# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *William v. British Columbia,*
2012 BCCA 285

Date: 20120627
No.: CA035617; CA035618; CA035620

Docket: CA035617

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**

Respondent
(Plaintiff)

And

**Her Majesty the Queen in Right of the Province of British Columbia and the Regional Manager of the Cariboo Forest Region**

Appellants
(Defendants)

And

**The Attorney General of Canada**

Respondent
(Defendant)

And

**B.C. Wildlife Federation and B.C. Seafood Alliance, Treaty 8 First Nations, Chief Wilson and Chief Jules, First Nations Summit and Te'mexw Treaty Association**

Intervenors

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Between:

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Appellant
(Plaintiff)

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(Defendants)

And

**B.C. Wildlife Federation and B.C. Seafood Alliance, Chief Wilson and Chief Jules, First Nations Summit and Te'mexw Treaty Association**

Intervenors

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe
The Honourable Mr. Justice Groberman

On Appeal from the Supreme Court of British Columbia, November 20, 2007
(*Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700,
Victoria Registry No. 90-0913)

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|---|---|
| Counsel for the Plaintiffs: | D.M. Rosenberg, Q.C.<br>P.S. Rosenberg<br>J.C. Nelson<br>E.J. Woodward, Q.C.<br>P.M. Hutchings |
| Counsel for the British Columbia Defendants: | P.G. Foy, Q.C.<br>K.J. Tyler |
| Counsel for the Attorney General of Canada: | B.A. McLaughlin<br>J. Chow |
| Counsel for the B.C. Wildlife Federation and B.C. Seafood Alliance: | J.K. Lowes |
| Counsel for Treaty 8 First Nations: | C.G. Devlin<br>J.W. Gailus<br>T.H. Thielmann |
| Counsel for Chief Wilson and Chief Jules: | M.L. Mandell, QC<br>A.A. Walkem<br>C.Y. Sharvit |
| Counsel for the First Nations Summit: | A.C. Pape<br>J. Teillet<br>R.B. Salter<br>J. Copeland<br>M.A. Louie |
| Counsel for Te'mexw Treaty Association : | R.J.M. Janes<br>K. Brooks |
| Place and Date of Hearing: | Vancouver, British Columbia<br>November 15-19 and 22, 2010 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 27, 2012 |

**Written Reasons by:**
The Honourable Mr. Justice Groberman

**Concurred in by:**
The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe

**Reasons for Judgment of the Honourable Mr. Justice Groberman:**

[1] These appeals concern the Aboriginal rights, including Aboriginal title, of the Xeni Gwet'in and the Tsilhqot'in First Nation in an area comprising approximately 438,000 ha. (4,380 $km^2$) in the Chilcotin region of the west central interior of British Columbia.

## I. The Plaintiff and the Claim Area

[2] Roger William, the plaintiff, is the former chief of the Xeni Gwet'in First Nations Government (formerly known as the Nemiah Valley Indian Band), a band recognized under the *Indian Act*, R.S.C. 1985, c. I-5. The Band has approximately 400 members, about half of whom live in the area that is the subject of this litigation. Of that number, almost all live on reserves.

[3] The Xeni Gwet'in is part of the Tsilhqot'in Nation. The Nation is made up of indigenous people who share a common culture and history and who speak the same proto-Athapaskan language (Tsilhqot'in). In addition to the Xeni Gwet'in, there are five other Tsilhqot'in bands: the Tl'etinqox-t'in Government Office (formerly the Anaham Band), the ?Esdilagh First Nation (formerly the Alexandria Band), the Stone Indian Band (also known as the Yunesit'in), the Alexis Creek Indian Band (also known as the Tsi Del Del or Redstone), and the Toosey Indian Band (also known as the Tl'esqox). In addition, some members of the Ulkatcho First Nation are Tsilhqot'in, though the majority of that band are Dakelh (Carrier). There are approximately 3,000 Tsilhqot'in people in total.

[4] The Tsilhqot'in consider their traditional territory to include a vast tract of the west central interior of British Columbia extending west from the portion of the Fraser River lying between Lillooet and Quesnel across the Chilcotin plateau to the Coast Mountain Range. The land is regarded by the Tsilhqot'in as belonging to the entire Nation. In the modern political structure of the Tsilhqot'in Nation, the Xeni Gwet'in are the caretakers of a portion of the territory lying in the southwest corner of the traditional territory, including the land that is in issue in this litigation.

[5] As much of the evidence referred to various landmarks by their Tsilhqot'in descriptions, and as the trial judge used those names in his reasons, I will, for the most part, follow that practice, providing the common name for the landmark, as well, when it is first mentioned.

[6] This litigation concerns Aboriginal title and rights in two areas (together, the "Claim Area"), described as Tachelach'ed (the Brittany Triangle) and the "Trapline Territory", excluding those parts of the areas that are currently Indian reserves. The Claim Area comprises only about five percent of what the Tsilhqot'in regard as their traditional territory.

[7] Tachelach'ed is a roughly triangular tract of land comprising 141,769 ha. It is bounded on the east by the Dasiqox (Taseko River) and on the west by the Tsilhqox (Chilko River) and the eastern shore of Tsilhqox Biny (Chilko Lake). The southern boundary of Tachelach'ed runs along the Nemiah Valley Road from the point where it crosses the Dasiqox at Davidson Bridge west to Xeni Biny (Konni Lake), then along the southern shore of Xeni Biny to Xeni Yeqox (Nemiah Creek), and along Xeni Yeqox to the point where it flows into Tsilhqox Biny.

[8] The Trapline Territory is defined as the area within Trapline Licence #0504T003 issued by British Columbia to the Xeni Gwet'in. It consists of two discontiguous tracts of land. The western portion of the Trapline Territory borders upon (and, to some extent, overlaps) Tachelach'ed, extending to the south and west of it, encompassing lands that surround Tsilhqox Biny. The smaller eastern portion of the Trapline Territory includes lands on the east side of nearby Dasiqox Biny (Taseko Lake). Maps 2 and 3 in Appendix A to the trial judge's reasons show the boundaries of Tachelach'ed and of the Trapline Territory.

[9] The Claim Area is located in a remote part of the Chilcotin and is mostly made up of undeveloped land. Ts'il?os (sometimes spelled "Ts'il-os") Provincial Park covers 233,000 ha. (39%) of the Claim Area. The smaller Nuntsi Provincial Park covers a further 20,570 ha. (3%) of the Claim Area.

## II. Background to the Litigation

[10] This litigation was precipitated by proposed forestry activities in both Tachelach'ed and the Trapline Territory. Both areas are located in the Williams Lake Timber Supply Area within the Cariboo Forest Region.

[11] In 1983, the provincial Crown granted Carrier Lumber Ltd. a forest licence giving it rights to conduct logging activities within the Trapline Territory. The granting of a forest licence did not, itself, give Carrier Lumber a right to remove specific timber, but did assign rights to the company in accordance with the provisions of the *Forest Act* (now R.S.B.C. 1996, c. 157). In 1989, Carrier Lumber submitted a Forest Development Plan that proposed logging within the Trapline Territory. The Crown approved the plan and granted the company a cutting permit in respect of cut blocks in the Trapline Territory.

[12] The granting of cutting permits infuriated many members of the Xeni Gwet'in. As the trial judge found at para. 25:

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

[13] In response to the proposed logging, the Xeni Gwet'in issued a declaration on August 23, 1989 covering an area that included the Claim Area. The declaration included the following provisions:

a) There shall be no commercial logging. Only local cutting of trees for our own needs i.e., firewood, housing, fencing, native uses, etc.

b) There shall be no mining or mining explorations.

c) There shall be no commercial road building

d) All-terrain vehicles and skidoos shall only be permitted for trapping purposes.

e) There shall be no flooding or dam construction on Chilko, Taseko, and Tatlayoko lakes.

f) This is the spiritual and economic homeland of our people. We will continue in perpetuity:

i. To have and exercise our traditional rights of hunting, fishing, trapping, gathering, and natural resources.

ii. To carry on our traditional ranching way of life.

iii. To practice our traditional native medicine, religion, sacred, and spiritual ways.

g) That we are prepared to share our Nemiah Aboriginal Wilderness Preserve with non-natives in the following ways:

i. With our permission visitors may come and view and photograph our beautiful land.

ii. We will issue permits, subject to our conservation rules, for hunting and fishing within our Preserve.

iii. The respectful use of our Preserve by canoeists, hikers, light campers, and other visitors is encouraged, subject to our system of permits.

h) We are prepared to enforce and defend our Aboriginal rights in any way we are able.

[14] In December 1989, the Nemiah Valley Indian Band (as the Xeni Gwet'in First Nations Government was then known) commenced an action to stop the threat of logging within the Trapline Territory. That litigation was discontinued and replaced by another action (the "Trapline Territory Action") a few months later. In that action, the Band claimed Aboriginal trapping rights and sought to enjoin logging within the Trapline Territory.

[15] The immediate threat of logging in the Trapline Territory was resolved through consent orders in the Trapline Territory Action. The orders prohibited logging in the Trapline Territory (and activities in preparation for logging) pending the trial of the action.

[16] After the injunction was granted, forest companies turned their attention to the possibility of logging within Tachelach'ed. In order to access the area, they needed to upgrade a bridge across the Tsilhqox north of Tsilhqox Biny at a place known as "Henry's Crossing".

[17] On May 7, 1992, members of the Tsilhqot'in Nation established a blockade to prevent work on the bridge at Henry's Crossing. This led to a promise by the then-

premier of the province that there would be no further logging without the consent of the Xeni Gwet'in.

[18] In 1994, Ts'il?os Provincial Park was established over a large part of the Claim Area. While the Ministry of Forests and the Xeni Gwet'in continued to engage in discussions concerning logging elsewhere in Tachelach'ed, the talks reached an impasse. The main sticking point was control of forestry activities. The Xeni Gwet'in wished to have a right of first refusal on any logging that took place, while Ministry officials considered that they did not have jurisdiction to grant such a right.

[19] On June 25, 1998, the Band amended the claim in the Trapline Territory Action to include claims for Aboriginal title on behalf of the Tsilhqot'in Nation, damages for infringement of Aboriginal rights and title, compensation for breach of fiduciary duty, declarations concerning the issuance and use of certain forest licences, and injunctions restraining the provincial Crown from issuing cutting permits.

[20] On December 18, 1998, in response to proposed logging in Tachelach'ed, the Band commenced a separate action against the provincial Crown and others, seeking declarations similar to those sought in the Trapline Territory Action.

[21] In November 1999, Vickers J., sitting as a case management judge, made an order substituting the current plaintiff for the Band in both actions.

[22] In 2000, the Attorney General of Canada was added as a defendant in both actions. On November 27, 2001, the Supreme Court of British Columbia made an advance costs order requiring Canada and British Columbia to pay the plaintiff's costs of the litigation in both actions on an interim basis and in any event of the cause (2001 BCSC 1641). This Court dismissed an appeal from that order (2002 BCCA 434). The Supreme Court of Canada granted leave to appeal ([2002] S.C.C.A. No. 295), but remanded the case back to the trial court to be dealt with in accordance with its judgment in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371. The trial judge, on reconsidering

the matter, affirmed his original order (2004 BCSC 610). The costs order has ensured that the plaintiff has had the necessary resources to advance this difficult and expensive litigation.

[23] The two actions were consolidated into the present proceeding by consent. There were several amendments to the statement of claim along the way and the claims against the various forest companies were discontinued or dismissed.

[24] The trial of the action commenced in November 2002 and occupied 339 court days over a span of nearly five years. Twenty-four Tsilhqot'in witnesses testified and five additional Tsilhqot'in witnesses provided evidence by affidavit. The parties adduced expert evidence from a wide range of disciplines including anthropology, archeology, cartography and biology. A very large number of historical documents were entered as exhibits.

[25] Before turning to a more detailed discussion of the reasons for judgment, I would like to say a few words about the trial and the trial judge.

[26] This was very complex and difficult litigation. A great deal was at stake, and the parties were conscious of the fact that this case might set important precedents for Aboriginal title and rights claims. The funding order made by the case management judge meant that the opportunity existed for a very complete record to be constructed.

[27] The trial was a massive undertaking for the parties, their counsel, and for the trial judge. Mr. Justice Vickers was the presiding judge. He retired after giving the judgment, and, sadly, passed away shortly thereafter. One is struck, in reading the transcript of the proceedings, by the incredible patience and conscientiousness shown by the trial judge. His judgment is organized and comprehensive. While it extends to 458 pages, it is neither verbose nor tedious. It is a tribute to Vickers J.'s diligence and intellect that this case presents a suitable opportunity for this Court to address complex issues that go to the heart of Aboriginal rights and title. Mr. Justice

Vickers hoped that his judgment would assist the parties to settle their disputes without further litigation. In the final paragraph of his judgment, he said:

> [1382] Reconciliation is a process. It is in the interests of all Canadians that we begin to engage in this process at the earliest possible date so that an honourable settlement with Tsilhqot'in people can be achieved.

[28] The parties attempted to reach a settlement following the trial, but ultimately found it necessary to proceed with the appeal (see *William v. British Columbia (HMTQ)*, 2009 BCCA 83).

[29] Neither the fact that the parties were unable to resolve this matter short of appeal nor the fact that this Court differs from him on certain issues of law should be seen as diminishing Vickers J.'s achievements in this matter. That the parties do not take issue with any significant findings of fact made by the trial judge is a tribute to his thorough understanding and careful analysis of the evidence.

## III. The Tsilhqot'in Nation

[30] The trial judge reviewed a great deal of ethnographic and historical evidence. He noted evidence that the Tsilhqot'in displaced Salish people in the Claim Area by about the middle of the 17th century, and accepted that the transition of the area from Salish to Tsilhqot'in territory was complete well before the first contact with European peoples. He concluded that the Tsilhqot'in have been present in the Claim Area for more than 250 years. This was, of course, before Captain George Vancouver stepped ashore and claimed all of the land that would later become British Columbia on behalf of the Crown in June 1792.

[31] It is not certain when the first European explorer met the Tsilhqot'in, but it is quite possible that it was in June 1808, when Simon Fraser met with some members of the Tsilhqot'in Nation (who were on horseback). On his return through the area the following month, he wrote that the Tsilhqot'in had not seen a white man before. The Tsilhqot'in traded with coastal Aboriginal groups, and it is apparent that European goods reached them before they encountered European explorers.

[32] The Tsilhqot'in continued to occupy their traditional territory (including the Claim Area) in 1846, when the Oregon Treaty put an end to American claims to what is now British Columbia. That date has, in cases such as *Calder v. Attorney-General of B.C.*, [1973] S.C.R. 313, and *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, been taken to be a significant one for the establishment of Aboriginal title, on the basis that it represents a recognition of Crown sovereignty as a matter of international law. The trial judge analyzed the matter and accepted, at para. 601, that the date the treaty was entered into should be treated as the crystallization date for a claim to Aboriginal title. While it is curious that a treaty that had no practical impact on relations between the Crown and the Tsilhqot'in can be seen as the defining moment for a claim of Aboriginal title, the parties do not, in this Court, challenge the determination to that effect, and the determination is in accordance with earlier case law.

[33] The trial judge had the benefit of historical evidence concerning Tsilhqot'in occupation of the territory from the time period immediately prior to 1846. The Hudson's Bay Company operated a trading post at Fort Chilcotin (about 15 km east of the northern boundary of the Claim Area) in 1829 and from 1831-1843 (though its detailed records only survive from the years 1837 to 1840, with most of the 1838 journals also missing). As well, Father Giovanni Nobili, a Jesuit Priest, journeyed through Tsilhqot'in territory and into the Claim Area in 1845. His journals confirm the presence of Tsilhqot'in people in the area at that time, and describe hunting, trapping and fishing activities and the presence of structures including lodges and bridges.

[34] The historical, ethnographic and archeological evidence depicts the Tsilhqot'in as a loosely-organized semi-nomadic group. The trial judge reviewed the evidence in great detail, and his findings are not challenged. In terms of a general overview, I reproduce the trial judge's summary of the socio-political structure of the Tsilhqot'in from paras. 356-363 of his judgment:

> [356] Tsilhqot'in groups are less stratified and more egalitarian than many neighbouring First Nations. This may have been partly a result of the mobility

of Tsilhqot'in groups, which made both accumulation of wealth and rigid organizational structures unwieldy.

[357] Traditionally, no one leader of all Tsilhqot'in speakers was recognized. The enforcement of conformity to behavioural norms – to the extent that it occurred at all – occurred at the family or encampment level rather than at the level of band or nation. Prior to contact, as [anthropologist Robert] Lane wrote in his 1981 article ["Chilcotin", in Volume VI of the *Handbook of North American Indians* (Washington: Smithsonian Institution, 1981)] at p. 408:

> Individuals had a high degree of autonomy. In theory, beyond the confines of the family, no one could force anyone else to do anything.

[358] Lane also discussed the social political structure of Tsilhqot'in people in [his unpublished thesis entitled *Cultural Relations of the Chilcotin Indians of West Central British Columbia* (Ph.D. Thesis, University of Washington, 1953)] at p. 166 as follows:

> The Chilcotin had various subdivisions. The band was a loosely associated group of families who wintered in the vicinity of a certain lake or group of lakes. The band was usually named for the lake with which it was most intimately associated. There was a degree of mobility between neighbouring bands […]

[359] He continued at pp. 170-171, as follows:

> Within the band there were unnamed local groups, which can be called encampments. Each consisted of several families who usually, particularly in the winter time, camped together; and who often acted as the main cooperating group. Such groups were united by kinship, friendship or by economic dependence.
>
> Several brothers and their families might form such a group; or parents and their families, and their children and their families. Several friends might form such a group and through intermarriage between the friends' families, the unity of the group would be perpetuated.
>
> …
>
> In these encampments there was a great deal of mobility. A family might remain in such an association for a season or a lifetime. Probably most families had constituted parts of several different local groups in the course of their existence.
>
> Such a group had no definitely outlined territorial rights. However, it was recognized that the families in such a group had rights to certain winter camping sites, providing that they occupied them every season. However, when the usual occupants of such a site failed to use it for one or more winters, someone else could move in and claim it.
>
> In much the same way, fish trap sites were regarded as belonging to the person who habitually used them. When the habitual user neglected to use them, someone else was free to do so. Band members tended to utilize for hunting and fishing purposes the suitable territories nearest to their wintering sites. However, there

> were no explicitly defined band territories. In theory and to a lesser degree in fact, any family utilized any part of Chilcotin territory.

[360] I pause at this point to note that the latter observation concerning fish trap sites and the use of Tsilhqot'in territory was confirmed by the evidence at trial. Tsilhqot'in elders testified about family fish sites but at the same time were clear that all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory.

[361] Lane continued his observations at pp. 171-173 of this thesis:

> At mid-winter all of a band might be concentrated in certain parts of the band territory, hunting around and fishing at various lakes. However, not all of the band would be at any particular lake. In the spring individual families scattered to hunt by themselves. Later in the season groups of families gathered at streams and lakes to fish the various runs of trout, whitefish, suckers and other small fish. In the summer when the salmon were running, large groups gathered at the river fishing sites but they were not necessarily members of the same band. Other large groups hunted and dug roots at certain places in the mountains but again all of the people in one area were not from one band. After the salmon fishing season, families again went off by themselves, to hunt or fish or gather until winter.
>
> The band was a functioning unit only upon a few special occasions such as feasts and celebrations. It never gathered at one place for economic purposes. For about three months of the year, the encampment appears to have been the basic unit, above the family level. For about four months, the individual family lived nomadically and more or less by itself. During the two months or so of the spring fish runs, people gathered in greater numbers at specific sites on lakes. These people were usually from the same band. I call this grouping a "semi-band" because almost everybody at one such site was from the same band; but the entire band rarely gathered at one site.
>
> During three months in the summer, the largest groups of people were together in the mountains and at salmon fishing sites in "mixed bands," composed of families from one or several bands.
>
> … the Chilcotin had very vague concepts of ownership of territory. All Chilcotin had right to use all the Chilcotin territory. Bands occupied vaguely defined geographic areas. They did not "own" such areas. Hunting territories were also used rather than "owned" by members of certain bands …. Fishing sites involved somewhat more of a feeling of ownership. But such ownership also depended upon use.

