor as an example, the Court of Appeal cast doubt on (but never directly overruled) the Trial Judge's findings of Aboriginal title, describing the historical record as "limited", the *viva voce* evidence as mostly post-dating 1846, and the archaeological evidence as unable to show occupation at the relevant time.[298]

223. These statements contradict the Trial Judge's express findings.[299] Moreover, the Court of Appeal focused on a few paragraphs of the Trial Judge's findings in isolation, without regard to the extensive review of relevant supporting facts throughout the trial judgement, *e.g.*:

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[295] Trial Decision, para. 794 (AR vol. II, Tab 4 at 78) (underscore added).
[296] Trial Decision, para. 825 (AR vol. II, Tab 4 at 87) (underscore added).
[297] Trial Decision, para. 893 (AR vol. II, Tab 4 at 105) (underscore added).
[298] Appeal Decision, para. 67 (AR vol. III, Tab 9 at 120).
[299] See, *e.g.*, Trial Decision, paras. 168, 197, 199 (AR vol. I, Tab 3 at 70, 80), 712 (AR vol. II, Tab 4 at 53).

- "The literal meaning of Tsilhqot'in is people of the Tsilhqox; ... The name indicates a long standing presence of Tsilhqot'in people on this river corridor";[300]

- "[T]he Tsilhqox is the major salmon bearing stream at the core of their existence as Aboriginal people, weaving its way into their oral traditions and providing them with sustenance and shelter for centuries";[301]

- "Because it was the main salmon-bearing stream in the territory, occupancy of the banks proper was higher in later summer and fall, but there seems to have been year-round habitation at several selected sites; and in 1872, Smith remarked that the plateaux on either side were important Tsilhqot'in hunting grounds ...";[302]

- "At the time of sovereignty assertion, the population of Tsilhqot'in people in this immediate area [*i.e.* Tachelach'ed] … could mainly be found along the Tsilhqox corridor, at the outlet area of Tsilhqox Biny and southward into Xeni …";[303]

- "McDougall [1822], Connolly [1825], McBean [1840], other [Hudson's Bay Company] employees and Jesuit priest Father Nobili [1845] found village or dwelling sites along the Tsilhqox corridor … When Connolly, McDougall, McBean and Father Nobili travelled the Tsilhqox corridor they recorded the fact that Tsilhqot'in people were in occupation of these winter dwellings";[304]

- "The historical record confirms the presence of Tsilhqot'in people down the length of the Tsilhqox corridor up to and including Tsilhqox Biny. At the time of sovereignty assertion, the Stone Chilcotin made their winter headquarters along that river corridor on both sides and extending to the lakes, rivers and streams to the south, east and west";[305]

- "Site selection for construction of winter dwelling was dependant on a number of factors, including the availability of resources and the proximity with others for security and socializing during the long winter months …";[306]

- "The evidence showed that the movement of Tsilhqot'in to xi [winter] dwellings sites began in November. ... nists'i [deer] hunting continued, mainly utilizing ?ash (snow shoes). Fur bearing animals were trapped throughout xi until early March. Snowshoe

[300] Trial Decision, para. 689 (AR vol. II, Tab 4 at 45) (underscore added).
[301] Trial Decision, para. 690 (AR vol. II, Tab 4 at 45) (underscore added). See also para. 22 (AR vol. I, Tab 3 at 24).
[302] Trial Decision, para. 707 (AR vol. II, Tab 4 at 51), quoting from expert report (underscore added); see also para. 953 (AR vol. II, Tab 4 at 123).
[303] Trial Decision, para. 793 (AR vol. II, Tab 4 at 77) (underscore added).
[304] Trial Decision, paras. 707, 712 (AR vol. II, Tab 4 at 51, 53) (underscore added); and *re* dates see paras. 234-35, 237 (AR vol. I, Tab 3 at 89-90), 700 (AR vol. II, Tab 4 at 48) and 255 (AR vol. I, Tab 3 at 96), 702 (AR vol. II, Tab 4 at 49); see also para. 633 (AR vol. II, Tab 4 at 24).
[305] Trial Decision, para. 337 (AR vol. I, Tab 3 at 126).
[306] Trial Decision, paras. 376 (AR vol. I, Tab 3 at 135) (underscore added).

hares were taken and ice fishing was a regular event … there was nits'i hunting and dwelling sites along the Tsilhqox corridor and across Xeni";[307]

- "The areas that provided a greater degree of permanency and regular use are the sites where abandoned lhiz qwen yex [pit houses] and niyah qungh [winter dwellings] are found …"[308]

224. In fact, there was considerable agreement between the respective experts of British Columbia and the Plaintiff, accepted by the Trial Judge, matching archaeological sites along the Tsilhqox Corridor with historical Tsilhqot'in winter settlements based on first person accounts of HBC traders [1820s, 1840] and Father Nobili [1845].[309] Moreover:

- The Trial Judge cited from a substantial body of oral history evidence of ancestral Tsilhqot'in winter dwellings along the Tsilhqox Corridor;[310]

- The expert evidence was that "the four Tsilhqot'in groups identified in the 1838 Hudson's Bay Company census attached to Fort Chilcotin" were associated with the lhiz qwen yex (pit house) sites upriver along the Tsilhqox Corridor at Gwetsilh, Tlegwated, Tsilangh, and Biny Gwechugh/Gwedats'ish.[311] Oral history evidence indicated Tsilhqot'in winter residence in lhiz qwen yex at Tlegwated and Gwedats'ish into "the latter half of the nineteen century";[312]

- The Tsilhqot'in had bridges across the Tsilhqox at Gwetsilh and Tlegwated, and forded the river at Biny Gwechugh (Canoe Crossing). There was also evidence of an ancient river crossing at Nusay Bighinlin;[313]

[307] Trial Decision, paras. 382-83 (AR vol. I, Tab 3 at 141) (underscore added).
[308] Trial Decision, para. 955 (AR vol. II, Tab 4 at 124) (underscore added).
[309] See *e.g.*: Trial Decision, paras. 693, 709, 714-716, 721, 727, 758, 863 (AR vol. II, Tab 4 at 46, 52, 54, 56, 58, 68, 97).
[310] See *e.g.*: Trial Decision, para. 713, 723, 737, 740, 751, 755-56, 761, 862 (AR vol. II, Tab 4 at 53, 57, 61, 62, 66, 67, 69, 97). The record is vast. As one example only, see: Exhibit 0173, Affidavit #1 of Mabel William, paras. 2, 5-6, 39-46, 50-51 (AR vol. V, Tab 30 at 88-89, 100-101, 103-05).
[311] Trial Decision, paras. 714-716, 719-722, 727, 757-758, 861-863 (AR vol. II, Tab 4 at 54-56, 58, 67-68, 96-97); see, *e.g.*: Exhibit 0224, Dinwoodie Report, at 17-51 (AR vol. VIII, Tab 45 at 69-103); Exhibit 0443, Dewhirst Report, para. 189 (AR vol. XI, Tab 53 at 199).
[312] Trial Decision, paras. 723, 862 (AR vol. II, Tab 4 at 57, 97).
[313] Trial Decision, paras. 22 (AR vol. I, Tab 3 at 24), 714, 719, 733, 753 (AR vol. II, Tab 4 at 54, 55, 60, 66).

- The evidence identified numerous smaller sites of lhiz qwen yex (pit houses) in the Tsilhqox Corridor at Tsilhqot'in-named places adjacent to (e.g. Tachi, Tsi Lhizbed, Ts'u Nintil) and within (e.g. Nusay Bighinlin, Tsi T'is Gulin, Ts'u Nintil, Sul Gunlin) the Claim Area.[314] It indicated Tsilhqot'in use of many of these winter residences (*e.g.* Ts'eman Ts'ezchi, west Tsi T'is Gulin, Gwedeld'en T'ay), including prior to (south Nusay Bighinlin) and at the time of (Sul Gunlin) Crown sovereignty.[315]

- Tsilhqot'in families continued to physically occupy several of these sites by way of constructed cabins (*e.g.* Nusay Bighilin, Tse'man Tse'zchi, Tsi T'is Gulin, Sul Gunlin);[316]

- The evidence also established numerous continuing Tsilhqot'in fishing grounds and camps through the Tsilhqox Corridor, both adjacent to (e.g. Tsilangh, Tsi Lhizbed, Biny Gwetsel, Biny Gwechugh) and within (e.g. Nusay Bighilin, Ts'u Nintil, Biny Gwetsel, Biny Gwechugh) the Claim Area.[317]

225. The Trial Judge's findings clearly establish a documented Tsilhqot'in population occupying winter settlements along the length of the Tsilhqox Corridor before, at and after 1846. Occupation was not only seasonal, but <u>multi-seasonal</u>.[318] In winter, Tsilhqot'in bunkered down in their winter settlements, hunting and trapping the surrounding lands for provisions; in late summer and fall, Tsilhqot'in occupation of the Tsilhqox surged again for salmon fishing season; additionally, there "seems to have been year-round habitation at several selected sites".[319]

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[314] Trial Decision, paras. 729-30, 740, 742, 747, 761 (AR vol. II, Tab 4 at 59, 62-64, 69).
[315] Trial Decision, paras. 732, 735-37, 740, 742, 751, 761 (AR vol. II, Tab 4 at 60-63, 66, 69).
[316] Trial Decision, paras. 733, 735-37, 742-44, 762 (AR vol. II, Tab 4 at 60, 61, 63, 69).
[317] Trial Decision, para. 22 (AR vol. I, Tab 3 at 24), 729, 733, 743, 745, 747, 749, 760, 864 (AR vol. II, Tab 4 at 59, 60, 63, 64, 65, 68, 97). Current and post-sovereignty occupation can be used as evidence of <u>pre</u>-sovereignty occupation: *Delgamuukw*, paras. 101, 143, 152-53.
[318] See, *e.g.*: Exhibit 0443, Dewhirst Report, paras. 174, 189 (AR vol. XI, Tab 53 at 196, 199). For a similar summary of year-round occupation of Xeni (Nemiah Valley), see: Exhibit 0174, Affidavit #2 of Mabel William, para. 40 (AR vol. V, Tab 31 at 135).
[319] Trial Decision, para. 707 (AR vol. II, Tab 4 at 51), quoting from expert report.

