File No. 34986

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR 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 and the Regional Manager of the Cariboo Forest Region

RESPONDENTS

AND:

THE ATTORNEY GENERAL OF CANADA

RESPONDENT

AND:

ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF MANITOBA
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INTERVENERS

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PART I – STATEMENT OF FACTS

A. Overview

1. What is needed to establish a claim to Aboriginal title? According to this Court's consistent jurisprudence, the answer lies in the recognition of the full spectrum of Aboriginal rights—free-standing rights, land-based rights to harvest resources, and Aboriginal title—the right to the land itself. The spectrum of Aboriginal rights is adapted to the diverse cultures and circumstances of the Aboriginal peoples that are protected by s. 35.[1]

2. The courts below recognized Aboriginal rights to hunt, trap, trade in animal skins and pelts, and to capture and use wild horses. They also found those rights had been unjustifiably infringed by forestry activities. In the result, Tsilhqot'in opposition to anticipated logging in the Claim Area—the original purpose of this litigation—was vindicated.

3. At trial, and in the Court of Appeal, the Appellant also sought a declaration of Aboriginal title over the same territories where he had established Aboriginal rights.[2] This Court has repeatedly held[3] that reconciliation involves recognition of Aboriginal rights but does not require acceptance of claims to Aboriginal title throughout traditional territories. The Court of Appeal recognized that "the culture and traditions of a semi-nomadic group, like the Tsilhqot'in, depend on rights to use lands that extend well beyond the definite tracts that may be found to be subject to Aboriginal title".[4]

4. The modern test for proof of Aboriginal title has developed in this broader context of the spectrum of Aboriginal rights. This Court has distinguished the Aboriginal activities that may give rise to Aboriginal rights from those that give rise to title:

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[1] *R v. Gladstone*, [1996] 2 SCR 723; para. 65 ("*Gladstone*") (Respondent's Book of Authorities ("BCBOA"), II Tab 24 at 31).

[2] In this Court, the Appellant has reduced his claim to a declaration of Aboriginal title to those portions of Vickers' J.'s Opinion Areas within the Claim Area.

[3] *R v. Adams*, [1996] 3 SCR 101 ("*Adams*") (BCBOA I Tab 17); *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 ("*Delgamuukw*") (BCBOA I Tab 9); *R v. Marshall; R v. Bernard*, [2005] 2 SCR 220 ("*Marshall; Bernard*") (BCBOA II Tab 29); *R v. Sappier; R v. Gray*, [2006] 2 SCR 686, ("*Sappier*") (BCBOA II Tab 31).

[4] *William v. British Columbia*, 2012 BCCA 285 ("BCCA Reasons"), para. 232 (Appellant's Record ("AR"), III Tab 9 at 169).

> Aboriginal peoples used the land in many ways at the time of sovereignty. Some uses, like hunting and fishing, give rights to continue those practices in today's world…Aboriginal title, based on occupancy at the time of sovereignty, is one of these various aboriginal rights.[5]

5. The notion of territoriality is not irrelevant to s. 35. In the identification of activities "inherently tied to the land",[6] the areas where those activities were exercised may be defined by the extent of traditional territories. But Aboriginal territory and Aboriginal title are not co-extensive. The content of Aboriginal title – a right to the land itself – and its position on the spectrum of s. 35 Aboriginal rights make it clear that Aboriginal title does not subsist throughout traditional territories, or throughout large arbitrarily defined portions of those territories. Aboriginal title is restricted to "definite tracts" where a "degree of physical occupation or use equivalent to common law title has been made out".[7]

6. The Appellant refers to the "clear factual findings" of the trial judge.[8] In examining the trial judge's findings, it is important to distinguish between factual findings and findings of mixed fact and law. For example, the trial judge labelled his opinion that the Appellant had established title to certain areas ("Opinion Areas") "findings of fact"[9] when they were findings of mixed fact and law (discussed below).

7. The trial judge's findings were:

a) as a matter of fact, the Tsilhqot'in were semi-nomadic, who settled only temporarily, and travelled frequently throughout various lands;
b) as a matter of law, this form of seasonal semi-nomadic occupation sufficed to establish Aboriginal title to the Opinion Areas that he arbitrarily defined.

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[5] *Marshall; Bernard*, para. 38 (BCBOA II Tab 29 at 75-76).
[6] *Mitchell v. M.N.R*, [2001] 1 SCR 911, para. 56 ("*Mitchell*") (BCBOA I Tab 15 at 239).
[7] *Marshall; Bernard*, para. 66 (BCBOA II Tab 29 at 83-84).
[8] Appellant's Factum ("AF"), para. 9.
[9] *Tsilhqot'in Nation v. British Columbia,* 2007 BCSC 1700, ("BCSC Reasons"), para. 961 (AR II Tab 4 at 127).

8. The Court of Appeal recognized that "the question of whether a particular presence in a territory meets the standard of occupation necessary to found a claim to title is a question of mixed fact and law".[10]

9. British Columbia does not accept several parts of the Appellant's Statement of Facts and restates the relevant findings below.

B. The Claimants

10. Roger William brought this Claim 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.

11. The Xeni Gwet'in First Nations Government, also known as the Nemiah Valley Indian Band, is a "band" within the meaning of the *Indian Act*,[11] for whose use and benefit reserve lands have been have been set apart.

12. The Xeni Gwet'in number about 390-400, of whom about 200 live on Xeni Gwet'in reserves, 15 live off reserve in the Claim Area; the balance live outside the Claim Area.[12]

13. The Tsilhqot'in Nation is the term used by the Appellant to describe the collective membership of those Aboriginal communities that were originally composed of Tsilhqot'in speaking people. Those communities include the Xeni Gwet'in (Nemiah Valley) inside the Claim Area, and the Tl'esqox (Toosey), the Tsi Del Del (Redstone), the Tletinqox-t'in (Anahim), ?Esdilagh (Alexandria),[13] and the Yunesit'in (Stone) First Nations,[14] as well as the Tsilhqot'in-speaking minority of the Ulkatcho First Nation at Nagwentl'un (Anahim Lake), all outside of the Claim Area.[15] In total, the members of these First Nations who consider themselves to be Tsilhqot'in number about 3000.[16]

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[10] BCCA Reasons para. 227 (AR III Tab 9 at 168).
[11] *Indian Act*, R.S.C. 1985, c I-5, s. 1(1) "band".
[12] BCSC Reasons para. 33 (AR I Tab 3 at 27).
[13] ?Esdilagh is a mixed Carrier and Tsilhqot'in-speaking community with a Tsilhqot'in majority.
[14] BCSC Reasons para. 30 (AR I Tab 3 at 26).
[15] BCSC Reasons para. 456 (AR I Tab 3 at 162).
[16] BCSC Reasons para. 31 (AR I Tab 3 at 26).

C. The Claim to Aboriginal Title to the Claim Area

14. The Appellant sought declarations that the Tsilhqot'in exclusively occupied the whole of the lands and have Aboriginal title in the whole of the Claim Area – the "Brittany" and the "Trapline Territory",[17] as "part of the lands exclusively occupied by the Tsilhqot'in".[18]

15. The Brittany, or Brittany Triangle, is an area of land south of the confluence of the Tsilhqox (Chilko) and Dasiqox (Taseko) rivers extending between those two rivers as far south as an undefined line in the Nemiah Valley. It was estimated to be 1418 sq. km in area.[19]

16. The Trapline Territory is an area of land designated by the Province as a registered trapline area for the Nemiah Valley Indian Band. The Trapline Territory consists of two non-contiguous blocks containing a total of approximately 3,376 sq. kms.[20] Because the Trapline Territory overlaps with the Brittany by about 414 sq. kms,[21] the overall Claim Area was approximately 4,380 sq. km.[22]

17. The boundaries of the Claim Area were artificial.[23] Both sides of the Tsilhqox were used for hunting, fishing, berry picking, root gathering and dwelling sites, but only the eastern side was included.[24] Lands outside the Claim Area in between the Eastern and Western Blocks of the Trapline Territory were used to the "same extent as the land to the east and west" that was in the Claim Area.[25]

D. The Tsilhqot'in Were Semi-Nomadic

18. The trial judge quoted Livingston Farrand, an early ethnographer, who wrote in 1898 that until the late 1860's the center of Tsilhqot'in territory and population had been at Anahim Lake,

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[17] Approximately 4,380 km². BCCA Reasons para 1 (AR III, Tab 9 at101).
[18] Approximately 88,000 km², as claimed in the *Charleyboy* pleadings. See BCSC Reasons para. 619 (AR II Tab 4 at 19-20).
[19] BCSC Reasons paras. 40-43 (AR I Tab 3 at 29-30).
[20] BCSC Reasons, Appendix A, Map 2 (AR XIII Tab 58).
[21] BCSC Reasons para. 43 (AR I Tab 3 at 30).
[22] For comparison purposes, the Northwest Miramichi Watershed area claimed in *R. v. Bernard*, [2000] 3 CNLR 184 (NBPC) ("*Bernard* (PC)") (BCBOA I Tab 20).was approximately 2,400 km^2.
[23] BCSC Reasons para. 641 (AR II Tab 4 at 28).
[24] BCSC Reasons para. 641 (AR II Tab 4 at 28).
[25] BCSC Reasons para. 643 (AR II Tab 4 at 28).

about 140 kms northwest of the Nemiah Valley. They subsequently had migrated to the southeast and by the late 1890's had settled on four reserves. Farrand added:

> Besides these there are a considerable number of families leading a semi-nomadic life on the old tribal territory in the woods and mountains to the westward [who]… are known ... as the Stone Chilcotin or Stonies.[26]

19. These Stone Chilcotin were the ancestors of the Xeni Gwet'in and the Stone First Nations. The Stone Chilcotin made their winter headquarters along the Tsilhqox River on both sides and on some unidentified lakes, rivers and streams to the south, east and west.[27] The trial judge concluded that in 1846, the total population of Tsilhqot'in people living in the entire Claim Area was not more than 400 persons.[28]

20. Traditionally, no one leader of all Tsilhqot'in speakers was recognized.[29] Bands were loosely associated groups of families who wintered in the vicinity of a lake or group of lakes.[30] Within each band were unnamed local groups, called encampments, united by kinship, friendship or economic dependence.[31]

21. Encampments had no definitely outlined territorial rights. User rights were recognised only while sites were occupied.[32] There were no explicitly defined band territories.[33] All Tsilhqot'in people were entitled to use the entire "Tsilhqot'in territory".[34]

22. Traditional Tsilhqot'in living was semi-nomadic and seasonal. The "seasonal round" was summarized in generalized terms by the trial judge.[35] The same families did not always stay together and did not go to the same location every year. Although the same resources tended to be harvested at a roughly similar time each year, families might go to many different places from

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[26] BCSC Reasons para. 335 (AR I Tab 3 at 124-125).
[27] BCSC Reasons para. 337 (AR I Tab 3 at 126).
[28] BCSC Reasons para. 951 (AR II Tab 4 at 122-123). Today the number living on the Xeni Gwet'in reserves and in the Claim area is approximately 215. *Idem*.
[29] BCSC Reasons para. 357 (AR I Tab 3 at 131); quoted in BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[30] BCSC Reasons para. 358 (AR I Tab 3 at 131); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[31] BCSC Reasons para. 359 (AR I Tab 3 at 131-132); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[32] BCSC Reasons para. 359 (AR I Tab 3 at 131-132); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[33] BCSC Reasons para. 359 (AR I Tab 3 at 131-132); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[34] BCSC Reasons para. 360 (AR I Tab 3 at 132); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[35] BCSC Reasons paras. 380-397 (AR I Tab 3 at 140-145).

year to year to obtain those resources. It was important not to deplete a resource in any given area. Some areas were visited annually, others less often.[36]

23. In winter, all of a band might congregate; in spring, individual families separated to hunt by themselves. Later, groups of families might gather to fish. Large groups congregated during salmon runs. Other large groups hunted and dug roots at certain places in the mountains, but not all of the people in such groups were from the same band. Bands only gathered occasionally, and then usually for feasts and celebrations, rather than economic purposes.[37]

24. Hunting areas were used, not owned, by members of certain bands. Rights to fishing sites depended on use.[38] There was frequent movement for hunting, fishing, and gathering.[39] None of the Tsilhqot'in's immediate neighbours had as loose and flexible a group organization as they did.[40]

25. In the winter, Tsilhqot'in people lived in underground lodges or pit houses (lhiz qwen yex) or log shelters (niyah qungh); in summer, they used lean-tos, wind breaks, and tents for shelter.[41] Families had rights to certain winter camping sites, provided they occupied them every season. [42]

26. There were no village sites occupied year round by Tsilhqot'in people. Tsilhqot'in had no cultivated fields or other lands showing visible signs of an investment of labour.[43]

E. The Trial Judgment

1) The Successful Claim of Unjustified Infringement of Aboriginal Rights

27. The trial judge found that the Tsilhqot'in held Aboriginal rights that had been unjustifiably infringed by forestry activities, stating in his order:

> The Tsilhqot'in people have an Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals

[36] BCSC Reasons para. 397 (AR I Tab 3 at 145).
[37] BCSC Reasons para. 361 (AR I Tab 3 at 132-133);BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[38] BCSC Reasons para. 361 (AR I Tab 3 at 132-133); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[39] BCSC Reasons paras. 363 (AR I Tab 3 at 133-134); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[40] BCSC Reasons para. 362 (AR I Tab 3 at 133); BCCA Reasons para. 34 (AR III Tab 9 at 108-111).
[41] BCSC Reasons paras. 364-5 (AR I Tab 3 at 134).
[42] BCSC Reasons para. 378 (AR I Tab 3 at 139).
[43] BCSC Reasons para. 683 (AR II Tab 4 at 43).

> for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses. This right is inclusive of a right to capture and use horses for transportation and work;
>
> The Tsilhqot'in people have an Aboriginal right to trade in skins and pelts taken from the Claim Area as a means of securing a moderate livelihood;
>
> Forestry activities, which include logging and all other silvicultural practices, have unjustifiably infringed the Aboriginal rights in the Claim Area.[44]

28. These findings were upheld by the Court of Appeal, and leave to appeal was not sought in respect of them. Some courts have considered it unnecessary to address Aboriginal title claims after concluding that proof of an Aboriginal right is sufficient to dispose of the case.[45]

2) Aboriginal Title Claim Dismissed Without Prejudice to New Claims

29. The trial judge found that the Appellant's title claim as pleaded was an "all or nothing" claim for a declaration of Aboriginal title over the entire Claim Area.[46] He was unable to conclude that there was sufficient occupation of the Claim Area as a whole to establish Aboriginal title and dismissed the claim on a without prejudice basis.[47]

3) Opinion Areas

30. The trial judge went on to offer his "opinion" that the Appellant had established Aboriginal title to Opinion Areas that did not correspond to the lands claimed by the Appellant. He identified six "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" based upon "sites and their interconnecting links".[48] These Opinion Areas form the basis of the Appellant's Claim to Aboriginal title before this Court. They will be dealt with further in Argument.

4) Consequences of a Declaration of Aboriginal Title

31. The trial judge opined that, after a declaration of Aboriginal title:

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[44] BCCA Reasons para. 250 (AR III Tab 9 at 173-174).
[45] *Adams*, para 34 (BCBOA I Tab 17 at 259); *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2009 BCSC 1494 at paras. 498-502, (BCBOA I Tab 1 at 15-16) appeal allowed in part and dismissed in part 2011 BCCA 237, decision on remand 2013 BCCA 300.
[46] BCSC Reasons para. 120 (AR I Tab 3 at 50-51).
[47] BCSC Reasons para. 928 (AR II Tab 4 at 116).
[48] BCSC Reasons para. 959 (AR II Tab 4 at 125-127).

a) the Forest *Act* would not apply to Aboriginal title lands as a matter of statutory interpretation. He concluded that the *Forest Act* was directed towards the regulation of public lands in which the Crown had a present beneficial interest, and that the Crown would have no present beneficial interest in Aboriginal title lands, which should be treated as if they were private lands;[49]

b) as a matter of constitutional interpretation, the *Forest Act* could not apply to Aboriginal title lands because the management, acquisition, sale and removal of timber from such lands would be matters exclusively within federal jurisdiction;[50] and

c) the application of the *Forest Act* to Aboriginal title lands, without acknowledgement or recognition of the Aboriginal owner of those lands, would be an infringement of Aboriginal title[51] which the Province failed to justify in the Claim Area.[52]

F. The Court of Appeal

1) Aboriginal Rights

32. The Court of Appeal upheld the Aboriginal rights findings.

2) Title Claim made not "All or Nothing"

33. The Court of Appeal accepted that the claim was sufficiently pleaded to allow the Court to consider whether Aboriginal title had been proven in respect of only part of the Claim Area, provided there was no change in legal theory.[53]

3) Defendants Prejudiced if New Legal Theory Permitted in Argument

34. The Court of Appeal held that it would be prejudicial to the defendants if the trial proceeded on a certain theory of Aboriginal title, and the Appellant were later given the right to assert a different theory in argument.[54] The Court of Appeal described the theory of the Plaintiff's case:

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[49] BCSC Reasons paras. 971-981 (AR II Tab 4 at 130-135).
[50] BCSC Reasons paras. 1002-1049 (AR II Tab 4 at 141-158).
[51] BCSC Reasons paras. 1053-1081 (AR II Tab 4 at 159-170).
[52] BCSC Reasons paras. 1082-1141 (AR II Tab 4 at 170-191).
[53] BCCA Reasons para. 117 (AR III Tab 9 at 136).
[54] BCCA Reasons para. 120 (AR III Tab 9 at 138).

> In the case before us, the plaintiff's case was based on a territorial theory of Aboriginal title. He postulated that "occupation", for the purpose of an Aboriginal title claim, could be established by showing that the Tsilhqot'in moved through the territory in various patterns at and around the date of the assertion of sovereignty. He further asserted that the anecdotal evidence of attempts by the Tsilhqot'in to repel others who sought to use the land was sufficient evidence of "exclusivity" to found title.
>
> British Columbia and Canada rejected the territorial theory of Aboriginal title, instead taking the view that Aboriginal title could only be demonstrated over smaller tracts of land (like village sites, cultivated fields, and specific trapping or fishing sites) that were occupied by a First Nation intensively and, if not continuously, at least regularly. This theory of Aboriginal title was not the theory upon which the plaintiff presented his case, and it would not have been fair to any of the parties for the trial judge to attempt to identify particular areas of land within the Claim Area that qualified as candidates for Aboriginal title on the theory espoused by the defendants. Indeed, on this appeal, the plaintiff agrees that if Aboriginal title cannot be proven through a broad territorial claim, then the judge was right to dismiss the claim.[55]

35. The Court of Appeal commented on the theory underlying the Opinion Areas:

> While [the trial judge] found that the degree of occupation proven by the plaintiff sufficed to found a claim of title in only part of the Claim Area, he did so on the basis of the territorial theory on which the case was presented.
>
> It follows that if the territorial theory is the correct basis on which to assess Aboriginal title, the judge could properly have granted a declaration covering a more limited territory than the one claimed by the plaintiff, and should have done so.[56]

4) Territorial Theory Not Consistent with this Court's Jurisprudence

36. The Court of Appeal went on to consider whether, in light of this court's s. 35 jurisprudence, a territorial theory was the correct basis on which to establish Aboriginal title, and concluded that it was not.