[362] Lane noted at p. 174 of his dissertation that "among none of the Chilcotin's immediate neighbours do we find such a loose and flexible group organization". This description accords with socio-political structure described to me by Tsilhqot'in elders in the course of the trial.

[363] Tsilhqot'in people living in bands had a chief. The presence of several bands meant there was more than one chief. They met together as a group for feasts, celebrations or annual gatherings and there was no single person

> who was the chief of the entire Tsilhqot'in people. Given their semi-nomadic nature, there was frequent movement for hunting, gathering and making the tools and clothing needed for survival. Thus, there appeared to be little time for art, in the way that was pursued by coastal Aboriginal people. There were no totems. There was no evidence of a crest system such as that described in *Delgamuukw*. There was no evidence of named ceremonial groups and no evidence of any honorific ranking system such as is found amongst some Aboriginal people. The oral traditions, stories and legends told from generation to generation provide the binding social fabric for Tsilhqot'in people.

[35] It should not be thought, however, that the Tsilhqot'in lacked a sense of the land belonging to the Nation. On this issue, the trial judge said, at para. 429:

> I … am satisfied that an examination of the historical records leads to a conclusion that Tsilhqot'in people did consider the land to be their land. They also had a concept of territory and boundaries, although this appears to have been enlarged following the movements of the mid-nineteenth century.

[36] The trial judge included in his historical summary several incidents in which the Tsilhqot'in prevented members of other nations from coming into their territory, as well as some in which Hudson's Bay Company personnel were excluded. In 1864, a road-building crew was killed while attempting to construct a road through Tsilhqot'in territory, an event which touched off what is known as the Tsilhqot'in War – a sad low point in relations between the Crown and the Tsilhqot'in Nation that culminated in several Tsilhqot'in Chiefs being executed. While the precise causes of the dispute are not clear, there is at least some indication that the Crown's use of land without seeking the permission of the Tsilhqot'in Nation was a factor.

## IV. The Issues at Trial

[37] In June 2003 (during the trial), the parties filed their final amended pleadings. In the amended statement of claim, the plaintiff sought:

- a declaration that the Tsilhqot'in Nation has Aboriginal title to the Claim Area;
- a declaration that the Xeni Gwet'in has Aboriginal rights to hunt and trap in the Claim Area;

- a declaration that British Columbia does not have jurisdiction to authorize forestry activities within the Claim Area;

- declarations that British Columbia's authorization of forestry activities within the Claim Area unjustifiably infringed the Aboriginal title of the Tsilhqot'in Nation and the Aboriginal rights of the Xeni Gwet'in;

- injunctive relief restraining British Columbia from authorizing forestry activities in the Claim Area in the future;

- damages for unjustifiable infringement of the Aboriginal title of the Tsilhqot'in Nation and Aboriginal rights of the Xeni Gwet'in; and

- damages for breach of fiduciary duty.

[38] At para. 101 of the judgment, the trial judge summarized the issues in the proceeding as follows:

> a) Are the Tsilhqot'in people entitled to a declaration of Aboriginal title to all or part of the Claim Area?
>
> b) Are the Tsilhqot'in people entitled to a declaration of Aboriginal rights to hunt and trap birds and animals throughout all or part of the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses, inclusive of a right to capture and use horses for transportation and work?
>
> c) Are the Tsilhqot'in people entitled to a declaration of an Aboriginal right to trade in the furs, pelts and other animal products obtained from all or part of the Claim Area as a means of securing a moderate livelihood?
>
> d) Does the *Forest Act* apply to Aboriginal title lands?
>
> e) Does the issuing of forest licences, the granting of authorizations and any forest development activity unjustifiably infringe Aboriginal rights in the Claim Area?
>
> f) Are Tsilhqot'in people entitled to damages?
>
> g) Are any claims advanced statute barred or otherwise affected by the doctrines of Crown immunity or *laches*?

[39] He (1) dismissed the plaintiff's claims for declarations of Aboriginal title without prejudice to the Tsilhqot'in's ability to make new claims to Aboriginal title within the Claim Area; (2) dismissed the plaintiff's claims for damages without

prejudice to the Tsilhqot'in's right to make new damages claims in respect of Aboriginal title land; (3) declared that the Tsilhqot'in Nation has Aboriginal rights to trap and hunt birds and animals for specified purposes, and to trade in skins and pelts taken from the Claim Area "as a means of securing a moderate livelihood", as well as to capture and use horses; and (4) declared that forestry activities in the Claim Area unjustifiably infringed Tsilhqot'in Aboriginal rights.

## V. The Issues on Appeal

[40] Three appeals have been taken from the trial judgment – one by the plaintiff, one by Canada and one by British Columbia. The appeals by the plaintiff and by Canada are concerned with Aboriginal title, while the British Columbia appeal is concerned with a number of issues surrounding Aboriginal rights claims.

[41] The plaintiff contends that the trial judge erred by failing to find that the Tsilhqot'in exclusively occupied the entire Claim Area at the date of assertion of sovereignty. He says that the trial judge should have declared the entire Claim Area to be subject to Tsilhqot'in Aboriginal title. In the alternative, the plaintiff argues that the trial judge erred in treating the title claim as an "all or nothing claim", such that he considered himself without jurisdiction to make an order finding a part of the Claim Area to be subject to Aboriginal title.

[42] Canada, in its appeal, argues that the judge was right to find the claim to be an "all or nothing claim" and was right to dismiss the Aboriginal title claim. It says, however, that the dismissal ought to have been final, and that the judge erred in dismissing the claim without prejudice to the plaintiff's ability to pursue geographically smaller claims within the Claim Area.

[43] British Columbia's appeal raises a number of issues concerning Aboriginal rights. First, it contends that the trial judge erred in identifying the Tsilhqot'in Nation as the holder of Aboriginal rights, and says that the judge ought to have confined himself to determining whether or not the Xeni Gwet'in held such rights.

[44] Second, it argues that the judge mischaracterized the extent of Aboriginal hunting and trapping rights by finding these to include a right to a harvestable surplus of all wildlife species. Such a ruling, British Columbia says, amounts to a finding of a right to a resource rather than a right to engage in a traditional activity.

[45] Third, it says that the trial judge failed to apply the appropriate burden of proof on the issue of infringement of Aboriginal rights. It contends that he effectively required the government to demonstrate that the logging activities would not interfere with Aboriginal hunting and trapping rights rather than placing the onus on the plaintiff to demonstrate interference.

[46] Fourth, it says that the trial judge erred in finding the province's consultations with the Tsilhqot'in to be insufficient; in particular, it says that the trial judge wrongly imposed a prerequisite to proper consultation, being the acknowledgement by the province of Tsilhqot'in Aboriginal rights.

[47] Fifth, it contends that the judge erred in considering whether the Tsilhqot'in possessed a right to trade skins and pelts to the extent of earning "a moderate livelihood" through hunting and trapping. It says that this claim was not pleaded, and the test for establishing rights to trade was not, in any event, made out on the evidence.

[48] Finally, British Columbia contends that the judge erred in considering whether the Tsilhqot'in have a right to capture horses for transportation and work purposes, as the claim was not properly pleaded. In any event, it says that the judge erred in finding the relevant practices to have existed pre-contact or, alternatively, in treating the right as a "contemporary extension" of pre-contact practices.

## VI. The Reasons for Judgment of the Trial Judge

### A. An "All or Nothing Claim"

[49] The first major issue addressed by the trial judge was a pleadings issue. In the statement of claim, the plaintiff sought two declarations of Aboriginal title – one in respect of Tachelach'ed (described in the prayer for relief as "the Brittany") and one

in respect of the Trapline Territory. The statement of claim did not explicitly seek declarations of Aboriginal title over portions of those territories in the event that the court was not persuaded that it existed throughout the Claim Area. In final argument, however, the plaintiff argued that a declaration could be made in respect of whatever parts of the Claim Area the court found to be subject to Aboriginal title.

[50] The judge considered whether, given those pleadings, the court could make a declaration of Aboriginal title in respect of a part of the Claim Area. He held that he could not. He described the pleadings as making an "all or nothing claim", and found that it would be "prejudicial to the defendants" for the court to make a declaration in respect of a part of the Claim Area only.

## B. The Proper Rights Holder

[51] The second issue considered by the trial judge was the identity of the holder of Aboriginal rights or title. While Aboriginal rights are communal rights held by a collective, it can be difficult to identify the extent of that collective. As the trial judge noted at para. 446, there are numerous different overlapping Aboriginal collectives:

> In both historical and contemporary times, an individual can simultaneously be a member of a family, a clan or descent group, a hunting party, a band, and a nation.

[52] While the amended statement of claim sought a declaration of Aboriginal title on behalf of the Tsilhqot'in Nation and a declaration of Aboriginal rights on behalf of the Xeni Gwet'in First Nations Government, in his final argument the plaintiff sought declarations of both title and rights in the name of the Tsilhqot'in Nation.

[53] British Columbia argued that the collective rights in issue were held, if at all, at the level of the band, and that if Aboriginal rights or title were established, the proper rights holder would be the Xeni Gwet'in. This argument was based on historical and ethnographic evidence that established that decision-making typically took place at the encampment or band level, and that while there were local chiefs, the Tsilhqot'in did not have a national chief or political organization.

[54] The trial judge was not satisfied that the Xeni Gwet'in was a homogenous group that could be traced back to any single subgroup of the Tsilhqot'in Nation. He referred to evidence arising from the reserve allocation process to support his conclusion:

> [465] The laying aside of … reserves [for the "Nemaiah Valley Indians"] appears to have followed a request made by Hewitt Bostock, M.P. to James A. Smart, Deputy Superintendent General of Indian Affairs, in a letter dated July 27, 1899. … Bostock referred to the people living in Xeni as "a number of Indians who have belonged to different tribes in that part of the country but who for one reason or another have left their own reservation or tribe and have gone to live in this valley". I conclude that the people from "different tribes" were all Tsilhqot'in people who are the ancestors of the modern day Xeni Gwet'in.

[55] Thus, if Aboriginal rights or title were properly held at the level of the band, tribe, or encampment, it would be difficult or impossible to find that the Xeni Gwet'in First Nations Government was the modern representative of that group. The judge found, however, that rights were held on a national level by the Tsilhqot'in. He noted that while the Tsilhqot'in did not, either historically or today, have any pan-national political structure, it did represent a distinct cultural group that recognized itself as holding collective entitlements:

> [459] Tsilhqot'in people make no distinction amongst themselves at the band level as to their individual right to harvest resources. The evidence is that, as between Tsilhqot'in people, any person in the group can hunt or fish anywhere inside Tsilhqot'in territory. The right to harvest resides in the collective Tsilhqot'in community. Individual community members identify as Tsilhqot'in people first, rather than as band members.
>
> …
>
> [468] In the modern Tsilhqot'in political structure, Xeni Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xeni, including Tachelach'ed. Other bands are considered to be the caretakers of the lands that surround their reserves. Still, the caretakers have no more rights to the land or the resources than any other Tsilhqot'in person.

[56] In British Columbia today, the combined effect of the reserve creation process and the *Indian Act* has tended to magnify the importance of bands. The judge discounted the idea that rights should be seen as being held at the level of the band:

> [469] The setting aside of reserves and the establishment of bands was a convenience to government at both levels. The creation of bands did not alter

> the true identity of the people. Their true identity lies in their Tsilhqot'in lineage, their shared language, customs, traditions and historical experiences. While band level organization may have meaning to a Canadian federal bureaucracy, it is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people.

[57] He concluded that the proper rights holder was the Tsilhqot'in Nation rather than the Xeni Gwet'in First Nations Government:

> [470] I conclude that the proper rights holder, whether for Aboriginal title or Aboriginal rights, is the community of Tsilhqot'in people. Tsilhqot'in people were the historic community of people sharing language, customs, traditions, historical experience, territory and resources at the time of first contact and at sovereignty assertion. The Aboriginal rights of individual Tsilhqot'in people or any other subgroup within the Tsilhqot'in Nation are derived from the collective actions, shared language, traditions and shared historical experiences of the members of the Tsilhqot'in Nation.

## C. Aboriginal Title

[58] Having found the proper claimant to be the Tsilhqot'in Nation, the trial judge turned to the issue of whether the plaintiff's claim to Aboriginal title was made out. Citing *Delgamuukw*, he set out the test for Aboriginal title as requiring proof of exclusive occupation of the claimed lands by the Aboriginal group at the time of the assertion of Crown sovereignty. Referring to *R. v. Marshall; R. v. Bernard,* 2005 SCC 43, [2005] 2 S.C.R. 220, he noted at para. 554 that Aboriginal title is not co-extensive with an Aboriginal group's traditional territory, and at para. 583 that occasional entry and use of land would not be sufficient to found a claim to title.

[59] The judge summarized a considerable body of evidence pointing to continuous occupation of the Claim Area by the Tsilhqot'in over a period of several hundred years. Dr. Richard G. Matson, an archeologist, provided an opinion to the effect that the Tsilhqot'in moved into Tachelach'ed by about 1645-1660, and into the Trapline Territory at about the same time or a little later. They had come from an area northwest of the Claim Area.

[60] The judge also reviewed the oral traditions of the Tsilhqot'in, including legends that were tied to landmarks within the Claim Area. While he acknowledged that many of the legends had analogs among other Aboriginal groups, he concluded,

at para. 665, that the names of geographic locations had been adapted to the circumstances of the Tsilhqot'in, and that "the references to lakes, rivers and other landmarks [within the Claim Area] formed a part of these legends for Tsilhqot'in people at the time of sovereignty assertion".

[61] The judge then turned to evidence with respect to the adoption of Tsilhqot'in place names in the Claim Area by European fur traders and settlers. The judge noted and accepted the opinions of archaeologist Morley Eldridge and anthropologist Dr. David Dinwoodie to the effect that the adoption of Tsilhqot'in names suggests that, by the time of European contact, the Tsilhqot'in had been in the area for a very lengthy period. Similarly, he accepted the evidence of Dr. Nancy J. Turner, an ethno-botanist and ethno-ecologist, to the effect that the presence in the Tsilhqot'in language of words to describe plants in the Claim Area, as well as the uses made of the plants by the Tsilhqot'in, suggest a presence in that area of more than 250 years.

[62] The evidence of Dr. Kenneth Brealey, a cartologist and historical geographer, was to the effect that a network of Tsilhqot'in trails in the Claim Area predated contact with Europeans. The judge accepted that opinion, and noted that John Dewhirst, a cultural anthropologist, was also of the view that the trail network was in existence prior to the date of the Oregon Treaty.

[63] In short, the judge had no difficulty accepting that the Tsilhqot'in were present in the Claim Area prior to 1846 and continued to be present at the time of the Oregon Treaty. He then turned to the question of the nature and extent of the occupation. He noted that there was no evidence of village sites that were occupied year round, only evidence of relatively small groupings of winter dwellings. There was also no evidence of cultivated fields, though the evidence did establish that the Tsilhqot'in harvested and, to some extent, managed naturally-occurring berries and root plants on mountain slopes.

[64] The judge characterized the positions of the parties with respect to Aboriginal title as follows:

> [608] Both Canada and the Province argue that the evidence might support a declaration of Aboriginal title to smaller sites where specific Aboriginal activities or practices took place. For example, the Province says that hunting is a practice that will not ordinarily lead to utilization of the same area year after year. Most species of game animals roam the landscape and are taken by hunters on an opportunistic basis wherever they happen to be found. There may be certain exceptions where features of the natural landscape such as a salt lick or a narrow defile between mountains or cliffs attract animals and their hunters to the same place year after year, but these would seem to be the exception.
>
> [609] Canada's approach to Aboriginal title is similar. For example, it says that salmon fishing might make it possible for a definite tract of land to be used on a regular basis if, for example, it could be shown that fishers would use a particular rock or promontory each year to spear or net spawning salmon. Canada says it was unable to locate any evidence in the transcripts with this level of specificity. It says that lake fishing would seem even less likely to satisfy the criteria since fish would be distributed throughout the lake, and fishers would be less likely to use any particular spots to fish for them. Once again, Canada was unable to locate any evidence in the transcripts that would satisfy these criteria.
>
> [610] The plaintiff characterizes the foregoing arguments of the defendants as a postage stamp approach to Aboriginal title. I think that is a fair description. There is 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. It was government policy that caused them to alter their traditional lifestyle and live on reserves.

[65] The judge, in the result, rejected what was pejoratively described as the "postage stamp approach" of searching for evidence with respect to specific tracts of land. Instead, he appears to have adopted a broad-brush approach to occupation. While he reviewed the evidence in respect of many individual sites, his conclusions relate, instead, to broad geographical areas, which he considered to be more in keeping with the semi-nomadic traditions of the Tsilhqot'in. The judge analyzed the evidence with respect to sites in five broad regions – the Tsilhqox Corridor (effectively the western boundary of Tachelach'ed), the Xeni (the Nemiah Valley – effectively the southern boundary area of Tachelach'ed), Tachelach'ed (other than the Tsilhqox Corridor and the Xeni), the Western Trapline Territory, and the Eastern Trapline Territory.

[66] I do not intend, in this judgment, to review the judge's analysis with respect to each individual site. A reader interested in that level of detail should consult the trial

judgment at paras. 688-911. In order to give a flavour of the approach taken, however, I will describe the analysis undertaken with respect to the Tsilhqox Corridor, which the judge described at para. 707 as providing "the best evidence of residential sites that might qualify as village sites especially during the fall and winter months".

[67] The judge undertook an extensive review of the evidence as it related to numerous specific sites, both inside and outside the Claim Area. His review included historical records, *viva voce* evidence, archaeological evidence, and evidence of place names. The nature of the evidence, however, made the trial judge's task difficult. Historical documentation from the period of the Oregon Treaty was limited. *Viva voce* evidence related to a more recent period than the time of the assertion of Crown sovereignty. The archaeological evidence was generally unable to show occupation at a specific point in time – many of the pit dwellings in the area long pre-dated the relevant period. The evidence established that, in addition to being semi-nomadic, the Tsilhqot'in migrated over time, so determining whether a specific site was occupied in or around 1846 generally involved a degree of speculation. Evidence of place names might establish some sort of presence in the general geographic area, but was of limited use in determining the nature of occupation.

[68] In respect of sites within the Claim Area, the judge found three specific sites along the Tsilhqox Corridor that were used by the Tsilhqot'in as dwelling places at or around the time of the Oregon Treaty.

[69] Tl'egwated is a site roughly parallel to the north end of Lhuy Nachasgwengulin (Little Eagle Lake). While most of the 15 or more pit houses found at the site were outside the Claim Area, some were within it. With respect to the site, the judge said:

> [721] Some 169 pit features have been mapped on or near the site, including numerous pit houses of a very large size. The site, also known as Kigli Holes, is generally regarded as non-Athapaskan (Plateau Pithouse Tradition) in origin, but appears to have been partly occupied by Tsilhqot'in people prior to and at the time of sovereignty assertion. Both Dewhirst and Eldridge believe Tl'egwated to be the home of the "Tlo quot tock" Indians recorded as attached to Fort Chilcotin in the Hudson's Bay Company census

> of 1838. It may also mark the site where Father Nobili visited a relatively large concentration of Tsilhqot'in people in the winter of 1845 ….
>
> [722] On the evidence, I conclude that Tl'egwated can be identified with archeological site ElRw-4, and represents the site known to the Hudson's Bay Company as Tlo quot tock as well as the pit house village visited by Nobili ….