226. The Trial Judge reached his findings based on "the whole of the evidence".[320] The deference of appellate courts to the facts as found by trial judges is well established, in part because,

> …[t]he trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow …[321]

227. Appellate courts must defer to a trial judge's determinations of fact, and mixed fact and law, absent a palpable and overriding error.[322] The Court of Appeal lauded the "thorough understanding and careful analysis of the evidence" by the Trial Judge,[323] and did not expressly overrule him on any findings, but nonetheless proceeded, in error, to substitute its own factual findings for those of the Trial Judge. This appeal cannot be decided on the Court of Appeal's factual findings, or on facile assumptions about "nomadic peoples", or on the facts of *Marshall* or *Bernard*. It must be decided on the facts of this case as found by the Trial Judge.

E. Reconciliation

228. The goal of the modern law of Aboriginal rights is well established: "the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions".[324]

229. As the Court cautioned in ***R. v. Van der Peet***,

> It is possible, of course, that the Court could be said to be "reconciling" the prior occupation of Canada by aboriginal peoples with Crown sovereignty through either a narrow or broad conception of aboriginal rights; the notion of "reconciliation" does not, in the abstract, mandate a particular content for aboriginal rights. However, the only fair and just reconciliation is … one which takes into account the aboriginal perspective while at the same time taking into account the perspective of the common law. True reconciliation will, equally, place weight on each.[325]

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[320] Trial Decision, para. 712 (AR vol. II, Tab 4 at 53).
[321] *Housen v Nikolaisen*, 2002 SCC 33, para. 14 ["***Housen***"]; *Delgamuukw*, paras. 78, 89.
[322] *Housen*, paras. 1-6, 10, 13, 25, 37; *Resurfice Corp. v Hanke*, 2007 SCC 7, para. 12.
[323] Appeal Decision, para. 29 (AR vol. III, Tab 9 at 107).
[324] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388, para. 1.
[325] *Van der Peet*, para. 50 (underscore added).

230. Viewed in this light, reconciliation is not so much a distant aspirational goal as it is the journey itself. It is a commitment, at the core of s. 35, to truly recognize and incorporate Aboriginal perspectives into the very law of Aboriginal rights, at every stage, on an equal footing with the common law.

231. This Court has mandated, in no uncertain terms, this exact approach to assessing Aboriginal occupation for proof of Aboriginal title: "[t]he aboriginal perspective grounds the analysis and imbues its every step".[326]

232. The Court of Appeal has charted a very different path. It would subject Aboriginal peoples to a test for proof of title that is more inflexible, extreme and restrictive than the common law; a test that ignores Aboriginal perspectives on occupation and regards their systems of land use as less legitimate and less deserving of legal protection than European modes of land use. This is the well-worn path of inequality and exclusion.

233. The Court of Appeal ultimately justified its decision as a "practical compromise":

> … There is a need to search out a practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians. As I see it, an overly-broad recognition of Aboriginal title is not conducive to these goals.[327]

234. With respect, this is a "practical compromise" that demands compromise only from Aboriginal peoples. Aboriginal title should not be defined into near meaninglessness to avoid confronting the challenges created by the historic and ongoing failure to recognize and deal with the existence of Aboriginal title.

235. To accept the Court of Appeal's ruling would be to roll back the progress made by this Court and plunge the doctrine of Aboriginal title back into the long, unfortunate era of neglect and denial.[328] First Nations in British Columbia have struggled, unrelentingly, for over 150

[326] *Marshall*, para. 50; see also: *Delgamuukw*, paras. 81, 148.
[327] Appeal Decision, para. 239 (AR vol. III, Tab 9 at 171) (underscore added).
[328] See L Mandell, "Aboriginal Title Over the Buffalo Jump: Decision of the British Columbia Court of Appeal in the *Tsilhqot'in* Case" (August 2012).

years to see the long overdue recognition of their Aboriginal title. They have petitioned this Court for recognition of Aboriginal title for some 40 years (*Calder*), starting not long after the federal law against raising funds to hire lawyers for such purposes was finally repealed.[329]

236. Denying Aboriginal title from the outset, except to pinpoint sites, threatens the very legitimacy of the doctrine. The consequences for Crown-Aboriginal relations would be devastating. In this day and age, Aboriginal peoples cannot be expected to accept a test for Aboriginal title that wholly disregards their perspectives on occupation and subjects them to an exceedingly narrow, Eurocentric view of what constitutes legitimate possession for proof of title.

237. To compound the injustice, the test would practically eviscerate the economic and jurisdictional base that Aboriginal groups – like the Tsilhqot'in – urgently require to sustain their distinctive societies into the future. It would place the "just settlement"[330] promised by s. 35 permanently out of reach for Aboriginal groups like the Tsilhqot'in.

238. This is a blueprint for conflict and discord, not reconciliation. Unfortunately, at the same time that it would fuel and intensify conflict, it would threaten the very legitimacy of the law as a vehicle for resolving such conflict – perhaps fatally. By abandoning the doctrine's foundation in an equality of perspectives, the capacity and the promise of Aboriginal rights to effect "[t]rue reconciliation"[331] would be squandered.

239. The impacts of such a decision would be immediate and consequential. This is because existing processes for reconciling Crown and Aboriginal interests (*e.g. Haida* consultation, modern treaty negotiations) are operating on the premise that First Nations may legitimately assert Aboriginal title to far more expansive areas than the site-specific limit imposed by the Court of Appeal.

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[329] *Indian Act*, SC 1926-27 (17 Geo V) c 32, s 6, s 149A, renumbered as s. 141 of the *Indian Act*, 1927 RSC c 98, s 141, repealed *Indian Act*, SC 1951, c 29, s 123(2).
[330] *Sparrow*, at 1106.
[331] *Van der Peet*, para. 50; *Delgamuukw*, paras. 81, 148.

240. As a result, the Court of Appeal's approach would have far-reaching impacts for Crown consultation. Pursuant to *Haida Nation*, the scope of the Crown's duty to consult and, if indicated, accommodate is proportionate to the strength of the claim in support of asserted Aboriginal rights or title, and the seriousness of the potential impacts of its decision.[332]

241. To date, the Crown's consultation duties have not been confined to a "postage stamp" view of Aboriginal title. For example, in *Haida Nation* itself, this Court observed that "[t]he Haida's claim to title to Haida Gwaii is <u>strong</u>".[333] The Court specifically noted that, among other factors, the strength of the case for Haida Aboriginal title suggested "the honour of the Crown may well require significant accommodation".[334]

242. Lower courts have applied *Haida Nation* in a similar manner, recognizing *prima facie* claims of Aboriginal title to traditionally occupied lands, not confined to specific sites.[335]

243. Such recognition is important because only Aboriginal title confers the right to the economic benefit from the land and resources, and the right to choose how the lands are used.[336] *Prima facie* Aboriginal title claims provide support for First Nations in Crown consultation for benefit sharing from development and an enhanced voice in how development proceeds.

244. If the Court of Appeal decision stands, it will drastically shift the landscape of Crown consultation. Apart from very specific sites, First Nations in many instances will face the prospect of <u>no</u> strength of claim to Aboriginal title, and minimal leverage for economic benefits or a meaningful role in decision-making about resource development on their traditional lands.[337]

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[332] *Haida Nation*, para. 39.
[333] *Haida Nation*, para. 7 (underscore added); see also: paras. 70-71.
[334] *Haida Nation*, para. 77 (underscore added); see also paras. 1, 5, 6, 65-66.
[335] See, *e.g.*: *Hupacasath First Nation v British Columbia (Minister of Forests)*, 2005 BCSC 1712, paras. 89, 117, 120, 126-32, 247-48; *Da'naxda'xw/Awaetlala First Nation v British Columbia (Environment)*, 2011 BCSC 620, paras. 9, 133, 136-39, 152, 163-69, 177-78, 182; *Halalt First Nation v British Columbia (Environment)*, 2011 BCSC 945, paras. 94-97; 460-86 (rev'd 2012 BCCA 472, on other grounds); see also: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550, para. 27.
[336] *Delgamuukw*, paras. 140, 166.
[337] See, *e.g.*: *Adams Lake Indian Band v Lieutenant Governor in Council*, 2011 BCSC 266, para. 24; rev'd (but not on this point), 2012 BCCA 333, para. 73; *K'omoks First Nation v Canada (Attorney General)*, 2012 FC 1160, para. 41 ["***K'omoks***"].

245. The Crown has already started to advance a restrictive view of Aboriginal title in court – requiring site-specific proof of title – to deny or diminish their duties of consultation and accommodation.[338] If the Court of Appeal's site-specific limit on Aboriginal title is endorsed,

> … the process of consultation and accommodation and the law of infringement and justification would have the entire economic content sucked out of them, leaving those processes incapable of providing any balancing benefits to First Nations from the harvesting and extraction of the natural resources of their traditional homelands.[339]

246. The Court of Appeal's approach could also be expected to have serious implications for modern treaty negotiations. Modern treaty agreements reflect a compromise between Crown and First Nations' positions on Aboriginal title; the resulting "settlement lands" have far exceeded the Court of Appeal's "site-specific" view of Aboriginal title.[340] If the Court of Appeal's view were entrenched as the law, it would drastically undermine the position of First Nations at negotiating tables, with grave consequences for the prospects of lasting reconciliation.