37. The Court of Appeal noted that *R v. Van der Peet*[57] marked "the beginning" of the Court's modern framework of s. 35 analysis[58] and that this framework was advanced in *Adams*

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[55] BCCA Reasons paras. 122-123 (AR III Tab 9 at 138-139).
[56] BCCA Reasons paras. 125-126 (AR III Tab 9 at 139-140).
[57] *R v. Van der Peet* [1996] 2 SCR 507 ("*Van der Peet*") (BCBOA II Tab 33).

and *R. v. Coté*[59] which held "land-based Aboriginal rights could exist in places where claims to Aboriginal title were not made out." [60] Aboriginal rights could be demonstrated "even if they [the claimants] have not shown that their occupation and use of the land was sufficient to support a claim of title to the land."[61]

38. The Court of Appeal then reviewed in detail this Court's discussion of Aboriginal title in *Delgamuukw* and *Marshall; Bernard*.[62] It held that a territorial claim for Aboriginal title did not meet the tests articulated and applied in *Delgamuukw* and *Marshall: Bernard*.[63] It further observed that this case was, on its facts, materially similar to the cases decided in *Marshall; Bernard*, particularly to *Marshall*.[64]

39. The Court of Appeal considered that the trial judge, in his Opinion Areas, did not properly apply the principles articulated by this Court, stating:

> 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.[65]

40. The Court of Appeal emphasised the importance of Aboriginal rights, other than title, in protecting Aboriginal culture and lifestyles[66] and noted that title is not the "only tool available to provide cultural security to the Tsilhqot'in".[67]

41. In the result, the Court of Appeal, for different reasons, upheld the trial judge's order dismissing the title claim. The Court of Appeal noted that although there may be definite tracts within the Claim Area upon which Aboriginal title could be established, the current litigation did

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[58] BCCA Reasons para. 182 (AR III Tab 9 at 154).
[59] *R. v. Côté* [1996] 3 SCR 139 ("*Côté")* (BCBOA II Tab 23).
[60] BCCA Reasons para. 182 (AR III Tab 9 at 154).
[61] *Adams*, para 26, (BCBOA I Tab 17 at 255-256). Emphasis in original. BCCA Reasons para 182 (AR III Tab 9 at 154).
[62] BCCA Reasons paras. 187-204. (AR III Tab 9 at 155-162).
[63] BCCA Reasons paras.219-224. (AR III Tab 9 at 165-167).
[64] BCCA Reasons para 226 (AR III Tab 9 at 167-168).
[65] BCCA Reasons para. 229 (AR III Tab 9 at 168).
[66] BCCA Reasons para. 234 (AR III Tab 9 at 170).
[67] BCCA Reasons para. 235 (AR III Tab 9 at 170).

not provide a proper basis for such a determination.[68] The Tsilhqot'in should be permitted to pursue such claims notwithstanding that the territorial claim had been dismissed.[69]

5) Consequences of a Declaration of Title

42. The Court of Appeal found it unnecessary to comment on the consequences of a declaration of Aboriginal title.[70]

[68] BCCA Reasons para 126 (AR III Tab 9 at 138-140).
[69] BCCA Reasons paras. 127-131 (AR III Tab 9 at 140-141).
[70] BCCA Reasons paras. 242-243 (AR III Tab 9 at 172).

PART II – POINTS IN ISSUE

A. Proof of Aboriginal title

43. The first issue raised by the Appellant is "whether the Court of Appeal erred by creating a new test" for proof of Aboriginal title.

44. British Columbia's position is that the Court of Appeal correctly applied this Court's consistent jurisprudence to reject "territorial," or "range of seasonal use of semi-nomadic peoples" occupation to establish Aboriginal title. Proof of Aboriginal title requires evidence of physical occupation of sites or definite tracts, the boundaries of which are reasonably capable of definition.

45. A second alternate issue raised by the Appellant is whether the trial judge correctly identified areas of Aboriginal title in his Opinion Areas.

46. British Columbia's position is that the trial judge fell into error in drawing the Opinion Areas by:

a) failing to apply the proper legal test for Aboriginal title;
b) arbitrarily drawing boundaries which had no meaning in Tsilhqot'in culture;
c) failing to adequately identify the lands in the Opinion Areas; and
d) failing to invite submissions from the parties.

B. Consequences of Proof of Aboriginal Title

47. The third issue raised by the Appellant concerns the legal consequences of proof of Aboriginal title.

48. If, unlike the Court of Appeal,[71] this Court considers it necessary to consider this issue, British Columbia's positions are as follows:

a) Aboriginal title lands are Crown lands within the meaning of the *Forest Act*, subject to the burden of title;

[71] BCCA Reasons paras. 242-243 (AR III Tab 9 at 172).

b) the doctrine of interjurisdictional immunity does not prevent the application of the *Forest Act* to Aboriginal title lands; and

c) the application of the *Forest Act* has not been shown to unjustifiably infringe Aboriginal title lands in the Claim Area. To the extent the *Forest Act* might authorize an unjustified infringement of Aboriginal title it would be inapplicable to that extent.

49. If the stated Constitutional questions are to be dealt with, they should be answered as follows:

> Are the *Forest Act*, RSBC 1996, c 157, or the *Forest Practices Code of British Columbia Act* RSBC 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*?
>
> Answer: No.
>
> Are the *Forest Act*, RSBC 1996, c 157, or the *Forest Practices Code of British Columbia Act* RSBC 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*?
>
> Answer: Yes.

PART III – ARGUMENT

A. This Court Has Identified the Degree of Occupation Necessary to Establish Title

50. The question raised by the Appellant's appeal is the degree of occupation that suffices to establish a claim of Aboriginal title. This Court has addressed this question in *Van der Peet; Adams; Côté; Delgamuukw; Marshall; Bernard and Sappier* (the "Modern Section 35 Cases", discussed below).

51. The Appellant's legal review of this question:

- omits discussion of important authorities, including *Adams*, *Côté*, *Van der Peet* and *Sappier*;
- selectively quotes general passages, without regard to the substantive findings made, and not made, particularly in *Marshall; Bernard*;
- argues that *Marshall; Bernard* turned on evidence, when the result turned on the identification of the correct legal test for proof of title;
- fails to acknowledge that the legal tests postulated by LeBel and Fish J.J. in *Marshall; Bernard,* and by La Forest J. in *Delgamuukw* were not shared by the majority;
- relies on U.S. authorities, where the law relating to Aboriginal rights and title is "significantly different";
- applies passages of this Court's jurisprudence that speak to Aboriginal resource user rights as if they applied to Aboriginal title;[72]
- refers to British Crown policy in eastern Canada, and to the *Royal Proclamation*, as if they applied in British Columbia,[73] which they do not.

B. An Introduction to the Modern Section 35 Cases

52. The relationship between Aboriginal rights, and the "sub-category" right, Aboriginal title,[74] developed in response to Constitutional reform in 1982. The *Constitution Act, 1982*, s. 35 does not

[72] AF, Paras. 97, 98.
[73] AF, Paras 99-101.
[74] *Van der Peet*, para. 74 (BCBOA II Tab 33 at 149).

expressly mention Aboriginal title. This Court has recognized Aboriginal title as one right in the spectrum of Aboriginal rights.

53. In the pre-*Constitution Act, 1982* era, claims were made that "Indian" or Aboriginal title existed throughout "traditional territories" and gave rise to usufructuary rights to continue to use Crown lands for "traditional" pursuits. The content of this "title" was commonly understood to include rights to hunt and fish. Its geographic scope was based on a territorial notion of "occupation" and extended throughout the entirety of the lands used by an Aboriginal community. It was thought that the existence of hunting and fishing rights depended upon proof of this concept of title.

54. In the post *Constitution Act, 1982* cases, this Court redefined the content and scope of Aboriginal title, rejecting the view that Aboriginal hunting and fishing rights flowed from Aboriginal title.[75] It is now understood that Aboriginal title is "one manifestation"[76] and a "sub-category",[77] on the spectrum of Aboriginal rights. The different content of Aboriginal title—the right to the land itself, including rights to use the land in non-traditional ways—required a different geographic scope.

55. The Modern s. 35 cases are premised on the recognition of the full spectrum of Aboriginal rights. If Aboriginal title subsisted throughout traditional territories, or artificially defined large parts of territories, there would be little reason to seek to establish Aboriginal rights.[78]

56. This Court has held that the goal of reconciliation does not require that all Aboriginal groups must be able to establish Aboriginal title throughout large portions of their traditional territories. In responding to the argument that the proper test for Aboriginal title might make it difficult for a semi-nomadic group to prove title, McLachlin, C.J.C, speaking for a majority of this Court, said:

> With respect, this argument is circular. It starts with the premise that it would be unfair to deny the Mi'kmaq title…To confer title in the absence of

[75] *Adams*, para. 26 (BCBOA I Tab 17 at 255-256); *Marshall; Bernard*, para. 53 (BCBOA II Tab 29 at 79).
[76] *Adams*, para. 25 (BCBOA I Tab 17 at 254-255).
[77] *Van der Peet*, para. 74 (BCBOA II Tab 33 at 149).
[78] *Marshall; Bernard*, para. 77 (BCBOA II Tab 29 at 86).

> evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land: *Adams* and *Côté*.[79]

C. The Background to the Modern Section 35 Cases

1) The Law Prior to Calder; The Need for Legislative or Executive Recognition of Aboriginal Rights

57. Prior to the Supreme Court of Canada decision in *Calder v. A.G.B.C.*,[80] there was little support in Canadian law for the recognition of Aboriginal rights unless the claim was based on the *Royal Proclamation,* which did not apply in British Columbia.[81]

2) The Limited Scope of the Declaration Sought in *Calder*

58. In *Calder*, a representative action was brought seeking a declaration that the Nishga tribe's "'aboriginal title', otherwise known as the Indian title …" had never been lawfully extinguished.[82] There was no claim beyond this negative declaration; no claim for a positive declaration of the content or scope of Aboriginal title, and no remedial claims for ownership, jurisdiction, recovery of possession, invalidity of grants or compensation.

59. Given the narrowness of the negative declaration sought it was possible to try *Calder* largely on admissions that the territory (1,000 square miles in and around the Nass River Valley), had been inhabited from time immemorial by the Plaintiffs' ancestors who had "hunted, fished and roamed" there. Counsel for Calder admitted that the Province had underlying title to the lands in question, but sought a declaration that a "personal and usufructuary interest", arising under either the *Royal Proclamation* or the common law, had not been extinguished.

60. In the result, while the Court split on the issue of whether title had been extinguished, both Judson J. and Hall J. held that the *Royal Proclamation* was not the exclusive source of title. Judson J. said:

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[79] *Marshall; Bernard*, para. 77 (BCBOA II Tab 29 at 86).
[80] *Calder v. A.G.B.C.*, [1973] SCR 313 ("*Calder*") (BCBOA I Tab 6).
[81] D.W. Elliott, "Aboriginal Title" reproduced in Morse (ed.) *Aboriginal Peoples and the Law* (Ottawa: Carleton University Press, 1985) 48 at 61 (BCBOA II Tab 43 at 209).
[82] *Calder* at 345 (*per* Hall J. quoting the statement of claim) (BCBOA I Tab 6 at 71).

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means . . .[83]

61. Because of the narrow scope of the declaration sought, Hall J. appears to have considered it unnecessary to define precisely the exact nature and extent of the Indian right or title claimed.[84]

62. A question left open was whether Aboriginal presence of the kind disclosed by the facts in *Calder* was sufficient juridical possession to give rise to proprietary rights.

3) The Application of *Calder* in *Baker Lake*: A "Title" to Hunt and Fish Enjoyed by Nomadic Peoples

63. *Calder* was applied in Baker *Lake v. Minister of Indian Affairs*,[85] in which an Inuit community brought action asserting claims over a vast vaguely defined portion of the Northwest Territories, including approximately 78,000 square kilometres surrounding the hamlet of Baker Lake. The Plaintiffs' ancestors lived a nomadic existence on these "barren lands". Survival depended primarily upon the availability of caribou.

64. The Plaintiffs claimed relief under two heads, first, "ownership" claims, including injunctions restraining the Crown from issuing land use permits, and resource companies from mining, and a declaration that the claimed lands were not public or territorial lands; second, non-proprietary claims of a "title" to "hunt and fish". Mahoney J. observed:

> The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.[86]

65. Mahoney J. held that to establish such a "title" to hunt and fish, the claimants had to prove:

a) that they and their ancestors were members of an organized society
b) that the organized society occupied the specific territory over which they asserted the title;
c) that the occupation was to the exclusion of other organized societies; and

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[83] *Calder*, at 328 (BCBOA I Tab 6 at 70).
[84] *Calder*, at 352-353 (BCBOA I Tab 6 at 70-73).
[85] *Baker Lake v. Minister of Indian Affairs*, [1980] 1 FC 518 (TD) (BCBOA I Tab 4).
[86] *Baker Lake*, paras. 7(c), 83 (BCBOA I Tab 4 at 46, 49).

d) that the occupation was an established fact at the time sovereignty was asserted by England.[87]

This territorial standard of occupation subsequently became known as the *Baker Lake* test.

66. On the evidence, Mahoney J. concluded that the Inuit had established their claim to a right to hunt and fish over most of the lands in issue. He concluded that the Plaintiffs had a common law "aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it …"[88]

67. In relation to the "ownership" based claims, the Plaintiffs asked for a declaration that the lands were not "public lands" and that the Inuit were "holders of surface rights". Both of these declarations were refused. The interlocutory injunction that had been granted against mining companies was dissolved.[89]

D. The Modern Section 35 Cases

68. In 1982, Aboriginal rights were recognized and affirmed by s. 35 of the *Constitution Act, 1982*. Chief Justice Lamer said that the "entrenchment of aboriginal ancestral and treaty rights in s. 35(1) has changed the landscape of aboriginal rights in Canada".[90]

69. In its post 1982 cases, this Court redefined the content of Aboriginal title, extending it beyond a right to hunt and fish. A different test for the degree of occupation necessary to establish Aboriginal title was developed to mirror this different content.

1) The Spectrum of Aboriginal Rights

70. This Court located Aboriginal title in s. 35 as "one manifestation of the broader concept of Aboriginal rights." It "rejected the view of a dominant right to title to land, from which other rights, like the right to hunt or fish, flow. … It is more accurate to speak of a variety of independent aboriginal rights." One of those rights is Aboriginal title to land.[91]

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[87] *Baker Lake*, para. 80 (BCBOA I Tab 4 at 48).
[88] *Baker Lake*, para. 95 (BCBOA I Tab 4 at 50).
[89] *Baker Lake*, paras. 7, 126-127, 135-139 (BCBOA I Tab 4 at 46, 51, 52).
[90] *Côté*, para. 51 (BCBOA II Tab 23 at 16).
[91] *Marshall; Bernard*, para. 53 (BCBOA II Tab 29 at 79).

71. In its description of the spectrum of Aboriginal rights according "to their degree of connection with the land",[92] this Court has separately recognized:

a) free-standing Aboriginal rights;
b) land based Aboriginal rights, apart from Aboriginal title, for example, "defined as, and limited to, the rights to hunt on the specific tract of land";[93]
c) Aboriginal title—"the right to the land itself".[94]

72. The recognition of free standing and land based Aboriginal rights, where the "degree of connection" is "not sufficient" to make out a claim to Aboriginal title, make it axiomatic that Aboriginal title does not exist everywhere Aboriginal rights activities are carried out. In its spectrum analysis, this Court has recognized different degrees of "occupation" or "connection" with a specific "parcel of land", some of which are "sufficient" to establish Aboriginal title and some of which come "short of title".[95]

2) Nomadic Peoples and Claims to Modern s. 35 Aboriginal Title: *Adams; Côté: Delgamuukw; Marshall; Bernard; Sappier;*

73. In *Adams*, this Court explained that "some Aboriginal peoples were nomadic, varying the location of their settlements with the seasons and changing circumstances". Lamer C.J.C. added:

> That this is the case may (although I take no position on this point) preclude the establishment of aboriginal title to the lands on which they settled; however, it in no way subtracts from the fact that, wherever they were settled before or after contact, prior to contact the Mohawks engaged in practices, customs or traditions on the land which were integral to their distinctive culture.[96]

74. This Court held that, to establish title, there is a "further hurdle of demonstrating that their connection within the piece of land in which the actions was taking place was of central significance to their distinctive culture sufficient to make out a claim to Aboriginal title to the

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[92] *Delgamuukw*, para. 138 (BCBOA I Tab 9 at 135-136).
[93] *Adams*, para. 30 (BCBOA I Tab 17 at 257); *Delgamuukw*, para. 138 (BCBOA I Tab 9 at 135-136).
[94] *Delgamuukw*, para. 138 (BCBOA I Tab 9 at 135-136).
[95] *Delgamuukw*, paras. 138, 151 (BCBOA I Tab 9 at 135-136, 140-141). *Marshall; Bernard*, para. 54 (BCBOA II Tab 29 at 79-80). See also *Sappier*, para. 72 (BCBOA II Tab 31 at 116).
[96] *Adams*, paras. 28-29 (BCBOA I Tab 17 at 256-257). Emphasis in original.

land."[97] Commentators recognized that nomadic peoples would still be entitled to exercise Aboriginal rights where they might not establish Aboriginal title.[98]

75. Rothman J.A., who had dissented in the Quebec Court of Appeal in *R. v. Adams*, but whose views were endorsed by this Court, distinguished between the requirements for proof of Aboriginal title, giving rise to property rights in the land, and for proof of Aboriginal fishing rights, as follows:

> While permanent settlements, uninterrupted control and physical occupation may be essential to the establishment of Aboriginal property rights in the land, with respect, I do not believe they are essential to a claim for fishing rights.[99]

76. Rothman J.A. described the Mohawks' form of territorial occupation as follows:

> They roamed the waters of the St. Lawrence, the Richelieu, Lake Champlain and Lake Ontario, trading, trapping, hunting and fishing, and, of course, warring with other Indian tribes and with the French.[100]

77. This territorial characterization of land use is reminiscent of the admission made by the Province in *Calder*, *supra*, where the Attorney General admitted the Plaintiff's ancestors had "hunted, fished and roamed." It is also consistent with the usage of Vickers J. who referred to "land over which Indigenous people roamed on a regular basis".[101] In the result in *Adams*, Aboriginal fishing rights were recognized, but not Aboriginal title.