[70] A second site discussed by the judge is known as Nusay Bighinlin, near the point where Natasewed Yeqox (Brittany Creek) enters the Tsilhqox. He noted that there is a single pit house in the area, which appears to have pre-dated Tsilhqot'in entry into the Claim Area. However, a site approximately one kilometre south, dating to 500 years ago, was consistent with Tsilhqot'in occupation. The judge said:

> [732] This would locate a presence of Tsilhqot'in people well before sovereignty assertion making it … reasonable to infer, as I do, that there were Tsilhqot'in people one kilometre away, at the Nusay Bighinlin site, well before the assertion of sovereignty.

[71] The third site is Sul Gunlin, near the outlet of Tsilhqox Biny on its eastern shore. There was some evidence of Tsilhqot'in occupation of the site, but none that directly showed occupation around the time of the Oregon Treaty. The judge said:

> [762] …No archaeological or historical records were cited that would confirm Tsilhqot'in residence at this site *circa* 1846, but given its proximity to Biny Gwechugh [a site that was mostly outside the Claim Area, and was partly occupied in 1846], it is logical to infer, as I do, that this was a site used and occupied by Tsilhqot'in people at the time of sovereignty assertion.

[72] The judge's findings with respect to these specific sites, combined with his review of evidence relating to sites outside the Claim Area, led him to find that the entire Tsilhqox Corridor was occupied by the Tsilhqot'in in 1846:

> [712] British Columbia says that as a result of the previous occupation of the Tsilhqox corridor by non-Tsilhqot'in people, and because the later reoccupation by Tsilhqot'in people did not extend to all sites or to all features in a given site, the presence of archaeological remains cannot, in itself, indicate a Tsilhqot'in dwelling site or even a Tsilhqot'in presence in an area. This would be true if one were to ignore the presence of Tsilhqot'in people at various locations as recorded in the historical documents. When [Hudson's Bay Company employees] and Father Nobili travelled the Tsilhqox corridor they recorded the fact that Tsilhqot'in people were in occupation of these winter dwellings. Thus, the logical inference to draw from the whole of the evidence is that during these times it was Tsilhqot'in people who occupied the

> entire Tsilhqox corridor. There is no historical evidence of occupation by others during this critical historical period.

[73] The judge's conclusions with respect to specific sites in the areas other than the Tsilhqox Corridor were generally less categorical, though he did refer in considerable detail to a number of such sites.

[74] The judge found that the entirety of the Xeni was occupied by the Tsilhqot'in in 1846 in a manner sufficient to support a claim for Aboriginal title. The historical documentation with respect to the Xeni, however, was much less helpful than it was with respect to the Tsilhqox Corridor. At para. 764, the judge noted that "the Xeni sites do not appear in the historical documents until the turn of the last century". While he reviewed the evidence concerning a number of specific sites, it is not clear that he reached a conclusion regarding occupation in 1846 in respect of any of them. His conclusions with respect to Xeni as a whole were as follows:

> [783] Much of the evidence concerning the use and occupation of the various places in Xeni relate to twentieth century activities. Oral history evidence provides an understanding of use and occupation in the nineteenth century. That evidence records use and occupation by the ?Esggidam [Tsilhqot'in ancestors], living in and about the valley, using the old trails, hunting, fishing and harvesting root and medicinal plants. There is also evidence of house pit depressions. I infer that these were the remains of pit houses in which Tsilhqot'in people lived. This entire area is also in close proximity to the head of Tsilhqox Biny where the evidence clearly shows Tsilhqot'in occupation pre-sovereignty.

[75] With respect to the rest of Tachelach'ed, the judge found that the requisite degree of Tsilhqot'in occupation was established only to the southern part of the area:

> [792] As semi-nomadic people, there is no doubt that Tsilhqot'in people have derived subsistence from every quarter of Tachelach'ed. They have hunted, fished and moved about this area since before first contact with Europeans. It is a central part of their oral traditions, providing strength and continuity to their lives as Tsilhqot'in people. However, the entire area of [Tachelach'ed] does not qualify for a declaration of Tsilhqot'in Aboriginal title due to the absence of evidence with respect to the northern and central portions of the triangle. I later discuss those portions of Tachelach'ed that do warrant a finding of [Aboriginal] title.
>
> [793] In reaching this conclusion, I have taken the following factors into account:

- Tachelach'ed is a vast area comprising almost 142,000 hectares.
- At the time of sovereignty assertion, the population of Tsilhqot'in people in this immediate area was approximately 300. That population could mainly be found along the Tsilhqox corridor, at the outlet area of Tsilhqox Biny and southward into Xeni. It is not possible to recreate today an accurate census for that period.
- Occupation of a more permanent nature during the winter season was confined to the lakes and rivers at the southern end of Tachelach'ed and towards the Tsilhqox.
- Other than the presence of [Hudson's Bay Company] traders, there is no evidence of occupation by others at the significant historical point of sovereignty assertion.
- Oral history evidence may be traced to the late nineteenth century and the twentieth century. It is extremely difficult to find oral history evidence to accurately connect to a period over 150 years ago.
- The oral history evidence does not demonstrate the same degree of use throughout the entire area. There appears to have been a much wider use at the southern end of the triangle and over towards the Tsilhqox than in other areas of Tachelach'ed.
- There is an absence of historical evidence concerning the interior of Tachelach'ed at the critical historical point.
- There is evidence of the remains of traditional housing in the interior of Tachelach'ed but no archaeological or anthropological evidence to tie these remains to Tsilhqot'in use at the time of sovereignty assertion. If the age of some of these remains were known, it might be easier to connect them to Tsilhqot'in use. Notwithstanding this absence of evidence, I am prepared to draw the inference and acknowledge the use of this housing by Tsilhqot'in people on a balance of probabilities but, once again, the time and extent of use is not known.

> [794] In summary, there are areas within Tachelach'ed where I consider the use and occupation by Tsilhqot'in people at the time of sovereignty assertion to be sufficient to warrant a finding of Aboriginal title. The evidence does not lead to a finding of sufficient use and occupation throughout Tachelach'ed.

[76] With respect to the fourth area, the Western Trapline Territory, the trial judge again found Tsilhqot'in occupation in 1846 to have been insufficient to establish title over the entire area:

> [825] … The entire area of the Western Trapline does not qualify for a declaration of Tsilhqot'in Aboriginal title. While there is no doubt that there was a Tsilhqot'in presence in the entire area at the time of sovereignty assertion, much of the area was not occupied to the extent required to ground a declaration of Tsilhqot'in Aboriginal title. Once again, in considering the invitation of counsel to express an opinion on where Tsilhqot'in Aboriginal title

> might lie, it is convenient to consider discrete smaller portions of the Western Trapline Territory.

[77] Finally, with respect to the Eastern Trapline Territory, the trial judge similarly concluded that Tsilhqot'in occupation in 1846 was insufficient to found Aboriginal title:

> [893] I am satisfied Tsilhqot'in people were present in the Eastern Trapline Territory at the time of first contact. The area has been used by Tsilhqot'in people since that time for hunting, trapping, fishing and gathering of roots and berries. I am not able to find that any portion of the Eastern Trapline Territory was occupied at the time of sovereignty assertion to the extent necessary to ground a finding of Tsilhqot'in Aboriginal title….

[78] Based on these various findings, and on his preliminary conclusion that the claim was an "all or nothing claim", the trial judge declined to grant a declaration of Aboriginal title. He did, however, provide an opinion as to what areas he would have declared to have been subject to Aboriginal title had the case been pleaded in a manner that allowed a partial declaration to be granted. The "Opinion Area" encompassed the Tsilhqox Corridor, the Xeni, the rest of the southern portion of Tachelach'ed, and a part of the Western Trapline Territory. It included both land inside and outside the Claim Area, and encompassed roughly 40% of the Claim Area:

> [959] The entire body of evidence in this case reveals village sites occupied for portions of each year. In addition, there were cultivated fields. These fields were not cultivated in the manner expected by European settlers. Viewed from the perspective of Tsilhqot'in people the gathering of medicinal and root plants and the harvesting of berries was accomplished in a manner that managed these resources to insure their return for future generations. These cultivated fields were tied to village sites, hunting grounds and fishing sites by a network of foot trails, horse trails and watercourses that defined the seasonal rounds. These sites and their interconnecting links set out definite tracts of land in regular use by Tsilhqot'in people at the time of sovereignty assertion to an extent sufficient to warrant a finding of Aboriginal title as follows:
>
> - The Tsilhqox (Chilko River) Corridor from its outlet at Tsilhqox Biny (Chilko Lake) including a corridor of at least 1 kilometre on both sides of the river and inclusive of the river up to Gwetsilh (Siwash Bridge);
> - 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 [Mt. Nemiah] and Xeni

Dwelh [Konni Mountain] combine to provide the northern boundary, while Tsiyi (Tsi ?Ezish Dzelh or Cardiff Mountain) marks the eastern boundary.

- North from Xeni into Tachelach'ed to a line drawn east to west from the points where Elkin Creek joins the Dasiqox (Taseko River) over to Nu Natase?ex [Mountain House] on the Tsilhqox. Elkin Creek is that water course draining Nabi Tsi Biny (Elkin Lake), flowing northeast to the Dasiqox;
- On the west, from Xeni across Tsilhqox Biny to Ch'a Biny [Big Lagoon] and then over to the point on Talhiqox Biny (Tatlayoko Lake) where the Western Trapline boundary touches the lake at the southeast shore, then following the boundary of the Western Trapline so as to include Gwedzin Biny (Cochin Lake);
- On the east from Xeni following the Dasiqox north to where it is joined by Elkin Creek; and
- With a northern boundary from Gwedzin Biny in a straight line to include the area north of Naghatalhchoz Biny (Big Eagle Lake or Chelquoit Lake) to Nu Natase?ex on the Tsilhqox where it joins the northern boundary of Tachelach'ed over to the Dasiqox at Elkin Creek.

## D. The "Exclusivity" Requirement for Aboriginal Title

[79] In reaching his conclusion that the Tsilhqot'in Nation had demonstrated an entitlement to Aboriginal title over the Opinion Area, the judge was required to consider what had to be proven in order to show that the Nation had "exclusive" possession of the land in 1846. The question of what it means to "exclusively" occupy territory was a primary issue at trial.

[80] The trial judge summarized the plaintiff's position on exclusivity as follows:

> [915] The plaintiff argues that Tsilhqot'in people had the capacity to control their territory and in fact did exercise such control. It is submitted that the evidence supports a conclusion that Tsilhqot'in people entered into treaties or bonds of peace from time to time, exercised control over the movements of non-Tsilhqot'in people in their territory, and enjoyed a reputation amongst their neighbours as a people who fiercely defended their land.
>
> [916] Tsilhqot'in witnesses testified to their ancestors' use of scouts and runners to check for intruders and warn their communities. There is also some historical evidence of this practice, including the journals of Simon Fraser. On July 26, 1808 Simon Fraser recorded that "Chilkoetins … had the information of our return from the lower parts of the river by messages across the Country": Letters and Journals of Simon Fraser, pp. 124-125.
>
> [917] Professor [Hamar] Foster, a legal historian, wrote in his report at p. 23 that the archival records show that "[t]o be safe" in Tsilhqot'in country, "one

> had to be accompanied by Tsilhqot'in, paying what in effect was a 'toll' to enter and 'rent' if you wanted to stay and settle down".
>
> …
>
> [920] Military practices were also used to instil fear of Tsilhqot'in warriors. One such military practice was a policy of killing as many opponents as possible but at the same time, deliberately allowing one or two badly wounded opponents the opportunity to escape death. Upon their return, these badly wounded individuals would present the best evidence possible of the fierceness of Tsilhqot'in warriors. This worked to instill fear of Tsilhqot'in people in all those who might venture into Tsilhqot'in territory.

[81] The judge then went on to summarize and reject Canada's position on exclusivity:

> [922] Canada is critical of the plaintiff's approach to this issue and says that a propensity for violence does not establish Tsilhqot'in exclusivity in the Claim Area. In the submission of Canada, the sparse Tsilhqot'in population would make it impossible for Tsilhqot'in people to maintain exclusive control over their traditional territory. Canada says it is more likely that after Tsilhqot'in people moved on from one location to another … the land [was left] available for others to move in and exploit. Canada also argues that an abandonment of the Claim Area on a failure of a salmon run would make it impossible to maintain exclusive control, at least during such a period.
>
> [923] There is nothing to indicate that Tsilhqot'in populations at any given time were small compared to their neighbours. In fact, early records of the [Hudson's Bay Company] appear to record a marginally larger number of Tsilhqot'in men trading at Fort Alexandria than the numbers of Dakelh (Carrier) men. I acknowledge the population was small given the size of the area, but it is fair to infer there were no large numbers of invaders on the edges of Tsilhqot'in territory.
>
> [924] It is also important to place events in context. If an area was used to hunt, fish, and gather berries, root plants and medicines, the area would not be available for resource exploitation for at least another year. It would be highly unlikely that a neighbouring Aboriginal group would follow into an area that had already been exploited. Similarly, if the salmon run failed in any given area, there would be no possibility that any other group would move into such a distressful situation.

[82] Finally, the judge described the position put forth by British Columbia, which tied the concept of exclusivity to what it contended was the site-specific nature of Aboriginal title:

> [925] British Columbia says the fundamental problem lies in the plaintiff's approach to proving Aboriginal title. According to this argument, the plaintiff failed to identify and establish pre-sovereignty occupation of any definite tracts of land within the Claim Area. British Columbia also says that the

> plaintiff has approached the question of exclusivity from a territorial, rather than a site-specific, perspective.
>
> [926] In his reply, the plaintiff argues that exclusivity does not require site-specific evidence of control directed at "each marsh meadow and berry patch". What is required is effective control over the land in question.
>
> [927] It is fair to say that the argument made by the plaintiff was directed towards a conclusion that Tsilhqot'in people had vigorously defended their territory and had closely monitored and controlled its use by others. British Columbia's position is consistent with the view that site-specific definite tracts are required in the proof of Aboriginal title and thus proof of site-specific exclusivity is also required.

[83] While accepting that there was some merit in the approach suggested by British Columbia, the judge adopted a test for exclusivity that was, effectively, that suggested by the plaintiff:

> [929] The question is: does the evidence [show] that Tsilhqot'in people at the time of sovereignty assertion exercised effective control of this land? Or, can a reasonable inference be drawn that Tsilhqot'in people could have excluded others had they chosen to do so? …

[84] Applying that standard of exclusivity, the judge found that the Tsilhqot'in exclusively occupied all of the lands in the Opinion Area.

## E. The *Forest Act*

[85] Having dealt with the claim to Aboriginal title, the judge next considered the applicability of the *Forest Act* to the Opinion Area. While the judge was not prepared to grant a declaration of title, he did find that the existence of Aboriginal title over the Opinion Area prevented the *Forest Act* from applying to it.

[86] He found that the timber on land that is subject to Aboriginal title is not "Crown timber" as defined in the *Forest Act*, because it is not "timber on Crown land". The *Forest Act* adopts (subject to an exception which is not relevant to this case) the definition of "Crown land" set out in the *Land Act*, R.S.B.C. 1996, c. 245: "land vested in the government". As a matter of statutory interpretation, the judge found that land subject to Aboriginal title is not vested in the government.

[87] He further held that, in any event, British Columbia did not have constitutional competence to regulate forestry on land subject to Aboriginal title. While the regulation of forestry is generally within the competence of the provincial government under s. 92A of the *Constitution Act, 1867*, he found that the doctrine of interjurisdictional immunity prevented provincial forestry legislation from applying on Aboriginal title lands. The regulation of forestry on such lands would go to the "core of Indianness", and impermissibly affect the core of federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*.

[88] The judge went on to consider whether, assuming the *Forest Act* did apply to lands in the Opinion Area, the Crown had administered it in a way that unjustifiably interfered with Aboriginal title. He found that it had.

[89] He held that any claim to justification must fail for a number of reasons. First, he found that British Columbia could not show a compelling and substantial objective in authorizing logging in the Claim Area. He commented that the exclusive focus of the *Forest Act* on timber values, to the exclusion of ecosystem management, resulted in a failure to properly balance the interests of the Tsilhqot'in against economic interests of the larger society. Further, he found that the province had failed to demonstrate that logging in the Claim Area was necessary or even economically viable.

[90] The judge was also critical of consultation efforts made on behalf of the Crown with respect to timber harvesting, saying at para. 1141 that "the failure of the Province to recognize and accommodate the claims being advanced for Aboriginal title and rights leads me to conclude that the Province has failed in its obligation to consult with the Tsilhqot'in people".

[91] Accordingly, the judge found that the Crown had, in administering the *Forest Act*, unjustifiably infringed the plaintiff's Aboriginal title in the Claim Area.

## F. Aboriginal Rights (other than Title)

[92] The judge next turned to issues of Aboriginal rights other than title. British Columbia and Canada admitted the Xeni Gwet'in held Aboriginal rights "to hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial and cultural uses". At issue before the trial judge (in addition to the question of the proper rights holder, which I have already discussed) was whether the Tsilhqot'in also held rights to trade in skins and pelts and to capture horses for transportation and work purposes. The judge was also required to consider whether any Tsilhqot'in Aboriginal rights had been unjustifiably infringed.

[93] The date for the crystallization of Aboriginal rights is the date of European contact. The judge considered various possible dates, and concluded that a single date should apply throughout British Columbia. He noted that 1793 was significant in terms of European exploration of what later became British Columbia. In that year, Alexander Mackenzie completed his journey following the Peace, Fraser and Blackwater (West Road) Rivers and reached the shores of Dean Channel, near the present site of Bella Coola. Captain George Vancouver completed his survey of the coast of what is now British Columbia in the same year.

[94] The judge acknowledged that there is no clear evidence that Mackenzie encountered any Tsilhqot'in people during his expedition, and that it is very improbable that Vancouver met any on his voyages. The first documented contact between a European and the Tsilhqot'in was Simon Fraser's 1808 expedition. Still, the judge found that the extensive European exploration of what they called "New Caledonia" in 1793 should be taken to be the date of European contact with all First Nations in mainland British Columbia. The judge acknowledged, in any event, that the precise date of first contact was of minimal importance, as the evidence did not suggest any substantial changes in the practices of the Tsilhqot'in people in the years following 1793.

[95] With respect to the plaintiff's claim of a right to capture wild horses, the judge noted that wild horses (perhaps numbering up to 100) live in Tachelach'ed. While the judge took judicial notice that horses are not native to North America, and that they had been introduced by Europeans, he also noted the evidence that the Tsilhqot'in encountered by Simon Fraser in 1808 were already using horses for transportation. He drew the inference that wild horses had migrated into the Claim Area prior to 1793, and that the Tsilhqot'in were capturing and using horses for transportation and work before contact. In any event, the judge found that even if horses arrived in the area after contact, their capture and use was simply an extension of the Tsilhqot'in tradition of using plants and hunting and trapping animals in the Claim Area for their subsistence and livelihood.

[96] The judge found that the use of horses for work and transportation was integral to the Tsilhqot'in culture, and that it constituted an Aboriginal right.

[97] With respect to the right to trade in pelts and skins, the judge considered that at the time of contact, the Tsilhqot'in traded skins and pelts with neighbouring indigenous groups. He found that trade to have been a "way of life" integral to the Tsilhqot'in culture, not simply opportunistic or incidental. At para. 1263, he commented that Tsilhqot'in trade in skins and pelts was for the purpose of securing the necessaries of life rather than to accumulate wealth. He found that trade in pelts and skins taken from the Claim Area was established as an Aboriginal right. At para. 1265, he characterized the right as one of trade as a means of securing a "moderate livelihood".