247. It is not realistic to expect most, if any, First Nations to negotiate a modern treaty agreement based on a view of Aboriginal title that wholly endorses the most extreme position advanced by the Provincial and Federal Crowns. As stated by the Trial Judge,

> What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations.[341]

ISSUE #2: LEGAL CONSEQUENCES OF ABORIGINAL TITLE

248. The Appellant agrees with the Trial Judge's conclusions as to the consequences of a declaration of Tsilhqot'in Aboriginal title: (a) British Columbia does not have statutory authority under the *Forest Act* to authorize timber harvesting on Aboriginal title lands; (b) British Columbia does not have constitutional authority to infringe Aboriginal title pursuant to the *Forest Act* or the *Forest Practices Code*; and (c) alternatively, British Columbia's actions under

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[338] See, *e.g*: *K'omoks*, para. 41.
[339] Lambert, *Tsilhqot'in Case*, at 830 (underscore added).
[340] See, *e.g.*: *Maa-nulth First Nations Final Agreement Act*, SBC 2007, c 43, ss 7; Sch. 2, ss 2.1 - 2.3; *Nisga'a Final Agreement Act*, SBC 1999, c 2, Schedule, c 3, ss 1-3.
[341] Trial Decision, para. 1376 (AR vol. III, Tab 5 at 75).

the *Forest Act* and the *Forest Practices Code*, even if otherwise valid and applicable, nonetheless unjustifiably infringed Tsilhqot'in Aboriginal title.

A. Lack of Statutory Authority

249. First, British Columbia's forestry officials exceeded their statutory authority each time they granted forestry tenures and approved forest development activities in relation to Tsilhqot'in Aboriginal title lands. At the material times, the *Forest Act* did not provide the necessary statutory authority to grant rights to third parties in timber situated on Aboriginal title lands.

250. This is because at the material times, as now, the *Forest Act* confined its officials to the disposition of rights to harvest "Crown timber", as defined.[342] Although this definition has varied slightly over the years, at all material times it has referred, in essence, to timber that belongs to the Crown.

251. By contrast, the timber situated on Tsilhqot'in Aboriginal title lands at the material times was not "Crown timber" as defined by the *Forest Act* but rather Tsilhqot'in timber. Accordingly, it was not, and still is not, available for disposition under the *Forest Act.*

252. This is not to deny that the underlying title to Tsilhqot'in Aboriginal title lands vests in the Crown; rather, it is the straightforward recognition that the beneficial interest and economic benefit of Aboriginal title lands, like privately held *fee simple* lands, vests in the title holder and not the general public. As with privately owned timber, the beneficial interest in timber standing on Tsilhqot'in Aboriginal title lands is simply not the Crown's to give under the *Forest Act*.

253. As set out below, the Plaintiff agrees with the Trial Judge's reasoning on this point, as supplemented with additional supporting authority referenced below:[343]

a. Aboriginal title is a right to the land itself. Tsilhqot'in Aboriginal title encompasses the right to the exclusive possession, use and enjoyment of the land and its resources.[344]

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[342] *Forest Act*, RSBC 1936, as am., ss 2, 5(*f*), 17(1); *An Act to Amend the "Forest Act"*, SBC 1947, c 38, s 4; *Forest Act*, SBC 1978, c 23, ss 1, 10; *Land Act*, RSBC 1979, c 214, s 1; *Forest Amendment Act*, SBC 1979, c 11, s 1.
[343] Trial Decision, para. 971 (AR vol. II, Tab 4 at 130); see generally paras. 963-81 (AR vol. II, Tab 4 at 128-135).
[344] *Delgamuukw*, paras. 122, 140, 166; *Marshall*, paras. 62, 70.

b. British Columbia has no present interest by way of possession, nor does it have any beneficial interest in Aboriginal title lands. British Columbia's ownership of the lands and resources in the Province is subject to Aboriginal title, pursuant to s. 109 of the *Constitution Act, 1867*. Because Aboriginal title includes the exclusive right to the possession and enjoyment of its subject lands, the Province's interest is reduced to its underlying title, which does not vest in possession until Aboriginal title is surrendered.[345]

c. The Province is not entitled to demand any revenue or royalties with respect to such timber while Aboriginal title persists. Similarly, such timber is not situated on "Crown lands". Tsilhqot'in Aboriginal title lands vest in the exclusive possession of the Tsilhqot'in people and not the Crown.[346]

d. The primary purpose of the *Forest Act*, is the management and allocation of interests in public forestry resources on public lands.[347] The *Forest Act* was never intended as an expropriation statute for granting interests to third parties in timber already held in the possession of a party other than the Crown. In the rare circumstances that the *Forest Act* imbues forestry officials with powers of expropriation (for example, to facilitate the creation of logging roads), it sets this authority out explicitly, and imposes strict guidelines on its use.[348]

e. If the *Forest Act* were to authorize the appropriation of property rights vested in Tsilhqot'in people pursuant to Aboriginal title, it would have to do so in clear and unequivocal language that is not found in that statute …[349]

254. This is not to say that British Columbia could never legislate with respect to, or lawfully grant interests to third parties in, the timber on Tsilhqot'in Aboriginal title lands – only that it has not yet done so. If British Columbia deems it necessary to access such timber, and allocate it to third parties for harvesting, it will have to do what it has thus far steadfastly refused to do: acknowledge the reality of Tsilhqot'in Aboriginal title.

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[345] *Constitution Act, 1867*, s 109; *British Columbia Terms of Union* (reprinted in RSC, 1985, App II, No. 10), Term 10; *Delgamuukw*, para. 175; *Haida Nation*, para. 59; *St. Catherine's Milling and Lumber Co. v The Queen* (1888), 14 AC 46 (PC) at 59; *Amodu Tijani v Southern Nigeria* [1921] 2 AC 399 (PC) at 409-10; *Ontario (Attorney-General) v Francis* (1889), 2 CNLC 6 (Ont HC) at 22-25; K McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask LR 281 at 295.

[346] *Black's Law Dictionary* (7th ed.) at 1557, "vested".

[347] See *e.g.*, *Ministry of Forests Act*, RSBC 1996, c 300, s 4; Royal Commission on Forest Resources, *Timber Rights and Forest Policy in British Columbia* (1976), v 1, at 1-2, 22, 68, 83.

[348] See, *e.g.*, *Forest Act*, RSBC 1996, c 157, s 121.

[349] *Spooner Oils Ltd. v Turner Valley Gas Conservation Board*, [1933] SCR 629 at 638; PA Côté, *The Interpretation of Legislation in Canada* (3rd ed.) at 482-83; *Nowegijick v the Queen*, [1983] 1 SCR 29 at 36; *Osoyoos Indian Band v Oliver (Town)*, [2001] 3 SCR 746, 2001 SCC 85, para. 68.

255. This would require constitutionally competent legislation (see below) that explicitly empowers provincial officials to appropriate the interests of the Tsilhqot'in in their Aboriginal title lands, with attendant mechanisms in place to govern the exercise of such powers.

B. Lack of Constitutional Authority

256. As held by the Trial Judge, the *Forest Act* and the *Forest Practices Code* cannot constitutionally apply to authorize the management, acquisition, removal or sale of timber from Tsilhqot'in Aboriginal title lands.[350]

257. This conclusion rests on well-established principles of law, namely: (a) Aboriginal title lies at the core of federal jurisdiction under s. 91(24); (b) pursuant to the doctrine of interjurisdictional immunity, the Provinces cannot impair the core of federal jurisdiction even through the incidental effects of otherwise valid laws of general application; (c) for this reason, Provinces cannot impair the use or possession of "Lands reserved for the Indians", which includes both reserve lands and Aboriginal title lands; (d) s. 88 of the *Indian Act* does not referentially incorporate provincial laws that impair "Lands reserved for the Indians".

258. It is important to appreciate that the division of powers analysis is distinct from, and logically precedes, the *Sparrow* infringement analysis. Unless the impugned law falls within the province's constitutional powers, there is no need to consider whether it complies with s. 35.[351]

1. Aboriginal title is at the core of exclusive federal jurisdiction under s. 91(24)

259. The "core" of exclusive federal jurisdiction under s. 91(24) has been described as matters touching on "Indianness" or the "core of Indianness".[352] Although not exhaustively defined, it has been said to embrace activities that are "at the centre of what they do and what they are".[353]

[350] Trial Decision, paras. 1001-49 (AR vol. II, Tab 4 at 141-158).
[351] *Reference re* Firearms Act *(Can.)*, [2000] 1 SCR 783, para. 56; *R v Alphonse* (1993), 80 BCLR (2d) 17 (CA) at 35; *R v Morris*, 2006 SCC 59, paras. 14-15, 55 ["***Morris***"].
[352] J Woodward, *Native Law,* looseleaf, (Toronto: Thomson Reuters Canada Ltd), para. 3§241 ["**Woodward, *Native Law***"].
[353] *Dick v The Queen,* [1985] 2 SCR 309 at 320 ["***Dick***"].

260. The Court has confirmed that Aboriginal title lies at the core of exclusive federal jurisdiction regarding "Indians, and Lands reserved for the Indians" under s. 91(24).[354]

261. This does not make Aboriginal title lands (or reserve lands) a federal "enclave", wholly insulated from any provincial law. To the contrary, the provinces are accorded considerable latitude to incidentally affect federal matters through laws of general application directed at valid provincial objectives (*e.g.* traffic laws).[355] As a general rule, provincial laws of general application apply of their own force to Indians and Indian Lands.[356]

2. Interjurisdictional immunity and s. 91(24)

262. However, pursuant to the doctrine of interjurisdictional immunity, the Provinces cannot impair the core of federal jurisdiction even through the incidental effects of otherwise valid laws of general application. Provincial legislation is "constitutionally inapplicable" to the extent that it impairs the core of exclusive federal jurisdiction.[357] Interjurisdictional immunity thus safeguards the constitutional division of powers upon which our nation is founded.[358]

263. The Court has said that the concept of interjurisdictional immunity has limited application in the present era, but it has also confirmed that "the doctrine remains part of Canadian law".[359] In ***Canadian Western Bank***, the Court expressly stated that it would continue to affirm previous applications of the doctrine, including in respect of s. 91(24).[360]

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[354] *Delgamuukw*, paras. 178, 181.
[355] *Paul v British Columbia (Forest Appeals Commission)*, [2003] 2 SCR 585, para. 14 ["***Paul***"].
[356] *Delgamuukw*, para. 179.
[357] *Paul*, paras. 6, 12, 15, 17-19, 33; *Delgamuukw*, paras. 178, 181; *Ordon Estate v Grail*, [1998] 3 SCR 437, para. 83; see also PW Hogg, *Constitutional Law of Canada*, 5th ed, looseleaf (Thompson Reuters Canada Limited: Toronto, 2007) at 28-11 to 28-12; Woodward, *Native Law,* para. 3§60.
[358] *Bell Canada v Quebec*, [1988] 1 SCR 749 at 766.
[359] *Quebec (Attorney General) v Canadian Owners and Pilots Association,* 2010 SCC 39, para. 58 ["***Canadian Owners***"]; see also *Canadian Western Bank*, para. 47 (Binnie and Lebel JJ.) ["***Canadian Western Bank***"].
[360] *Canadian Western Bank*, paras. 61, 77 (Binnie and Lebel JJ.); see also: *Canadian Owners,* paras. 37 and 40.