78. The same result obtained in *Côté*, where this Court contrasted Aboriginal rights and the "incidents of a continuous and historical occupation of a specific tract of land".[102]

79. *Adams* and *Côté* were followed in Delgamuukw where the degree of connection sufficient to establish title was described as depending on a "…special bond between the group and the land in question such that the land will be part of the definition of the groups' distinctive culture"[103] and that "their connection with a piece of land…was of central significance to their distinctive

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[97] *Adams*, para. 26 (BCBOA I Tab 17 at 255-256).
[98] B.J. Burke, "Left Out in the Cold: The Problem with Aboriginal Title under s. 35(1) of the *Constitution Act*, 1982 for Historically Nomadic Peoples," (2000) 38 Osgoode Hall J. 1 at 3 (BCBOA II Tab 42 at 205).
[99] *R. v. Adams*, [1993] 3 CNLR 98 (Que. C.A.) at 135 ("*Adams* (CA)") (BCBOA I Tab 18 at 263).
[100] *Adams* (CA), at 135 (BCBOA I Tab 18 at 263).
[101] BCSC Reasons para. 1377 (AR III Tab 5 at 75).
[102] *Côté* , para. 38 (BCBOA II Tab 23 at 14-15).
[103] *Delgamuukw*, para. 128 (BCBOA I Tab 9 at 133).

culture.[104] The requirement that the land be of central significance was said to be "subsumed by the requirement of occupancy".[105] Thus, any consideration of the degree of occupation sufficient to establish title has an underlying premise of "central significance".

80. In *Marshall; Bernard* the majority of this Court confirmed that "[n]ot every nomadic passage or use will ground title to land. … In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out".[106]

3) Sappier

81. The practical importance of the spectrum of Aboriginal rights was demonstrated by the culminating case related to Aboriginal rights to harvest timber in New Brunswick and Nova Scotia. While claims based upon treaty rights and Aboriginal title were unsuccessful in *Marshall; Bernard*, in *Sappier* Aboriginal rights to harvest timber for domestic purposes were upheld by this Court and found to accord with the practices, customs and traditions of the Mi'kmaq and Maliseet First Nations.[107]

4) Proof of Aboriginal Title Must Mirror Content of Title: *Delgamuukw*

82. The term "occupation" takes its meaning from the context in which it is used. In the context of Aboriginal rights generally, this Court has said:

> Long before Europe explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land ….[108]

83. In the context of proof of Aboriginal title, occupation means physical occupation of definite tracts equivalent to common law title.[109]

84. Modern Aboriginal title:

a) is a species of Aboriginal right,[110] which differs from Aboriginal rights to engage in particular activities;[111]

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[104] *Delgamuukw*, para. 150 (BCBOA I Tab 9 at 140), quoting *Adams* para. 26 (BCBOA I Tab 18 at 255-256).
[105] *Delgamuukw*, para. 142 (BCBOA I Tab 9 at 138).
[106] *Marshall; Bernard*, para. 66 (BCBOA II Tab 29 at 83-84).
[107] *Sappier* (BCBOA II Tab 31).
[108] *Mitchell*, para. 9 (BCBOA I Tab 16 at 237-238).
[109] *Marshall; Bernard*, para. 66 (BCBOA II Tab 29 at 83-84).
[110] *Delgamuukw*, para 137 (BCBOA I Tab 9 at 134-135).

b) confers a *sui generis* interest[112] in particular pieces of land,[113] that is, a right to the land itself,[114] an interest which can compete on an equal footing with other proprietary interests;[115]

c) confers a right to exclusive use, occupation and possession to use the land for the general welfare and present-day needs of the Aboriginal community[116] for a variety of activities, not all of which activities are Aboriginal rights;[117]

d) includes a proprietary-type right to choose what uses Aboriginal titleholders can make of their title lands,[118] subject to an inherent ultimate limit (defined by the nature of the attachment to the land which forms the basis of the particular group's Aboriginal title)[119] prohibiting those uses that would destroy the ability of the land to sustain future generations of Aboriginal peoples;[120] and

e) has an economic component,[121] which will ordinarily give rise to fair compensation when Aboriginal title is infringed, varying in amount with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.[122]

85. In Delgamuukw, a new trial was necessary, and Lamer C.J.C. said that it would be open to the new trial judge to make all or some of the same findings that had previously been made.[123] In respect of those previous findings, McFarlane J.A. noted in the Court of Appeal that the Plaintiffs "…did not establish to the satisfaction of the trial judge they had the required exclusive possession of land to make out their claims for ownership except in locations already in reserves".[124]

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[111] *Delgamuukw*, para. 140 (BCBOA I Tab 9 at 136-137).
[112] *Delgamuukw*, para. 111 (BCBOA I Tab 9 at 124-125).
[113] *Delgamuukw*, para. 158 (BCBOA I Tab 9 at 142-143).
[114] *Delgamuukw*, para. 138 (BCBOA I Tab 9 at 135-136).
[115] *Delgamuukw*, para. 113 (BCBOA I Tab 9 at 125-126).
[116] *Delgamuukw*, para. 121 (BCBOA I Tab 9 at 129-130).
[117] *Delgamuukw*, paras. 111, 117, 140 (BCBOA I Tab 9 at 124-125, 127-128, 136-137).
[118] *Delgamuukw*, para. 166 (BCBOA I Tab 9 at 145-146).
[119] *Delgamuukw*, para. 111 (BCBOA I Tab 9 at 124-125).
[120] *Delgamuukw*, paras. 111, 166 (BCBOA I Tab 9 at 124-125, 145-146).
[121] *Delgamuukw*, para. 166 (BCBOA I Tab 9 at 145-146).
[122] *Delgamuukw*, para. 169 (BCBOA I Tab 9 at 147-148).
[123] *Delgamuukw*, para. 108 (BCBOA I Tab 9 at 123).
[124] *Delgamuukw v. British Columbia*, [1993] 104 DLR (4th) 470 (BCCA) ("*Delgamuukw* (CA)") at 499 (BCBOA I Tab 8 at 104).

5) The Different Conception of Aboriginal Title Appearing in the Separate Reasons of La Forest J. in *Delgamuukw*

86. In his argument,[125] the Appellant incorrectly equates the reasons of La Forest J. with those of the majority of this Court. Although La Forest J. concurred in the result (the order for a new trial), he expressly disagreed with "the methodology [Lamer C.J.C.] uses to prove that Aboriginal peoples have a general right of occupation of certain lands (often referred to as 'aboriginal title')".[126]

87. La Forest J. began his reasons by distinguishing (1) a claim to "complete control over the territory", or "ownership of and jurisdiction over the land", which would require proof of "governance and control" as opposed to (2) proof of "general occupation of the affected land", which, in his view, was "the *sine qua non* of 'aboriginal title'".[127]

88. La Forest J. conceived of a "general right to occupy and possess ancestral lands", not as owners, and not by reference to Indian reserve lands[128] but as a "generalized claim over vast tracts of territory, a claim which is itself the foundation for particular rights and activities".[129] (This conception resembles the traditional notion of title recognized in *Baker Lake* and superseded in the Modern s. 35 cases).

89. Given his different conception of the content of title, La Forest J.'s view of "occupancy" was not restricted to village or permanently settled areas but would extend to "vast tracts":[130]

> … the use of adjacent lands and even remote territories to pursue a traditional mode of life is also related to the notion of occupancy.[131]

90. La Forest J. went on to separately identify a number of incidents of his concept of title (in a manner similar to the Australian approach to Native Title) when he distinguished village areas from remotely visited areas, stating:

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[125] AF, paras. 123, 148.
[126] *Delgamuukw*, para. 187 (BCBOA I Tab 9 at 151).
[127] *Delgamuukw*, para. 188 (BCBOA I Tab 9 at 151-152).
[128] *Delgamuukw*, paras. 191-192 (BCBOA I Tab 9 at 153-154).
[129] *Delgamuukw*, para. 193 (BCBOA I Tab 9 at 155).
[130] *Delgamuukw*, para. 200 (BCBOA I Tab 9 at 156-157).
[131] *Delgamuukw*, para. 199 (BCBOA I Tab 9 at 156).

> It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area.[132]

6) This Court's Decision in *Marshall; Bernard*

91. The Appellant takes general passages of this Court's reasons out of context, and without regard to the history of the cases in the lower courts below. This Court's reasons are best explained by first examining the lower court's decisions in *R v. Bernard* and *R v. Marshall*.

92. At trial in *R v. Bernard,* the defendants claimed Aboriginal title as a defence to unauthorized forestry activities in the Sevogle area of the Northwest Miramichi Watershed (approximately 2400 km^2) based upon claimed occupation of the watershed as within their ancestors' seasonal rounds.

93. The trial judge identified well established and well defined areas of occupation that were now included in Indian reserves.[133] But he was unable to conclude that the cutting sites in the Sevogle area were used on a regular basis, noting that "occasional forays for hunting, fishing, and gathering are not sufficient to establish Aboriginal title on the land".[134]

94. In the New Brunswick Court of Appeal, Daigle J.A., held that the trial judge had misapprehended the legal requirement of occupancy set out in *Delgamuukw* by requiring evidence of actual physical use of the cutting sites, rather than territorial seasonal occupation of the Northwest Miramichi Watershed.[135]

95. Daigle, J.A. concluded that the "legal requirement of occupation" did not require "proof of specific areas of occupation and regular use of the Sevogle area".[136] Rather, he believed weight should have been accorded "the long-standing pattern of land and resource use and occupancy of

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[132] *Delgamuukw*, para. 203 (BCBOA I Tab 9 at 158-159).
[133] *Bernard* (PC) at paras. 98-99 (NBPC), (BCBOA I Tab 20 at 276).
[134] *Bernard* (PC), para 107 (BCBOA I Tab 20 at 278). These conclusions were upheld by the Summary Conviction Appeal Judge. *R. v. Bernard*, [2002] 3 CNLR 141 ("*Bernard* (QB)") at para. 36 (NBQB) (BCBOA I Tab 21 at 281-282).
[135] *R. v. Bernard* (2003), 230 DLR (4^{th}) 57 ("*Bernard* (CA)") paras 90-91 (*per* Daigle J.A.) (BCBOA I Tab 22 at 301-302).
[136] *Bernard* (CA), para 124 (*per* Daigle J.A.) (BCBOA I Tab 22 at 303-304).

their claimed territory",[137] and "the seasonal cycle of movement and migration within the Northwest Miramichi" where the "Miramichi Mi'kmaq during the winter months, would break up into smaller hunting groups and disperse inland fishing along rivers and creeks and hunting in the interior for moose, caribou, and other territorial animals".[138] Daigle J.A. considered that "the hunting grounds of a hunting and gathering aboriginal community" would establish Aboriginal title.[139] In Daigle J.A.'s view:

> The common law does not require proof of intensive, regular or physical use of every narrowly confined area within a claimed territory to constitute occupation of that territory.[140]

96. In *R v. Marshall*, an Aboriginal title claim was again made as a defence to a charge of unauthorized logging. The cutting sites were at various locations in mainland Nova Scotia and on Cape Breton. The trial judge found that no other group challenged the Mi'kmaq's exclusive control of what is now Nova Scotia.[141] The trial judge and the summary conviction appeal judge rejected the clam to Aboriginal title by insisting on evidence of intensive, regular use of the cutting sites.[142]

97. In the Nova Scotia Court of Appeal, the majority held that the trial judge had erred in applying a more stringent statement than was consistent with the nomadic nature of the Mi'kmaq culture and ordered a new trial.[143]

7) The Proper Legal Standard of Occupation to Prove Title

98. This Court, when hearing *Marshall* and *Bernard* together, was faced with identifying the proper legal standard of occupation to prove title—"…the strict standard applied by the trial judges; the looser standards applied by the Courts of Appeal, or some other standard?"[144]

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[137] *Bernard* (CA), para 124 (*per* Daigle J.A.) (BCBOA I Tab 22 at 303-304).
[138] *Bernard* (CA), para 127 (*per* Daigle J.A.) (BCBOA I Tab 22 at 305-306).
[139] *Bernard* (CA), para 90 (*per* Daigle J.A.) (BCBOA I Tab 22 at 301-302).
[140] *Bernard* (CA), para. 90 (*per* Daigle J.A.) (BCBOA I Tab 22 at 301-302).
[141] *R. v. Marshall*, [2001] 2 CNLR 256; 2001 NSPC 2 ("*Marshall* (PC)") at para. 7 (BCBOA II Tab 26 at 42).
[142] *Marshall* (PC) at paras. 139-141 (BCBOA II Tab 26 at 44-45); *R. v. Marshall*, [2002] 3 CNLR 176; 2002 NSSC 57 ("*Marshall* (SC)") at para. 117 (BCBOA II Tab 27 at 52-53). See also *R. v. Marshall*, [2004] 1 CNLR 211; 2003 NSCA 105 ("*Marshall* (CA)") at para 4; para 80 (BCBOA II Tab 28 at 60; 61).
[143] *Marshall* (CA) at para. 182. The Court was unanimous on Aboriginal title issues. See para. 257 (BCBOA II Tab 28 at 63; 34).
[144] *Marshall; Bernard*, para. 44 (BCBOA II Tab 29 at 77-78).

99. McLachlin C.J.C., speaking for the majority, held that the trial judges in *Bernard* and *Marshall* had correctly required proof of regular and exclusive use of the particular cutting sites[145] and that the less onerous standard of "within the range of seasonal use" applied by Daigle J.A. was wrong.[146]

100. Professor McNeil noted that "…by endorsing the trial judge's requirement of proof of occupation of the specific cutting sites, McLachlin C.J.C. appears to have rejected the territorial approach of the Court of Appeal judge…"[147] The Court of Appeal in the instant case agreed that this Court rejected a territorial approach to proof of Aboriginal title.[148]

8) U.S. Authorities Are Distinguished

101. The Appellant relies on the same U.S. authorities that equate "Indian title" with "hunting grounds" that were relied on by Daigle J.A.[149] Original Indian title in the U.S. is not, as the Appellant asserts, "the equivalent of our Aboriginal title".[150] Instead, original Indian title in the U.S. is an occupancy right only, not a proprietary right to the land itself.

102. The U.S. notion of Indian title as a mere right of "occupancy" for hunting was adopted in *Johnson's Lessee v. McIntosh,*[151] a point affirmed in *Tee-Hit-Ton Indian v. United States,* which held that the taking by the United States of unrecognized original Indian title was not compensable under the Fifth Amendment because

> This is not a property right but amounts to a right of occupancy… which…may be terminated and such lands fully disposed of by the Sovereign itself without any legally enforceable obligation to protect the Indian. [152]

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[145] *Marshall; Bernard*, paras. 73-75 (BCBOA II Tab 29 at 85).
[146] *Marshall; Bernard*, para. 82 (BCBOA II Tab 29 at 88-89).
[147] K. McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" Saskatchewan Law Review (2006) 69, at 281-308, at 302 (BCBOA II Tab 44 at 211).
[148] BCCA Reasons para. 219 (AR III Tab 9 at 165-166).
[149] AF, paras. 103.
[150] AF, para. 103.
[151] *Johnson's Lessee v. McIntosh*, 21 U.S. (8 Wheaton) 543 (1823) at 574, 584-85, 588, 592, 596 (BCBOA I Tab 12 at 202, 203-204, 206, 207, 208).
[152] *Tee-Hit-Ton Indian v. United States*, 348 U.S. 272 (1955) at 279. See also 281-285 (BCBOA II Tab 40 at 185-186).

103. In contrast, the post-1982 s. 35 concept of "Aboriginal title" is conceived of as a "right to the land itself", which can compete on an equal footing with other proprietary interests, conferring a right of exclusive non-traditional use (subject to the inherent limit).

9) *Marshall; Bernard* Did Not Turn on a Lack of Evidence

104. The Appellant argues that the result in *Marshall; Bernard* turned upon a lack of evidence.[153] As noted above, the result in this Court turned upon identification of the legal standard of occupation to prove title.[154]

105. The Appellant, in a manner similar to his failure to acknowledge that La Forest J. had articulated a different concept of Aboriginal title than that accepted by the majority in *Delgamuukw*, fails to acknowledge that although LeBel and Fish JJ. (the "minority") agreed with the ultimate disposition of the case, they took a different approach to the requirements for proof of Aboriginal title from the majority reasons of McLachlin CJC. [155] In particular, the minority stated:

> On the issue of aboriginal title, I take the view that given the nature of land use by aboriginal peoples – and in particular the nomadic nature of that use by many First Nations – in the course of their history, the approach adopted by the majority is too narrowly focused on common law concepts relating to property interests.[156]

106. The minority recognized that the majority's reasons required proof of "intensive and regular use of the land" to establish Aboriginal title; but believed that this requirement would be difficult for nomadic or semi-nomadic people to meet.[157]

107. The minority preferred a different conception of Aboriginal title, closer to La Forest J.'s minority views in *Delgamuukw*, of Aboriginal general occupancy, not limited to villages or permanently settled areas, and not equated to the common law notion of possession amounting to a fee simple.[158]

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[153] AF, paras. 138-142.
[154] *Marshall; Bernard,* para. 44 (BCBOA II Tab 29 at 77-78).
[155] AF, paras. 136, 142.
[156] *Marshall; Bernard,* para. 110 (BCBOA II Tab 29 at 90).
[157] *Marshall; Bernard,* paras. 126, 140 (BCBOA II Tab 29 at 91, 93-94).
[158] *Marshall; Bernard,* para. 138 (BCBOA II Tab 29 at 92-93).

E. The Trial Judge's Opinion Areas Were Not Based on the Proper Legal Test for Proof of Title

108. Whether the Court of Appeal was correct to find that it was open on the pleadings for the trial judge to consider a declaration of Aboriginal title to tracts other than the Claim Area need not be decided (although it is noted that none of the parties had the opportunity to comment on the Opinion Areas) because the Court of Appeal was correct to find that the trial judge did not apply the proper legal test for Aboriginal title to define the Opinion Areas.[159]

109. The Appellant attempts to justify the Aboriginal title Opinion Areas of the trial judge by asserting that those substantial areas had been found to be definite tracts that had been regularly used as "hunting grounds,".[160] However, the trial judge did not describe any of his Opinion Areas as a "hunting ground".