[98] The judge further held that the *Forest Act* applied to Crown lands over which Aboriginal rights (other than title) exist, and found that the statute could constitutionally apply to such lands. The province was required, however, to justify any infringements of Aboriginal rights resulting from the administration of the *Act*.

[99] The judge found that the administration of the *Forest Act* infringed Tsilhqot'in Aboriginal rights because both harvesting activities and silviculture practices reduce the diversity and abundance of wildlife:

> [1288] Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification.

[100] With respect to justification, the judge characterized, at para. 1286, the Crown's objective in administering the *Forest Act* and related legislation as being to "maximize the economic return from provincial forests". He found that "the protection and preservation of wildlife for the continued well-being of Aboriginal people is very low on the scale of priorities". He concluded that the infringement of Aboriginal rights was not justified:

> [1294] … A management scheme that manages solely for maximizing timber values is no longer viable where it has the potential to severely and unnecessarily impact Tsilhqot'in Aboriginal rights. To justify harvesting activities in the Claim Area, including silviculture activities, British Columbia must have sufficient credible information to allow a proper assessment of the impact on the wildlife in the area. In the absence of such information, forestry activities are an unjustified infringement of Tsilhqot'in Aboriginal rights in the Claim Area. As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.

[101] Towards the end of his judgment, the judge also dealt with certain issues that are not raised on these appeals – issues of limitation periods, *laches*, and Crown immunity.

[102] I will turn, now, to the issues on this appeal, which I will deal with in the same order as they were dealt with in the trial judgment.

## VII. The "All or Nothing Claim"

[103] The first issue is the judge's determination that the claim for Aboriginal title was an "all or nothing claim".

### A. Did the Amended Statement of Claim make an "All or Nothing Claim"?

[104] The issue arises from the amended statement of claim, a very concise document given the breadth of the claims advanced. The prayer for relief sought only the following declarations of Aboriginal title:

> a) A declaration that the Tsilhqot'in has existing aboriginal title to the Brittany; [and]
>
> b) A declaration that the Tsilhqot'in has existing aboriginal title to the Trapline Territory.

[105] As the trial judge noted at para. 120, the amended statement of claim did not explicitly seek a declaration of Aboriginal title for portions of the Claim Area in the event that the court did not find the full claims to be made out. Interestingly, however, the statement of defence of British Columbia included the following pleading:

> 12. … [T]he Provincial Defendants:
>
> …
>
> c.) say … that if the Aboriginal activities that may have been practised by the Ancestral Tsilhqot'in Groups constituted occupation establishing Aboriginal title to any portions of the Brittany or the Trapline Territory, such occupation did not extend to the whole of the Brittany or the Trapline Territory, but only to limited portions thereof and put the Plaintiff to the strict proof of the location and extent of such limited portions ….

[106] The courts of this province have generally taken a functional approach to pleadings. Pleadings are designed to provide the parties and the court with an outline of the material allegations and the relief sought. Where they succeed in fulfilling that function, minor defects are generally overlooked, unless other parties are prejudiced by them.

[107] The trial judge did express the view, at para. 129, that "[t]o allow the plaintiff to now seek declarations over portions of the Claim Area would be prejudicial to the defendants", but did not give any indication of why that would be so. Given that he felt the evidence was capable of fairly defining the Opinion Area, and that he used that area to find a violation of Aboriginal title, it is difficult to believe that the trial

judge had serious concerns with respect to trial fairness. He did not express specific concerns, nor, except as I will discuss below, have the defendants postulated any plausible ones on this appeal.

[108] In accepting that the amended statement of claim adopted an "all or nothing" approach, the trial judge placed a great deal of weight on the decision of the English Court of Appeal in *Biss v. Smallburgh Rural District Council*, [1965] Ch. 335 (C.A.). In that case, the plaintiffs sought a declaration that use of a 35-acre piece of land for caravan sites constituted a lawful non-conforming use under a regulatory statute. The trial judge found that only about nine acres of the parcel had been used as a caravan site before the enactment of the regulatory statute, and granted a declaration that the plaintiffs were entitled to a caravan licence in respect of that area only. On appeal, the Court found that the evidence did not support the granting of a declaration, either in respect of the 35-acre parcel or the 9-acre portion of it. The plaintiffs asked, however, that the Court make a declaration in respect of such smaller portion of the parcel as it was found to have been used as a caravan site at the relevant period.

[109] It is evident that Harman L.J. found the plaintiffs' approach to the case to be a frustrating one. At 360-62, he said:

> It seems to me perfectly hopeless on such evidence as there was to try to persuade the court that the whole 35 acres was a caravan site in March, 1960. Indeed, in this court that contention was after a time abandoned and it was no longer sought to obtain a declaration covering the whole 35 acres.
>
> From then on the cross-appeal was conducted after the manner of a Dutch auction where the auctioneer starts at the top price and comes gradually down till he finds a bidder. So here various lines of demarcation were suggested, coming down at last to about three acres round the house, and we were treated to a minute review of the evidence in order to show that in particular there was considerable evidence of the stationing of caravans (a) on the area immediately to the south of the farmhouse, (b) between it and the sea, and (c) round about the first pylon carrying the electric power line to the house.
>
> For myself I do not think that this is a legitimate way of conducting an action such as this. No suggestion was made of any amendment of the pleadings, which be it remembered dealt only with the 72 acres or the 35 acres as a whole, and I do not think that the remedy by declaration can properly be used

> in this way. It is a useful method, but I think that he who seeks a declaration must make up his mind and set out in his pleading what that declaration is.
>
> …
>
> In my judgment a plaintiff ought not to be allowed to ask the court to make a declaration covering whatever area the court shall after the inquiry conclude ought to be counted as within the Act. This might be a legitimate method of conducting an inquiry before an inspector appointed by the Minister after service of an enforcement notice, but I think that it is not legitimate here.
>
> Assuming, however, that I am wrong about that, have the plaintiffs proved to my satisfaction that any defined area ought to be treated as a caravan site?
> …
>
> A review of the evidence has satisfied me that the judge was right in his conclusion as to the whole 35 acres. He did not consider, because he was not asked to do so, the smaller areas to which our attention has been specially called. It seems to me, however, that he would have reached the like conclusions as to them and I think that he would have been right.

[110] The other two members of the Court agreed that the evidence did not establish any part of the land as a caravan site. Davies L.J., however, appears to have disagreed with Harman L.J. on the pleadings issue. At 369, he said:

> Had the evidence proved that the plaintiffs were entitled to something less than their full claim, it would, I think, have been unfortunate if their failure to make, either originally or by amendment, the appropriate alternative claim should have deprived them of their right to a declaration; but this question does not in the event arise.

[111] The third member of the Court, Russell L.J., did not address the pleadings issue.

[112] The idea that a claim for a declaration must be pleaded with precision and that a court cannot grant a declaration that differs from the one sought is not supportable in law. As the plaintiff points out, in *Harrison-Broadley v. Smith*, [1964] 1 All E.R. 867 (C.A.), heard about two weeks before *Biss*, Harman L.J. himself agreed that a declaration could be granted notwithstanding that it had not been specifically sought in the statement of claim.

[113] The plaintiff also cites the discussion of *Biss* in *Lau Wing Hong & Others v. Wong Wor Hung & Another*, [2006] 4 HKLRD 671 (H.C.):

> [144] It is apparent that the astringent comments of Harman LJ were *obiter* as the Court found no relief in terms of the proposed Declaration was available ….
>
> [145] … The fact that a Declaration is not specifically sought in the prayer for relief does not prevent one being granted [citations omitted]. It cannot be overlooked that, in an adverse possession case, the pleaded factual issues may permit of several possible variations and permutations as to the edges or boundaries of the disputed land at the material time. It would be unnecessarily demanding to require the party to plead in the prayer every precise possible variation of the underlying factual dispute that could be ultimately found to be proved. It would be like pleading all the results of the peeling of an onion – in which every single layer generates a slightly different and smaller variation of the one before it. The real test is whether there is genuine prejudice caused by this ambulatory approach. Here there was none. It will always be a matter of degree; but the Court should not indulge pedantry as being the same thing as prejudice.
>
> …
>
> [147] In *Zamir & Woolf: The Declaratory Judgment* (3rd ed., 2002), p. 284, the authors conclude that the *obiter* remarks of Harman LJ in *Biss* should not now be regarded as of general application. I agree as the emphasis in *Biss* was too austere. … The authors also state:
>
> > In practice it frequently happens that it is only after the court has determined the facts that it will be possible to decide in what terms a declaration should be granted. As long as the parties are given an opportunity to address the court on any proposed declaration it is highly desirable that it should retain as wide a discretion as possible as to the precise terms in which a declaration is granted.
>
> [148] These pragmatic considerations correctly represent the proper approach in Hong Kong. The position under Australian law, [PW] Young, *Declaratory Orders,* (2nd ed., 1984) pp. 54, 188; Canadian law, Lazar Sarna, *The Law of Declaratory Judgments* (2nd ed., 1988) p. 84 and New Zealand law, is to the same effect: *Manga v Attorney-General* [2000] 2 NZLR 65 at p. 84.

[114] As counsel for Canada points out, this case is not binding on this Court, but of course, the same can be said of *Biss* itself. In my view, the discussion in *Lau Wing Hong* is entirely persuasive. There is no general rule of pleading that either requires declarations to be pleaded precisely or that precludes a court from granting a declaration that is less sweeping than the one sought by the plaintiff. The issue in every case is whether the parties are prejudiced by the manner in which the case has proceeded.

[115] In *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, the Court granted a declaration, though none had been specifically sought in the pleadings. The Court accepted, at 647, that a "basket clause" in the prayer for relief was sufficient to permit a court to exercise its discretion to grant a declaration. The Court noted that the appellant had not been taken by surprise or prejudiced by the court's decision to grant a declaration.

[116] The pleadings in the case before us also include a "basket clause" in the prayer for relief, which seeks "such further, other, equitable, and related relief, … as to this Honourable Court may seem meet and just". While I doubt that resort need be had to that clause in this case, *Native Women's Assn.* clearly establishes that such a clause can be sufficient to cover a claim for a declaration.

[117] It follows that I do not agree with the trial judge's ruling that the plaintiff's claim was an "all or nothing claim". The claim was sufficiently pleaded to allow the court to find that Aboriginal title had been proven in respect of only part of the Claim Area.

[118] As the plaintiff points out, flexibility in the granting of a declaration is particularly important in a case where Aboriginal title is claimed. The occupation of traditional territories by First Nations prior to the assertion of Crown sovereignty was not an occupation based on a Torrens system, or, indeed, on any precise boundaries. Except where impassable (or virtually impassable) natural boundaries existed, the limits of a traditional territory were typically ill-defined and fluid. This was particularly the case with groups such as the Tsilhqot'in, who were semi-nomadic. To require proof of Aboriginal title precisely mirroring the claim would be too exacting. Indeed, the trial judge recognized this, and discussed the difficulty of defining boundaries at paras. 641-649 of his judgment:

> [641] On several occasions during the course of the trial I remarked that the boundaries of Tachelach'ed and the Trapline Territories were entirely artificial. Tachelach'ed is bounded east and west by two rivers, the Tsilhqox and the Dasiqox, and on the south by a boundary characterized by a difference of opinion even amongst the people who live there. No one would suggest that the resource harvesting activities of Tsilhqot'in people ever stopped at the rivers. …

> [645] As the evidence unfolded it became apparent that in order to assert his claim, the plaintiff had to conform to the Eurocentric need to define boundaries. Traditional boundaries, surveyed with proper metes and bounds were not a possibility; some boundaries simply had to be found. The Trapline Territories provided convenient boundaries, even if they had little historical or anthropological relevance. They are, at least, relevant to the survival of a twentieth century Tsilhqot'in person. Tachelach'ed, on the eastern and western edges, provides natural geographic boundaries, rooted in oral traditions.
>
> …
>
> [647] Tsilhqot'in society, as described to me by several elder witnesses, displayed a high degree of territorial mobility and, until the twentieth century, appeared to place little or no reliance on European style cultivation. The fixing of reserves and the pressure to raise cattle brought such a "cultivation" component to Tsilhqot'in nomadism. Tsilhqot'in nomadism, characterized by Dr. Brealey as "relatively nomadic" or "semi nomadic" was centralized within Tsilhqot'in traditional territory. Tsilhqot'in people tended to follow the same seasonal patterns in ways that accommodated their kinship based society. They were semi-nomadic in the sense that there was a collective regrouping in one location each year as a respite from the dark and cold of winter. Tsilhqot'in nomadism also allowed people to move at short notice in the case of a periodic failure of the salmon run. In these circumstances large numbers moved to the west to winter with their neighbours the Nuxalk people.
>
> [648] In Tsilhqot'in semi-nomadic society there were no boundaries in the sense that a boundary is currently understood with reference to set metes and bounds.
>
> …
>
> [649] In hindsight, I fully understand the need to postulate artificial boundaries. There is a contemporary societal demand for limits, even if those limits, measured against the whole, are entirely arbitrary. Boundary construction in Tsilhqot'in society was a social exercise. Their boundaries were and continue to be "recognized, understood and validated not by maps and plans, but from 'inside the collective'".

[119] The Opinion Area defined by the trial judge contained artificial boundaries based on a process of approximation. Although he found, for example, that the southern part of Tachelach'ed was occupied more intensively in 1846 by the Tsilhqot'in than the northern part, the precise placement of the boundary between the Opinion Area and other parts of the Claim Area was, in the end, arbitrary. It would have been miraculous if the plaintiff, in pleading his case, had fixed upon precisely the same boundary as the trial judge ultimately selected.

[120] In its argument, however, British Columbia raises an issue that is, in my view, of considerable importance. Where a trial has proceeded on a certain theory of Aboriginal title, it would be prejudicial to the defendants if the plaintiff were given the right to assert a completely different theory in argument.

[121] The difficulty is well-illustrated by *Delgamuukw*. In that case, the plaintiffs asserted that 51 Gitksan and Wet'suwet'en houses each had individual claims to particular territories. Among the difficulties with the assertion was that claims of individual houses conflicted with one another, making it impossible for the court to conclude that a particular house had exclusive possession of its claimed territory. On appeal, the plaintiffs attempted to eliminate the problem by amalgamating the claims of the Gitksan houses and amalgamating the claims of the Wet'suwet'en houses. The Supreme Court of Canada held that to allow such a change in the theory of the case at the appeal stage would be unfair:

> [76] … The appellants argue that the respondents did not experience prejudice since the collective and individual claims are related to the extent that the territory claimed by each nation is merely the sum of the individual claims of each House; the external boundaries of the collective claims therefore represent the outer boundaries of the outer territories. Although that argument carries considerable weight, it does not address the basic point that the collective claims were simply not in issue at trial. To frame the case in a different manner on appeal would retroactively deny the respondents the opportunity to know the appellants' case.

[122] 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.

[123] 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.

[124] The Supreme Court of Canada's decision in *Lax Kw'alaams Indian Band v. Canada (Attorney General*), 2011 SCC 56, [2011] 3 S.C.R. 535, was released after the oral hearing of the appeal in this case, and, accordingly, we have not had the benefit of submissions with respect to it. It seems to me, however, that it supports the idea that a court should address the question of whether lesser rights than were claimed have been proven when the lesser rights are of the same nature as those claimed, are capable of clear definition, and can be considered without prejudicing the defendants. In accordance with those principles, the trial judge was entitled to consider whether a lesser territorial entitlement than was claimed had been proven. On the other hand, if he had considered site-specific title claims on a theory different than the one advanced at trial, he would have been in contravention of those principles.

[125] In my view, the trial judge, in discussing the Opinion Area, was not adopting the theory of Aboriginal title advanced by the defendants. Rather, he appears to have accepted that Aboriginal title could be claimed on a territorial basis, and did not demand proof of intensive occupation of particular sites. While he 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.

[126] 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. On

the other hand, if Aboriginal title must be established on the basis of more intensive physical occupation of specific sites, the current litigation did not provide a proper basis for such a finding. I will address this issue further in my discussion of the nature of proof of Aboriginal title.

### B. Does dismissal of the title claim found a cause of action estoppel?

[127] Canada argues that the judge was wrong to dismiss the Aboriginal title claim on a "without prejudice" basis. It contends that any claim to title within the Claim Area must be *res judicata* based on the doctrine of cause of action estoppel deriving from *Henderson v. Henderson* (1843), 3 Hare 100. In that case, at 115, the Vice-Chancellor described the rule as follows:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[128] I would reject Canada's contention. The claim before the court was a claim for Aboriginal title based on a territorial theory. The case was one of the most complex ever adjudicated in this country. To suggest that the plaintiff ought to have been compelled to bring other, site-specific claims within the same litigation lacks reality. Such claims did not "belong to the subject of litigation" in this case. They would have raised much different factual issues, and would have required a much longer and more unwieldy trial. It would not have been in the interests of justice to have such claims adjudicated in this proceeding.

[129] The doctrine of *res judicata,* including cause of action estoppel, is concerned with abuse of process (see the comment of Lord Keith of Kinkel in *Arnold v. National Westminster Bank Plc.*, [1991] 2 A.C. 93 at 110 (H.L.)). I do not think that it can

possibly be argued, in the context of the present case, that the plaintiff's decision to proceed with a territorial claim rather than a narrower site-specific claim was an abuse of process. As I will discuss, Aboriginal title has been a bit of a moving target in Canadian law, and it would be unfair to fault a person in the position of the plaintiff for choosing to pursue one theory of title rather than another.

[130] I recognize that the doctrine of cause of action estoppel normally requires a plaintiff to bring all related claims together in a single action, and I do not wish to cast any doubt on that proposition. In the unique circumstances of this case, however, it would have been completely impractical for site-specific title claims to be joined with the territorial claim that was advanced. For that reason, further site-specific claims to Aboriginal title in the territory would not constitute abuses of process, and are not barred by the doctrine of *res judicata*.

[131] There are, in the result, only two possible conclusions with respect to the judge's dismissal of the title claim. If the plaintiff was correct in asserting a territorial claim, the judge ought to have granted a declaration with respect to a more limited territory than the entire Claim Area. On the other hand, if a territorial claim is not a tenable basis for asserting Aboriginal title, the dismissal of the territorial claim cannot form the basis of cause of action estoppel so as to bar any future site-specific claim based on a different theory of title.

## VIII. The Proper Rights Holder

[132] The second issue that arises on this appeal is whether the trial judge erred in finding that the proper rights holder was the Tsilhqot'in Nation. The plaintiff's claim was brought on behalf of both the Xeni Gwet'in and the Tsilhqot'in, but the relief sought in respect of the two entities was different: the plaintiff sought a declaration of Aboriginal title on behalf of the Tsilhqot'in, and a declaration of other Aboriginal rights on behalf of the Xeni Gwet'in. In closing argument, he sought to advance claims for declarations of Aboriginal rights on behalf of the Tsilhqot'in as well as the Xeni Gwet'in. The trial judge allowed the plaintiff to proceed in that manner and ultimately found that the Tsilhqot'in Nation was the proper rights holder.

[133] British Columbia contended that it was prejudiced in its defence by the plaintiff's decision to modify his claim in the course of final argument. It said that if it had known that claims for Aboriginal rights were being advanced on behalf of the Tsilhqot'in Nation, it could have concentrated effort on exposing conflicting interests of different subgroups within the Tsilhqot'in Nation, with a view to demonstrating that particular Aboriginal rights are not held collectively by all Tsilhqot'in people.