3. Provinces cannot impair the use or possession of "Lands reserved for the Indians"

264. A substantial and long-standing body of law holds that Provinces cannot interfere with the use or possession of "Lands reserved for the Indians".[361]

265. "Lands reserved for the Indians" include not only reserve lands but also <u>Aboriginal title lands</u>.[362] Both interests are situated at the core of s. 91(24). It would be absurd to hold that Indian reserves are more "at the centre of what they do and what they are",[363] than Aboriginal title lands, which are defined by their central cultural significance to the Aboriginal group.[364] As stated in *Delgamuukw*, "the same legal principles [govern] the aboriginal interest in reserve lands and lands held pursuant to aboriginal title".[365]

266. In short, the jurisprudence leads inescapably to the conclusion that "any provincial legislation which regulates 'the right to the beneficial use of property' or 'who may own or possess land' cannot apply of its own force to Aboriginal title lands".[366]

267. The Appellant acknowledges that this Court has referred, in passing, to the possibility of the Provinces infringing Aboriginal rights.[367] However, in so doing, the Court has not considered or addressed the doctrine of interjurisdictional immunity. Indeed, in a subsequent decision, the Court held that provincial laws cannot infringe treaty rights of their own force, because to do so would impermissibly impair the core of s. 91(24).[368] Aboriginal title, like treaty rights, lies at the core of s. 91(24) and the same reasoning applies with equal force.

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[361] *Derrickson v Derrickson* (1984), 51 BCLR 42 (CA) ["***Derrickson*** **(BCCA)**"], aff'd [1986] SCR 285 at 296 ["***Derrickson*** **(SCC)**"]; *Roberts v Canada*, [1989] 1 SCR 322 at 338; *Paul v Paul*, [1985] 2 CNLR 93 at 97 (BCCA), aff'd [1986] 1 SCR 306; *Surrey (District) v Peace Arch Enterprises Ltd*., [1970] BCJ No. 538 (CA), paras. 13, 25, 30; *R v Isaac*, [1975] NSJ No. 412, 13 NSR (2d) 460 (SCAD), paras. 15, 19-20, 30 ["***Isaac***"]; *Chippewas of Sarnia Band v Canada (Attorney General)*, [1999] OJ No. 1406 (SCJ), paras. 459-60, 477, varied (on other grounds), *Chippewas* (OCA), para. 222.

[362] *Delgamuukw*, paras. 120, 174-76; *Guerin*, at 379; Woodward, *Native Law,* para. 3**§**230.

[363] *Dick* at 320.

[364] *Delgamuukw*, paras. 150-51.

[365] *Delgamuukw*, para. 120.

[366] K McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998), 61 Sask LR 431, para. 42 (citations omitted); see also: Slattery, *Understanding Aboriginal Rights*, at 776; K Lysyk, "The Unique Constitutional Position of the Canadian Indian" (1967) 45 CBR 513 at 552; GV La Forest, *Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 176-77.

[367] *Delgamuukw*, para. 160; *Côté*, para. 74; *Paul*, para. 25.

[368] *Morris*, paras. 14, 45, 49-50, 53, 60 (Deschamps and Abella JJ.); 91, 100 (McLachlin C.J. and Fish J.).

268. Accordingly, this Court's earlier references to provincial infringement of Aboriginal title should be read as confirming the authority of the provinces to infringe Aboriginal title pursuant to constitutionally valid legislation. Indeed, in *Delgamuukw*, the Court cited ***R. v. Badger*** for the proposition that provinces can infringe Aboriginal rights, but the Court in *Badger* made it abundantly clear that Alberta could not have infringed the treaty rights at issue in that case but for federal empowerment through the *Natural Resources Transfer Agreement.*[369]

4. Section 88 of the *Indian Act* does not apply

269. Section 88 of the *Indian Act* referentially incorporates provincial laws of general application that would otherwise not apply to Indians because they impair Parliament's exclusive legislative jurisdiction over "Indians".[370]

270. The question in this appeal is whether s. 88 also invigorates provincial laws that impair Parliament's core jurisdiction over the second branch of s. 91(24), "Lands reserved for the Indians," such as the *Forest Act* and the *Forest Practices Code of British Columbia Act.*

271. In ***Derrickson v. Derrickson***, this Court expressly declined to decide whether s. 88 invigorates provincial laws relating to Indian lands.[371] Most of the lower courts that have ruled on the matter have concluded that s. 88 only applies to laws relating to "Indians", not their lands,[372] and in the Appellant's submission, those rulings are sound.

272. In interpreting s. 88, the principle that "statutes enacted by a legislature that deal with the same subject are presumed to be drafted with one another in mind"[373] applies:

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[369] *R v Badger*, [1996] 1 SCR 771, paras. 69-70 ["***Badger***"].
[370] *Indian Act*, RSC, 1985, c I-5, s 88 (text at material times; for most recent version see Trial Decision, para. 1033 (AR vol. II, Tab 4 at 153)); Woodward, *Native Law,* paras. 3§260 and 3§270.
[371] *Derrickson* (SCC), at 297, 299.
[372] *Park Mobile Home Sales Ltd. v Le Greely*, (1978), 85 DLR (3d) 618 (BCCA), para. 6; *Derrickson* (BCCA) at 46; *Paul v Forest Appeal Commission*, 2001 BCCA 411, paras. 75-78 (Lambert J.A.) and para. 92 (Donald J.A.) (rev'd but this issue not addressed) ["***Paul* (BCCA)**"]; *Stoney Creek Indian Band v British Columbia*, [1999] 1 CNLR 192 (BCSC), para. 36 (rev'd but this issue not addressed) ["***Stoney Creek***"]; *Isaac*, para. 102.
[373] R Sullivan, *Sullivan and Driedger on the Construction of Statutes*, (4th ed.) (Markham: Butterworths, 2002) at 324 ["**Sullivan, *Construction of Statutes***"].

> Where there are different statutes *in pari materia* though made at different times, or even expired, and not referring to each other, they shall be taken and construed together, as one system, and as explanatory of each other.[374]

The principle of implied exclusion also applies: "When a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items that are not mentioned".[375]

273. It must be assumed that s. 88 was drafted with awareness that s. 91(24) of the *Constitution Act*, *1867* references <u>two</u> distinct heads of power: "Indians, and Lands reserved for the Indians". Courts have thus interpreted Parliament's express reference in s. 88 to the first head of power ("Indians") and its omission of the second head of power ("Lands reserved for the Indians") as deliberate and significant.[376]

274. Indeed, Canada itself has taken the position that s. 88 does not apply to "Lands reserved for the Indians" in previous litigation about s. 88.[377]

275. Interpreting s. 88 as delegating Parliament's exclusive law-making power over Indian lands would significantly expand the scope of s. 88 beyond the role assigned to it by Parliament, and would not comport with the relevant rules of statutory interpretation or the role of the Court.

5. Application to the present appeal

276. As the Trial Judge correctly concluded,[378] the provisions in the *Forest Act* and the *Forest Practices Code of British Columbia Act* pursuant to which the Crown assigns timber harvesting rights, authorizes the removal and sale of timber, and otherwise regulates and manages timber resources on Tsilhqot'in Aboriginal title lands necessarily impair Tsilhqot'in Aboriginal title,

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[374] *R v Loxdale,* (1758), 1 Burr 445 at 447, 97 ER 394; *Armbrust v Ferguson*, 2001 SKCA 122, para. 40; *Regina v Lawrie and Pointts Ltd.*, (1987) 59 OR (2d) 161, para. 42.
[375] Sullivan, *Construction of Statutes*, at 187.
[376] *Stoney Creek*, para. 36 (rev'd but this issue not addressed); *Paul* (BCCA), para. 76 (per Lambert J.A.).
[377] *Derrickson* (SCC) at 298; *Palm Dairies Ltd. v R,* [1979] 1 FC 531 (TD), para. 14.
[378] Trial Decision, paras. 1030-1032, 1044-45 (AR vol. II, Tab 4 at 152, 156).

and in particular the right to the economic benefit of these lands and resources, and the right to choose how these lands will be used.[379]

277. As such, these statutory provisions impair the core of exclusive federal jurisdiction over "Lands reserved for the Indians" and, under the doctrine of interjurisdictional immunity, are inapplicable to Tsilhqot'in Aboriginal title lands.

6. The implications of interjurisdictional immunity are manageable

278. The recognition that Tsilhqot'in possession of their Aboriginal title lands rests at the core of federal jurisdiction under s. 91(24) does not remove these lands from regulation. Rather, the objective is to ensure that such regulation emanates from a constitutionally competent body. The Appellant seeks only to restore the relationship between the Tsilhqot'in people and the Crown to a solid constitutional footing.

279. Parliament has a central and ongoing responsibility to "safeguard one of the most central of native interests — their interest in their lands".[380] It has both the power and the responsibility to mediate the relationship between Provincial objectives and Aboriginal title.