110. Moreover, this Court has made it clear that hunting typically gives rise to Aboriginal rights, not to title. Lamer CJC's comment that a "hunting ground" may attract Aboriginal title[161] recognizes the possibility that a "definite tract" used for hunting may qualify, but, as the trial judge acknowledged, boundaries necessary to define definite tracts had no meaning for the Tsilhqot'in.[162] The Court of Appeal did not (as the Appellant asserts)[163] find that Aboriginal title can never be established to a particular hunting area.[164]

111. The Appellant asserts that the trial judge faithfully applied the test from *Marshall; Bernard* in formulating the Opinion Areas.[165] At some points in his judgment, the trial judge did set out the test for sufficiency of occupation identified by this Court in *Marshall, R v. Bernard*,[166] but it is clear from other passages, from his description of the Opinion Areas, and from the factors that he took into account in devising those Areas that he did not properly apply the *Marshall; Bernard* test, and that he made legal errors in whatever test he did apply.

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[159] BCCA Reasons paras. 229-230 (AR III Tab 9 at 168).
[160] AF, paras. 101-103.
[161] *Delgamuukw* para. 128 (BCBOA I Tab 9 at 133).
[162] BCSC Reasons para. 648-649 (AR II, Tab 4, at 30-31).
[163] AF, para. 146.
[164] BCCA para. 216 (AR III Tab 9 at 165).
[165] AF, paras. 217-220.
[166] BCSC Reasons paras. 570-581. (AR I Tab 3 at 200 and II Tab 4 at 1-4).

112. The legal test used by the Appellant in formulating his original claim at trial was based upon Daigle J.A.'s territorial occupation test.[167] This affected the nature of the evidence adduced. In order to establish title to the Claim Area in accordance with the territorial notion of occupation suggested by Daigle J.A., it was only necessary to identify lands within the Aboriginal groups' "habitual range". It was not necessary to identify any village sites, cultivated fields or definite tracts physically occupied in the common law sense.[168] British Columbia did adduce some evidence of specific sites that were candidates for Aboriginal title based upon the intersection of the historical record and the archeological record.[169]

113. The Court of Appeal noted:

> The plaintiff does not suggest that the Tsilhqot'in physically occupied the entire Claim Area, either at all times or seasonally. Rather, he says that they lived in various encampments in the Claim Area at different times, some of which have been identified. They hunted, trapped and fished at various places, some of which are in the Claim Area. On a seasonal basis, groups would transit over trails covering most regions of the Claim Area. He says that this type of presence in the Claim Area amounts to "occupation" for the purpose of claiming title, and allows a claim to title over the territory.[170]

114. In order to satisfy this Court's requirement for a "degree of physical occupation or use equivalent to common law title", dwelling sites, enclosed and cultivated fields, or other definite tracts must be established. Definite tracts have boundaries. As Macfarlane J.A. said in the Court of Appeal in *Delgamuukw:* "It is clear that no one can own an undefined non-specific parcel of land".[171]

115. The trial judge found these requirements to be too onerous for the Appellant to meet. He acknowledged that "permanent village sites, cultivated fields and other lands showing visible signs of an investment of labour would satisfy this test for Aboriginal title",[172] but immediately added

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[167] Plaintiff's Opening Statement, Mr. Rosenberg, Transcript at Day 21, page 38, line 7 to page 64, line 5. (Respondent British Columbia's Record ("BCR"), Tab 2.
[168] *Bernard* (CA) at paras. 86-88 (BCBOA I Tab 22 at 300-301).
[169] M. Eldridge, "The Correlation of Archeological Sites and Historic Tsilhqot'in Villages along the Chilko River and Vicinity", Trial Exhibit No. 538 (BCR Tab 7).
[170] BCCA Reasons para. 214 (AR III Tab 9 at 164-165).
[171] *Delgamuukw* (CA), at 499 (BCBOA I Tab 8 at 104).
[172] BCSC Reasons para. 682 (AR II Tab 4 at 43).

that there did "not appear to be village sites that were occupied year round by Tsilhqot'in people".[173]

116. British Columbia does not take the position that the year round habitation of dwelling houses is necessary to establish physical occupation. That question has not yet been decided by the Courts. In articulating the test for Aboriginal title this Court has emphasized the importance of the investment of labour. In *Delgamuukw*, Lamer CJC referred to the "construction of dwellings" and the "cultivation and enclosure of fields" as meeting the physical occupation requirement,[174] not the mere existence of dwelling places and fields which might be found in nature.

117. The trial judge also indicated that the Tsilhqot'in would have difficulty in establishing physical occupation through the cultivation and enclosure of fields:

> At the time of sovereignty assertion, Tsilhqot'in people had no cultivated fields or other lands showing visible signs of an investment of labour.[175]
>
> Even in these areas, there were no "cultivated fields" as those words are generally understood. The Tsilhqot'in people were not an agrarian people. They utilized what nature had to offer on the mountain slopes and valleys: berry picking, harvesting medicinal plants, mountain potato and other root vegetables. They used and managed these resources and in that sense these areas were their "cultivated fields".[176]

118. The trial judge observed that it was not possible to identify definite tracts because the concept of definite boundaries was alien to Tsilhqot'in culture. He concluded that it was therefore necessary to arbitrarily define artificial boundaries.[177]

119. The trial judge's divergence from this Court's jurisprudence is revealed in those portions of his reasons where he:

a) failed to apply the "physical occupation or use equivalent to common law title"[178] standard of occupation to the Tsilhqot'in;[179]

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[173] BCSC Reasons para. 683 (AR II Tab 4 at 43).
[174] *Delgamuukw* para. 149 (BCBOA I Tab 9 at 139-140). Emphasis added.
[175] BCSC Reasons para. 683 (AR II Tab 4 at 43).
[176] BCSC Reasons para. 707 (AR II Tab 4 at 51).
[177] BCSC Reasons paras. 648-649 (AR II Tab 4 at 30-31). See also AF paras. 149-150.
[178] *Marshall; Bernard*, para. 66 (BCBOA II Tab 29 at 83-84).
[179] BCSC Reasons paras. 608-610 (AR II Tab 4 at 15-16).

b) described the Opinion Areas as the land that provided cultural "security and continuity" to the Tsilhqot'in, a phrase used by this Court to describe lands subject to Aboriginal rights, not lands subject to Aboriginal title;[180]

c) translated general hunting into title;

d) translated the use of trails into title over surrounding areas;

e) failed to give any weight to the common law perspective respecting proof of physical occupation (an error of omission); and

f) stepped outside the confines of a "usual judgment".[181]

1) Physical Occupation

120. The Appellant asserts that the Province's references to the common law requirements for proof of title by physical occupation reflect a "postage stamp" approach unsuited to semi-nomadic people. The trial judge agreed. He opined that the physical occupation test reflected an "impoverished view" and should not apply to semi-nomadic peoples because there was:

> … no evidence to support a conclusion that Aboriginal people ever lived this kind of postage stamp existence. Tsilhqot'in people were semi-nomadic and moved with the seasons over various tracts of land within their vast territory.[182]

121. This Court has held that the physical occupation test does apply to semi-nomadic peoples. In effect, the trial judge repeated the "circular" argument of the Nova Scotia Court of Appeal in *R v. Marshall*, an argument that was not accepted by this Court.[183]

2) Lands That Provide Cultural Security

122. The trial judge described the Opinion Areas as "various tracts" that provided "cultural security and continuity", a phrase that appears several times in the trial judge's reasons. For example, he noted that:

> The plaintiff says that a declaration of Aboriginal rights that does not include a declaration of Aboriginal title to the land would be insufficient to

[180] BCSC Reasons paras. 612, 960, 1376 (AR II Tab 4 at 17and 127, and III Tab 5 at 75).
[181] BCSC Reasons paras. 18, 1338-1350 (AR I Tab 3 at 23 and III Tab 5 at 59-65).
[182] BCSC Reasons para 610 (AR II Tab 4 at 16).
[183] *Marshall; Bernard*, para. 77 (BCBOA II Tab 29 at 86).

> ensure Tsilhqot'in "cultural security and continuity": *R v. Sappier; R. v. Gray*, [2006] 2 S.C.R. 686, 2006 SCC 54 at para. 33.[184]
>
> ...Tsilhqot'in people continued to move around their traditional territory … From the perspective of a Tsilhqot'in person, this land provided their cultural security and continuity.[185]
>
> Individual sites such as hunting blinds and fishing holes are but a part of the land that has provided "cultural security and continuity" to Tsilhqot'in people for better than two centuries.[186]

123. The trial judge effectively asserted that the provision of "cultural security and continuity" is part of the test for Aboriginal title. In the paragraph immediately following his identification of the 6 Opinion Areas he states:

> This was **the** land that provided security and continuity for Tsilhqot'in people at the time of sovereignty assertion: *Sappier; Gray* at para. 33.[187]

124. The phrase "cultural security and continuity" has been used by this Court to describe lands subject to land based Aboriginal rights, not Aboriginal title. The case referred to by the trial judge—*Sappier*—dealt, not with the identification of Aboriginal title lands, but with the identification of the lands subject to an Aboriginal right to harvest wood for domestic purposes. A claim to Aboriginal title to the same lands had been earlier rejected. In paragraph 33 of *Sappier* referred to by the trial judge, Bastarache J. said:

> As in *Adams*, I infer from this evidence that the practice of harvesting wood for domestic uses was also significant, though undertaken primarily for survival purposes. Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society.[188]

125. The trial judge's conflation of the distinctions between land based Aboriginal rights and Aboriginal title appeared again when he considered that the Province's acknowledgement of

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[184] BCSC Reasons para. 603 (AR II Tab 4 at 14).
[185] BCSC Reasons para. 612 (AR II Tab 4 at 17).
[186] BCSC Reasons para. 1376 (AR III Tab 5 at 75).
[187] BCSC Reasons para. 960 (AR II Tab 4 at 127). Emphasis added.
[188] *Sappier*, para. 33 (BCBOA II Tab 31 at 114-115).

Aboriginal hunting rights in the Claim Area contained "the implicit acknowledgement of Tsilhqot'in occupation of the Claim Area".[189]

3) Hunting and Fishing Activities Typically Give Rise to Rights, Not Title

126. This Court's decisions make clear that acknowledgement of hunting rights over an area does not acknowledge physical occupation equivalent to common law title. McLachlin C.J.C. said:

> 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*.[190]

127. In effect, the trial judge reversed this rule; in his view, seasonal hunting will typically translate into title on the lands used by a semi-nomadic people.

128. Hunting does not typically give rise to possession at common law, such use being "transitory and to a particular purpose, which leaves no marks of appropriation".[191] But, there are a few examples of common law title cases based in part on hunting. One is *Red House Farms (Thorndon) Ltd v. Catchpole,* referred to in *Marshall; Bernard*. In that case, the definite tract requirement was satisfied by the nature of the land—a marsh—that had been used for shooting, and which could not be reasonably be said to have been useful for any other purpose.[192] Such a conclusion would not have been possible if the land in question contained not just a marsh, but also a meadow, a fishing stream, a woodlot, a garden, and an orchard. Where physical characteristics provide the definition of a definite tract, those tracts are naturally limited, and the court can examine whether the actual use made of the land gives rise to a right of use, or amounts to a taking of possession. For example, if a definite tract is defined by an area in which particular roots grew,

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[189] BCSC Reasons paras. 680-681 (AR II Tab 4 at 42).
[190] *Marshall; Bernard*, para. 58 (BCBOA II Tab 29 at 81). Emphasis added.
[191] *New Abridgment of the Law, 7th ed.*, 1832, Vol III, at 188 (BCBOA II Tab 45 at 214); *Skellekorne v. Hay*, (1618) 2 Rolle 123 (BCBOA II Tab 37).
[192] *Red House Farms (Thorndon) Ltd v. Catchpole* [1977] 2 EGLR 125 at 126 and 127 (BCBOA II Tab 34 at 151 and 152).

the court could examine whether harvesting practices on that tract translate into a harvesting right (like the timber harvesting in *Sappier*), or to title.

4) Trails Give a Right of Access, Not Title

129. The trial judge repeatedly referred to the links provided by a network of trails between sites used for dwellings, and villages, and for hunting, fishing and gathering activities, as the basis for concluding that Aboriginal title extends beyond the limits of physical occupation sites to include large areas of intervening lands.[193]

130. The trial judge acknowledged that the function that these trails performed for the Tsilhqot'in was to provide access to hunting, fishing, and gathering areas.[194]

131. The translation of the Tsilhqot'in practice of building trails to its nearest equivalent at common law is to recognize a right of easement for Tsilhqot'in people along such trails. It was disproportionate to the Aboriginal usage to translate the existence of such trails into a right to the land itself extending in many instances to several kilometres in all directions from the trails themselves.[195]

5) The Failure to Refer to the Common Law Perspective

132. *Marshall; Bernard* makes clear that both the Aboriginal perspective and the common law perspective must be considered in analyzing a claim for Aboriginal title:

> *Delgamuukw* requires that in analyzing a claim for aboriginal title, the Court must consider both the aboriginal perspective and the common law perspective.[196]

133. The trial judge's error in this regard is one of omission. Although in his introductory comments, the trial judge noted that Aboriginal title must be understood by reference to both common law real property rules and property rules in Aboriginal legal systems,[197] he did not subsequently refer to common law cases to identify the requirements of physical occupation, or of

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[193] BCSC Reasons paras. 679, 897, 959, 960. (AR II Tab 4 at 41-42, 107, 125-127).
[194] BCSC Reasons paras. 680, 798. (AR II Tab 4 at 42, 79)
[195] See *Spicer v. Bowater Mersey Paper Co.*, 212 NSR (2d) 132; 2003 NSSC 19 ("*Spicer* (SC)") at para 51 (BCBOA II Tab 38 at 172). Reversed without reference to the translation of trails to easements at common law: *Spicer v. Bowater Mersey Paper Co.*, [2004] NSJ No. 104, 2004 NSCA 39 ("*Spicer* (CA)") (BCBOA II Tab 39).
[196] *Marshall; Bernard*, para. 46 (BCBOA II Tab 29 at 78).

regularity and exclusivity that "comport with title at common law". Nor did he refer to any common law or Aboriginal law rules in defining the Opinion Areas.

134. The only reference the trial judge made to the applicable common law principles was to accept Professor Slattery's criticism of these requirements.[198]

135. Where lands are not bounded, the common law requires an "actual procession, an occupation exclusive, continuous, open or visible and notorious…[which] must not be equivocal, occasional or for a special or temporary purpose."[199]

6) The Trial Judge Stepped Outside the Confines of a "Usual Judgment"

136. The trial judge stepped outside the confines of a "usual judgment" to attempt to become "part of a larger process of reconciliation between Tsilhqot'in people and the broader Canadian society".[200] He considered himself free to act extra-judicially in order to promote negotiations.[201] In his view, the existing jurisprudence should not be "allowed to pervade and inhibit genuine negotiations".[202]

137. The trial judge recognized that much of what he opined "is, of course, not a task for a court".[203] The correct approach was expressed by the trial judge, in *Lax Kw'alaams Indian Band v. Canada (Attorney General)* where she said:

> It must also be recognized that no matter how unusual the subject matter, or how politically sensitive some of these issues are, aboriginal cases are law suits and must be treated as such…
>
> At the end of the day, the parties have chosen to bring their claim to a court of law, not to a political forum, and they are entitled to receive an impartial

[197] BCSC Reasons paras. 505, 536 (AR I Tab 3 at 177, 187).
[198] BCSC Reasons paras. 1361-1365 (AR III Tab 5 at 69-71).
[199] *Sherren v. Pearson* (1887), 14 SCR 581 at 585 (BCBOA II Tab 36 at 167); See also *Spicer* (SC) at para. 51 (BCBOA II Tab 38 at 172) reversed without reference to this point: *Spicer* (CA) (BCBOA II Tab 39).
[200] BCSC Reasons para. 18 (AR I Tab 3 at 23).
[201] BCSC Reasons paras. 1338, 1349, 1350 (AR III Tab 5 at 59, 64-65).
[202] BCSC Reasons para. 1376 (AR III Tab 5 at 75).
[203] BCSC Reasons para. 1371 (AR III Tab 5 at 73).

> adjudication that resolves their dispute by the application of the laws of Canada to the facts as I find them from the evidence before me. [204]

138. The trial judge's comments are particularly problematic because he formulated his Opinion Areas for the primary purpose of facilitating negotiations,[205] but the Appellant is now requesting this Court to make a legal determination based upon them.

F. The Opinion Areas of the Trial Judge

139. Having dismissed the Appellant's claim on a pleadings issue, the trial judge attempted to assist negotiations by identifying significant areas both inside and outside of the Claim Area that, in his opinion, would qualify as Aboriginal title lands. The trial judge also denominated the portions of these "Opinion Areas" that fell within the Claim Area as "binding on the parties as a finding of fact" if he were found to have been wrong on the pleadings point.[206]

140. The identification of the Opinion Areas involved the application of a legal test for Aboriginal title to the facts as disclosed by the evidence. Thus those findings were properly characterized as findings of mixed fact and law, rather than findings of fact alone.

141. It is not possible to discern a consistent basis for the arbitrary boundaries drawn by the trial judge. For example, he excluded the area around one lake notwithstanding the fact that a witness had testified that there had been 10 to 12 pithouses there some of which had been intact as recently as 50 years ago.[207] But the area around another lake was included in an Opinion Area even though the only basis that the trial judge gave for its inclusion was that a witness had testified that "there are remains of pithouses that were once occupied by Tsilhqot'in ancestors" there and a second witness had testified that "one of the pithouses contained human remains". [208] In another instance the trial judge drew a boundary through the middle of an area that he described as lands used "since before the time of first contact as important hunting, trapping and gathering grounds"[209] excluding

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[204] *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2008] 3 CNLR 158; 2008 BCSC 447 ("*Lax Kw'alaams"*) at paras. 7-8 (BCBOA I Tab 14 at 221), appeal dismissed [2010] 1 CNLR 278; 2009 BCCA 593, appeal dismissed [2011] SCR 535; 2011 SCC 56.
[205] BCSC Reasons para. 18 (AR I Tab 3 at 23).
[206] BCSC Reasons para. 961 (AR II Tab 4 at 127-128).
[207] Lhuy Naschasgwengulin (Little Eagle Lake) BCSC Reasons paras 827-828 (AR II Tab 4 at 88).
[208] Tsanlgen Biny (Chaunigan Lake) BCSC Reasons para. 824 (AR II Tab 4 at 87).
[209] West Side of Tsilhqox Biny (Chilko Lake) BCSC Reasons para. 892 (AR II Tab 4 at 105).

at least half of them from any Opinion Area without offering any explanation for why part of such grounds should be included and the rest excluded.

142. On the west side of the Claim Area, the trial judge stopped at the western boundary of the Trapline Territory because it "…was there, and not because there was a sudden end to the activities of Tsilhqot'in people".[210] In the Tsilhqox corridor, the trial judge did not stop at the Trapline Territory boundary, notwithstanding that it was also "there".