[134] The trial judge rejected the assertion that British Columbia had suffered procedural or evidentiary prejudice:

> [1220] … The evidence in this case leads to one conclusion: all Tsilhqot'in people were entitled to utilize the entire Tsilhqot'in territory in the course of their seasonal rounds. The Xeni Gwet'in people are Tsilhqot'in people, distinguished only by their nascent group and the fact of their location at the time reserves were set aside.
>
> [1221] This fact comes as no surprise and it cannot be prejudicial to British Columbia to acknowledge that it was Tsilhqot'in people who hunted, trapped and traded throughout the Claim Area and beyond before the arrival of European people.

[135] On appeal, British Columbia renews the argument that the plaintiff's late change of position caused it prejudice. I am not persuaded that this argument can succeed. The question of how members of the Tsilhqot'in Nation shared land-based rights was fully canvassed at trial, albeit with an emphasis on Aboriginal title rather than other Aboriginal rights. In the circumstances, it is difficult to accept that British Columbia was prejudiced by the late change in the plaintiff's position. In any event, it seems to me that the judge was in an ideal position to assess British Columbia's contention that it might have approached the case differently had the Aboriginal rights claims been advanced, from the outset, on behalf of the Tsilhqot'in.

[136] While the plaintiff did not formally apply to amend the statement of claim to assert his claim to Aboriginal rights on behalf of the Tsilhqot'in Nation, that was, effectively, what he was seeking and what the judge tacitly allowed. It was within the judge's discretion to allow such an amendment. Absent a demonstrated error in the manner in which the judge exercised his discretion, this Court should not interfere with his decision. In my view, no error has been demonstrated. In particular, British

Columbia has not shown that the judge was wrong in finding that it suffered no prejudice as a result of the late change in the relief sought.

[137] While I would uphold the judge's determination that British Columbia suffered no evidentiary or procedural prejudice as a result of the plaintiff being allowed to argue that Aboriginal rights are held by the Tsilhqot'in Nation rather than by the Xeni Gwet'in, that is not the end of the matter. British Columbia argues that, as a matter of law, the Tsilhqot'in Nation cannot properly be described as the rights holder.

[138] British Columbia points to serious practical problems that it will face as a result of a finding that rights are held at the level of the Tsilhqot'in Nation rather than at the level of the Xeni Gwet'in. It notes, for example, that it has granted exclusive commercial trapping rights to the Xeni Gwet'in in the Trapline Territory. It says that it has done so on the understanding that the Xeni Gwet'in are the holders of Aboriginal rights to trap in that area.

[139] More importantly, British Columbia says that a finding that Aboriginal rights are held on behalf of the Tsilhqot'in Nation will wrongly assign rights to an entity that has no governing or decision-making body, and which has no established power structure by which it can designate people who are authorized to speak on behalf of the collective. Indeed, it contends that the judge's conclusions on the evidence "would not support a finding that there existed one Tsilhqot'in Nation".

[140] British Columbia's position that the Tsilhqot'in Nation lacks political structure is supported by the findings of the trial judge. He found that there was, traditionally, no pan-Tsilhqot'in governing body. While five Tsilhqot'in bands have, in recent years, incorporated an organization known as the Tsilhqot'in National Government under the *Canada Corporations Act*, R.S.C. 1970, c. C-32, it does not represent all Tsilhqot'in people. The Tl'esqox (or Toosey Indian Band) is not a member, nor is the Ulkatcho First Nation which, though predominately Carrier, also includes many Tsilhqot'in people. Further, it would appear that there are Tsilhqot'in people who are not members of any of those bands (see *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.* (1999), 37 C.P.C. (4th) 101 at para. 3 (B.C.S.C.)).

[141] On the other hand, the Xeni Gwet'in, as a band under the *Indian Act*, has well-defined membership and a clear political structure. That makes it possible to definitively identify individuals entitled to exercise Aboriginal rights, and allows governments to engage in proper consultation when rights are threatened.

[142] I have considerable sympathy for the position of British Columbia. The courts have established that governments must respect Aboriginal rights. Where governments infringe such rights, they must justify the infringement; one component of the justification analysis is the question of whether or not there has been consultation with the group that holds the Aboriginal right (*R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1119). Even where Aboriginal rights are unproven, governments must engage in consultations with groups asserting rights at a level commensurate with the strength of the claim (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511). Where there is no body with authority to speak for the collective (or worse, where there are competing bodies contending that they have such authority), consultation may be stymied.

[143] Consultation and negotiation are, without doubt, the preferred routes to reconciliation of Aboriginal rights with the needs of British Columbians as a whole. Practical barriers to consultation and negotiation are, therefore, more than mere inconveniences.

[144] British Columbia asserts that these practical considerations demonstrate the necessity for any rights-holding group to have a political structure capable of decision-making. It goes further, however, and says that the requirement is supportable not merely on practical grounds, but also on jurisprudential ones.

[145] Aboriginal rights are communal rights. British Columbia suggests that in order for a collective to be considered a proper rights holder, it must have traditionally exercised decision-making authority with respect to the exploitation and allocation of such rights within the collective. British Columbia contends that the absence of any traditional pan-Tsilhqot'in governance structure is fatal to any claim on behalf of the Tsilhqot'in Nation.

[146] If the law adopted such a position, it might well be devastating to claims by groups such as the Tsilhqot'in. The judge found that Tsilhqot'in decision-making and governance traditionally took place on a localized level, typically within family or encampment groupings, depending on the season. Because of the fluidity of the group structure and the limits of available evidence, however, it would be impossible to trace those localized collectives into modern counterparts. If Aboriginal rights devolve only upon collectives that can show that they are the modern successors of groups that had a clear decision-making structure, no one would be able to claim Aboriginal rights on behalf of the Tsilhqot'in.

[147] Even if it were possible to trace modern counterparts to the traditional family, encampment, and sub-band groupings of the Tsilhqot'in, recognizing those collectives as the holders of Aboriginal rights would not reflect the judge's findings with respect to the traditional allocation of rights. He found that the Tsilhqot'in people recognized that they collectively had rights throughout their traditional territories, regardless of which sub-groups they belonged to.

[148] British Columbia argues that bands under the *Indian Act* will typically be the proper claimants in Aboriginal rights cases. It points to a number of cases in which claims have been brought by or on behalf of such entities. Rights will not, however, always be allocated along band lines. This fact was recently recognized by this Court in *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193. While the Court found that the "Aboriginal collectives" identified by the chambers judge were not juridical persons entitled to make a claim in a class proceeding, the majority did not doubt that rights could be held on a collective basis that was not based on band membership:

> [77] … [T]he chambers judge designated the class members as "Aboriginal collectives" because of his recognition of the fact that Band membership does not necessarily establish the requisite ancestral connection to assert an Aboriginal right. I agree with the chambers judge in this regard. This is so because in some cases, an Aboriginal collective may self-identify along traditional lines independent of *Indian Act* designation as a Band. A Band is not necessarily the proper entity to assert an Aboriginal right.

[149] In my view, the position taken by British Columbia does not take adequate account of the Aboriginal perspective with respect to this matter. I agree with the trial judge's conclusion that the definition of the proper rights holder is a matter to be determined primarily from the viewpoint of the Aboriginal collective itself. In that regard, at para. 471, the judge cited with approval a passage from Professor Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 745:

> What role, then, does native custom play in this scheme? The answer lies in the fact that, while the doctrine of aboriginal land rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. Subject, always, to valid legislation, the latter are governed by rules peculiar to the group, as laid down by custom or internal governmental organs.
>
> Thus, the doctrine of aboriginal land rights attributes to native groups a collective title with certain general features. The character of this collective title is not governed by traditional notions or practices, and so does not vary from group to group. However, the rights of individuals and other entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules founded on custom. These rules dictate the extent to which any individual, family, lineage, or other sub-group has rights to possess and use lands and resources vested in the entire group. The rules have a customary base, but they are not for that reason necessarily static. Except to the extent they may be otherwise regulated by statute, they are open to both formal and informal change, in accordance with shifting group attitudes, needs, and practices.
>
> [Footnotes omitted; see also Slattery, "The Metamorphosis of Aboriginal Title" (2006) 85 Can. Bar Rev. 255.]

[150] In the case before us, the evidence clearly established that the holders of Aboriginal rights within the Claim Area have traditionally defined themselves as being the collective of all Tsilhqot'in people. The Tsilhqot'in Nation, therefore, is the proper rights holder.

[151] It will, undoubtedly, be necessary for First Nations, governments, and the courts to wrestle with the problem of who properly represents rights holders in particular cases, and how those representatives will engage with governments. I do not underestimate the challenges in resolving those issues, and recognize that the law in the area is in its infancy. I do not, however, see that these practical difficulties can be allowed to preclude recognition of Aboriginal rights that are otherwise proven.

[152] Fortunately, the record in this case resolves the question of who speaks for the Tsilhqot'in Nation. Once again, I refer to what the trial judge described as the "modern political structure" of the Tsilhqot'in Nation:

> [468] In the modern Tsilhqot'in political structure, Xeni Gwet'in people are viewed amongst Tsilhqot'in people as the caretakers of the lands in and about Xeni, including Tachelach'ed. Other bands are considered to be the caretakers of the lands that surround their reserves. Still, the caretakers have no more rights to the land or the resources than any other Tsilhqot'in person.

[153] While the judge did not specifically refer to the Trapline Territory in this paragraph, it was clearly his intention to include it. There was a great deal of evidence establishing that the lands over which the Xeni Gwet'in was the "caretaker" included all of the Claim Area.

[154] I read this paragraph as a recognition that the Xeni Gwet'in is the custodian of land-based Aboriginal rights within the Claim Area – indeed, several witnesses used the word "custodian" to describe the relationship between the Xeni Gwet'in and the Claim Area. Thus, though the rights are held on behalf of the entire Tsilhqot'in Nation, it is the Xeni Gwet'in that administers and protects those rights.

[155] In saying this, I do not ignore the fact that the judge also said, in the paragraph immediately following the one I have quoted, that "band level organization … is without any meaning in the resolution of Aboriginal title and rights for Tsilhqot'in people". As I read the context of that statement, the judge's point was only that the organization of the Tsilhqot'in into bands as a result of the reserve allocation process and the *Indian Act* does not affect the identity of the Nation as the holder of rights. To the extent that the statement goes further than that, and suggests that band councils have no role to play in the administration of rights or in discussions with government, it is, in my view, not a correct assessment of the situation.

[156] In the result, I am not persuaded that the judge made any error in finding that the Tsilhqot'in Nation is the proper rights holder. The Xeni Gwet'in, as modern "caretaker" or custodian of the Tsilhqot'in rights in the Claim Area, has a special role

to play in asserting those rights and in engaging with governments in attempts to reconcile them with broader public interests.

[157] Before leaving the issue of the proper rights holder, I think it appropriate to refer to the judge's view that the tests in *R. v. Powley*, 2003 SCC 43, [2003] 2 S.C.R. 207, can be used to determine membership in the Tsilhqot'in Nation. I note that *Powley* dealt with the difficult issue of who qualifies as Métis for the purposes of s. 35 of the *Constitution Act, 1982*. The Métis have a unique history and mix of traditions, and have not, historically, been given the same recognition as a distinct group as have those who are described in s. 35(2) as "the Indian … peoples of Canada". While it may well be that the *Powley* tests, or some variation of them, serve to identify those individuals who are entitled to the benefit of Aboriginal rights in the cases of all First Nations, I prefer not to express any opinion on that matter in this case.

## IX. Aboriginal Title

### A. Introduction

[158] Before addressing the substance of the Aboriginal title claim, I wish to comment on the difficulties that First Nations and governments face in attempting to settle cases such as the present one.

[159] In accordance with the common law tradition, the courts have proceeded to develop the law relating to Aboriginal title incrementally on a case-by-case basis. It is a particularly daunting task because the issues involved are unique. In developing rules for the proof of rights and title, the courts have had to develop, as well, an entire philosophical and jurisprudential framework for the recognition of traditional rights that came into being before the reception of the common law.

[160] Even, however, taking into account the difficulties inherent in this area of the law, jurisprudential development has been slow. While several full-scale claims for title to large areas of land have been advanced to the level of the Supreme Court of Canada, none has succeeded, and considerable areas of uncertainty subsist.

[161] To some degree, the apparent reluctance of the courts to go beyond what is needed to resolve the specific cases is understandable. I have already noted that that is the traditional manner in which the common law has developed. Further, the stakes in Aboriginal title claims have been high – cases such as *Calder*, *Delgamuukw*, and *Marshall; Bernard* involved vast areas of land. The resolution of such claims can be critical to the future of both the First Nation involved and the broader Canadian population.

[162] The technical difficulty of this area of law has exacerbated the problem, and has led to considerable frustration. The efforts of the Nisga'a in *Calder*, the Gitksan and Wet'suwet'en in *Delgamuukw*, and the Tsilhqot'in in this case (to this point) all consumed enormous amounts of resources, only to have the cases end inconclusively due to problems with the way they were commenced or pleaded.

[163] The courts have frequently emphasized the need for resolution of Aboriginal rights and title issues through negotiated agreements where possible. The trial judge in this case went beyond the ordinary role of the court in attempting to set the stage for a negotiated resolution. Negotiated resolution of issues, however, is not facilitated by uncertainty in the law.

[164] It is apparent that all sides have attempted to resolve the issues in this case, but without success. That is not surprising, given that the theories of Aboriginal title espoused by the plaintiff, on the one hand, and the defendants, on the other, are as far apart as they are. The trial judge's decision to provide a non-binding opinion as to the title area did not, in the end, assist the parties in finding common ground.

[165] The present case has been an extraordinary one, both in terms of the resources mustered by the parties to present their cases and in terms of the court resources that have been devoted to it. It is in many respects a test case on the issue of Aboriginal title. It presents a suitable vehicle for development of the law.

## B. The Basis for Aboriginal Title and Rights

[166] The basic concepts underlying claims of Aboriginal title and Aboriginal rights are straightforward. First Nations occupied the land that became Canada long before the arrival of Europeans. As the trial judge noted at para. 592, “Aboriginal nations were not recognized as nation states by the European nations colonizing North America”. European explorers considered that by virtue of the “principle of discovery” they were at liberty to claim territory in North America on behalf of their sovereigns (see *Guerin v. The Queen*, [1984] 2 S.C.R. 335 at 378). While it is difficult to rationalize that view from a modern perspective, the history is clear. As was said in *Sparrow* at 1103:

> [W]hile British policy towards the native population was based on respect for their right to occupy their traditional lands, … there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. [Citations omitted.]

[167] The assertion of Crown sovereignty did not, as a matter of common law, serve to extinguish the pre-existing traditional rights of First Nations, and those rights survived. Aboriginal rights, then, are recognized rather than created by the common law.

[168] The general notion that Aboriginal rights survived the assertion of Crown sovereignty in common law jurisdictions is beyond doubt. The manner in which different common law jurisdictions deal with Aboriginal rights, however, varies. (See the discussion in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at paras. 36-42).

[169] This variation is not surprising. While the basic concept of Aboriginal rights is easily understood, the recognition of such rights in a common law system is a complex matter. Three major questions must be answered in order to elaborate a workable framework of Aboriginal rights: What types of rights are recognized? How is their existence to be determined? What protection is to be afforded those rights? Compendiously, the answers to those questions have been described as representing a reconciliation of Aboriginal rights with Crown (or national) sovereignty.

[170] There are extreme positions which attempt to “reconcile” Aboriginal rights with Crown sovereignty by giving one or the other absolute primacy, and these extreme positions have, from time to time, been advanced in the courts. For example, in *Calder*, the Attorney General of British Columbia argued that Aboriginal title (and, by extension, other Aboriginal rights) had been completely extinguished in British Columbia. At the other extreme, the plaintiffs in *Delgamuukw* originally claimed absolute ownership of their traditional territory, as well as a paramount right to govern it (see *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 at 193-4 (B.C.S.C.)). While these positions were not, *per se*, inconsistent with a basic theory of Aboriginal rights, they failed to provide a basis for genuine reconciliation of Aboriginal rights with Crown sovereignty. Such reconciliation demands not only a framework that is jurisprudentially defensible, but also one that presents a practical compromise and encourages consensual settlement of differences. As Lamer C.J.C. put it at the end of his judgment in *Delgamuukw*:

> [186] ... Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. Let us face it, we are all here to stay.

[171] One fundamental aspect of Aboriginal rights that must be kept in mind is that they are intimately connected with traditional Aboriginal culture and practices, adapted, as they may be, to modern conditions. Respect for Aboriginal rights safeguards the unique cultures of Aboriginal groups, and preserves their abilities to continue to live according to their traditions: see *R. v. Sappier; R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686 at paras. 26 and 33. Such respect is the proper focus of an Aboriginal rights analysis.

[172] As I will indicate, this fundamental aspect of Aboriginal rights must be kept in mind in defining the extent of Aboriginal title. The law must recognize and protect Aboriginal title where exclusive occupation of the land is critical to the traditional culture and identity of an Aboriginal group. This will usually be the case where the traditional use of a tract of land was intensive and regular.

[173] Where traditional use and occupation of a tract of land was less intensive or regular, however, recognition of Aboriginal rights other than title may be sufficient to fully preserve the ability of members of a First Nation to continue their traditional activities and lifestyles and may fully preserve Aboriginal culture. In such cases, the recognition of those other rights may be more commensurate with the reconciliation of Aboriginal rights with Crown sovereignty than would a broader recognition of Aboriginal title.

## C. Canadian Law of Aboriginal Title

[174] The rights of First Nations to lands that they traditionally occupied has been a concern of colonial and Canadian law from the earliest times. The history of protection of those rights, has, however, been embarrassingly weak. As the Supreme Court of Canada remarked in *Sparrow* at 1103:

> [T]here can be no doubt that over the years the rights of the Indians were often honoured in the breach…. As MacDonald J. stated in *Pasco v. Canadian National Railway Co*., [1986] 1 C.N.L.R. 35 (B.C.S.C.), at p. 37: "We cannot recount with much pride the treatment accorded to the native people of this country."

[175] In most of Canada, the Crown entered into treaties with First Nations in an attempt to resolve many of the concerns. Even where such treaties exist, however, there continue to be many issues that arise. The Crown did not enter into treaties in respect of most of the territory in what is now British Columbia, and, accordingly, Aboriginal title issues arise in this province in a very stark way.

[176] Despite the lengthy period in which reconciliation of Aboriginal interests with those of the broader population has been required, it is only comparatively recently that the law has begun to develop a robust theory of Aboriginal rights, including Aboriginal title.

[177] While early Canadian law recognized "Indian tenure" in land, the scope and nature of that tenure was uncertain. In *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at 56 (J.C.P.C.), the tenure was described as being "a personal and usufructuary right, dependent on the goodwill of the Sovereign".

[178] The description of Aboriginal title as being "personal and usufructuary" was subject to criticism in later cases. In *Calder* at 328, Judson J. said that he found the description unhelpful, a sentiment that would later be echoed in *Delgamuukw* at para. 112. A discussion of various criticisms of the use of the phrase "personal and usufructuary" can be found in *Guerin* at 380-382. In *Guerin*, Aboriginal title was described, at 382, as being a *sui generis* interest. The majority said:

> The nature of the Indians' interest is … best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.

[179] Most of the criticisms of the phrase used in *St. Catherine's Milling* were focused on the question of whether Aboriginal title should be considered to be more akin to a real or a personal interest in land. They were not directed, so much, at the idea that the interest was of a usufructuary character.

[180] Until relatively recently, Aboriginal rights were often considered to be incidents of Aboriginal title. This was in keeping with the idea that Aboriginal title itself was a sort of usufructuary right. Thus, in *Baker Lake (Hamlet) v. Canada (Minister of Indian Affairs and Northern Development)*, [1980] 1 F.C. 518, an important case in the development of Canadian Aboriginal law, the judge granted a declaration at 579 that "the lands [in issue] are subject to the aboriginal right and title of the Inuit to hunt and fish thereon".