280. The challenges are entirely manageable. The federal and provincial governments have already overcome the limits of provincial jurisdiction resulting from s. 91(24) through a number of cooperative mechanisms including but not limited to s. 88 of the *Indian Act*, *e.g.*:

a) In 1912, Parliament expanded the boundaries of Ontario and Quebec and authorized both Provinces to obtain surrenders of Indian rights within the new provincial territory, subject to Governor in Council approval.[381]

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[379] See, *e.g.*: *Forest Act*, SBC 1978, c 23, ss 10, 12, 17, 25, 28, 35, 42, 46, 47, 91; *Forest Act*, RSBC 1979, c 140, ss 7(1), 8, 10-18, 25, 28, 35, 42, 46, 47; *Forest Act*, RSBC 1996, c 157, ss 8, 10, 12-15, 18, 20-21, 24, 81, 115-16; *Forest Amendment Act*, 1992, SBC 1992, c 40, ss 1, 11; *Forest Practices Code of British Columbia Act*, RSBC 1996, c 159, ss 10, 12, 17-19, 39-41 [note that the *Forest and Range Practices Act* fully replaced the *Forest Practices Code* as of January 1, 2007; see in particular *Forest and Range Practices Act*, SBC 2002, c 69, s 3 and Part 11]; Exhibit 0464, Carson Expert Report (AR vol. XII, Tab 55); Exhibit 0467, Fuller Expert Report (AR vol. XII, Tab 56).

[380] *Delgamuukw*, para. 176; see also: Trial Decision, para. 1046 (AR vol. II, Tab 4 at 157).

[381] *The Quebec Boundaries Extension Act, 1912*, 2 Geo V, c 45, s 2; *The Ontario Boundaries Extension Act*, *1912*, 2 Geo V, c 40, s 2.

b) The *Natural Resource Transfer Agreements* concluded between Parliament and the Prairie Provinces altered the division of powers in relation to the treaty rights subsisting across those lands. They expressly provided that "the laws respecting game in force in the Province from time to time shall apply to the Indians".[382]

c) Modern treaty agreements in British Columbia recognize the application of federal, provincial and First Nation laws on First Nation lands as well as to the First Nation's members, government, public institutions, and corporations; they establish rules as to which laws take priority in the event of a conflict.[383] Federal settlement legislation for these agreements authorizes the application of provincial laws to the extent that they would not apply of their own force due to s. 91(24).[384]

281. Canada, British Columbia, and the Tsilhqot'in will inevitably need to work together to resolve jurisdictional issues. The concrete examples of cooperative federalism both within and beyond the Aboriginal law context confirm that diverse solutions can be developed to address the reality of Canadian federalism.

C. Unjustified Infringement of Tsilhqot'in Aboriginal title

282. Even if the Province had the necessary statutory and constitutional authority in this case (which the Appellant denies, for the reasons above), the Province's land use planning and forestry activities in the Proven Title Area unjustifiably infringed Tsilhqot'in Aboriginal title. Pursuant to the *Sparrow/Gladstone* framework, provincial authorizations are inapplicable to the extent that they infringe Aboriginal rights or title without sufficient justification.[385]

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[382] *R v Horseman* [1990] 1 SCR 901 at 935-36; *Badger*, paras. 69-70.
[383] See, *e.g.*: *Tsawwassen First Nation Final Agreement*, c 2, ss 19-25, c 6, ss 5-8, c 16 ss 47, 49, 53 and 54.
[384] See, *e.g.*: *Tsawwassen First Nation Final Agreement Act*, SC 2008, c 32, s 15; *Maa-nulth First Nations Final Agreement Act*, SC 2009, c 18, s 14.
[385] *Delgamuukw*, paras. 160-69.

283. The Court of Appeal confirmed the Trial Judge's conclusions that provincial land use planning and forestry activities unjustifiably infringed Tsilhqot'in Aboriginal rights to hunt, trap and trade.[386] Those conclusions have not been appealed.

284. By definition, Tsilhqot'in Aboriginal title has been infringed by the same provincial land use planning and forestry activities in the Proven Title Area. Tsilhqot'in Aboriginal title includes, but is not limited to, rights to hunt and trap in the Proven Title Area – rights that the courts below held to be infringed without justification.

285. As found by the Trial Judge, provincial land use planning in this case demonstrated "the Province's determination to open up the Claim Area for logging" and gave the force of law to "timber targets for harvesting that direct a substantial level of commercial harvesting in the Claim Area".[387] At the same time, none of this planning "took into account any Aboriginal title or Aboriginal rights that might exist in the Claim Area".[388] In fact, the timber harvest levels set by the Annual Allowable Cut ("**AAC**") were "based on the assumption that all areas contribute to the timber supply within the TSA until the issue of Aboriginal title is finally resolved"[389] and "[t]he former Chief Forester testified that he did not (and believed he could not) adjust his AAC determination on the basis of a claim to Aboriginal rights and title".[390]

286. The Court of Appeal accepted the Trial Judge's conclusion that "there was no governmental objective that was sufficiently weighty to justify the infringement of Tsilhqot'in Aboriginal rights".[391] This finding of fact is fatal to any effort by the Crown to justify the infringements of Tsilhqot'in Aboriginal title in this case.

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[386] Appeal Decision, paras. 316, 322, 343 (AR vol. III, Tab 9 at 191, 193, 198). See Trial Decision, paras. 1141 (AR vol. II, Tab 4 at 191), 1288, 1294, 1301 (AR vol. III, Tab 5 at 39, 41, 44).
[387] Trial Decision, para. 1132 (AR vol. II, Tab 4 at 188); Appeal Decision, para. 313 (AR vol. III, Tab 9 at 190).
[388] Trial Decision, para. 1133 (AR vol. II, Tab 4 at 188).
[389] Trial Decision, para. 1125 (AR vol. II, Tab 4 at 185).
[390] Trial Decision, para. 1128 (AR vol. II, Tab 4 at 186); see also para. 1127 (AR vol. II, Tab 4 at 186); Transcript (Larry Pedersen), v. 111, pp. 19333, 19387-90, 19400, 19404:45 – 19407:10; v. 112, pp. 19490:6 – 19491:16; 19498:1 – 19499:33 (AR vol. V, Tabs 26, 27).
[391] Appeal Decision, para. 343 (AR vol. III, Tab 9 at 198).

287. As Aboriginal title includes additional rights to the economic benefit of the lands and resources, and the right to choose how they will be used, the infringement of Aboriginal title can only be more severe, and the justification for this infringement even more inadequate. Given the uncontested holdings that Tsilhqot'in Aboriginal rights were unjustifiably infringed in this case, there can be no dispute as to the unjustified infringement of Tsilhqot'in Aboriginal title.

D. Conclusions on the Legal Consequences of Tsilhqot'in Aboriginal Title

288. True reconciliation cannot be founded on denial. It requires recognition. Recognition of Aboriginal title, based equally on Aboriginal and common law perspectives, is the starting point for fair and lasting reconciliation.

289. British Columbia was founded and has operated for almost 150 years largely in denial of the very existence of Aboriginal title. It is hardly surprising that recognizing Aboriginal title on the ground, for the first time, will require some adjustment by British Columbia, Canada and the Tsilhqot'in Nation to accommodate this legal reality and establish the frameworks needed to reconcile title with other interests.

290. Just like the initial affirmation by this Court of existing Aboriginal rights in *Sparrow*, and the Crown's duty to consult in *Haida Nation*, this next essential development of the law undoubtedly will pose challenges, but these are necessary and surmountable challenges – challenges that renew our commitment as a nation to our highest constitutional principles.[392]

291. Recognizing Aboriginal title does not mean rejecting the greater public interest; rather, it is the entry point for balancing these interests in a principled manner.[393] Aboriginal title is not absolute. *Delgamuukw* affirmed the continuing ability of the Crown to justify infringements that "are of sufficient importance to the broader community as a whole".[394]

[392] *Reference re Secession of Quebec*, [1998] 2 SCR 217, para. 82.
[393] Slattery, *Metamorphosis*, at 281-86.
[394] *Delgamuukw*, paras. 160-61 (underscore in original omitted).

292. Moreover, the courts have diverse tools at their disposal to balance the competing interests and arrive at fair and just results in the particular circumstances of each case. For example, in ***Chippewas of Sarnia Band v. Canada (Attorney-General)***, the Ontario Court of Appeal, invoking equitable doctrines, declined to order the return of reserve land that was alienated without a proper surrender, but presently occupied by over 2,000 different individuals, organizations, and businesses. Instead, the Court preserved the Chippewas' action for damages against the Crown for wrongful appropriation.[395] The courts will continue tailoring remedies that are shaped to the unique history, demands and opportunities of each particular case.

293. The Tsilhqot'in people have fought for recognition of their fundamental rights as the original possessors of their traditional lands for generations. In the Chilcotin War, their Chiefs literally gave their lives in defence of their territory in the face of a hostile colonial government and an unsympathetic court system. Although this betrayal lives on today, vividly, in the hearts of the Tsilhqot'in, the Tsilhqot'in people have invested over 20 years in the Canadian court system. They have done so with a singular hope: that the courts will deliver on the promise of s. 35 and recognize and affirm their Aboriginal title to the land, undiminished by discrimination or political expedience, so that the real work of reconciliation can finally begin.

294. It is hard to imagine a more opportune time and place to start. The Proven Title Area is remote and largely undeveloped wilderness. The declaration of Aboriginal title sought by the Tsilhqot'in on this appeal excludes private lands and submerged lands. There are no overlapping claims into the Proven Title Area by other First Nations.

295. To this day, the Tsilhqot'in remain by far the predominant population in the area. The immediate conflict has subsided, now that the courts have conclusively held that the provincial forestry regime unjustifiably infringes Tsilhqot'in Aboriginal rights. At any rate, the economic value of timber in the Proven Title Area is marginal, at best.[396] And the Xeni Gwet'in, as the

[395] *Chippewas* (OCA), paras. 243-311.
[396] Trial Decision, para. 1107 (AR vol. II, Tab 4 at 178).

traditional caretakers, are focused on managing these lands for the continuity of their culture and their community.[397]

296. This creates an ideal opportunity for the Parties, with the assistance of the courts if necessary, to resolve the implications of Aboriginal title incrementally, step by step, without undue impacts on other interests.