143. In paragraph 959 of his judgment the trial judge described the Opinion Areas as "definite tracts" of land that in his opinion qualified for Aboriginal title. However, in the very next paragraph of his reasons, the trial judge referred to all five or six areas as a single "tract of land".[211] The Plaintiff apparently prefers the latter description. In an appendix to his factum, he attempts provide a map of what he calls the "Proven Title Area". British Columbia disputes the validity of this map, not only because it is inconsistent with some of the boundaries described by the trial judge (the south-western boundary does not commence at Ch'a Biny, and the north-western boundary does not commence at Gwedzin Biny, nor is it a straight line); but because the vague and ambiguous boundary descriptions of the trial judge make it impossible to draw any map of the tracts or tract that he believed to be the locus of Aboriginal title. As drawn by the Plaintiff, the Opinion Area or Areas would appear to total approximately 1,900 sq. kms. However, the area could be significantly larger or smaller.

144. Given the trial judge's finding that the total population of Tsilhqot'in people living in the Claim Area in 1846 was not more than 400,[212] it appears evident that a population of that limited size could not possibly have physically occupied the 1,900 sq. kms in the Opinion Areas to the extent necessary to establish Aboriginal title at the time of sovereignty assertion.[213]

145. Claims of title to land must be determined based upon an analysis setting out the basis upon which the particular land in question has met or not met the test for title. In identifying the

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[210] BCSC Reasons para. 958 (AR II Tab 4 at 125).
[211] BCSC Reasons paras. 959-960 (AR II Tab 4 at 125-127).
[212] BCSC Reasons para. 951 (AR Tab 4 at 122-123).
[213] See *Marshall* (PC), at paras. 131 and 142 (BCBOA II Tab 26 at 43 and 45); see also *Marshall* (SC) at para. 108 (BCBOA II Tab 27 at 49-50).

Opinion Areas and in describing the various territories in the vicinity of the Claim Area, the trial judge failed to conduct such an analysis. In none of the Opinion Areas did the trial judge identify any particular enclosed or cultivated fields, nor any specific definite tracts that were regularly used for hunting, fishing or otherwise exploiting resources. Instead he gave vague descriptions of various areas without reference to the criteria this Court has established for title other than the presence of dwellings. What is perhaps most striking, however, is the disproportion between the geographic extent of the sites upon which the trial judge relied for his findings of Aboriginal title and the large areas that he included in his Opinion Areas. This disproportion confirms the Court of Appeal's conclusion that he was applying a regional or territorial concept of Aboriginal title.[214]

146. To endorse the trial judge's Opinion Areas would lead to proliferation of Aboriginal title claims to artificially defined parts of traditional territories, supported by extensive unfocused evidence of every conceivable activity that might have occurred in the general vicinity of the area claimed. Trial judges would then be expected to make declarations on where Aboriginal title might or might not have been made out based upon their subjective general impressions of the evidence as a whole. This "commission of inquiry" approach has been rejected by this Court[215] in favour of a focused approach to litigation defined by pleadings that raise concrete disputes with respect to the particular lands where consequential remedies will identify the necessary parties and the necessary averments.

147. A close examination of the details of the inconsistent and arbitrary manner in which the trial judge defined his Opinion Areas demonstrates the unreliability of his approach and his error in failing to invite the submissions from the parties. The Court of Appeal did not consider it necessary to make a detailed examination of those areas, but if this Court considers it advisable to scrutinize the Opinion Areas of the trial judge more fully, a detailed examination can be found in Appendix A.

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[214] BCCA Reasons para. 229 (AR III Tab 9 at 168).
[215] *Lax Kw'alaams*, paras 40-43 (BCBOA I Tab 14 at 223-224).

G. Exclusivity

148. The Appellant overstates the trial judge's comments regarding exclusivity.[216] The trial judge considered exclusivity to be established by the absence of adverse claimants[217] and not "exclusive physical possession equivalent to common law notions of title", as required by *Marshall; Bernard*.[218]

149. According to the leading academic Tsilhqot'in ethnographer: "Bands occupied but did not exclusively control territory".[219]

150. The requirement of "exclusivity" is in addition to the need to prove "physical occupation", not a substitute for it. If exclusivity alone sufficed to prove title, *Marshall* would have been decided differently. Had the Appellant confined his claim to those locations within the Claim Area where he could establish pre-sovereignty physical occupation in accordance with the requirements set out by the majority of this Court in *Marshall; Bernard*, it is unlikely that he would have encountered great difficulty in meeting the exclusivity requirement.

H. The Aboriginal Perspective

151. The Appellant asserts that the Court of Appeal failed to have regard to the Aboriginal perspective. This is incorrect. The Aboriginal perspective was at the forefront of the recognition of the Tsilhqot'in as the collective that is the proper holder of Aboriginal rights,[220] was the basis for the finding that trade in skins and pelts was culturally integral,[221] and was fundamental to limiting that right to trade for the necessaries of life.[222]

152. This Court has identified three aspects of the Aboriginal perspective associated with Aboriginal title. One is "the fact that it is held communally".[223] Another "dimension is its

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[216] AF, para. 181-186.
[217] BCSC Reasons para. 943 (AR II Tab 4 at 120).
[218] *Marshall; Bernard*, para. 62 (BCBOA II Tab 29 at 82).
[219] Trial Exhibit 176 at p. 407; Robert Lane, "Chilcotin." in Handbook of North American Indians Vol. 6 - Subarctic (Washington, Smithsonian Institution, 1981). (BCR Tab 4).
[220] BCCA Reasons paras. 51-57, 149-150 (AR III Tab 9 at 115-117, 146).
[221] BCCA Reasons paras. 283-288. (AR III Tab 9 at 183-184).
[222] BCCA Reasons para. 280-281 (AR III Tab 9 at 182).
[223] *Delgamuukw* para. 115 (BCBOA I Tab 9 at 126-127).

inalienability".[224] A third aspect is the inherent limit which prevents lands held pursuant to Aboriginal title from being used in a way that is "irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place".[225]

153. In identifying the Opinion Areas, the trial judge failed to indicate the nature of the Tsilhqot'in occupation or the relationship that the Tsilhqot'in had with those Areas. This failure makes it impossible to identify any inherent limit in connection with those lands, and is a further indication that the trial judge's approach was flawed.

I. Reconciliation

154. The Appellant argues that reconciliation demands recognition of his claim to title.[226] This Court has consistently held that reconciliation does not require recognition of Aboriginal title in all cases. The Court of Appeal did not accord "no weight" to Aboriginal perspectives[227]; its judgment is consistent with the perspective of people who had no definite boundaries. This Court's test for Aboriginal title does not "practically eviscerate"[228] the economic base of Aboriginal groups, who may, in appropriate circumstances establish commercial Aboriginal rights[229] or non-commercial user rights.[230]

155. The Appellants point to historic treaties covering vast areas to suggest that governments have recognized Aboriginal title to large tracts.[231] This argument was considered in *Marshall* (SC), where the summary conviction appeal judge pointed out that "treaty agreements can address bundles of rights. Aboriginal title is but one possible aspect of the treaty agreements."[232]

156. There is no basis for the Appellant's assertion that modern treaty negotiations and consultation processes operate on the premise of legitimate Aboriginal title claims to expansive

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[224] *Delgamuukw* para. 113 (BCBOA I Tab 9 at 125-126).
[225] *Delgamuukw* para. 128 (BCBOA I Tab 9 at 133).
[226] AF, paras. 238-247.
[227] AF, para. 5. Emphasis in original.
[228] AF, para. 237.
[229] *Gladstone* (BCBOA II Tab 25); *Ahousaht v. Canada (Attorney General*), 2013 BCCA 300 (BCBOA I Tab 2).
[230] *Sappier* (BCBOA II Tab 31).
[231] AF, para. 196
[232] *Marshall* (SC) para. 112 (BCBOA II Tab 27 at 50-51).

areas.[233] Those processes depend upon the assertion of Aboriginal rights or treaty rights, not Aboriginal title alone.[234]

157. The Appellants are not in treaty negotiations, but modern treaties with other B.C. First Nations do not suggest that claims to vast areas are vindicated. Three recent final agreements provide modest areas to the claimants: Sliammon—8,323 ha.; Yale—1966 ha.; and Tswassen—717 ha. (all areas inclusive of existing reserve lands). The Appellant is asking this Court to effectively impose the equivalent of a Treaty settlement of approximately 190,000 ha.

158. The Appellant asserts that First Nations should be given more "leverage for economic benefits" in consultations;[235]but this Court has held that impacts on First Nations negotiating positions are not part of the duty to consult.[236]

159. The Appellant's position on consultation is premised on the traditional territory theory of Aboriginal title rejected by this Court: an assertion of ownership to all the "natural resources of their traditional homelands."[237]

160. Reconciliation of the special rights of Aboriginal peoples and the rights of all Canadians in public lands and resources is best served by a robust recognition of the full spectrum of Aboriginal rights, including Aboriginal title. This approach:

a) Does not take a "one size" fits all approach, but rather:

   i. Reflects the diversity among Aboriginal cultures throughout Canada;

   ii. Is sensitive to actual patterns of Aboriginal use and occupation;

   iii. Protects the distinctive features of claimants' relationships with their traditional territories and pre-contact practices;238

b) Promotes negotiated solutions, as opposed to litigated outcomes, by

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[233] AF, para. 239.
[234] All information from the British Columbia Treaty Commission website: *http://www.bctreaty.net/index.php*
[235] AF, para. 244.
[236] *Rio Tinto Alcan Inc. Carrier Sekani Tribal Council*, 2010 SCC 43 para. 46 (BCBOA II Tab 35 at 162).
[237] AF, para. 245. The author of the article quoted was a member of the Appellant's legal team.
[238] *Sappier* para. 22 (BCBOA II Tab 31 at 111-112).

i. Drastically narrowing overlapping title claims that hinder negotiations among First Nations, and between the Crown and First Nations;

ii. Promoting the negotiation of shared responsibility for lands and resources among First Nations, the Crown and local authorities;

iii. Promoting the resolution of land claims on the basis of broad public support

c) Fulfills the purposes of the constitutional recognition of Aboriginal rights,

d) Is consistent with this Court's jurisprudence on consultation and honour of the Crown.

e) Facilitates the recognition of Aboriginal rights and title by,

i. Focussing on the specific practices that were integral to a particular Aboriginal group's culture;239

ii. Promoting the clear demarcation of title lands;

iii. Recognizing the interests of the non-Aboriginal community;

iv. Promoting public acceptance of Aboriginal claims.

161. In contrast, the Appellant's approach:

a) would obliterate the distinction between Aboriginal rights and title;

b) is inflexible, insisting that only recognition of Aboriginal title will foster reconciliation;

c) is inconsistent with the evidence of the Aboriginal perspective in this case with respect to the existence of definite tracts in Tsilhqot'in culture.[240]

J. Consequences of Proof of Aboriginal Title: Introduction

162. The trial judge opined that as a matter of statutory interpretation "the present provisions of the *Forest Act*[241] do not apply to those areas that meet the test for Aboriginal title".[242] He also

[239] *Sappier*, paras. 22, 24 (BCBOA II Tab 31 at 111-112, 112-113).
[240] BCSC Reasons para. 648 (AR II Tab 4 at 30-31).
[241] *Forest Act*, R.S.B.C. 1996 c. 157 ("*Forest Act*").
[242] BCSC Reasons para. 981 (AR II Tab 4 at 135).

found that a declaration of Aboriginal title would render lands constitutionally immune from the *Forest Act*'s provisions respecting management, acquisition, sale and removal of timber.[243]

163. The Province's positions are that:

a) Aboriginal title lands are "Crown" lands, and the timber on such lands is "Crown timber", within the meaning of the *Forest Act* and upon which Aboriginal title is a burden;
b) the Province has the constitutional authority to justifiably infringe Aboriginal title on such lands and in relation to the timber on them;
c) the Provincial Crown has a *sui generis* fiduciary duty in exercising discretionary control over Aboriginal title lands.

K. Consequences of Proof of Aboriginal Title: Crown Lands

164. The question of whether particular lands and timber are "Crown lands" and "Crown timber" within the meaning of the *Forest Act* is answered by how those terms are defined in the statute. The *Forest Act* defines "Crown timber" as "timber on Crown lands". [244] With an assist from the *Land Act*, it defines "Crown lands" as "land … vested in the government".[245] The *Interpretation Act* defines "government" for the purpose of British Columbia statutes as "Her Majesty in right of British Columbia".[246] The statutory interpretation question with respect to whether timber on Aboriginal title land is "Crown timber" is thus resolved by whether such timber is located on land that has been vested in the provincial Crown.

165. By a Proclamation issued on 14 February 1859, Governor James Douglas vested all lands in the Colony of British Columbia, including all of the lands in the Claim Area, in the Crown in fee.[247] The Proclamation had the effect of vesting the lands in the Crown in right of the Colony,[248] and by virtue of section 109 of the *Constitution Act, 1867* the Crown in right of the Province succeeded to the Colony's interests in Crown lands.

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[243] BCSC Reasons para. 1030 (AR II Tab 4 at 152).
[244] *Forest Act*, s. 1(1) "Crown timber".
[245] *Forest Act*, R.S.B.C. 1996, c. 157, s. 1(1) "Crown land"; *Land Act*, R.S.B.C. 1996, c. 245, s. 1 "Crown land".
[246] *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 29 "government".
[247] Proclamation No. 2, 1859, s. 1. See also *Land Ordinance, 1865* ss. 1-3.
[248] *Attorney General of British Columbia v. Attorney General of Canada* (1889), 14 AC 295 at 304 (P.C.) (BCBOA I Tab 3).

166. The Crown does not necessarily possess a full beneficial interest in all Crown lands or Crown timber. It is well understood that pursuant to section 109 of the *Constitution Act, 1867* the Crown lands of a Province are subject to the burden of Aboriginal title where it exists, and that the Parliament of Canada has the constitutional jurisdiction to legislate in respect of that burden.[249] Section 35 of the *Constitution Act, 1982* also imposes limits upon the Province's ability to deal with lands and timber subject to the burden of Aboriginal title.

167. Nevertheless, it has always been understood that provincial lands burdened by Aboriginal title are Crown lands.[250] Administration of title lands as Crown lands ensures their inalienability by Aboriginal title holders, one of the *sui generis* incidents of Aboriginal title. This Court has found that the Province has both a duty to protect Aboriginal interests in Crown lands and timber,[251] and the sovereign and legislative authority to infringe the Aboriginal interest for the benefit of all the public, where such infringement can be justified.[252]

168. Neither the trial judge nor the Appellant has shown any basis for concluding that lands subject to Aboriginal title were not vested in the Crown prior to Confederation. Nor have they identified any subsequent statutory provision or intervening event that would have excluded Aboriginal title lands from the ambit of the *Forest Act*. The restraints on the Province's ability to administer lands and timber subject to Aboriginal title are constitutional and do not arise out of any legislative lacunae.

L. Consequences of Proof of Aboriginal Title: Interjurisdictional Immunity

169. This Court has held that the doctrine of interjurisdictional immunity "should in general be reserved for situations already covered by precedent".[253] It has also held that it should not be

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[249] *Delgamuukw*, para. 175 (BCBOA I Tab 9 at 149-150).
[250] *Ontario Mining v. Seybold*, [1903] AC 73 (JCPC) at 79 (BCBOA I Tab 16 at 246); *Wewaykum Indian Band v. Canada*, [2002] 4 SCR 245; 2002 SCC 79 at para 15 (BCBOA II Tab 41 at 202).
[251] *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 SCR 511, ("*Haida Nation*") para. 18 (BCBOA I Tab 11 at 172).
[252] *Delgamuukw*, para. 160 (BCBOA I Tab 9 at 144).
[253] *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3; 2007 SCC 22 ("*Canadian Western Bank*") para. 77. See also paras. 38 and 50 (BCBOA I Tab 7 at 89, 86, 87-88).

invoked where its use is not essential to make federal powers effective for the purposes for which they were conferred".[254]

170. Not only is there no precedent for the application of the doctrine of interjurisdictional immunity to prevent the application of provincial laws to Aboriginal title lands, there is express authority from this Court affirming the applicability of such laws. Furthermore if the doctrine of interjurisdictional immunity might ever have served a protective purpose in relation to Aboriginal title lands its role has been eclipsed and rendered redundant by this Courts jurisprudence on section 35 of the *Constitution Act, 1982*.

171. In *Delgamuukw* this Court held that:

> The Aboriginal rights recognized and affirmed by s. 35(1), including aboriginal title, are not absolute. Those rights may be infringed, both by the federal (e.g. *Sparrow*) and provincial (e.g. *Côté*) governments. However, s. 35(1) requires that those infringements satisfy the test of justification.[255]

172. It is clear that potentially justifiable provincial government infringements include those found in legislation as well as in executive actions.[256] As Lambert J.A. stated in *Haida Nation v. B.C. and Weyerhaeuser*:

> But, of course, the Provincial Legislative has the legislative capacity to authorize what proves to constitute an infringement of aboriginal title by a law of general application.[257]

173. In *Delgamuukw*, the majority of this Court identified a significant range of legislative objectives that might justify infringement of Aboriginal title, virtually all of which involved the provincial disposition and development of Crown lands and resources.[258]

174. The Ontario Court of Appeal has recently rejected a suggestion that the Ontario government could only take up lands in a portion of Treaty Three if it was first authorized to do so by the

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[254] *British Columbia (Attorney General) v. Lafarge Canada Inc.* [2007] 2 SCR 86; 2007 SCC 23 para. 43. (BCBOA I Tab 5 at 64).
[255] *Delgamuukw*, para. 160. (BCBOA I Tab 9 at 144).
[256] *Côté* para. 74 (BCBOA II Tab 23 at 18); *R. v. Badger*, [1996] 1 S.C.R. 771 para. 2 (*per* Sopinka J.) and para. 98 (*per* Cory J.) (BCBOA I Tab 19 at 272, 273).
[257] *Haida Nation v. B.C. and Weyerhaeuser* 2002 BCCA 147 para. 32 (BCBOA I Tab 10 at 164); *R. v. Marshall*, [1999] 3 SCR 533, para. 24 (BCBOA II Tab 25 at 37-38).
[258] *Delgamuukw* para 165 (BCBOA I Tab 9 at 145).

federal Crown following its consultations with the Treaty beneficiaries, calling the proposed process "unnecessary, complicated, awkward and likely unworkable".[259]. The Appellant's position might be similarly described.