[181] Even as Aboriginal rights were recognized to exist separately from Aboriginal title, the relationship between title and rights remained in a state of flux. In her dissenting judgment in *Van der Peet*, for instance, L'Heureux-Dubé J. expressed the view that common law recognition of Aboriginal title depended on proof of a large "bundle" of Aboriginal rights in a particular area:

> [119] … Aboriginal title … is founded on the common law and strict conditions must be fulfilled for such title to be recognized. In fact, aboriginal title exists when the bundle of aboriginal rights is large enough to command the recognition of a *sui generis* proprietary interest to occupy and use the land. [Citations omitted.]

[182] The decision of the majority in *Van der Peet* marks the beginning of the Supreme Court of Canada's construction of a modern comprehensive framework dealing with Aboriginal rights and Aboriginal title. It defined the basic requirements for recognition of an Aboriginal right. The construction of the framework was further advanced in *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Côté*, [1996] 3 S.C.R. 139, which considered whether land-based Aboriginal rights could exist in places where claims to Aboriginal title could not be made out. The Court affirmed that they could. In *Adams*, Lamer C.J.C., speaking for the majority, said:

> [26] What [the test for identification of Aboriginal rights set out in *Van der Peet*], along with the conceptual basis which underlies it, indicates, is that while claims to aboriginal title fall within the conceptual framework of aboriginal rights, aboriginal rights do not exist solely where a claim to aboriginal title has been made out. Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that that group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.
>
> [Emphasis in original.]

[183] The majority of the Court, then, seems to have considered that Aboriginal title could only be established by a particular (unstated) level of occupation or use. Further, in order to found a claim to Aboriginal title, it would have to be shown that the land on which the activity took place was of "central significance" to the distinctive culture.

[184] Lamer C.J.C. continued by referring specifically to the situation of nomadic groups:

> [27] To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect.

[185] He noted that levels of occupation and use of land that were insufficient to found a claim to Aboriginal title might, nonetheless, found a claim to specific Aboriginal rights:

> [30] The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish <u>on the tract of land in question</u>.
>
> [Emphasis in original.]

[186] *Adams* stands for the proposition that traditional use of land will not necessarily found a claim to Aboriginal title – it may, instead, found an Aboriginal right to continue to use the land for specific activities or purposes. As the law recognized that usufructuary rights could be divorced from title, the rationale for describing Aboriginal title as being "usufructuary" in nature ceased to exist. I agree with the trial judge's conclusion, at para. 478, that it is no longer correct to describe Aboriginal title in this way.

[187] The Supreme Court of Canada first attempted a comprehensive discussion of Aboriginal title in *Delgamuukw*. Lamer C.J.C., speaking for the majority, described Aboriginal title as follows:

> [111] … Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit … flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.

[188] Referring back to *Adams*, he considered the relationship between Aboriginal rights and Aboriginal title:

> [137] … [A]lthough aboriginal title is a species of aboriginal right recognized and affirmed by s. 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land "was of a central significance to their distinctive culture" [citing para. 26 of *Adams*].
>
> [138] The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" [citing para. 26 of *Adams;* emphasis is from *Adams*]. Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity.…
>
> [Emphasis in original.]

[189] He emphasized that traditional use of land will not necessarily found claims to Aboriginal title, even when it establishes an Aboriginal right:

> [139] Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied "the location of their settlements with the season and changing circumstances" (at para. 27)….

[190] Lamer C.J.C. set out specific requirements for the establishment of Aboriginal title in para. 143:

> [143] In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[191] For the purposes of the present case, the question is what degree of occupation suffices to found a claim for Aboriginal title. There is some discussion of this question in *Delgamuukw* beginning at para. 149:

> [149] … Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title*, at pp. 201-2. In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed": Brian Slattery, "Understanding Aboriginal Rights", at p. 758.
>
> [150] In *Van der Peet*, I drew a distinction between those practices, customs and traditions of aboriginal peoples which were "an aspect of, or took place in" the society of the aboriginal group asserting the claim and those which were "a central and significant part of the society's distinctive culture" (at para. 55). The latter stood apart because they "made the culture of the society distinctive . . . it was one of the things that truly made the society what it was" (at para. 55, emphasis in original). The same requirement operates in the determination of the proof of aboriginal title. As I said in *Adams*, a claim to title is made out when a group can demonstrate "that their connection with the piece of land … was of a central significance to their distinctive culture" (at para. 26).
>
> [151] Although this remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.

[192] After discussing the requirement that occupancy be exclusive, the majority judgment concluded by noting that non-exclusive occupation can found rights other than Aboriginal title:

> [159] I should also reiterate that if aboriginals can show that they occupied a particular piece of land, but did not do so exclusively, it will always be possible to establish aboriginal rights short of title. These rights will likely be intimately tied to the land and may permit a number of possible uses. However, unlike title, they are not a right to the land itself. Rather, as I have suggested, they are a right to do certain things in connection with that land. If, for example, it were established that the lands near those subject to a title claim were used for hunting by a number of bands, those shared lands would not be subject to a claim for aboriginal title, as they lack the crucial element of exclusivity. However, they may be subject to site-specific aboriginal rights by all of the bands who used it. This does not entitle anyone to the land itself, but it may entitle all of the bands who hunted on the land to hunting rights.

[193] The Supreme Court further considered the issue of Aboriginal title in its judgment in *Marshall; Bernard*. The judgment arose out of two separate appeals. In *Marshall*, thirty-five Mi'kmaq Indians were charged under Nova Scotia legislation with cutting timber on Crown land without authorization. In *Bernard*, a Mi'kmaq Indian was charged with unlawful possession of logs under New Brunswick legislation. The logs had been cut by another Mi'kmaq Indian on Crown lands. In both cases, the accused argued that the land from which the timber was cut was subject to Mi'kmaq Aboriginal title, and that provincial authorization for logging by the Mi'kmaq was therefore unnecessary. Technically, the title issue in each case only concerned the tract of land from which the logs had been cut. In asserting title, however, the defendants in each case contended that the relevant tract of land was, in fact, part of a large territory over which the Mi'kmaq held title.

[194] The accused were convicted at trial in both *Marshall* and *Bernard*. In both cases, the trial judges found that Mi'kmaq occupation of the cutting sites at the time of Crown sovereignty was insufficient to support a claim to Aboriginal title. They both interpreted the test for title as requiring regular and exclusive occupancy of the area. In both cases, summary conviction appeal judges upheld the convictions.

[195] In *Marshall*, the Nova Scotia Court of Appeal held that the trial judge had applied too stringent a test for occupation, particularly given that the Mi'kmaq were a semi-nomadic group. Instead, the court considered that occupation could be made out by demonstrating entry into an area, combined with an intention to occupy. In a passage quoted at para. 42 of the Supreme Court of Canada's decision, the Court of Appeal held that "cutting trees or grass, fishing in tracts of water, and even perambulation" could be relied upon to show occupation sufficient to found a title claim. The Court of Appeal ordered a new trial.

[196] In *Bernard*, the New Brunswick Court of Appeal held that it was unnecessary to show occupation or regular use of the specific area from which logs were taken. Instead, it held, occupation of a nearby area was sufficient to show "that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq" (quoted at para. 43 of the Supreme Court of Canada's decision). The Court of Appeal substituted an acquittal for the conviction that had been entered at trial.

[197] The Supreme Court of Canada heard the two cases together. In both, it reinstated the convictions entered by the trial courts. McLachlin C.J.C., writing for the majority, began her discussion of the issue of common law Aboriginal title by referring to *Delgamuukw*. At para. 40 she noted that while *Delgamuukw* had established general principles governing proof of Aboriginal title, it had left many of the details to be developed in subsequent cases, including what level of occupation was necessary to found a claim to title.

[198] At para. 54, she held that in order to establish Aboriginal title, the claimant must demonstrate "possession similar to that associated with title at common law". She noted that that level of possession depends on all of the circumstances, including "the nature of the land and the manner in which the land is commonly enjoyed" as well as the actual nature of the occupation.

[199] In respect of the nature of occupation, she said:

> [56] "Occupation" means "physical occupation". This "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources": *Delgamuukw*, *per* Lamer C.J., at para. 149.
>
> …
>
> [58] 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* [*R. v. Nikal*, [1996] 1 S.C.R. 1013], *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.
>
> …
>
> [62] Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title: *Delgamuukw*, at para. 156. They often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering. The question is whether the evidence here establishes this sort of possession.

[200] She also considered the specific question of whether a semi-nomadic group could successfully make a claim of Aboriginal title:

> [66] The second sub-issue is whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to use the land in traditional ways. The answer is that it depends on the evidence. As noted above, possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient "physical possession" to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples (para. 27). On the other hand, *Delgamuukw* contemplates that "physical occupation" sufficient to ground title to land may be established by "regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources" (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.

[201] McLachlin C.J.C. summarized her legal conclusions at para. 70:

> [70] In summary, exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights. The requirement of physical occupation must be generously interpreted taking into account both the aboriginal perspective and the perspective of the common law: *Delgamuukw*, at para. 156. These principles apply to nomadic and semi-nomadic aboriginal groups; the right in each case depends on what the evidence establishes. Continuity is required, in the sense of showing the group's descent from the pre-sovereignty group whose practices are relied on for the right. On all these matters, evidence of oral history is admissible, provided it meets the requisite standards of usefulness and reasonable reliability. The ultimate goal is to translate the pre-sovereignty aboriginal right to a modern common law right. This must be approached with sensitivity to the aboriginal perspective as well as fidelity to the common law concepts involved.

[202] She found that, in each case, the trial judge had applied the correct test of Aboriginal title. While the trial decision in *Bernard* had turned in large measure on the question of whether occupation had been exclusive, the decision in *Marshall* had not. In his reasons for judgment in *R. v. Marshall*, 2001 NSPC 2, 191 N.S.R. (2d) 323, Curran P.C.J. specifically indicated that to the extent there was occupation, it was exclusive:

> [137] The question of exclusiveness really does not arise in this case. There was no other aboriginal group in Nova Scotia in 1713 or 1763. On the mainland in 1713 there were a few Acadian enclaves and one small British outpost. In Cape Breton between the fall of Louisbourg and 1763 there was one small French community and some scattered French settlers. There is no reason to believe there was any European on any of the cutting sites, or for that matter on most of the mainland or in most of Cape Breton, at the relevant times. That leaves the question of occupancy.

[203] His analysis of the issue of sufficiency of occupation was as follows:

> [139] The problem for the defendant is that mere occupancy of land does not necessarily establish aboriginal title: (See *Delgamuukw*, *supra*, at paragraph 138, where Lamer C.J. commented on *R. v. Adams*, [1996] 3 S.C.R. 101). If an aboriginal group has used lands only for certain limited activities and not intensively, the group might have an aboriginal right to carry on those activities, but it doesn't have title.
>
> [140] The Supreme Court considered the question of sufficient occupancy for aboriginal title in *R. v. Côté, supra*. In paragraph 60 Lamer C.J. said, for the majority, that the superior court judge who heard the first appeal in the

> case had "made a finding of fact which was directed at the proper question before the court." The question was whether the ancestors of the appellants, the Algonquins, had "exercised sufficient occupancy" to prove aboriginal title. According to the evidence, the Algonquins were "a moderately nomadic people who settled only temporarily and moved frequently within the area of the Ottawa River basin." Their habits were the result of "the presence and movements of their sources of sustenance,...governed by the changes of the seasons." Although the judge had found that the Algonquins frequented the territory at the relevant time, he decided that "in light of the itinerant hunting patterns and the thin population of the Algonquins" they had not "exercised real and exclusive possession" of the territory.
>
> [141] In paragraph 149 of *Delgamuukw*, *supra et sequitur*, while quoting with favour from Brian Slattery's Canadian Bar Review article *Understanding Aboriginal Rights*, the Chief Justice wrote:
>
> > In considering whether occupation sufficient to ground title is established, "one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".
>
> The problem is to have a clear way of differentiating between sufficient and insufficient occupancy for title. *Delgamuukw* offers some help. Paragraph 139 begins as follows:
>
> > Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by s. 35(1), including site-specific rights to engage in particular activities. As I explained in *Adams*, this may occur in the case of nomadic peoples who varied "the location of their settlements with the season and changing circumstances".
>
> In paragraph 149 the Chief Justice referred to the book Common Law Aboriginal Title by Professor Kent McNeil and said:
>
> > Professor McNeil has convincingly argued that at common law, the fact of physical occupation is proof of possession at law, which in turn will ground title to the land ... Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosures of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources...
>
> The line separating sufficient and insufficient occupancy for title seems to be between nomadic and irregular use of undefined lands on the one hand and regular use of defined lands on the other. Settlements constitute regular use of defined lands, but they are only one instance of it. There is no persuasive evidence that the Mi'kmaq used the cutting sites at all, let alone regularly.

[204] At paras. 73 and 75 of her reasons, McLachlin C.J.C. accepted this analysis as being correct in law, and quoted from it with approval.

## D. Analysis

[205] The parties come to this Court with very different conceptions of what is needed to make out a claim to Aboriginal title. The plaintiff places great weight on what was said at para. 143 of *Delgamuukw*, which I repeat for convenience:

> [143] In order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.

[206] In his argument, the plaintiff often treats the concept of "occupation" as if it is synonymous with "presence in the territory". He rejects the idea that proof of title depends on showing any intensive or regular use of specific plots of land. Rather, he says that proof that the Tsilhqot'in were present in the region and that there was a degree of exclusivity to that presence suffices to found a title claim. He points to the defendants' concession that the Tsilhqot'in were present in Tachelach'ed and the Trapline Territory in 1846, and to the judge's findings of fact to the effect that the Tsilhqot'in did, in fact, enjoy effective exclusive occupancy.

[207] To buttress his contention that the key criterion for a title claim is exclusivity of occupation, the plaintiff points to para. 159 of *Delgamuukw*, quoted above, arguing that only a lack of exclusivity will prevent a claim to land-based Aboriginal rights from being a claim to Aboriginal title.

[208] The plaintiff says that the judge's findings that the Tsilhqot'in occupied the Opinion Area in 1846 and did so exclusively are findings of fact, which must be treated by this Court as binding.

[209] The plaintiff rejects the defendants' characterization of his claim as a "territorial" one. He points out that the Claim Area represents only a fraction of the traditional territory of the Tsilhqot'in. He also notes that the Claim Area is significantly smaller than the areas over which title was asserted in *Marshall* and *Bernard*.

[210] As at trial, the plaintiff emphasizes the semi-nomadic traditions of the Tsilhqot'in, and argues that requiring such a group to demonstrate intensive regular use of well-defined areas of land is to take a "postage stamp" approach to title. Such an approach, he contends, fails to give effect to the Aboriginal perspective from which the Tsilhqot'in claim arises.

[211] The defendants say that a claim to Aboriginal title can only be made out where definite boundaries can be established, and where there has been intensive occupation of a particular area. They emphasize Lamer C.J.C.'s comments in *Adams* and *Delgamuukw* doubting the ability of nomadic groups to prove title. They also place considerable weight on the examples of title land given at para. 149 of *Delgamuukw*: dwellings, cultivated areas, enclosed fields, and definite tracts of land used for hunting, fishing, or other resource exploitation.

[212] The defendants also refer to passages from *Marshall; Bernard* that speak of a correspondence between the nature of the occupancy necessary to found an Aboriginal title claim and the common law requirements for title by virtue of possession.

[213] Canada, in particular, argues that this case is materially identical to *Marshall; Bernard*, noting that the claim is one to a large region rather than to a definite tract of land, and arguing that, as in *Marshall; Bernard*, there is no evidence of a regular physical Tsilhqot'in presence except at a few places in the Claim Area.

[214] As I indicated when discussing the question of whether the claim in this case is an "all or nothing claim", I accept the defendants' characterization of the claim as being a "territorial" one. 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.

[215] Except in respect of a few specific sites, the evidence did not establish regular presence on or intensive occupation of particular tracts of land within the Claim Area. There were no permanent village sites, though there was evidence of encampments and wintering sites, including groupings of pit houses. Even among these, the evidence did not strongly point to occupation of particular sites in the period around 1846 except in three or four cases.

[216] The Tsilhqot’in did not cultivate or enclose fields. While they did hunt and fish in many parts of the Claim Area, there are only a few sites (primarily fishing sites) that can be said to be specifically delineated in the evidence. Only a few locations were referred to which may have been used intensively. As the defendants contend, the evidence and findings suggest that hunting, trapping and fishing occurred at many places in the Claim Area, more or less on an opportunistic basis. Gathering activities also appear to have been widespread, although the findings of fact suggest that some localized spots may exist where natural plants were harvested and, to a limited extent, managed.

[217] As I see it, the claim can only be described as being a “territorial” one rather than a site-specific claim to title. The fact that the territory being claimed, large as it is, is a fraction of the total area alleged to be the traditional territory of the Tsilhqot’in does not prevent the claim from being characterized in this way.

[218] Indeed, the plaintiff’s often repeated statement that the Tsilhqot’in did not lead a “postage stamp” existence underlines the territorial nature of the claim – with a few exceptions, there are no definite tracts of land that were habitually occupied by the Tsilhqot’in at and around 1846.

[219] I also agree with the defendants that a territorial claim for Aboriginal title does not meet the tests in *Delgamuukw* and in *Marshall; Bernard*. Further, as I will attempt to explain, I do not see a broad territorial claim as fitting within the purposes behind

s. 35 of the *Constitution Act, 1982* or the rationale for the common law's recognition of Aboriginal title. Finally, I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.

[220] As I read *Delgamuukw*, Aboriginal title cannot generally be proven on a territorial basis, even if there is some evidence showing that the claimant was the only group in a region or that it attempted to exclude outsiders from what it considered to be its traditional territory. I acknowledge that *Delgamuukw* did not fully address the quality of occupancy that was necessary to support a title claim, apart from indicating that the occupancy must have been exclusive. That said, several passages in *Delgamuukw* strongly suggest that an intensive presence at a particular site was what the Court had in mind.

[221] In particular, I note that the examples of title lands given at para. 149 of *Delgamuukw* are well-defined, intensively used areas. The reference to hunting, fishing and other resource extraction activities is coupled with a specific description of the lands so used as "definite" tracts of land. I agree with British Columbia's assertion that what was contemplated were specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis. Examples might include salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps.

[222] The Court's specific references to the difficulty that nomadic peoples might face in proving title is also telling. While, as the Court pointed out in *Marshall; Bernard*, there is no reason that semi-nomadic or nomadic groups would be disqualified from proving title, their traditional use of land will often have included large regions in which they did not have an adequate regular presence to support a

title claim. That is not to say, of course, that such groups will be unable to prove title to specific sites within their traditional territories.

[223] Finally, with respect to *Delgamuukw*, I note Lamer C.J.C.'s comments at paras. 150 and 151 dealing with the need for a group to demonstrate that a piece of land was of central significance to their distinctive culture. He considered this to be a "crucial" part of the test for Aboriginal title, but found that it was unnecessary to treat it as a specific element of the proof of title, because any land that met the other criteria for Aboriginal title would, of necessity, be of central significance to the culture. That position is a sensible one if the occupation needed to found a claim for title is site-specific; it is not, however, if undifferentiated land within a large territory is to be included in a title claim.

[224] *Marshall; Bernard*, as I read it, is even stronger in showing that Aboriginal title must be demonstrated on a site-specific rather than territorial basis. The majority expressly dealt with the question of whether hunting or fishing or the taking of other resources from land could found a title claim. At para. 58, it agreed that such activities could, where they were sufficiently regular and exclusive, be a basis for title. It also cautioned, however, that more typically, such activities will found only claims to specific Aboriginal rights.