297. *Calder* was dismissed on a procedural defect. *Delgamuukw* finally confirmed the continuing existence of Aboriginal title, but also ended without resolution, again as a result of procedural defects, and legal errors by the trial judge. *Marshall* failed on a deficient evidentiary record. To this day, 40 years after *Calder*, over 15 years since *Delgamuukw*, Aboriginal title exists only as an abstract legal theory in Canada, with no practical recognition or meaning on the ground.

298. The time for recognition of Aboriginal title is <u>now</u>, not only because it is long overdue and urgently needed, but because the governing law and the facts of this case call for it. The Trial Judge properly applied the law of Aboriginal title as articulated by this Court. His understanding of the facts was comprehensive, his findings undisputed on all significant matters. In the result, he found Aboriginal title was proven on the evidence to some – but not even half – of the Claim Area, lands that "provided security and continuity for Tsilhqot'in people".[398]

299. In the words of the Trial Judge, the Appellant submits that "[t]he time to reach an honourable resolution and reconciliation is with us today".[399]

PART IV - SUBMISSIONS CONCERNING COSTS

300. In granting leave to appeal, by order dated January 24, 2013, this Court awarded costs of the leave application and the appeal to the Appellant, in any event of the cause.

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[397] See, *e.g.*, the *Nemiah Declaration*, reproduced in the Trial Decision, para. 59 (AR vol. I, Tab 3 at 34).
[398] Trial Decision, para. 960 (AR vol. II, Tab 4 at 127).
[399] Trial Decision, para. 1338 (AR vol. III, Tab 5 at 59).

PART V - ORDERS SOUGHT

301. The Appellant seeks the following orders:

a. an order allowing the appeal;

b. a declaration that the Tsilhqot'in Nation holds Aboriginal title to the Proven Title Area lands within the Claim Area, in accordance with the reasons of the Trial Judge;

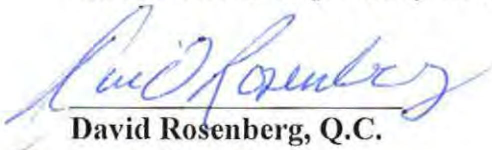
c. a declaration that "Crown timber" under the *Forest Act* at the material times did not include timber situated on Tsilhqot'in Aboriginal title lands and, as a result, British Columbia lacked statutory authority to grant an interest in such timber to third parties;

d. in the alternative, a declaration answering the first constitutional question in the affirmative, as the *Forest Act* and the *Forest Practices Code* impair the core of federal jurisdiction under s. 91(24), and are therefore inapplicable, to the extent that they purport to authorize the management of timber, or the acquisition, removal or sale of timber, on Tsilhqot'in Aboriginal title lands;

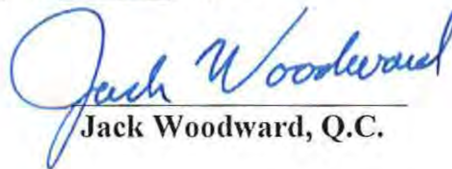
e. in the further alternative, a declaration answering the second constitutional question in the affirmative, as British Columbia has unjustifiably infringed Tsilhqot'in Aboriginal title through its land use planning and forestry authorizations pursuant to the *Forest Act* and the *Forest Practices Code*; and

f. such other relief as the Court deems just.

All of which is respectfully submitted this 30th day of May, 2013.



David Rosenberg, Q.C.



Jack Woodward, Q.C.

Jay Nelson

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CANADA

A Consolidation of

THE CONSTITUTION ACTS 1867 to 1982

DEPARTMENT OF JUSTICE
CANADA

Consolidated as of January 1, 2013

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Consolidation of the Constitution Acts, 1867 to 1982

This consolidation contains the text of the *Constitution Act, 1867* (formerly the *British North America Act, 1867*), together with amendments made to it since its enactment, and the text of the *Constitution Act, 1982*, as amended since its enactment. The *Constitution Act, 1982* contains the *Canadian Charter of Rights and Freedoms* and other provisions, including the procedure for amending the Constitution of Canada.

The *Constitution Act, 1982* also contains a schedule of repeals of certain constitutional enactments and provides for the renaming of others. The *British North America Act, 1949*, for example, is renamed as the *Newfoundland Act*. The new names of these enactments are used in this consolidation, but their former names may be found in the schedule.

The *Constitution Act, 1982* was enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.). It is set out in this consolidation as a separate Act after the *Constitution Act, 1867*.

Amendment of the Constitution Act, 1867

The law embodied in the *Constitution Act, 1867* has been altered many times otherwise than by textual amendment, not only by the Parliament of the United Kingdom but also by the Parliament of Canada and the legislatures of the provinces in those cases where provisions of that Act are expressed to be subject to alteration by Parliament or the legislatures. A consolidation of the Constitution Acts including only those subsequent enactments that alter the text of the Act would therefore not produce a true statement of the law. In preparing this consolidation, an attempt has been made to reflect accurately the substance of the law contained in enactments modifying the provisions of the *Constitution Act, 1867*, whether by textual amendment or otherwise.

The various classes of enactments modifying the *Constitution Act, 1867* have been dealt with as follows:

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1. ***Repeals***

Repealed provisions (*e.g.* section 2) have been deleted from the text and quoted in a footnote.

2. ***Amendments***

Amended provisions (*e.g.* section 4) are reproduced in the text in their amended form and the original provisions are quoted in a footnote.

3. ***Additions***

Added provisions (*e.g.* section 51A) are included in the text.

4. ***Substitutions***

Substituted provisions (*e.g.* section 18) are included in the text and the former provision is quoted in a footnote.

II. Non-textual Amendments

1. ***Alterations by United Kingdom Parliament***

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Provisions subject to alteration by the Parliament of Canada (*e.g.* section 37) have been included in the text in their altered form, wherever possible, but where this was not feasible (*e.g.* section 40) the original section has been retained in the text and a footnote reference made to the Act of the Parliament of Canada effecting the alteration.

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Footnote references are made to those sections that are spent or probably spent. For example, section 119 became spent by lapse of time and the footnote reference indicates this. In turn, section 140 is probably spent, but short of examining all statutes passed before Confederation there would be no way of ascertaining definitely whether or not the section is spent; the footnote reference therefore indicates that the section is probably spent.

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The enactments of the United Kingdom Parliament and the Parliament of Canada, and Orders in Council admitting territories, that are referred to in the footnotes may be found in Appendix II of the Appendices to the Revised Statutes of Canada, 1985 and in the annual volumes of the Statutes of Canada.

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Acknowledgement

This consolidation of the *Constitution Acts, 1867 to 1982* contains material prepared by the late Dr. E. A. Driedger, Q.C. The material has been updated where necessary. The Department of Justice gratefully acknowledges Dr. Driedger's earlier work.

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CONSTITUTION ACT, 1867

30 & 31 Victoria, c. 3 (U.K.)

An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith

(*29th March 1867*)

WHEREAS the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

And whereas such a Union would conduce to the Welfare of the Provinces and promote the Interests of the British Empire:

And whereas on the Establishment of the Union by Authority of Parliament it is expedient, not only that the Constitution of the Legislative Authority in the Dominion be provided for, but also that the Nature of the Executive Government therein be declared:

And whereas it is expedient that Provision be made for the eventual Admission into the Union of other Parts of British North America: [(1)]

I. PRELIMINARY

Short title

1. This Act may be cited as the *Constitution Act, 1867*. [(2)]

2. Repealed. [(3)]

[(1)] **The enacting clause was repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). It read as follows:**

Be it therefore enacted and declared by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

[(2)] **As amended by the *Constitution Act, 1982*, which came into force on April 17, 1982. The section originally read as follows:**

1. This Act may be cited as *The British North America Act, 1867*.

[(3)] **Section 2, repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.), read as follows:**

2. The Provisions of this Act referring to Her Majesty the Queen extend also to the Heirs and Successors of Her Majesty, Kings and Queens of the United Kingdom of Great Britain and Ireland.

Appropriation from Time to Time

106. Subject to the several Payments by this Act charged on the Consolidated Revenue Fund of Canada, the same shall be appropriated by the Parliament of Canada for the Public Service.

Transfer of Stocks, etc.

107. All Stocks, Cash, Banker's Balances, and Securities for Money belonging to each Province at the Time of the Union, except as in this Act mentioned, shall be the Property of Canada, and shall be taken in Reduction of the Amount of the respective Debts of the Provinces at the Union.

Transfer of Property in Schedule

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

Property in Lands, Mines, etc.

109. All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. (57)

Assets connected with Provincial Debts

110. All Assets connected with such Portions of the Public Debt of each Province as are assumed by that Province shall belong to that Province.

Canada to be liable for Provincial Debts

111. Canada shall be liable for the Debts and Liabilities of each Province existing at the Union.

---

(57) **Manitoba, Alberta and Saskatchewan were placed in the same position as the original provinces by the *Constitution Act, 1930*, 20-21 Geo. V, c. 26 (U.K.).**

These matters were dealt with in respect of British Columbia by the *British Columbia Terms of Union* and also in part by the *Constitution Act, 1930*.

Newfoundland was also placed in the same position by the *Newfoundland Act*, 12-13 Geo. V1, c. 22 (U.K.).

With respect to Prince Edward Island, see the Schedule to the *Prince Edward Island Terms of Union*.

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CONSTITUTION ACT, 1982 [80]

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

---

[80] **Enacted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), which came into force on April 17, 1982. The *Canada Act 1982*, other than Schedules A and B thereto, reads as follows:**

An Act to give effect to a request by the Senate and House of Commons of Canada

Whereas Canada has requested and consented to the enactment of an Act of the Parliament of the United Kingdom to give effect to the provisions hereinafter set forth and the Senate and the House of Commons of Canada in Parliament assembled have submitted an address to Her Majesty requesting that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose.

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. The *Constitution Act, 1982* set out in Schedule B to this Act is hereby enacted for and shall have the force of law in Canada and shall come into force as provided in that Act.