175. While this Court has affirmed the capacity of provincial governments and legislatures to infringe Aboriginal title it has also made it clear that any such infringement must be justified pursuant to section 35 of the *Constitution Act, 1982*. The justification process, unlike the doctrine of interjurisdictional immunity, is capable of taking into account the differing circumstances of each case,[260] and promotes reconciliation often through balanced and adaptive approaches to the protection of Aboriginal interests. There is nothing to be gained and much potentially to be lost by utilizing the blunt instrument of interjurisdictional immunity as a means of protecting Aboriginal title from provincial impairment.

176. Provincial incapacity to apply its laws to Aboriginal title lands would render consultation pointless, and incapacitate the Province from accommodating Aboriginal interests in relation to such lands.

177. Nor would the substitution of a bifurcated process of federal government consultation in relation to provincially authorized infringements serve the public interest. As the Ontario Court of Appeal observed in the *Keewatin* case:

> Leaving meaningful constitutional space for the exercise of provincial jurisdiction under ss. 109, 92(5) and 92A, without federal control under s. 91(24), fosters direct dialogue between the province and Treaty 3 First Nations. Such dialogue is key to achieving the goal of reconciliation.[261]

178. It follows therefore that if the first constitutional question is to be dealt with it should be answered in the negative.

M. Infringement Analysis: Planning and the "Right to Choose" the use of Title Lands

179. The trial judge opined that, if he was wrong in his Opinions on interjurisdictional immunity, the application of the *Forest Act* to Aboriginal title land amounted to a prima facie

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[259] *Keewatin v. Ontario (Natural Resources),* 2013 ONCA 158, ("*Keewatin*") para. 153 (BCBOA I Tab 13 at 213).
[260] See *Delgamuukw* para 165 (BCBOA I Tab 9 at 145).
[261] *Keewatin* para. 154. (BCBOA I Tab 13 at 213).

infringement because it deprived the Aboriginal title holder's right to make decisions with regard to land use and amounted to a denial of Aboriginal title.[262]

180. In trial judge's view, infringement would occur before any decision to harvest timber had been made:

> The infringement takes place the moment Crown officials engage in the planning process for the removal of timber from land over which the Crown does not have a present proprietary interest.[263]

181. The trial judge considered that any statute that conferred administrative discretion, the exercise of which risked infringing Aboriginal title, must outline specific criteria to accommodate the existence of Aboriginal title.[264]

182. The Appellant, and the trial judge, argued that infringement occurred when the Crown assumed the authority to determine what uses would be made of title lands, relying on the "right to choose the use" language of *Delgamuukw*.[265] Read in context, that language must relate to the proprietary right of the community of Aboriginal title holders to decide what uses, as individuals or as a community, they will make of their collective interest in title lands, not the sovereign authority to decide what uses, in the interests of all the public, the Crown might make of such lands in the course of a justifiable infringement. If it were otherwise, the Province's power to infringe would lack meaning.

183. The proprietary rights conferred may include the freedom to choose the uses to which Aboriginal titleholders may put the lands, subject to an inherent limit against waste, but not a veto over Crown authorized use by third parties when such use can be justified. Aboriginal title lands remain Crown lands, upon which Aboriginal title is a burden or encumbrance

184. The Province has a *sui generis* fiduciary duty when assuming discretionary control over Aboriginal title lands.[266]

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[262] BCSC Reasons paras. 1074-76 (AR II Tab 4 at 167).
[263] BCSC Reasons para. 1077 (AR II Tab 4 at 167-168).
[264] BCSC Reasons para. 1079 (AR II Tab 4 at 168-169).
[265] *Delgamuukw*, para. 168 (BCBOA I Tab 9 at 146-147).
[266] *Haida Nation* para. 18 (BCBOA I Tab 11 at 172).

185. The "right to choose the use" aspect of Aboriginal title does not confer regulatory jurisdiction. In *R. v. Sparrow*, the defendant Sparrow and the intervener, the National Indian Brotherhood/Assembly of First Nations, argued that the Aboriginal right to fish displaced governmental authority to regulate, submitting:

> This means that aboriginal title entails a right to fish by any non-dangerous method chosen by the aboriginals engaged in fishing. Any continuing governmental power of regulation would have to be exceptional and strictly limited to regulation that is clearly not inconsistent with the protective and remedial purposes of s. 35(1).[267]

186. This Court rejected that argument, confirming the continuing existence of the governmental right to regulate, so long as any government regulation that infringes upon or denies Aboriginal rights is justified:

> Rights that are recognized and affirmed are not absolute. Federal legislative powers continue …These powers must, however, now be read together with s. 35(1). In other words federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.[268]

187. Aboriginal rights, including title, establish limits on federal and provincial legislative powers, they do not displace those powers. Only to the extent that legislation unjustifiably infringes s. 35 rights will it be inapplicable. It follows therefore, that if the second constitutional question is to be dealt with it should be answered in the positive.

PART IV – SUBMISSION ON COSTS

188. In its grant of leave to appeal, the Coram granted leave "with costs to the applicant for leave to appeal and the appeal, in any event of the cause".

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[267] *Sparrow* at 1102 (BCBOA II Tab 32 at 126).
[268] *Sparrow* at 1109 (BCBOA II Tab 32 at 128) See also *R. v. Pamajewon*, [1996] 2 SCR 821 para. 26 (BCBOA I Tab 30 at 101-102).

PART V – ORDER SOUGHT

189. That the appeal is dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 30th day of July, 2013.

per: Patrick G. Foy, Q.C. (Borden Ladner Gervais LLP)
Counsel for the Respondent

per: Kenneth J. Tyler (Borden Ladner Gervais LLP)
Counsel for the Respondent

APPENDIX A—OPINION AREAS OF THE TRIAL JUDGE

A. The First Opinion Area—The Tsilhqox Corridor

190. The first Opinion Area described by the trial judge was the "Tsilhqox (Chilko River) Corridor":

> from its [the Tsilhqox's] 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).[269]

191. The trial judge offered no guidance as to where or to what extent this corridor exceeds two kilometres in width. At a minimum the Area included 142 sq. kms. Substantially more than half of this Opinion Area lies outside of the Claim Area.[270]

192. The trial judge identified 14 sites within the 71 km long Tsilhqox Corridor,[271] only 2 of which were entirely within the Claim Area,[272] with 7 being entirely outside[273] and 5 partially in and partially out.[274] 13 of these locations were identified as old winter village or dwelling sites,[275] but the trial judge found only 5 of those sites—Gwetsilh, Tl'egwated, Tsilangh, Biny Gwechugh, and Sul Gunlin—to have been occupied *circa* 1846.[276] It is not very likely that a larger number of villages could have been located within the Corridor at that time, given the trial judge's finding that only between 150 and 200 people wintered within the Corridor, and that some of the pit-houses in which they resided contained as many as 60 persons. [277]

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[269] BCSC Reasons para. 959. (AR II, Tab 4 at 125-127) Emphasis added. In the Tsilhqot'in language the suffix "qox" means "river"; "Biny" signifies a "lake".
[270] BCSC Reasons, Appendix A, Map 3. (AR XIII, Tab 59) A searchable version of this map can be found attached to the reasons of the trial judge on "the Courts of British Columbia" website: http://www.courts.gov.bc.ca/jdb-txt/SC/07/17/2007BCSC1700.pdf
[271] BCSC Reasons paras. 713-763 (AR II Tab 4 at 53-69).
[272] Nusay Nighinlin and Sul Gunlin. BCSC Reasons paras. 730 and 761 (AR II Tab 4 at 59, 69).
[273] Gwetsilh, ?Elhixidlin, Tachi, Tsilangh,Tsi Lhizbed, Ts'eman Ts'ezchi, and Gwedeld'en T'ay. BCSC Reasons paras. 713, 718, 726, 727, 728, 735, 751 (AR II Tab 4 at 53-54, 55, 58, 59, 61, 66).
[274] Tl'egwated, Tsi T'is Gulin, Ts'u Nintil, Biny Gwetsel, and Biny Gwechugh. BCSC Reasons paras. 719-720, 738-739, 747, 748, 754 (AR II Tab 4 at 55-56, 62, 64, 65, 67).
[275] All of the sites except ?Elhixidlin. BCSC Reasons paras. 714, 719, 726, 727, 729, 730, 737, 740, 747, 748, 751, 755, and 761 (AR II Tab 4 at 54, 55, 58, 59, 61, 62-63, 64, 65, 66, 67, 69).
[276] BCSC Reasons paras. 715-716, 721-722, 727, 758, and 762 (AR II Tab 4 at 54, 56-57, 58, 68, 69).
[277] BCSC Reasons paras. 32 and 710 (AR I Tab 3 at 27 and II Tab 4 at 52).

193. The trial judge found no cultivated fields within the Corridor,[278] nor did he identify any hunting grounds there, although he quoted an expert report to the effect that such grounds existed in unspecified locations on the "plateaux on either side".[279] He also noted that Tsilhqot'in people "hunted in the fall" at one of the locations, [280] and that a Tsilhqot'in individual who enfranchised in 1922 had had a hunting cabin at another site in the early twentieth century.[281]

194. Eight of the 14 sites were identified as locations where people fished,[282] and the trial judge recorded that a single witness had testified to picking berries at one of the 14 locations in the 20th century.[283]

195. Although the trial judge referred to some evidence of occupation and use of the 14 particular sites he identified in the Tsilhqox Corridor he made no findings concerning the physical occupation or regular use of the extensive areas between the sites or extending beyond the sites for at least one kilometre on both sides of the Tsilhqox.

B. The Second Opinion Area--Xeni

196. The second Opinion Area was "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 [*sic*] combine to provide the northern boundary, while Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) marks the eastern boundary.[284]

197. This description is inadequate to identify the actual boundaries of the second Opinion Area. The trial judge did not explain which parts of the mountains other than Ts'il?os were to be included in Xeni—were they particular slopes, or the whole of the mountains named?

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[278] BCSC Reasons para. 707 (AR II Tab 4 at 51).
[279] BCSC Reasons para. 707 (AR II Tab 4 at 51).
[280] Nusay Bighinlin. BCSC Reasons para. 733 (AR II Tab 4 at 60).
[281] Sul Gunlin. The individual was Eagle Lake Henry. See BCSC Reasons paras. 762 and 803. (AR II Tab 4 at 69, 81) See also Trial Exhibit # 156-1922/11/16.001 (BCR Tab 3).
[282] Gwetsilh, Tsilangh, Tsi Lhizbed, Nusay Bighinlin, Henry's Crossing, Ts'u Nintil, Biny Gwetsel and Biny Gwechugh BCSC Reasons paras. 717, 727, 729, 733, 743, 747, 749 and 755(AR II Tab 4 at 55, 58, 59, 60, 63, 64, 65, 67).
[283] Nusay Bighinlin. BCSC Reasons para. 733 (AR II Tab 4 at 60).
[284] BCSC Reasons para. 959. See also para. 766. (AR II Tab 4 at 125-127 and 70). With the exception of "Xeni', the place names in this description are all mountains. "Xeni" is otherwise known as the Nemiah Valley.

Furthermore there are significant gaps between the mountains that he employed as boundaries. The north slope of Ts'il?os is five or six kms in a straight line from the southern end of Tsi ?Ezish Dzelh, and the western end of Xeni Dzelh is approximately 12 kms from the same location. [285] Were these gaps intended to be filled by straight lines, or follow certain natural features such as watercourses or heights of land? The Appellant appears to assume that some sort of irregular boundary was intended.[286]

198. Although the description offered by the trial judge is inadequate to draw clear boundaries for Xeni, it appears that the second Opinion Area was at least 30 kms in length and 10 kms wide. The eastern portion of Xeni was outside of the Claim Area.

199. The trial judge did not identify any hunting grounds, or other lands within Xeni that he found were regularly used by the Tsilhqot'in for exploiting the area's resources. Nor did he make reference to any cultivated fields within the Opinion Area. He mentioned 9 sites within Xeni, 2 of which appear to have been entirely on reserve and thus not included in the Claim Area,[287] and 3 of which were primarily on reserve, but extended to small off reserve areas.[288] Only 3 of the sites contained archaeological evidence of physical occupation—two pit houses were said to have been located at Tlebbyi—a site predominantly on reserve,[289] a single pit house off reserve at ?Et'an Ghintil,[290] and several old house pits at Naghataneqed, also mostly on reserve.[291] One of the off-reserve sites referred to by the trial judge was a graveyard.[292] However, earlier in his reasons, the trial judge cautioned against employing gravesites as evidence for relevant occupation, pointing out that they would likely have postdated the arrival of

[285] BCSC Reasons, Appendix A, Map 3 (AR XIII, Tab 59).
[286] See Appellant's Factum, Appendix A, particularly the boundary drawn between Ts'il?os Dzelh and Tsi ?Ezish Dzelh.
[287] Ses Gen tach'l and Tses Nanint'i. BCSC Reasons para. 770 (AR II Tab 4 at 71) and Appendix A, Map 3 (AR XIII, Tab 59).
[288] Lhiz Bay, Tlebyi, and Naghataneqed. BCSC Reasons paras. 771, 773, 776, 780-82. (AR II Tab 4 at 71,72, 73-74)
[289] BCSC Reasons para. 776 (AR II Tab 4 at 72).
[290] BCSC Reasons para. 777 (AR II Tab 4 , at 72).
[291] BCSC Reasons para. 780 (AR II Tab 4 , at 73).
[292] Xexti. BCSC Reasons paras 769, 775 (AR II Tab 4 at 71, 72).

the missionaries who persuaded the Tsilhqot'in to cease the traditional practice of cremation.[293] Another off-reserve site contained 20th century cabins and a fishing camp, and was sometimes used for berry-picking.[294] A further site within Xeni was said to be a location where the Tsilhqot'in ancestors would pile rocks and set up a snare to catch wild chickens.[295] All of the sites referred to in this portion of his Reasons were located within a band of twenty kms east and west, bracketed at each end by Xeni Gwet'in Reserves. None of the sites appear to have been on the northern slopes of Ts'il?os or in the vicinity of Tsi ?Ezish Dzelh.

200. The trial judge admitted that most of the evidence for occupation within Xeni did not much pre-date the end of the nineteenth century.[296] However, he inferred from the existence of a limited number of house pit depressions, most of which were located on Reserves, and from the alleged close proximity of the north west corner of Xeni to the south end of the Tsilhqox Corridor, that Aboriginal title existed throughout the Second Opinion Area.[297]

C. Third Opinion Area—Unnamed (Southern Brittany Triangle).

201. The trial judge did not give a name to his third Opinion Area but described it as follows:

> 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[298]

202. It is unclear where on the indefinite Xeni boundary the third Opinion Area's boundary was to begin and whether it was to proceed in a straight line, along a height of land, along a watercourse, or by some other route, to the mouth of Elkin Creek. The Appellant apparently presumes that the southern and western boundaries of the third Opinion Area would coincide

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[293] BCSC Reasons para. 724 (AR II Tab4 at 57) Vickers J. only refers to burials at Xexti that occurred in the 20th century.
[294] Tl'ets'inged. BCSC Reasons para. 778 (AR II Tab 4 at 72-73).
[295] Tsi Nadenisdzay. BCSC Reasons para. 779 (AR II Tab 4 at 73).
[296] BCSC Reasons paras. 764, 767, and 783 (AR II Tab 4 at 69-70, 74).
[297] BCSC Reasons para. 783. (AR II Tab 4 at 74). The distance was approximately 20 kms by water or over mountainous land.
[298] BCSC Reasons para. 959 (AR II Tab 4 at 125-127).

with the northern and eastern boundaries of the first and second Opinion Areas,[299] but the trial judge did not say so. Furthermore, Nu Natase?ex is within the Tsilhqox Corridor so there was evidently intended to be some overlap in that corner, an overlap that casts doubt on whether the trial judge intended the boundaries to coincide.[300]

203. It would seem that the trial judge intended that Opinion Area 3 should coincide with the southern portion of Tachelach'ed (the Brittany Triangle), but he admitted that the Tsilhqot'in witnesses at trial could not agree on the location of Tachelach'ed's southern boundary,[301] and he himself gave inconsistent descriptions of what Tachelach'ed included—describing it both as containing several large barren mountains,[302] and as having "a largely uniform character, namely plateau dominated forestlands".[303]

204. In reciting the evidence that led him to conclude that Aboriginal title existed in Tachelach'ed south of a line drawn east to west from mouth of Elkin Creek to Nu Natase?ex, the trial judge admitted that there were few sites in any part of Tachelach'ed that could be linked by either historical or archaeological evidence to Tsilhqot'in villages or communities in the period around 1846. He further admitted that Tsilhqot'in people appeared to have moved into areas of Tachelach'ed in the 20th century for ranching purposes,[304] and that oral history relating to the area did not extend to a period earlier than the late 19th century.[305]

205. The trial judge did not identify any particular portion of Tachelach'ed as a hunting ground or hunting grounds. He did refer to an 1822 report of a HBC fur trader that the land east of the Tsilhqox was a "favourite hunting ground" for the Tsilhqot'in,[306] but whether that statement was intended to apply to all lands east of the Tsilhqox or a particular location on the east bank of that river was unclear. Certainly it gave no basis for distinguishing between the lands south and north

[299] See Appellant's Factum, Appendix A, which treats the six Opinion Areas as a single "tract of land".
[300] BCSC Reasons, Appendix A, Map 3. (AR XIII Tab 59)
[301] BCSC Reasons paras. 786 (AR II Tab 4 at 75).
[302] Ts'uni?ad Dzelh, Gweq'ez Dzelh, and Xeni Dzelh. BCSC Reasons para. 787 (AR II Tab 4 at75-76).
[303] BCSC Reasons para. 788 (AR II Tab 4 at 76).
[304] BCSC Reasons para. 790 (AR II Tab 4 at 76).
[305] BCSC Reasons para. 793 (AR II Tab 4 at 77-78).
[306] BCSC Reasons para. 790 (AR II Tab 4 at 76).

of the straight east west line drawn by the trial judge. He referred to one site outside of his Opinion Area 3 in northern Tachelach'ed as a "late fall or early winter deer hunting site",[307] and to oral evidence that Tsilhqot'in ancestors used to engage in spring hunting around a large lake located within the 3rd Opinion Area.[308]

206. At only one location near the northern boundary of Opinion Area 3, did the trial judge suggest that there may have been a dwelling house that dated back to as early as 1846. He recited second hand evidence that at the time of the great flu (1918-19) a Tsilhqot'in individual had observed that another Tsilhqot'in elder then in his nineties was living in a traditional wooden lodge (a niyah qungh) at Nu Natase?ex, and suggested that this oral history link indicated that the site had been occupied by Tsilhqot'in people at the time of sovereignty assertion.[309] All other evidence or residential occupation within Opinion Area 3 related either to 20th century houses,[310] or to pit houses and the footprints of niyah qungh of indeterminate age.[311]

207. Three sites associated with fishing were identified within Opinion Area 3,[312] but two of the sites were identified with a single family,[313] and the third site, which had been referenced on an 1864 map, was subsequently included in a Xeni Gwet'in fishing Reserve, and was thus excluded from the Claim Area.