[225] The majority's equation of sufficient occupancy for Aboriginal title with the common law requirements to show title by virtue of possession is also important. It supports the views that title must be claimed on a site-specific basis, and that a certain regularity and intensity of presence is needed before it will count as "occupancy".

[226] I further agree with Canada's contention that this case is, on its facts, materially similar to *Marshall; Bernard*, and particularly to *Marshall*. I acknowledge the plaintiff's arguments that there was more evidence presented in this case, that the trial was longer, and that the size of the claimed area was smaller. None of these facts, however, make this case materially different from *Marshall*. I also acknowledge that the traditions of the Tsilhqot'in were and are very different from

those of the Mi'kmaq, as were the traditional seasonal migration patterns. Again, however, those differences are not material to the legal analysis of the case. In *Marshall*, there was no evidence to support occupation of the specific site from which logs were taken. Similarly, in the case before us, there is no evidence to support occupation of most sites within the Claim Area.

[227] I acknowledge the plaintiff's argument that the question of occupation is ultimately a question of fact, on which the findings of a trial judge must prevail. While the question of whether land was occupied is, in large part, a question of fact, 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.

[228] In the case before us, it is not clear what precise test the judge applied in determining whether Tsilhqot'in occupancy of the Claim Area was sufficient to found title. While he divided the Claim Area into regions where there was sufficient occupation and regions where there was not, he did not describe the threshold for differentiating between the two.

[229] 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. The question of whether it is appropriate to determine title issues on a territorial rather than site-specific basis is an extricable issue of law. The standard of review on that question, is, therefore, one of correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 36-37.

[230] As I have discussed, the case law does not support the idea that title can be proven based on a limited presence in a broad territory. Rather, as I read the jurisprudence, Aboriginal title must be proven on a site-specific basis. A title site may be defined by a particular occupancy of the land (e.g., village sites, enclosed or cultivated fields) or on the basis that definite tracts of land were the subject of intensive use (specific hunting, fishing, gathering, or spiritual sites). In all cases, however, Aboriginal title can only be proven over a definite tract of land the boundaries of which are reasonably capable of definition.

[231] The limitation of Aboriginal title to definite tracts of land is fully in keeping with the purpose of s. 35 of the *Constitution Act, 1982* and the rationale for common law recognition of Aboriginal rights and title. In order for an Aboriginal group to preserve its culture and allow members of the group to pursue a traditional lifestyle, it is necessary for the group to have exclusive possession of those places that it traditionally occupied on a regular and intensive basis. The group must be given the opportunity to live where it lived traditionally, and to continue to use the land that it cultivated or intensively took resources from.

[232] I do not doubt 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. The Tsilhqot'in must be able to continue hunting and fishing throughout their traditional territory, and to have the right to pass and re-pass over the trails that they have used for hundreds of years. There will be other specific rights that must be recognized in order to preserve the rich traditions of the Tsilhqot'in people. It is not at all clear to me, however, that Tsilhqot'in culture and traditions cannot be fully respected without recognizing Aboriginal title over all of the land on which they roamed.

[233] In considering Aboriginal title and Aboriginal rights, the Court must take into account Aboriginal perspective as well as that of the common law. The connection of the Tsilhqot'in Nation to its traditional territory has both spiritual and temporal aspects that are difficult to convey in the dry words of a judgment. This deep connection must, however, remain foremost in the Court's mind in considering issues of Aboriginal title and Aboriginal rights. I am not convinced that the relationship of the Tsilhqot'in people to the land requires recognition of title on a territorial basis; it does, however, require the Court to affirm the existence of Aboriginal rights that respect the Tsilhqot'in perspective on its own culture and values. The recognition of such rights will serve to prevent incompatible uses of the land.

[234] The fallacy in the plaintiff's characterization of the defendants' positions as representing a "postage stamp" view of Aboriginal title is that it ignores the importance of Aboriginal rights other than title in protecting traditional culture and lifestyles. The "postage stamp" characterization was accepted by the judge:

> [610] The plaintiff characterizes the … arguments of the defendants as a postage stamp approach to Aboriginal title. I think that is a fair description. There is 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. It was government policy that caused them to alter their traditional lifestyle and live on reserves.
>
> …
>
> [1376] What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a "postage stamp" approach to title, cannot be allowed to pervade and inhibit genuine negotiations. A tract of land is not just a hunting blind or a favourite fishing hole. 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.
>
> [1377] A tract of land is intended to describe land over which Indigenous people roamed on a regular basis; land that ultimately defined and sustained them as a people. The recognition of the long-standing presence of Tsilhqot'in people in the Claim Area is a simple, straightforward acknowledgement of an historical fact.

[235] It seems to me that the plaintiff's approach to Aboriginal title does not account for the fact that title is not the only tool available to provide cultural security to the Tsilhqot'in.

[236] Aboriginal rights of various sorts protect cultural security and safeguard the ability of First Nations to continue to engage in traditional lifestyles. Indeed, as British Columbia points out, the phrase "cultural security and continuity" was originally used in *Sappier; Gray* to describe the function of Aboriginal rights in general, not merely Aboriginal title.

[237] Aboriginal title, while forming part of the picture, is not the only – or even necessarily the dominant – part. Canadian law provides a robust framework for recognition of Aboriginal rights. The cultural security and continuity of First Nations

can be preserved by recognizing their title to particular “definite tracts of land”, and by acknowledging that they hold other Aboriginal rights in much more extensive territories.

[238] The result for semi-nomadic First Nations like the Tsilhqot’in is not a patchwork of unconnected “postage stamp” areas of title, but rather a network of specific sites over which title can be proven, connected by broad areas in which various identifiable Aboriginal rights can be exercised. This is entirely consistent with their traditional culture and with the objectives of s. 35.

[239] It seems to me that this view of Aboriginal title and Aboriginal rights is fully consistent with the case law. It is also consistent with broader goals of reconciliation. There is a need to search out a practical compromise that can protect Aboriginal traditions without unnecessarily interfering with Crown sovereignty and with the well-being of all Canadians. As I see it, an overly-broad recognition of Aboriginal title is not conducive to these goals. Lamer C.J.C.’s caution in *Delgamuukw* that “we are all here to stay” was not a mere glib observation to encourage negotiations. Rather, it was a recognition that, in the end, the reconciliation of Aboriginal rights with Crown sovereignty should minimize the damage to either of those principles.

[240] In the result, while I do not agree with the trial judge’s analysis of the Aboriginal title issue, I would uphold his order. The claim to Aboriginal title, as it was advanced, was not sustainable.

[241] I do not doubt that there are specific sites within the Claim Area that may be of particular significance to the Tsilhqot’in and on which they traditionally had a regular presence. As I have already indicated, this litigation was not structured so as to identify such specific sites as candidates for Aboriginal title. The Tsilhqot’in should be entitled to pursue title claims to specific sites notwithstanding that the plaintiff’s territorial claim has been dismissed. Accordingly, I would also uphold the trial judge’s declaration that his dismissal of the title claim does not preclude new claims asserting title to lands within Tachelach’ed and the Trapline Territory.

## X. Does the *Forest Act* Apply to Title Lands?

[242] As I have noted, Vickers J. presented a detailed analysis of the proper scope of the phrase “Crown timber” in the *Forest Act* and concluded that it did not apply to forests on Aboriginal title lands. He also considered that the doctrine of interjurisdictional immunity prevented provincial legislation from regulating resource use on Aboriginal title lands.

[243] The judge’s reasons were cogent and comprehensive, and I anticipate that they will engender further debate on these issues. Given my conclusion that the claim to Aboriginal title is not made out, however, it is unnecessary for me to come to any final determination as to whether he was correct in finding that the *Forest Act* was inapplicable to title lands. Accordingly, I will refrain from further comment on the issue.

## XI. Aboriginal Rights

### A. The Relief in Issue

[244] The amended statement of claim included the following claim of Aboriginal rights on behalf of the Xeni Gwet’in:

> 14. Before and at the time of European contact, the Xeni Gwet'in trapped (trapping includes hunting) animals for their own use and for trading in skins and pelts (collectively "Trapping Activities") in the Brittany and the Trapline Territory. These Trapping Activities included the trapping of [there follows a list of animals, which does not include wild horses] and all other fur bearing animals. These Trapping Activities were practices which were integral to the distinctive culture of the Xeni Gwet'in prior to the time of contact with Europeans and continue to be integral to the distinctive culture of the Xeni Gwet'in.

[245] In the paragraphs that followed, the plaintiff alleged that British Columbia issued licences and permits that allowed private companies to engage in forestry activities in the Brittany (Tachelach’ed) and the Trapline Territories. It said that:

> 23. [These forestry activities] … will, or are likely to, adversely affect the ability of the Xeni Gwet'in to exercise their right to carry out Trapping Activities by reducing the number of animals available and the number of species available to the Xeni Gwet'in; by compromising the ecological, cultural and spiritual integrity of the Brittany and the Trapline Territory; and by

> reducing the wildlife refuge potential, and available wildlife habitat of the Brittany and the Trapline Territory.

[246] The relief sought by the plaintiff included declarations of Aboriginal rights to carry on trapping activities in Tachelach'ed and the Trapline Territory, and declarations that those rights had been violated by British Columbia in issuing licences and permits for forestry activities.

[247] As I have discussed, the trial judge allowed the plaintiff to modify the claims late in the trial, so that they were made on behalf of the Tsilhqot'in rather than the Xeni Gwet'in. My opinion, stated earlier in these reasons, is that the change in the claims was, in effect, an amendment of the pleadings, and that the judge acted within his discretion in allowing it.

[248] British Columbia admitted that the Xeni Gwet'in hold Aboriginal rights to "hunt and trap birds and animals throughout the Claim Area for the purposes of securing food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses" but denied that those rights extended to the capture of horses for transportation and work, or to trade in skins and pelts.

[249] British Columbia also admitted that it had granted forest tenures in areas that included the Claim Area and that it had issued certain authorizations. It accepted that the tenures and authorizations allowed private companies to undertake certain forestry activities and to apply for further authorizations to undertake other activities. It denied that the tenures and authorizations infringed any Aboriginal rights, and contended that if rights were infringed, the infringement was justified.

[250] The trial judge's order included the following declarations with regard to Aboriginal rights:

> 4. 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 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;

> 5. 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; [and]
>
> 6. Forestry activities, which include logging and all other silvicultural practices, have unjustifiably infringed the Aboriginal rights in the Claim Area.

[251] British Columbia says that the judge erred in finding a right to capture and use horses and a right to trade in skins and pelts. It also says that he erred in finding that forestry activities have infringed the Tsilhqot'in Aboriginal rights. In the alternative, it argues that if the judge was correct in finding an infringement, he erred in finding the infringement to have been unjustified.

## B. The Right to Capture Horses

[252] British Columbia objects to the declaration as it pertains to horses on both procedural and substantive grounds.

[253] The first procedural objection concerns the breadth of para. 14 of the amended statement of claim. British Columbia says that it does not encompass the right to capture wild horses for transportation and work.

[254] While it might, at first, be questioned whether the capture of wild horses is within the ambit of that paragraph, the procedural history of this matter resolves any doubt. In March 2003, British Columbia sought particulars in respect of para. 14, and the plaintiff responded to the demands. The demands and responses included the following:

> Demand: The Plaintiff says that the Xeni Gwet'in trapped animals for their own use. What uses does he say were included within the term "their own use"?
>
> Response: food, clothing, shelter, mats, blankets, crafts, spiritual, ceremonial and cultural uses. In addition, the Plaintiff includes trapping for safety reasons and *the use of horses for transportation and work*.
>
> Demand: The Plaintiff says that the Xeni Gwet'in Trapping Activities included the trapping of certain enumerated and "other fur bearing animals". What species of animals, if any, other than those specifically enumerated, does he include within the term "all other fur bearing animals"?
>
> Response: [A further list of species of fur-bearing animals is provided] ... [I]n addition … to fur bearing animals … the Plaintiff includes the following

> species of animals that were and are trapped by the Xeni Gwet'in for their own use: ..., *wild horses* ….
>
> [Emphasis added.]

[255] While it might have been open to British Columbia to argue that the second response included material that was not responsive to the demand, it did not immediately do so. In a document entitled "Identification of Deficiencies in Plaintiff's Reply to Demand for Particulars", British Columbia listed the various demands that had been made, the responses received, and the deficiencies that it alleged in the responses. In respect of each of the responses listed above, it stated that "[t]he British Columbia Defendants do not object to this response".

[256] During the trial, approximately three years after receiving the particulars, British Columbia brought an application to strike the one that added the reference to "wild horses" on the basis that it answered a question that had not been asked. The judge rejected the application in reasons indexed as 2006 BCSC 399. He said:

> [16] The opening words of [para. 14] in the statement of claim make reference to "animals" generally. Animals include, but are not limited to, fur bearing animals. The answer to the demand for particulars was not confined to the specific demand but went on to list animals generally, placing the defendants on notice as to the types of animals relied upon for use and trade by the Xeni Gwet'in.
>
> …
>
> [18] For the past three years the defendants have known that the plaintiff included in the definition of "animals", certain non fur bearing animals….
>
> [19] I am unable to find the words complained of in the March 14, 2003 Reply to Demand for Particulars to be frivolous and vexatious within the meaning given to those words in *Lang Michener Lash Johnston v. Fabian* (1987), 59 O.R. (2d) 353 at 358-359 (H.C.). On the contrary, those words have placed the defendants on notice for the past three years and there cannot now be an assertion that they are taken by surprise as to what animals (and birds) the plaintiff says were used and traded by the Xeni Gwet'in. The allegations set forth in this paragraph of the statement of claim as amplified by the particulars does not raise any new allegations, assertions or prayers for relief against either defendant. That portion of both motions is dismissed.

[257] In light of the background facts and the judge's ruling, I would not accede to British Columbia's argument with respect to the pleading.

[258] A second procedural argument brought by British Columbia contends that no declaration ought to have been granted because the judge did not specifically determine that any forestry activity has interfered, or will interfere, with the capture and use of wild horses. In making this argument, it relies on *Cheslatta Carrier Nation v. British Columbia*, 2000 BCCA 539. In that case, this Court upheld a chambers judge's decision to strike a claim for a declaration of Aboriginal rights to fish on the basis that there was no live controversy that would require the issuance of a declaration.

[259] I note that the Supreme Court of Canada has, since the hearing of the appeal in this matter, reached a similar conclusion in *Lax Kw'alaams* in which it upheld the trial judge's refusal of a declaration:

> [14] ... [T]he Lax Kw'alaams brought to the forefront a claim to an Aboriginal right to a fishery for food, social and ceremonial purposes. The Lax Kw'alaams presently hold federal fisheries licences for these purposes. Their entitlement seems not to be a contentious issue. It was therefore not an issue of significance in the present litigation. Courts generally do not make declarations in relation to matters not in dispute between the parties to the litigation and it was certainly within the discretion of the trial judge to refuse to do so here.

[260] In my view, neither *Cheslatta* nor *Lax Kw'alaams* assists British Columbia's argument. It is well-established that declaratory relief is discretionary, and that one ground for refusal of such relief (and, indeed, for refusal to consider an application for it) is that the matter is not of immediate or practical importance. That discretion was exercised by the chambers judge in *Cheslatta* and by the trial judge in *Lax Kw'alaams*. In the case before us, however, the trial judge exercised his discretion in favour of granting a declaration. It has not been shown that he erred in principle in doing so.

[261] The issue of the right to capture horses for personal use appears to be a contentious issue between the parties, and does appear to have been the subject of evidence and full argument. In these circumstances, the judge was well within the ambit of his discretion in deciding to issue a declaration.

[262] The more interesting argument brought by British Columbia concerns the requirement that the Aboriginal rights protected by s. 35 of the *Constitution Act, 1982* must be based on traditional practices, customs or traditions that pre-dated European contact (see *Van der Peet* at paras. 60-61). As I have mentioned, the judge fixed 1793 as the date of European contact. No appeal is taken from that finding. In respect of horses, he said:

> [1225] The origins of these animals have not been determined. The Court takes judicial notice of the fact that horses are not native to North America. They were introduced by Europeans, very likely by the Spanish in what is now Mexico. Thereafter, there was a gradual movement of horses across the continent. For my purposes, the route of their travels is unimportant. When Tsilhqot'in people met with Simon Fraser in June of 1808, horses had already arrived on the Chilcotin Plateau and were being used by Tsilhqot'in people. I find this evidence is sufficient to raise a fair inference of Tsilhqot'in use of horses in pre-contact times.
>
> …
>
> [1235] The historical record refers to Tsilhqot'in people's use of horses. The absence of the word "wild" cannot be of any consequence. Nor does the absence of oral tradition evidence persuade me that there were no wild horses in pre-contact times. Given their use in 1808, I believe it is logical to infer they were used in pre-contact times. I also infer that Tsilhqot'in people obtained horses from the wild stock of horses that is now said to have roamed the Chilcotin plateau over the past 200 years….

[263] It was open to the trial judge to use evidence that post-dated contact to draw inferences as to pre-contact practices. The issue was commented upon in *Van der Peet*:

> [62] ... It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

[264] "Traditional" practices, in order to qualify as Aboriginal rights, must have existed pre-contact. As indicated in *Van der Peet*, practices that arose only as a result of European influence cannot form the basis for Aboriginal rights:

> [73] The fact that Europeans in North America engaged in the same practices, customs or traditions as those under which an aboriginal right is claimed will only be relevant to the aboriginal claim if the practice, custom or tradition in question can only be said to exist because of the influence of European culture. If the practice, custom or tradition was an integral part of the aboriginal community's culture prior to contact with Europeans, the fact that that practice, custom or tradition continued after the arrival of Europeans, and adapted in response to their arrival, is not relevant to determination of the claim; European arrival and influence cannot be used to deprive an aboriginal group of an otherwise valid claim to an aboriginal right. On the other hand, where the practice, custom or tradition arose solely as a response to European influences then that practice, custom or tradition will not meet the standard for recognition of an aboriginal right.

[265] While I acknowledge that there is room for debate on the issue, it is my view that the Tsilhqot'in practice of capturing and using horses for work and transportation does qualify as an Aboriginal right, notwithstanding that horses were introduced (or, more precisely, reintroduced) to North America by Europeans.

[266] Horses reached North America more than 250 years before the date of contact fixed by the trial judge. If wild horses derived from European stock reached Tachelach'ed well before European explorers, I do not think it can be said that the Tsilhqot'in tradition of capturing and using the animals was a result of "European influences". The mere fact that the ancestors of the horses captured and used by the Tsilhqot'in came from Europe does not constitute European influence. There is also no indication that the Tsilhqot'in learned to capture or use horses either from Europeans or from people who had learned those practices from Europeans. It was open to the trial judge to infer, as he did, that they developed the practice independently when wild horses first appeared in their traditional territory.

[267] As the trial judge made no palpable and overriding error in finding that the Tsilhqot'in tradition of horsemanship pre-dated European contact, and as it is undoubtedly central to Tsilhqot'in culture, I would not interfere with the judge's findings with respect to Aboriginal rights to capture and use horses.

[268] In the result, it is not necessary to address the trial judge's alternative basis for finding an Aboriginal right to capture and use horses, i.e., that those activities constituted contemporary extensions of pre-contact practices.

## C. Trading Rights

[269] The trial judge held that the Tsilhqot'in have an Aboriginal right to trade in skins and pelts taken from the Claim Area as a means of securing a moderate livelihood. British Columbia says the trial judge erred by using the "moderate livelihood" standard, and, more generally, in concluding that Tsilhqot'in pre-contact trade was integral to their distinctive culture. Finally, it argues that the judge erred in failing to confine the right to specific species of animals.