2. No Act of the Parliament of the United Kingdom passed after the *Constitution Act, 1982* comes into force shall extend to Canada as part of its law.

3. So far as it is not contained in Schedule B, the French version of this Act is set out in Schedule A to this Act and has the same authority in Canada as the English version thereof.

4. This Act may be cited as the *Canada Act 1982*.

CITATION

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

Recognition of existing aboriginal and treaty rights

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Definition of "aboriginal peoples of Canada"

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

Land claims agreements

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

Aboriginal and treaty rights are guaranteed equally to both sexes

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. [96]

Commitment to participation in constitutional conference

35.1 The government of Canada and the provincial governments are committed to the principle that, before any amendment is made to Class 24 of section 91 of the "*Constitution Act, 1867*", to section 25 of this Act or to this Part,

(*a*) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the provinces, will be convened by the Prime Minister of Canada; and

(*b*) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item. [97]

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[96] **Subsections 35(3) and (4) were added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).**

[97] **Section 35.1 was added by the *Constitution Amendment Proclamation, 1983* (*see* SI/84-102).**

CHAPTER I-5

An Act respecting Indians

SHORT TITLE

Short title

1. This Act may be cited as the *Indian Act*. R.S., c. I-6, s. 1.

INTERPRETATION

Definitions

2. (1) In this Act,

"band" *«bande»*

"band" means a body of Indians

(*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,

(*b*) for whose use and benefit in common, moneys are held by Her Majesty, or

(*c*) declared by the Governor in Council to be a band for the purposes of this Act;

"child" *«enfant»*

"child" includes a legally adopted Indian child;

"council of the band" *«conseil...»*

"council of the band" means

(*a*) in the case of a band to which section 74 applies, the council established pursuant to that section,

(*b*) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band;

"Department" *«ministère»*

"Department" means the Department of Indian Affairs and Northern Development;

"elector" *«électeur»*

"elector" means a person who

(*a*) is registered on a Band List,

(*b*) is of the full age of twenty-one years, and

(*c*) is not disqualified from voting at band elections;

CHAPITRE I-5

Loi concernant les Indiens

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur les Indiens*. S.R., ch. I-6, art. 1.

DÉFINITIONS

Définitions

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

«argent des Indiens» *"Indian moneys"*

«argent des Indiens» Les sommes d'argent perçues, reçues ou détenues par Sa Majesté à l'usage et au profit des Indiens ou des bandes.

«bande» *"band"*

«bande» Groupe d'Indiens, selon le cas :

a) à l'usage et au profit communs desquels des terres appartenant à Sa Majesté ont été mises de côté avant ou après le 4 septembre 1951;

b) à l'usage et au profit communs desquels, Sa Majesté détient des sommes d'argent;

c) que le gouverneur en conseil a déclaré être une bande pour l'application de la présente loi.

«biens» *"estate"*

«biens» Tout bien meuble ou immeuble, y compris un droit sur des terres.

«boisson alcoolisée» *"intoxicant"*

«boisson alcoolisée» Tout liquide — alcoolisé ou non —, mélange ou préparation ayant des propriétés enivrantes et susceptible de consommation humaine.

«conseil de la bande» *"council..."*

«conseil de la bande»

a) Dans le cas d'une bande à laquelle s'applique l'article 74, le conseil constitué conformément à cet article;

b) dans le cas d'une bande à laquelle l'article 74 n'est pas applicable, le conseil choisi selon la coutume de la bande ou, en

(*b*) the personal property of an Indian or a band situated on a reserve.

Idem

(2) No Indian or band is subject to taxation in respect of the ownership, occupation, possession or use of any property mentioned in paragraph (1)(*a*) or (*b*) or is otherwise subject to taxation in respect of any such property.

(2) Nul Indien ou bande n'est assujetti à une taxation concernant la propriété, l'occupation, la possession ou l'usage d'un bien mentionné aux alinéas (1)*a*) ou *b*) ni autrement soumis à une taxation quant à l'un de ces biens.

Idem

Idem

(3) No succession duty, inheritance tax or estate duty is payable on the death of any Indian in respect of any property mentioned in paragraphs (1)(*a*) or (*b*) or the succession thereto if the property passes to an Indian, nor shall any such property be taken into account in determining the duty payable under the *Dominion Succession Duty Act*, chapter 89 of the Revised Statutes of Canada, 1952, or the tax payable under the *Estate Tax Act*, chapter E-9 of the Revised Statutes of Canada, 1970, on or in respect of other property passing to an Indian. R.S., c. I-6, s. 87; 1980-81-82-83, c. 47, s. 25.

(3) Aucun impôt sur les successions, taxe d'héritage ou droit de succession n'est exigible à la mort d'un Indien en ce qui concerne un bien de cette nature ou la succession visant un tel bien, si ce dernier est transmis à un Indien, et il ne sera tenu compte d'aucun bien de cette nature en déterminant le droit payable, en vertu de la *Loi fédérale sur les droits successoraux*, chapitre 89 des Statuts revisés du Canada de 1952, ou l'impôt payable, en vertu de la *Loi de l'impôt sur les biens transmis par décès*, chapitre E-9 des Statuts revisés du Canada de 1970, sur d'autres biens transmis à un Indien ou à l'égard de ces autres biens. S.R., ch. I-6, art. 87; 1980-81-82-83, ch. 47, art. 25.

Idem

LEGAL RIGHTS

General provincial laws applicable to Indians

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under this Act. R.S., c. I-6, s. 88.

DROITS LÉGAUX

88. Sous réserve des dispositions de quelque traité et de quelque autre loi fédérale, toutes les lois d'application générale et en vigueur dans une province sont applicables aux Indiens qui s'y trouvent et à leur égard, sauf dans la mesure où ces lois sont incompatibles avec la présente loi ou quelque arrêté, ordonnance, règle, règlement ou règlement administratif pris sous son régime, et sauf dans la mesure où ces lois contiennent des dispositions sur toute question prévue par la présente loi ou sous son régime. S.R., ch. I-6, art. 88.

Lois provinciales d'ordre général applicables aux Indiens

Property on reserve not subject to alienation

89. (1) Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour or at the instance of any person other than an Indian.

89. (1) Sous réserve des autres dispositions de la présente loi, les biens meubles et immeubles d'un Indien ou d'une bande situés sur une réserve ne peuvent pas faire l'objet d'un privilège, d'un nantissement, d'une hypothèque, d'une opposition, d'une réquisition, d'une saisie ou d'une exécution en faveur ou à la demande d'une personne autre qu'un Indien.

Inaliénabilité des biens situés sur une réserve

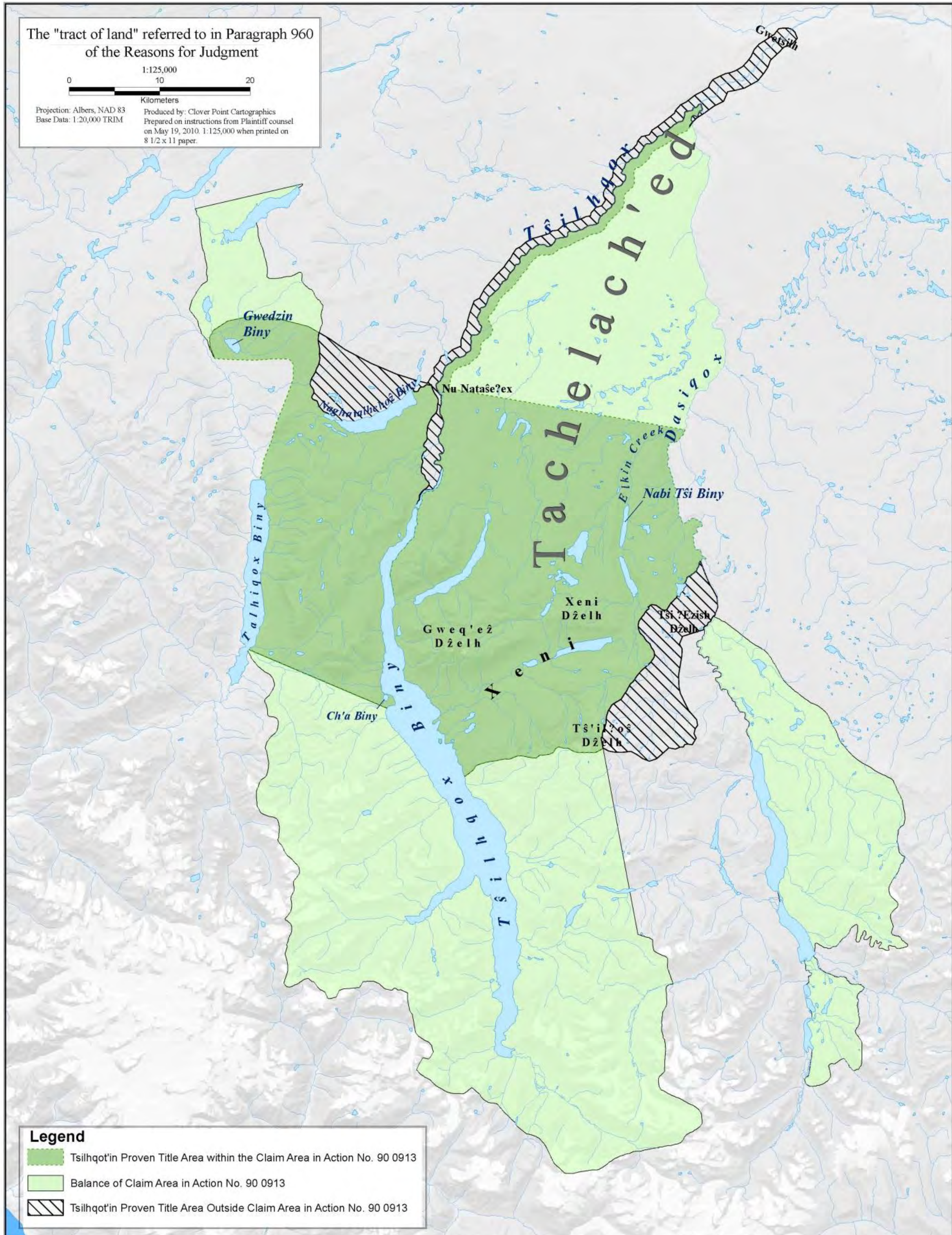
Conditional sales

(2) A person who sells to a band or a member of a band a chattel under an agreement whereby the right of property or right of possession thereto remains wholly or in part in the seller may exercise his rights under the agreement notwithstanding that the chattel is situated on a reserve. R.S., c. I-6, s. 89.