208. Finally, the areas surrounding and including the mountains of Gweq'ez Dzelh and Xeni Dzelh were found by the trial judge to be Aboriginal title lands as part of Opinion Area 3 because they were tied together by a network of Tsilhqot'in trails that connected Xeni with the fishing

[307] ?Esqi Nintanisdzah (Child Got Lost). BCSC Reasons para. 799 (AR II Tab 4 at 80).
[308] Ts'uni?ad Biny (more than 15 kms in length). BCSC Reasons para. 815 (AR II Tab 4 at 84-85).
[309] BCSC Reasons para. 802 (AR II Tab 4 at 80).
[310] Captain George Town, Far Meadow, Ts'uni?ad Biny, Nu Natase?ex, and ?Elhgatish. BCSC Reasons paras. 806, 809, 817,801 and 821. (AR II Tab 4 at 82, 85, 80, 86).
[311] Natasewed Biny, Tsanlgen Biny, ?Elgatish, Ts'uni?ad Biny, Ts'u Talh?ad, BCSC Reasons para. 791,805, 815, 820, and 824 (AR II Tab 4 at 76-77, 81, 84-85, 86, 87).
[312] At Delgi Ch'osh, Ts'uni?ad Biny, and ?Elghatish. BCSC Reasons paras. 812, 816, and 820 (AR II Tab 4 at 84, 85, 86).
[313] Delgi Ch'osh and ?Elghatish, said to be utilized by the family of Captain George.

grounds on Ts'uni?ad Biny and on the Tsilhqox and with "areas where [the Tsilhqot'in] hunted, fished and gathered medicinal plants, root plants and berries".[314]

D. Fourth Opinion Area—Unnamed and Incomplete

209. The fourth Opinion Area also lacked a distinctive name, and could not even be called an area. The trial judge described it as follows:

> 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).[315]

210. This description makes no reference to either northern or eastern boundaries, and the location of the southern boundary of Opinion Area 4 is unclear. It is possible that the trial judge intended that the eastern boundary should coincide with the western boundaries of Opinion Areas 1 and 2, although he does not say so. However, in order to find a northern boundary, one has to assume that the fourth and sixth Opinion Areas were actually intended to be a single area.

211. The description of the southern boundary of Opinion Area 4 does not explain where the boundary begins on the east—at the south western corner of Xeni? —directly across from Ch'a Biny? —or somewhere else on the eastern shore of Tsilhqox Biny? Nor does it explain how the boundary is to be drawn between Ch'a Biny and Talhiqox Biny—is it a straight line, or does it follow geographical features? The western boundary is ascertainable for most of its distance only because it adopts a carefully drawn metes and bounds boundary established by the Provincial Government in 1980.[316] However it is unclear how far Opinion Area 4 is to extend northward in order to "include Gwedzin Biny". The Trapline boundary does not touch Gwedzin Biny, raising the questions of where the Trapline boundary is to be departed from, and how much land around the lake, if any, is to be included.

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[314] BCSC Reasons para. 798 (AR II Tab 4 at 79).
[315] BCSC Reasons para. 959 (AR II Tab 4 at 125-127).
[316] See Trial Exhibit 468-23-1980/01/10.002, pp. 3-4 (BCR Tab 5).

E. Opinion Area 5—Unnamed

212. The trial judge's description of Opinion Area 5 is limited to an eastern boundary:

> On the east from Xeni following the Dasiqox north to where it is joined by Elkin Creek.[317]

213. Although this description indicates only one boundary, it does connect two points already mentioned in the boundaries of Opinion Areas 2 and 3. As indicated above, however, the course of the boundaries of those two Opinion Areas is far from clear. The trial judge did not clearly identify any sites or land uses that he associated with Opinion Area 5.

F. Opinion Area 6—Unnamed and Incomplete

214. Opinion Area 6 would appear to contain only a northern boundary:

> 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

215. If this description was intended to be read together with that for Opinion Area 4 to form a single Opinion Area it is nevertheless deficient. It fails to identify where on Gwedzin Biny it is to commence. By extending to Nu Natase?ex on the Tsilhqox it clearly overlaps with Opinion Area 1, casting doubt on whether the eastern boundary of the combined Opinion Area 4 and 6 was intended to coincide with the western boundaries of Opinion Areas 1 and 2. Combined Opinion Area 4 and 6 would appear to include a significant territory outside of the Claim Area north of Naghatalhchoz Biny.

216. The trial judge identified 8 locations within Opinion Area 4/6 where pit houses or the footprints of old niyah qungh were to be found[318] but in only 3 of those locations did he suggest that the habitations in question had been occupied in 1846.[319]

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[317] BCSC Reasons para. 959 (AR II Tab 4 at 125-127).

[318] ?Edibiny, Naghatalhchoz Biny, Sa Nagwedijan, Tsi Ch'ed Diz?an, Gwedats'ish, Ch'a Biny, Talhiqox Biny, and Ch'ezqud. BCSC Reasons paras. 837, 844-5, 852, 855, 861-2, 865, 876-8, and 834 (AR II Tab 4 at 90-91, 92-93, 94, 95, 96-97, 97-98, 101-102, 90).

[319] Gwedats'ish, Talhiqox Biny, and Ch'ezqud. BCSC Reasons para. 859, 863, 875, an 834. (AR II Tab 4 at 96, 97, 100-101, 90).

217. The trial judge identified general lands around 3 lakes in Opinion Area4/6 that were used for hunting, but did not describe them as hunting grounds nor attempt to define them any more precisely.[320] On the other hand he described locations within the Western Trapline but outside of his Opinion Areas as "traditional Tsilhqot'in trapping and hunting grounds"[321] or "hunting and trapping grounds".[322]

218. Seven sites within Opinion Area 4/6 were identified as fishing sites,[323] and 3 areas within the Opinion Area were found to have been locations for gathering edible plants.[324] The presence of trails was cited as contributing to the finding of Aboriginal title at 2 locations. [325] Other factors mentioned were the existence of cache pits, [326] the construction of cabins,[327] the cutting of hay,[328] and the location of graves[329] and cremation sites.[330]

[320] Gwedzin Biny, Naghatalhchoz Biny, and Tahliqox Biny. BCSC Reasons paras. 832, 842, 847, and 880-881. (AR II Tab 4 at 89, 91-92, 93, 102-103).
[321] BCSC Reasons para. 881 (AR II Tab 4 at 102-103).
[322] BCSC Reasons para. 889 (AR II Tab 4 at 105).
[323] Gwedzin Biny Ch'ezqud, ?Edibiny, Naghatalhchoz Biny, Naghatalhchoz Biny, Gwedats'ish, Talhiqox Biny, and Tsimol Ch'ed. BCSC Reasons paras. 831-2, 834, 838, 842, 847, 864, 880, and 885. (AR II Tab 4 at 89, 90, 91, 91-92, 93, 97, 102, 103-104).
[324] Ch'ezqud, Naghatalhchoz Biny, and Tsimol Ch'ed. BCSC Reasons paras. 834, 842, and 884-5. (AR II Tab 4 at 90, 91-92, 103-104).
[325] Tsi gheh ne?eten and Talhiqox Biny. BCSC Reasons paras. 848, 873-5, and 880. (AR II Tab 4 at 93-94, 100-101).
[326] ?Edibiny. BCSC Reasons para. 837. (AR II Tab 4 at 90-91).
[327] At Gwedzin Biny, ?Edibiny, Tsi gheh ne?eten, and Ch'a Biny. BCSC Reasons paras. 832, 837, 848, 850, and 865 (AR II Tab 4 at 89, 90-91, 93-94, 97-98).
[328] At Ch'ezqud, BCSC Reasons para. 834 (AR II Tab 4 at 90).
[329] Gwedzin Biny, Ch'ez qud, Tsi Ch'ed Diz?an, and Ch'a Biny, BCSC Reasons paras. 832, 834, 854, and 866 (AR II Tab 4 at 89, 90, 95, 98).
[330] Ch'ezqud and Gweats'ish. BCSC Reasons paras. 835, 864 (AR II Tab 4 at 90, 97).

PART VI – TABLE OF AUTHORITIES

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FOREST ACT

CHAPTER 157

[Updated to August 3, 2012]

Contents

PART 1 – DEFINITIONS AND INTERPRETATION

Definitions and interpretation

1 (1) In this Act:

"allowable annual cut" means

(a) in respect of a tree farm licence area, community forest agreement area, first nations woodland licence area, woodlot licence area or timber supply area, the rate of timber harvesting determined for the area under section 8, as increased or reduced under this Act, and

(b) in respect of an agreement entered into under this Act specifying an allowable annual cut, the rate of timber harvesting specified in the agreement, as increased or reduced under this Act;

"allowable annual cut available" means the portion of the allowable annual cut in respect of a tree farm licence area that is accessible by the holder of the tree farm licence after taking the following into account in accordance with the regulations or in accordance with an agreement authorized under section 151 (2) (a.2):

(a) a reservation referred to in section 35 (1) (h) or (n);

(b) a deletion of Crown land from the tree farm licence area under section 39.1 of the Act respecting a reduction under paragraph (d) or a reservation under paragraph (a);

(c) except for the purposes of sections 69 and 70, a reduction under one or both of those sections;

(d) a reduction under section 3 (3) of the *Forestry Revitalization Act*;

"BC timber sales agreement" means

(a) a licence, or

(b) a permit

referred to in any of paragraphs (b) to (f.1) of section 109 (2);

"bioenergy" means energy derived from Crown timber;

"bioenergy supply contract" means an energy supply contract as defined in section 68 of the *Utilities Commission Act*

(a) under which bioenergy is sold to the British Columbia Hydro and Power Authority, and

(b) that is designated by the minister under section 13.2 (a) as a bioenergy supply contract;

"bonus bid" means a bid

(a) tendered in order to acquire the right to harvest timber under an agreement under this Act,

(b) calculated on a dollar value per cubic metre of competitive species and forest products harvested and measured in compliance with the agreement, and

(c) payable from time to time in accordance with the agreement;

"bonus offer" means a lump sum dollar value that is tendered in order to acquire the right to harvest timber under an agreement under this Act, irrespective of the

volume and type of competitive species and forest products harvested under the agreement;

"chief forester" means the chief forester appointed under the *Ministry of Forests and Range Act*;

"commercial operation date" means the date determined under a bioenergy supply contract as the commercial operation date;

"commissioner" means the person designated to be the commissioner under section 142.11 (1);

"community forest agreement area" means the area of land subject to a community forest agreement;

"Crown land" has the same meaning as in the *Land Act*, but does not include land owned by an agent of the government;

"Crown timber" means timber on Crown land, or timber reserved to the government;

"cultural heritage resource" means an object, a site or the location of a traditional societal practice that is of historical, cultural or archaeological significance to British Columbia, a community or an aboriginal people;

"cutting permit" means a cutting permit issued under an agreement entered into under this Act;

"district manager" means a district manager appointed for a forest district under the *Ministry of Forests and Range Act*;

"dwelling" means

(a) a structure that is occupied as a private residence, and

(b) if only part of a structure is occupied as a private residence, that part of the structure;

"eligible bioenergy application" means an application for a non-replaceable forest licence under section 13.1 that

(a) is made by an applicant

(i) who is the seller of bioenergy under a bioenergy supply contract, and

(ii) whom the minister or a person authorized by the minister considers to be qualified to perform the obligations specified under section 13.1 (2) (c),

(b) conforms to section 13.1 (2), and

(c) is not rejected under section 81 (3) or refused under section 81 (5);

"first nations woodland licence area" means the area of land subject to a first nations woodland licence;

"Forest Appeals Commission" or **"commission"** means the Forest Appeals Commission continued under the *Forest Practices Code of British Columbia Act*;

"forest officer" means a person employed in the ministry of the minister responsible for the administration of this Act who is designated by name or title to be a forest officer by the minister;

"forest region" means a forest region established by regulation;

"forest service road" means a road on Crown land that

(a) is declared a forest service road under section 115 (5),

(b) is constructed or maintained by the minister under section 121,

(c) was a forest service road under this definition as it was immediately before the coming into force of this paragraph, or

(d) meets prescribed requirements;

"former Act" means the *Ministry of Forests Act* repealed by the *Forest Act*, S.B.C. 1978, c. 23;

"government" means the government of British Columbia;

"licence to cut" means

(a) a master licence to cut,

(b) an occupant licence to cut,

(c) a forestry licence to cut, and

(d) a fibre supply licence to cut;

"major licence" means

(a) a timber sale licence that was issued under section 23 (1) (a) before its repeal,

(b) a forest licence,

(c) a timber licence,

(d) a tree farm licence, and

(e) a forestry licence to cut that

(i) specifies that it is a major licence,

(ii) is issued to satisfy the obligations of the government under a pulpwood agreement, or

(iii) is entered into under section 47.3 (1) (a);

"merchantable timber", for the purposes of sections 28, 30 (c) and 74, means timber that

(a) on January 1, 1975 were older than 75 years, and

(b) are on an area of Crown land in quantities determined by the minister to be sufficient to be commercially valuable at the time when a timber cruise submitted under section 74 is made;

"objectives set by government" means objectives set by government as defined in section 1 (1) of the *Forest and Range Practices Act*;

"operational plan" means an operational plan under the *Forest Practices Code of British Columbia Act*, before its repeal, or the *Forest and Range Practices Act*;

"Peace River Block" means that rectangular block of land in the Peace River Land District of British Columbia with corners having these geographical values:
northeast corner, latitude 56º40′57.95″, longitude 119º59′59.25″;
southeast corner, latitude 55º38′09.04″, longitude 119º59′59.76″;
southwest corner, latitude 55º37′15.75″, longitude 121º56′02.45″;
northwest corner, latitude 56º40′01.66″, longitude 121º59′13.18″;

"private land" means land that is not Crown land;

"private tenure" means a timber licence, or private land, in a tree farm licence area;

"professional forester" means a professional forester as defined in the *Foresters Act*;

"Provincial forest" means forest land designated under section 5;

"pulpwood agreement" means a pulpwood agreement entered into before April 1, 2003 under Part 3, Division 7;

"pulpwood area" means an area designated under section 40 before its repeal;

"regional manager" means a regional manager appointed for a forest region under the *Ministry of Forests and Range Act*;

"revenue minister" means the Minister of Finance;

"road use permit" means a road use permit granted under section 117;

"salvaged logs" means salvaged logs as defined by regulation;

"special forest products" means forest products designated by regulation as special forest products;

"special use permit" means a special use permit referred to in section 2 of the *Forest Practices Code of British Columbia Act*;

"timber" means trees, whether standing, fallen, living, dead, limbed, bucked or peeled;

"timber processing facility" means a facility that processes timber or wood residue or both;

"timber sales manager" means

(a) [Repealed 2006-13-1.]

(b) a timber sales manager appointed under the *Ministry of Forests and Range Act* for a BC timber sales business area;

"timber supply area" means land designated as a timber supply area under section 7;

"tree farm licence area" means the area of land subject to a tree farm licence;

"wood residue" means wood chips, slabs, edgings, sawdust, shavings and hog fuel;

"woodlot licence area" means the area of land subject to a woodlot licence.

(2) A reference in this Act to the minister or the minister's designate, or the minister or a person authorized by the minister, or any similar reference is not to be construed as meaning that a reference to the minister alone requires the minister to deal with the matter personally, and a reference to the minister alone is to be construed as a reference to the minister or any appropriate official of his or her ministry.

(3) Despite the *Expropriation Act*, that Act does not apply, except as expressly provided in this Act, in respect of a taking, deletion or reduction, under this Act, of any right or interest held by a person under this Act or the former Act.

(4) For the avoidance of doubt it is declared that the reference in subsection (3) to a taking, deletion or reduction includes a taking, deletion and reduction in respect of which notice was given before that subsection came into force.

(5) For the purposes of this Act, unless the context otherwise indicates, a reference to a licence, agreement or permit listed in section 12 is a reference to that licence, agreement or permit as entered into or granted under this Act.

Delegation

1.1 (1) Subject to a regulation made under section 151 (2) (b.1), the minister, in writing, may

(a) delegate a power or duty of the minister under this Act, including a quasi-judicial power or duty, to

(i) a person employed in a ministry,

(ii) a class of persons employed in a ministry, or

(iii) an agent of the Crown,

(b) provide directions that are binding on the delegate respecting the exercise of the power or the performance of the duty, and

(c) vary or revoke a delegation or direction.

(2) In respect of a power or duty delegated under this section, this Act and the regulations apply to the delegate as they apply to the minister.

(3) A delegate, if not prohibited by a direction of the minister under subsection (1) (b), may subdelegate the power or duty to

(a) a person employed in a ministry,

(b) a class of persons employed in a ministry, or

(c) an agent of the Crown.

PART 2 – CLASSIFICATION AND MANAGEMENT OF FORESTS AND FOREST LAND AND REGULATION OF CUTTING RATES

2 to **4** [Repealed 2002-45-2.]

Provincial forests

5 (1) The Lieutenant Governor in Council may designate any forest land as a Provincial forest and may order that Provincial forests be consolidated or divided.

(2) Notice of an order made under subsection (1) must be published in the Gazette.

(3) All Crown land in a tree farm licence area is a Provincial forest and, if an amendment is made to the boundaries of a tree farm licence area, the boundaries of the Provincial forest are deemed to be amended accordingly.

(4) Crown land in a Provincial forest must not be disposed of under the *Taxation (Rural Area) Act* or, subject to subsection (5), under the *Land Act*.

(5) Crown land in a Provincial forest may be disposed of under the *Land Act* for

(a) an easement or right of way, or

(b) any other purpose that the chief forester considers is compatible with the uses described in section 2 (1) of the *Forest Practices Code of British Columbia Act* or that is permitted by regulations made under that Act,

but, except for the purposes of a highway, transmission line, or pipeline right of way, a disposition must not be made of the fee simple interest in the land.

(6) If the Lieutenant Governor in Council considers it will be to the social and economic benefit of British Columbia, he or she may cancel a Provincial forest, except for land in a tree farm licence area.

CANADA

CONSOLIDATION

CODIFICATION

Indian Act

Loi sur les Indiens

R.S.C., 1985, c. I-5

L.R.C. (1985), ch. I-5

Current to June 25, 2013

À jour au 25 juin 2013

Last amended on April 1, 2013

Dernière modification le 1 avril 2013

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to June 25, 2013. The last amendments came into force on April 1, 2013. Any amendments that were not in force as of June 25, 2013 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 25 juin 2013. Les dernières modifications sont entrées en vigueur le 1 avril 2013. Toutes modifications qui n'étaient pas en vigueur au 25 juin 2013 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

An Act respecting Indians

Loi concernant les Indiens

SHORT TITLE

Short title

1. This Act may be cited as the *Indian Act*.

R.S., c. I-6, s. 1.

TITRE ABRÉGÉ

Titre abrégé

1. *Loi sur les Indiens*.

S.R., ch. I-6, art. 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;

"Band List" « *liste de bande* »

"Band List" means a list of persons that is maintained under section 8 by a band or in the Department;

"child" « *enfant* »

"child" includes a legally adopted child and a child adopted in accordance with Indian custom;

"common-law partner" « *conjoint de fait* »

"common-law partner", in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship, having so cohabited for a period of at least one year;

"council of the band" « *conseil de la bande* »

"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;

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.

« conjoint de fait » "*common-law partner*"

« conjoint de fait » La personne qui vit avec la personne en cause dans une relation conjugale depuis au moins un an.

« conseil de la bande » "*council of the band*"

« 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

INTERPRETATION ACT

CHAPTER 238

[Updated to August 3, 2012]

Contents

Use of forms and words

28 (1) If a form is prescribed under an enactment, deviations from it not affecting the substance or calculated to mislead, do not invalidate the form used.

(2) Gender specific terms include both genders and include corporations.

(3) In an enactment words in the singular include the plural, and words in the plural include the singular.

(4) If a word or expression is defined in an enactment, other parts of speech and grammatical forms of the same word or expression have corresponding meanings.

Expressions defined

29 In an enactment:

"acquire" means to obtain by any method and includes accept, receive, purchase, be vested with, lease, take possession, control or occupation of, and agree to do any of those things, but does not include expropriate;

"affidavit" or **"oath"** includes an affirmation, a statutory declaration, or a solemn declaration made under the *Evidence Act*, or under the *Canada Evidence Act*; and the word "swear" includes solemnly declare or affirm;

"bank" or **"chartered bank"** means a bank to which the *Bank Act* (Canada) applies;

"barrister" or **"solicitor"** or **"barrister and solicitor"** means a practising lawyer as defined in section 1 (1) of the *Legal Profession Act*;

"British Columbia land surveyor" means a person entitled to practise as a land surveyor under the *Land Surveyors Act*;

["calendar year", see *"year"]*

["Canada", see *"government of Canada"]*

"Cascade Mountains" means the line described in the Schedule to this Act;

["chartered bank", see *"bank"]*

["civil engineer", see *"professional engineer"]*

"commencement", with reference to an enactment, means the date on which the enactment comes into force;

"commercial paper" includes a bill of exchange, cheque, promissory note, negotiable instrument, conditional sale agreement, lien note, hire purchase agreement, chattel mortgage, bill of lading, bill of sale, warehouse receipt, guarantee, instrument of assignment, things in action and any document of title that passes ownership or possession and on which credit can be raised;

"consolidated revenue fund", **"consolidated revenue"** or **"consolidated revenue fund of the Province"** means the consolidated revenue fund of British Columbia;

"corporation" means an incorporated association, company, society, municipality or other incorporated body, where and however incorporated, and includes a corporation sole other than Her Majesty or the Lieutenant Governor;

"correctional centre" means a correctional centre under the *Correction Act*;

"county" means a county constituted and defined in the *County Boundary Act*;

"Court of Appeal" means the court continued by the *Court of Appeal Act*;

"credit union" means a credit union or extraprovincial credit union authorized to carry on business under the *Financial Institutions Act*;

"*Criminal Code*" means the *Criminal Code* (Canada);

["Crown, the", see *"Her Majesty"]*

"deliver", with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business;

"Deputy Provincial Secretary" includes the Deputy Provincial Secretary and Deputy Minister of Government Services;

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of those things;

"electoral district" means an electoral district referred to in section 18 of the *Constitution Act*;

"Executive Council" means the Executive Council appointed under the *Constitution Act*;

"Gazette" means The British Columbia Gazette published by the Queen's Printer of British Columbia;

"government" or **"government of British Columbia"** means Her Majesty in right of British Columbia;

"government agent" means a person appointed under the *Public Service Act* as a government agent;

"government of Canada" or **"Canada"** means Her Majesty in right of Canada or Canada, as the context requires;

"Governor", **"Governor of Canada"** or **"Governor General"** means the Governor General of Canada and includes the Administrator of Canada;

"Governor in Council" or **"Governor General in Council"** means the Governor General acting by and with the advice of, or by and with the advice and consent of, or in conjunction with, the Queen's Privy Council for Canada;

"Great Seal" means the Great Seal of the Province;

"herein" used in a section or part of an enactment must be construed as referring to the whole enactment and not to that section or part only;

LAND ACT

CHAPTER 245

[Updated to August 3, 2012]

Contents

Definitions

1 In this Act:

"applicant" means a person applying for a disposition of Crown land under this Act or a former or other Act respecting Crown land;

"boundary by agreement" means a conventional boundary located by agreement between the government and the adjoining owner;

"commissioner" means the person appointed under the *Public Service Act* as commissioner in charge of any land recording district, and includes the minister, deputy minister, an assistant deputy minister and a person authorized by the minister to act for the minister in the portion of British Columbia for which he or she may be appointed to discharge the duties of a commissioner under this Act;

"construction purpose" includes, without limitation,

(a) the building or maintenance of a road, railway bed, runway, berm, dam, impoundment, breakwater, dike, levee, foundation, rock wall and other similar thing, and

(b) the providing of fill and riprap;

"conventional boundary" means a boundary consisting of a straight line or a series of straight lines of fixed direction and length conforming as nearly as possible to the natural boundary, but eliminating minor sinuosities;

"corporation" means a corporation incorporated or registered in British Columbia;

"Crown grant" means an instrument in writing conveying Crown land in fee simple;

"Crown land", subject to section 1.1, means land, whether or not it is covered by water, or an interest in land, vested in the government;

"director" means a person employed under the *Public Service Act* and designated by the minister as a director for the purposes of this Act;

"disposition" means the act of disposal or an instrument by which the act of disposal is effected or evidenced, or by which an interest in Crown land is disposed of or effected, or by which the government divests itself of or creates an interest in Crown land;

"fossil" means fossil as defined by regulation of the Lieutenant Governor in Council;

"interest" in reference to land includes a right or estate in that land;

"land district" means a portion of British Columbia that is a land district under section 2;

"land recording district" means a portion of British Columbia that is a land recording district under section 3;

"natural boundary" means the visible high water mark of any lake, river, stream or other body of water where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark on the soil of the bed of the body of water a character distinct from that of its banks, in vegetation, as well as in the nature of the soil itself;

"public road" means a portion of Crown land designated or indicated as a road on a plan of survey made under this Act, whether or not a road is constructed, and includes a road allowance or walkway allowance established under section 79;

"registrar" means the registrar under the *Land Title Act*;

"registry", except in Part 1.1, means the Crown land registry continued under section 7;

"reserved land" means Crown land that has been withdrawn from disposition under this or any other Act;

"right of way" means a statutory right of way as defined in the *Land Title Act*;

"surveyed land" means land the survey of which is accepted and confirmed by the signature of the Surveyor General on a plan made under this Act;

"Surveyor General" means the Surveyor General of British Columbia.

Exclusions from Crown land definition

1.1 A reference in a provision of this Act to Crown land does not include land referred to in section 6 (1) of the *Public Agency Accommodation Act* unless that provision of this Act is expressly made applicable to that land under section 6 (2) or (3) of the *Public Agency Accommodation Act*.

PART 1 – LAND DISTRICTS AND LAND RECORDING DISTRICTS

Land districts

2 The Lieutenant Governor in Council may, by regulation,

(a) constitute a part of British Columbia as a land district, and

(b) amend or cancel a land district whether constituted under this or a former Act.

Land recording districts

3 The Lieutenant Governor in Council may, by regulation,

(a) constitute a part of British Columbia as a land recording district, and

(b) amend or cancel a land recording district whether constituted under this or a former Act.

Administration of Crown land

4 The minister has the administration of all Crown land except land specifically under the administration of another minister, branch or agency of government.

Geographical names

5 The minister is responsible for geographical names in British Columbia.

Base mapping and land related information systems

6 (1) The minister is responsible for and may undertake, commission, coordinate and set standards for base mapping and land related information systems in British Columbia and for related remote sensing and survey control functions.

(2) The minister may distribute to any person a copy of any map, air photo or land related information made or obtained under subsection (1).

(3) The minister may make regulations prescribing fees for the purposes of subsection (2) of this section, section 7.1 (4) of the *Park Act* and section 3 (4) of the *Protected Areas of British Columbia Act*.

Crown land registry

7 (1) The Crown land registry is continued to record all lands administered by the government, and to record the acquisition and disposition of those lands, for the purpose of maintaining an inventory of Crown land.

(2) The minister is responsible for the security and maintenance of the registry.

(3) The registry is to be open to any person during regular business hours for the examination and inspection of the records of the registry.

(4) Every ministry of the government must record in the registry all Crown lands under its administration, and the acquisition in fee simple and disposition of those lands, in a manner acceptable to the minister.

(4.1) If the final agreement of a treaty first nation requires that survey plans of treaty lands be filed in the registry, the Surveyor General must file a copy of a final plan to which the requirement applies in the registry, whether or not the treaty lands include or consist of former federal Crown land.

(5) Subsection (4) does not apply to the following:

(a) a public road or highway established under this Act, the *Highway Act*, the *Transportation Act*, the *Community Charter* or the *Local Government Act*;

(b) a forest service road established under the *Forest Act*;

(c) an agreement to harvest Crown timber under the *Forest Act*;

(d) a grazing or hay cutting licence or permit under the *Range Act*;

(e) lands dedicated, transferred or vested in the government under section 107 (1) or 108 (2) of the *Land Title Act*.

(6) No action may be brought by any person against the government for loss or damage caused by reliance on the records of the registry by that person for any reason or purpose including, without limitation, reliance for the purpose of establishing priorities of interest or reliance on the completeness of the records.

PART 1.1 – INTEGRATED LAND AND RESOURCE REGISTRY

Definitions

7.1 In this Part:

"integrated registry" means the Integrated Land and Resource Registry referred to in section 7.2 (1);

"tenure" means

(a) any interest in Crown land that is granted or otherwise established under a prescribed instrument, or

(b) a prescribed designation or other status that, under an enactment, is given to, conferred on, or made or otherwise established in relation to Crown land;

"tenure authority", in relation to a tenure, means a prescribed person.

Integrated Land and Resource Registry

7.2 (1) The minister must maintain the electronic database known as the Integrated Land and Resource Registry established by the ministry of the minister.

(2) A tenure authority must submit prescribed information in respect of a tenure to the integrated registry

(a) in the form and manner and within the time period required by the minister, and

(b) in accordance with the standards established by the minister.

(3) The minister may include in the integrated registry information other than information submitted under subsection (2) to the integrated registry.

(4) For the purpose of facilitating the identification of information in the integrated registry, the minister may

(a) assign a unique number to identify information submitted to or included in the integrated registry, and

(b) include in a record of information in the integrated registry the unique number assigned to that information.

(5) The minister may delete or correct information in the integrated registry.

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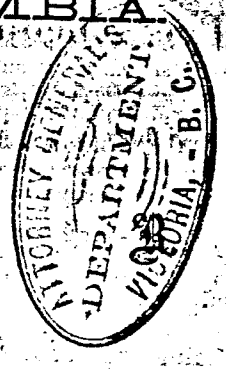
BRITISH COLUMBIA.

V.



PROCLAMATION.

By His Excellency JAMES DOUGLAS, Companion of the Most Honourable Order of the Bath, Governor and Commander-in-Chief of British Columbia.

WHEREAS, it is expedient to publish for general information, the method to be pursued with respect to the alienation and possession of agricultural lands, and of lands proposed for the sites of towns in British Columbia, and with reference also to the places for levying shipping and customs duties, and for establishing a capital and port of entry in the said Colony.

Now, therefore I, JAMES DOUGLAS, Governor of the said Colony, do proclaim and declare as follows, viz:

1.—All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee.

2.—The price of lands, not being intended for the sites of Towns, and not being reputed to be Mineral lands, shall be ten shillings per acre, payable one half in cash at the time of the sale, and the other half at the end of two years from such sale. Provided, that under special circumstances some other price, or some other terms of payment may from time to time be specially announced for particular localities.

3.—It shall also be competent to the Executive at any time to reserve such portions of the unoccupied Crown Lands, and for such purposes as the Executive shall deem advisable.

4.—Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, as soon as the same shall have been surveyed and made ready for sale. Due notice will be given of all such sales. Notice at the same time will be given of the upset price and terms of payment when they vary from those above stated, and also of the rights reserved (if any) for public convenience.

5.—All lands which shall remain unsold at any such auction may be sold by private contract at the upset price and on the terms and conditions herein mentioned, on application to the Chief Commissioner of Lands and Works.

6.—Unless otherwise specially notified at the time of sale, all such sales of Crown Land shall be subject to such public rights of way as may at any time after such sale, and to such private rights of way, and of leading or using water for animals, and for mining and engineering purposes, as may at the time of such sale be specified by the Chief Commissioner of Lands and Works.

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7.—Unless otherwise specially announced at the time of sale, the conveyance of the land shall include all trees and all mines and minerals within and under the same, except mines of Gold and Silver.

8.—When any "Ditch Privilege" shall be granted, there shall be included (unless excluded by express words) the right to lop, dress, or fell any trees standing on unoccupied Crown Lands which, in the opinion of the Proprietors of the Ditch, might by their accidental fall or otherwise, endanger the safety of the ditch or any part thereof.

GOLD CLAIMS.

9.—Until further notice, Gold Claims and Mines shall continue to be worked subject to the existing regulations.

CAPITAL OF BRITISH COLUMBIA.

10.—It is intended with all dispatch to lay out and settle the site of a city to be the Capital of British Columbia, on the right or North bank of Fraser River.

11.—Plans of the City are intended to be prepared and published in the month of March next. Three-fourths of the whole number of lots, excluding the public reserves, will be submitted in lots to public competition, by auction, in the month of April. One-fourth of the whole number of lots, excluding the public reserves, will be reserved in blocks for purchasers in the United Kingdom, Her Majesty's Colonies in North America and elsewhere. All of such last-mentioned lots which may not be disposed of in the United Kingdom, or Her Majesty's Colonies, other than British Columbia, will be submitted to public competition in this Colony, of which due notice will be given.

12.—As the Government is desirous of concentrating the commercial interests of the Colony in and around the Capital, purchasers of town lots in the said proposed Capital who may be owners of town lots in Langley, under the late sale on the 25th November last, on which the whole amount of purchase money has been paid to the Government, will if so disposed, be allowed to surrender the lots in Langley, so purchased, and to have the price so paid to the Government allowed them as payment in full for a lot or lots purchased by them in the said proposed Capital of an equal or less price in the aggregate, and as payment in part for lots in the said proposed Capital of a greater price in the aggregate. Every such surrender must be executed and delivered in writing, addressed to the Chief Commissioner of Lands and Works in British Columbia, at Victoria, Vancouver's Island, one week, at least, previous to the day appointed for the intended sale.

13.—The proposed Capital will be declared to be a Port of Entry so soon as the neccessary arrangements shall have been provided, which will be done with all convenient dispatch. Custom House officers will then be stationed there, and vessels will be able to proceed direct to Fraser River without touching at Victoria, or may clear at Victoria, at their option.

14.—The whole of the river frontage will be laid out in a continuous road, the edge of which it is contemplated, ultimately, to convert into a public quay. No quay will, however, be at present constructed at the public expense, nor will the absolute property of the soil along the edge of the water be now alienated by the Crown. But the right to make and maintain quays of convenient sizes, and to demand certain tolls and rates for the use thereof, will be granted to private individuals for the space of seven years; such rights will be disposed of at public auction at or immediately after the sale of town lots, to the bidder of the highest annual rent. No restrictions will be placed on the lessee, as to the form or nature of the quays, except such as shall be necessary to protect the public safety and convenience.

Issued under the Public Seal of the Colony of British Columbia, at Victoria, Vancouver's Island, this fourteenth day of February, one thousand eight hundred and fifty-nine, in the twenty-second year of Her Majesty's Reign, by me,

JAMES DOUGLAS. [L.S]

By His Excellency's command,
WILLIAM A. G. YOUNG,
Acting Colonial Secretary.

GOD SAVE THE QUEEN.

BRITISH COLUMBIA.

V. R.

No. 27. An Ordinance for regulating the acquisition of land in British Columbia.

[11th April, 1865.]

Preamble.

WHEREAS, it is expedient to amend and consolidate the laws affecting Lands in British Columbia, and for that purpose to repeal, alter, and re-enact certain portions of the existing laws affecting the same;

Be it enacted by the Governor of British Columbia, by and with the advice and consent of the Legislative Council thereof, as follows:

Repeals certain Acts.

1. The Proclamation passed on the 14th February, 1859, except the portion thereof after clause 9, which refers to the Capital of British Columbia; the Mining District Act, 1863; and the Pre-emption Consolidation Act, 1861, are hereby repealed.

Saving of existing rights.

2. Such repeal shall not be construed to prejudice or affect any rights actually existing to or in respect of any land in this Colony at the date of this Ordinance, or to revive any provisions of any Acts or Proclamations heretofore repealed.

Crown Lands.

3. All the lands in British Columbia, and all the mines and minerals therein, not otherwise lawfully appropriated belong to the Crown in fee.

Upset price of land 4s. 2d. per acre.

4. The upset price of surveyed lands not being reserved for the sites of towns or the suburbs thereof, and not being reputed to be mineral lands, shall be four shillings and two pence per acre.

Reserves.

5. The Governor shall at any time, and for such purposes as he may deem advisable, reserve any lands that may not have been either sold or legally pre-empted.

All land to be offered for sale at public auction.

6. Except as aforesaid, all the land in British Columbia will be exposed in lots for sale, by public competition, at the upset price above mentioned, after the same shall have been surveyed and made ready for sale. Due notice shall be given of all such sales; notice at the same time shall be given of the upset price and terms of payment when they vary from those above stated, and also of the rights specially reserved (if any) for public convenience.

Land unsold at auction may be purchased by private sale.

7. All lands which shall remain unsold at any such auction may be sold by private contract at the upset price and on the terms and conditions herein mentioned, on application to the Chief Commissioner of Lands and Works and Surveyor General, or other person for the time being duly authorized in writing by the Governor in that behalf.

Saves public rights.

8. Unless otherwise specially notified at the time of sale, all Crown Lands sold shall be subject to such public rights of way as may at any time after such sale be specified by the Chief Commis-