(2) Une personne, qui vend à une bande ou à un membre d'une bande un bien meuble en vertu d'une entente selon laquelle le droit de propriété ou le droit de possession demeure acquis en tout ou en partie au vendeur, peut exercer ses droits aux termes de l'entente, même si le bien meuble est situé sur une réserve. S.R., ch. I-6, art. 89.

Ventes conditionnelles

APPENDIX "A"
PROVEN TITLE AREA – VISUAL AID



APPENDIX "B"
ORDER STATING THE CONSTITUTIONAL QUESTIONS

Supreme Court of Canada Cour suprême du Canada

March 15, 2013 — Le 15 mars 2013

ORDER — **ORDONNANCE**
MOTION — **REQUÊTE**

ROGER WILLIAM, ON HIS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF THE XENI GWET'IN FIRST NATIONS GOVERNMENT AND ON BEHALF OF ALL OTHER MEMBERS OF THE TSILHQOT'IN NATION v. HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA AND THE REGIONAL MANAGER OF THE CARIBOO FOREST REGION AND THE ATTORNEY GENERAL OF CANADA
(B.C.) (34986)

THE CHIEF JUSTICE:

UPON APPLICATION by the respondents, Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region, for an order stating constitutional questions in the above appeal;

AND THE MATERIAL FILED having been read;

IT IS HEREBY ORDERED THAT THE CONSTITUTIONAL QUESTIONS BE STATED AS FOLLOW:

1. Are the *Forest Act*, R.S.B.C. 1996, c. 157 and the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, or their predecessor legislation, constitutionally inapplicable in whole or in part to Tsilhqot'in Aboriginal title lands in view of Parliament's exclusive legislative authority set out at s. 91(24) of the *Constitution Act, 1867*?

2. Are the *Forest Act*, R.S.B.C. 1996, c. 157 and the *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, or their predecessor legislation, constitutionally inapplicable in whole or in part to Tsilhqot'in Aboriginal title lands to the extent that they authorize unjustified infringements of Tsilhqot'in Aboriginal title, by virtue of ss. 35(1) and 52 of the *Constitution Act, 1982*?

À LA SUITE DE LA DEMANDE des intimés, Sa Majesté la Reine du chef de la Province de Colombie-Britannique et le chef régional de la région de Cariboo Forest, visant à obtenir la formulation de questions constitutionnelles dans l'appel susmentionné;

ET APRÈS AVOIR LU la documentation déposée;

LES QUESTIONS CONSTITUTIONNELLES SUIVANTES SONT FORMULÉES :

1. Est-ce que les lois intitulées *Forest Act*, R.S.B.C. 1996, ch. 157 et *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, ch. 159, ou celles qui les ont précédées, sont, pour tout ou partie, constitutionnellement inapplicables aux terres des Tsilhqot'in visées par un titre aborigène en raison de la compétence législative exclusive reconnue au Parlement par le par. 91(24) de la *Loi constitutionnelle de 1867* ?

2. Est-ce que les lois intitulées *Forest Act*, R.S.B.C. 1996, ch. 157 et *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, ch. 159, ou celles qui les ont précédées, sont, par l'effet du par. 35(1) et de l'art. 52 de la *Loi constitutionnelle de 1982*, constitutionnellement inapplicables, pour tout ou partie, aux terres des Tsilhqot'in visées par un titre autochtone dans la mesure où elles autorisent des atteintes injustifiées au titre aborigène des Tsilhqot'in?

C.J.C.
J.C.C.

CASE AUTHORITIES REGARDING LEVEL OF CERTAINTY AT TH ENVIRONMENTAL ASSESSMENT STAGE

Submitted by Taseko Mines Limited to the New Prosperity Federal Review Panel
July 31, 2013

Case	Para.	Quote (emphasis added)
Alberta Wilderness Assn. v. Express Pipelines Ltd., [1996] FCJ No 1016)	14	Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages ... and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. **By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.**
Inverhuron & District Ratepayers Ass. v. Canada (Minister of The Environment), 2001 FCA 203	54-56	The final and most specific of the appellant's submissions is an attack upon the quality of the assessment which was done. The appellant's main concern was with the choice of methodology adopted in the comprehensive study. In the appellant's view, the responsible authority was required to ensure that the final design was subjected to the same detailed scrutiny that the reference design was...In its view, there must be an actual study - including detailed calculations of the radiological effects - of the final system design that was actually selected. **The essence of the environmental assessment process is to predict the environmental effects of a proposed project and then assess their significance. This process must be conducted as early as**

		practicable in the planning stages of a project. By its very nature, then, the process is subject to some uncertainty. As this Court recognized in *Alberta Wilderness Assn. v. Express Pipelines Ltd.*, at 181. No information about probable future effects of a project can ever be complete or exclude all possible future outcomes." It went on to opine that "... given the nature of the task, we suspect that finality and certainty in environmental assessment can never be achieved." Given the nature of the process and the differences between the various types of projects subject to environmental assessment, there can be no one prescriptive method for conducting an environmental assessment...
Pembina Institute for Appropriate Development v. Canada (Attorney General), 2008 FC 302	56, 58, 61 and 62	...this approach is broadly consistent with the principles of adaptive management. As Evans J.A asserted in *Canadian Parks and Wilderness Society*, *supra*, at para. 24, **"[t]he concept of "adaptive management" responds to the difficulty, or impossibility, of predicting all the environmental consequences of a project on the basis of existing knowledge." The same holds true for the assessment of mitigation measures. While there does exist some uncertainty with respect to end pit lake technology, the existing level of uncertainty is not such that it should paralyze the entire project**... **In my opinion, the Panel is permitted and indeed mandated to make these kinds of recommendations regarding the proposed Project, which should include recommendations for continued study of potential impacts on valued environmental components and the development of further mitigation strategies. This is consistent with the ongoing and dynamic nature of environmental assessment referred to above and ensures that new information is obtained which facilitates the adaptation of project implementation as required...** Again, I note that the Federal Court of Appeal explained in *Express Pipelines Ltd.*, *supra*, that as the nature of the Panel's task is predictive, finality and certainty in environmental assessment can never be achieved... **It would be impossible for a review panel to conduct the environmental assessment early in the**

		planning stages of a project if the Panel was required to eliminate all uncertainty and precluded from commenting on follow-up activities. Thus, while uncertainties with respect to reclamation of peat-accumulating wetlands remained, they could be addressed through adaptive management given the existence of generally known replacement measures contained in Imperial Oil's mine closure plan. Indeed, it is worth noting that the Panel cited with approval the reclamation milestones from Imperial Oil's Project Application in its Report
Canadian Transit Company v. Canada (Transport), 2011 FC 515	178-180	As noted above, Appendix E to the Screening Report states that the details of mitigation measures for species at risk will be developed beyond the general mitigation measures explicitly provided in the Screening Report as permit applications are obtained under the *Ontario Endangered Species Act, 2007* ... As discussed above, the Screening Report was part of a complex process of coordination among federal and provincial authorities as well as U.S. state and federal authorities. The process was designed to reduce overlap and waste. This is an important purpose of the Act, as stated in section 4 of the Act... **Moreover, this Court has recognized that CEAA does not require that all the details of mitigating measures be resolved before acceptance of the Screening Report**. Madame Justice Tremblay-Lamer stated in *Pembina Institute for Appropriate Development v. Canada (Attorney General)*, 2008 FC 302 (CanLII), 2008 FC 302 (F.C.) at paragraphs 23 and 24: ¶23. The adequacy and completeness of the evidence must be evaluated in light of the preliminary nature of a review panel's assessment. In *Express Pipelines*, *supra*, at para. 14, Hugessen J.A. discussed the predictive and preliminary nature of the panel's role:

		The panel's view that the evidence before it was adequate to allow it to complete that function "as early as is practicable in the planning stages … and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly interfere. By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes**. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved.**
Grand Riverkeeper, Labrador Inc. v. Canada (Attorney General), 2012 FC 1520	59-61	Thus, to address the second part of the issue, it was entirely reasonable for the Panel to recommend that the Province and an independent study panel augment at a later time the information gathered with respect to the questions of need and alternatives. Indeed, this is expected behaviour from the Panel given the "ongoing and dynamic" nature of these large projects (*Pembina*, above, at para 24; *Union of Nova Scotia Indians v Canada (Minister of Fisheries and Oceans)*, [1996] FCJ No 1373 at para 65). **As this Court held in Pembina, above, environmental assessment is "not to be conceptualized as a single, discrete event" (at para 24).** **This is particularly so given the uncertainty of the process and the early phase in the process at which the EA occurs.** Subparagraph 5(2)(b)(i) of CEAA states that RAs "shall ensure that an environmental assessment of the project is conducted as early as is practicable in the planning stages of the project and before irrevocable decisions are made." The Federal Court of Appeal explored this point in *Express Pipelines*, above: [14] Finally, we were asked to find that the panel had improperly delegated some of its functions when it recommended that certain further studies and ongoing reports to the National Energy Board should be made before, during and after construction. This argument misconceives the panel's function which is simply one of information gathering and recommending. The panel's view that the evidence before it was adequate to allow it to complete that function "as early as practicable in the planning stages … and before irrevocable decisions are made" (see section 11(1)) is one with which we will not lightly

		interfere. **By its nature the panel's exercise is predictive and it is not surprising that the statute specifically envisages the possibility of "follow up" programmes. Indeed, given the nature of the task we suspect that finality and certainty in environmental assessment can never be achieved**