[270] In *Lax Kw'alaams*, the Supreme Court of Canada affirmed that in determining whether an Aboriginal right exists, a court must begin by characterizing the right that is claimed. At the characterization stage, "the focus is on ascertaining the true nature of the claim, not assessing the merits of this claim or the evidence offered in its support": *Mitchell v. M.N.R.,* 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 14.

[271] In *Lax Kw'alaams*, the claim began as one to an Aboriginal right to fish for commercial purposes on a "large scale". Late in the day, without seeking an amendment of the pleadings, the plaintiff argued, instead, for an ill-defined lesser right to fish for trading purposes. The trial judge refused to allow the claim to be re-characterized in that way. The Supreme Court of Canada found that the judge made no error in proceeding as she did, and made the following comments about characterizing a claim for Aboriginal rights:

> [45] To the extent the Lax Kw'alaams are saying that, in Aboriginal and treaty rights litigation, rigidity of form should not triumph over substance, I agree with them. However, the necessary flexibility can be achieved within the ordinary rules of practice. Amendments to pleadings are regularly made in civil actions to conform with the evidence on terms that are fair to all parties. The trial judge adopted the proposition that "he who seeks a declaration must make up his mind and set out in his pleading what that declaration is", but this otherwise sensible rule should not be applied rigidly in long and complex litigation such as we have here. A case may look very different to *all* parties after a month of evidence than it did at the outset. If necessary, amendments to the pleadings (claim or defence) should be sought at trial. There is ample jurisprudence governing both the procedure and outcome of such applications. However, at the end of the day, a defendant must be left in no doubt about precisely what is claimed. No relevant amendments were sought to the prayer for relief at trial in this case.

> [46] With these considerations in mind, and acknowledging that the public interest in the resolution of Aboriginal claims calls for a measure of flexibility not always present in ordinary commercial litigation, a court dealing with a s. 35(1) claim would appropriately proceed as follows:
>
> 1. First, at the characterization stage, identify the precise nature of the First Nation's claim to an Aboriginal right based on the pleadings. If necessary, in light of the evidence, refine the characterization of the right claimed on terms that are fair to all parties.
>
> …
>
> [Emphasis in original.]

[272] In the case before us, the statement of claim simply alleged an Aboriginal right to trade in skins and pelts. In argument, the plaintiff used the words "moderate livelihood" to characterize the scale of trade that he claimed was traditionally undertaken by the Tsilhqot'in.

[273] The use of the words "moderate livelihood" to describe Aboriginal trading rights has a curious history. In *R. v. Van der Peet,* (1993) 80 B.C.L.R. (2d) 75 (C.A.), Lambert J.A., dissenting, considered that the social significance of salmon in Sto:lo tradition could be translated into a right to trade in fish to the extent needed to provide a "moderate livelihood". The phrase "moderate livelihood" was adopted from American jurisprudence, particularly from *State of Washington v. Washington State Commercial, Passenger, and Fishing Vessel Association,* 443 U.S. 658 (1979). Wallace J.A., in a judgment concurring with the majority, was critical of that standard, arguing that it was tied into American standards for allocation of fisheries resources, was inherently subjective, and would be impossible to police.

[274] In the Supreme Court of Canada's decision in *Van der Peet*, Lamer C.J.C., for the majority, rejected the basis on which Lambert J.A. had found an Aboriginal right to sell fish:

> [79] … [A] claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. The definition of aboriginal rights is determined through the process of determining whether a particular practice, custom or tradition is integral to the distinctive culture of the aboriginal group. The <u>significance</u> of the practice, custom or tradition is relevant to the determination of whether that practice, custom or tradition is integral, but cannot itself constitute the claim to an aboriginal right. As such, the appellant's claim cannot be characterized as

> based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods.
>
> [Emphasis in original.]

[275] He held that the issue to be determined was not the significance of salmon to the Sto:lo but rather whether the First Nation had a pre-contact tradition of trading in salmon. Based on the trial judge's findings that the exchange of fish for money or other goods was irregular, incidental and not integral to the Sto:lo culture, he found no Aboriginal right to sell salmon.

[276] In *R. v. Marshall*, [1999] 3 S.C.R. 456, the Supreme Court of Canada interpreted a trade clause in a Mi'kmaq treaty to confer a right to trade the products of hunting and fishing activities to secure "necessaries". The majority considered this standard to be equivalent to that of a "moderate livelihood", and referred to Lambert J.A.'s dissenting judgment in *Van der Peet*:

> [59] The concept of "necessaries" is today equivalent to the concept of what Lambert J.A., in *R. v. Van der Peet* (1993), 80 B.C.L.R. (2d) 75, at p. 126, described as a "moderate livelihood". Bare subsistence has thankfully receded over the last couple of centuries as an appropriate standard of life for aboriginals and non-aboriginals alike. A moderate livelihood includes such basics as "food, clothing and housing, supplemented by a few amenities", but not the accumulation of wealth ([*R. v. Gladstone*, [1996] 2 S.C.R. 723], at para. 165). It addresses day-to-day needs. This was the common intention in 1760. It is fair that it be given this interpretation today.

[277] British Columbia argues that the judge erred in accepting the "moderate livelihood" standard in this case because it is a standard that applies to treaty rights, not traditional Aboriginal rights. It says the standard was rejected for traditional Aboriginal rights in *Van der Peet*. Further, it says that the right to a "moderate livelihood" standard was not pleaded.

[278] In my view, these objections cannot prevail. While *Marshall* was a case interpreting a treaty, the "moderate livelihood" standard was not described in the treaty itself. Rather, it was the Court's characterization of a standard somewhat

higher than mere subsistence, but not so high as to allow for the accumulation of wealth. There is nothing in *Marshall* to suggest that the standard can only apply within the context of a treaty.

[279] Further, it cannot be said that the Supreme Court of Canada rejected the "moderate livelihood" standard in *Van der Peet*. Rather, it rejected the idea that traditional subsistence through the consumption of salmon could be translated into a modern right to gain a moderate livelihood through the sale of salmon.

[280] It will normally be necessary, in characterizing an Aboriginal right to trade in a commodity, to describe the scale of such trading. That scale must be consistent with the traditional role of trade in the particular Aboriginal culture under consideration. In *Van der Peet*, the claim was for a right to exchange fish for money or other goods. In contrast, in *Gladstone*, the claim was for a right to sell herring spawn on kelp on a "commercial" scale. *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, makes clear, at paras. 17 and 18, that an Aboriginal right to trade a commodity should be described according to the scale of traditional trading.

[281] In this case, the trial judge found that trade in skins and pelts was integral to the Tsilhqot'in culture, and that the trade was at a level consistent with earning a moderate livelihood. I see nothing in *Van der Peet* or other cases that makes this an inappropriate assessment. Indeed, the "moderate livelihood" standard, having been more fully described in *Marshall*, would seem to furnish a proper benchmark for defining a relatively low level of commercial activity. The judicial consideration of the standard in *Marshall* eliminates many of the concerns expressed by Wallace J.A. in this Court in *Van der Peet*.

[282] I am also not convinced that the failure of the plaintiff to include the "moderate livelihood" language in the statement of claim precluded the court from making a declaration using that language. The claim made it clear that the right to trade in skins and pelts was in issue, and there is no suggestion that British Columbia was misled as to the scale of trade that was being argued for by the plaintiff. If British

Columbia needed greater detail as to the type of trading right that was being sought, it should have sought particulars.

[283] In my view, therefore, there was nothing in principle that prevented the judge from making a declaration that the Tsilhqot'in have a right to trade in skins and pelts as a means of securing a moderate livelihood. I turn, then, to his specific findings:

> [1247] Tsilhqot'in people traded animal skins and pelts with their Aboriginal neighbours who were willing to trade with them. These trading relationships were important to the Tsilhqot'in people as a means of obtaining salmon resources, particularly during the years when the salmon fishery failed. Trade was not restricted to years of poor salmon runs. Trading with neighbours was an element of the traditional Tsilhqot'in pattern of survival.
>
> [1248] The practice of trade for salmon and accommodations was an integral part of Tsilhqot'in society that cannot be ignored. This type of survival was intermittent but it was regular in the sense that there were always cycles produced by nature which forced changes in the preferred pattern of living off and staying on the land within the Claim Area.
>
> [1249] In *Sappier; Gray*, the issue arose as to whether a survival practice could be considered sufficiently integral to require protection as an Aboriginal right. The Court concluded that a practice undertaken for survival purposes is sufficient to meet the integral to a distinctive culture test. A Court must seek to understand how the particular pre-contact practice relied upon relates to the Aboriginal group's way of life.
>
> …
>
> [1263] Tsilhqot'in people moved about their territory harvesting what the land had to offer, according to their needs and the seasons. Fish, game, root plants, and berries provided the staples for their diets. Salmon were a critical component. When salmon failed, the Tsilhqot'in way of life included a trade of furs, root plants, and berries for salmon. I am satisfied that trade was not just opportunistic or incidental and was not limited to times of need. It was a way of life, accelerated in times of need. Trade was always undertaken for the necessaries of life; it was not trade to accumulate wealth. In my view, the trading practice of the Tsilhqot'in people, at the time of first contact and continuing well into the twentieth century, was more than sufficient to meet the tests of cultural integrality set out by the Supreme Court of Canada.

[284] After citing *Marshall*, the judge concluded:

> [1265] The right may be properly characterized as a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood. The evidence shows that the Tsilhqot'in ancestors engaged in that right and that it was integral to their distinctive culture.

[285] British Columbia contends that the judge's findings were not consistent with the evidence. In my view, there was evidence on which the judge was entitled to make the findings that he did. It is, of course, not this Court's role to re-weigh the evidence.

[286] British Columbia also contends that the trial judge's reference to *Sappier; Gray* is an error, because *Sappier; Gray* involved subsistence harvesting of resources, not trading. While it is true that *Sappier; Gray* involved harvesting for personal use rather than trading, I do not see that the nature of the case affects the basic proposition for which it was cited by the trial judge.

[287] Finally, British Columbia argues that trading rights must be species-specific, citing *Gladstone*, wherein a right to trade was in "herring spawn on kelp". I do not read *Gladstone* as standing for the proposition that a right to trade must always be species-specific. In my view, the characterization of the right will be dependent on the pleadings and the evidence. For example, in *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2011 BCCA 237 (remanded by the Supreme Court of Canada for reconsideration, [2011] S.C.C.A. No. 353), this Court upheld a finding of a right to "fish and to sell fish", except insofar as it related to geoducks. Similarly, in *Powley* the trial judge characterized the accused's right as a right to hunt for food. The Supreme Court of Canada agreed, affirming at para. 16 that "[t]he relevant right is not to hunt moose but to hunt for food in the designated territory" (emphasis in original).

[288] In this case, the judge's finding of a general right to trade in skins and pelts taken from the Claim Area was supported by evidence. I would not interfere with his declaration.

### D. *Prima facie* Infringement

[289] I now turn to the question of whether the judge erred in finding that the Aboriginal rights of the Tsilhqot'in were infringed by British Columbia's conduct in respect of forestry management in the Claim Area.

[290] The first step in the infringement analysis is that of characterizing the Aboriginal right at issue (see *Van der Peet* and *Lax Kw'alaams*). The trial judge characterized the rights at para. 1041 of his judgment:

> a) a Tsilhqot'in Aboriginal right to hunt and trap birds and animals throughout the Claim Area for the purposes of securing animals for work and transportation, food, clothing, shelter, mats, blankets and crafts, as well as for spiritual, ceremonial, and cultural uses; and
>
> b) a Tsilhqot'in Aboriginal right to trade in skins and pelts as a means of securing a moderate livelihood.

[291] Once the right has been characterized, the court must determine whether the claimant has demonstrated a *prima facie* infringement of the right. In *Sparrow*, at 1111, the Court equated a *prima facie* infringement with "interference" with an Aboriginal right. At 1112-1113, it elaborated on the concept of *prima facie* infringement in the context of the fishing rights at issue in the case:

> To determine whether the fishing rights have been interfered with such as to constitute a *prima facie* infringement of s. 35(1), certain questions must be asked. First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, does the regulation deny to the holders of the right their preferred means of exercising that right? The onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation. In relation to the facts of this appeal, the regulation would be found to be a *prima facie* interference if it were found to be an adverse restriction on the Musqueam exercise of their right to fish for food. We wish to note here that the issue does not merely require looking at whether the fish catch has been reduced below that needed for the reasonable food and ceremonial needs of the Musqueam Indians. Rather the test involves asking whether either the purpose or the effect of the restriction on net length unnecessarily infringes the interests protected by the fishing right. If, for example, the Musqueam were forced to spend undue time and money per fish caught or if the net length reduction resulted in a hardship to the Musqueam in catching fish, then the first branch of the s. 35(1) analysis would be met.

[292] In *Gladstone* at para. 43, the Court explained a seeming contradiction in the discussion in *Sparrow*:

> [43] The *Sparrow* test for infringement might seem, at first glance, to be internally contradictory. On the one hand, the test states that the appellants need simply show that there has been a *prima facie* interference with their rights in order to demonstrate that those rights have been infringed, suggesting thereby that any meaningful diminution of the appellants' rights will constitute an infringement for the purpose of this analysis. On the other

> hand, the questions the test directs courts to answer in determining whether an infringement has taken place incorporate ideas such as unreasonableness and "undue" hardship, ideas which suggest that something more than meaningful diminution is required to demonstrate infringement. This internal contradiction is, however, more apparent than real. The questions asked by the Court in *Sparrow* do not define the concept of *prima facie* infringement; they only point to factors which will indicate that such an infringement has taken place. Simply because one of those questions is answered in the negative will not prohibit a finding by a court that a *prima facie* infringement has taken place; it will just be one factor for a court to consider in its determination of whether there has been a *prima facie* infringement.

[293] The idea that the onus of showing interference is not an onerous one was confirmed in *R. v. Morris*, 2006 SCC 59, [2006] 2 S.C.R. 915. In that case, the Court considered the application of the *Sparrow* test in the context of a treaty right to hunt. After quoting para. 43 from *Gladstone*, the majority said:

> [53] Essentially, therefore, a *prima facie* infringement requires a "meaningful diminution" of a treaty right. This includes anything but an insignificant interference with that right.

[294] The issues in the case before us are much broader than those that were considered in *Sparrow*, *Gladstone*, and *Morris*. Each of those cases concerned a single regulation or set of regulations, and a specific prosecution for its violation. In contrast, this case concerns a broad Aboriginal right to hunt and trap over a large area, and a complex matrix of primary and secondary forestry legislation, government policies, grants of forest tenure, and issuance of licences and permits. Nonetheless, the basic framework for analysis established in *Sparrow* and *Gladstone* is applicable. The Tsilhqot'in are able to establish a *prima facie* infringement of their rights to hunt and trap simply by showing that government action has interfered with these rights in more than an insignificant or trivial way.

[295] This low threshold is entirely appropriate. If, as I have suggested, Aboriginal rights short of title are the primary means by which the traditional cultures and activities of First Nations (and particularly those that are nomadic or semi-nomadic) are protected, it is essential that those rights be taken seriously. Any interference with those rights (apart from trivial ones) demands legal protection. Such infringements must be justified.

[296] The judge commenced his discussion of infringement with an outline of the plaintiff's position:

> [1269] The plaintiff says that forest harvesting activities negatively impact a number of different species, affecting wildlife diversity as well as populations of individual species.
>
> [1270] In addition, the plaintiff says forest harvesting leads to the destruction of habitat. In the plaintiff's submission, habitat must be preserved to ensure a harvestable surplus of all species, sufficient to meet the needs of Tsilhqot'in people over time. He says Crown activities are an infringement of Tsilhqot'in rights if they are likely to reduce the habitat available for any particular species to below the level where the necessary harvestable surplus is available.

[297] He began his application of the *Sparrow* test with the following paragraph outlining his findings:

> [1276] On the whole of the evidence, I conclude that forest harvesting activities, which include logging and all other silviculture practices, reduce the number of different wildlife species (diversity) and the number of individuals within each species (abundance) in a landscape. Forest harvesting depletes species diversity and abundance through: 1) direct mortality; 2) the imposition of roads; and, 3) the destruction of habitat.

[298] British Columbia contends that the trial judge, in outlining the plaintiff's position and in his analysis at para. 1276, effectively changed the nature of the Aboriginal rights in issue. In its factum, it says:

> Rather than focus on any alleged specific and discrete interference with hunting activities, or unmet hunting needs, Vickers J. instead transformed the claimed activity right into a right to an undiminished diversity and number of each species of wildlife whether actively hunted or not.

[299] I do not agree with that contention. The judge fully understood that the Aboriginal right to hunt at issue in this case was not a property right to a resource. He said:

> [1162] In *Sappier; Gray* the [Supreme Court of Canada] emphasized that a claim for an Aboriginal right must be founded upon an actual practice, custom or tradition of the particular group claiming the right. The right cannot be characterized as a right to a particular resource: see *Sappier; Gray*, at para. 21.

[300] Further, he made it clear that he understood the *Sparrow* test, and that that was the test he was applying in determining whether Aboriginal rights had been infringed:

> [1274] This case differs from *Sparrow* in that it does not involve a regulatory restriction on a harvesting right. Here, the issue is whether forest harvesting activities and forest silviculture activities are or might be an infringement of Tsilhqot'in Aboriginal hunting and trapping rights in the Claim Area.
>
> [1275] Thus, in this case, the language in *Sparrow* leads to an inquiry as to whether such activities would impose an undue hardship on Tsilhqot'in people and whether the activities would deprive them of their preferred means or way of exercising their rights to hunt, trap and trade.

[301] The judge went on to outline his findings that forestry activities that were proposed for the Claim Area would result in a loss of habitat and reduce the number of species and their abundance. At paras. 1277-1287, the judge discusses the negative impacts of various forest practices on wildlife diversity: road construction; thinning and other silviculture practices; and removal of coarse, woody debris on the forest floor. He also discussed the effects of forestry activities on the land, including soil compaction, changes to hydrology, and the resulting slow regeneration of forests. At para. 1288, he concluded:

> [1288] Forest harvesting activities would injuriously affect the Tsilhqot'in right to hunt and trap in the Claim Area. The repercussions with respect to wildlife diversity and destruction of habitat are an unreasonable limitation on that right. For these reasons, I conclude that forest harvesting activities are a *prima facie* infringement on Tsilhqot'in hunting and trapping rights and thus demand justification.

[302] British Columbia says that the trial judge ignored certain evidence showing that forestry activities may actually result in an increase in ungulate populations, and notes that current Tsilhqot'in hunting practices focus on ungulates rather than on fur-bearing animals due to the depressed market for furs.

[303] The weighing of evidence was a matter for the trial judge. His conclusion that the overall effects of forestry on hunting would be negative was, in my view, open to him on the evidence.

[304] I acknowledge British Columbia's contention that the judge failed to focus attention on specific and discrete interference with hunting activities. The judge's approach was to examine proposed forestry activities in the Claim Area at a fairly high level, and to consider whether that activity would have large-scale effects on hunting and trapping rights.

[305] The judge's order stated that "[f]orestry activities, which include logging and all other silvicultural practices" unjustifiably infringed Aboriginal rights. I do not read this declaration as an indication that the judge's concern was specific to logging or to silvicultural practices. Rather, the order was meant to be inclusive – it was the totality of forest management that infringed rights, not specific activities or practices.

[306] The declaration granted by the trial judge is not one that provides detailed guidance as to the particular conduct of British Columbia that was improper, nor does it state the specific manners in which Tsilhqot'in hunting and trapping rights have been infringed.

[307] As I have already indicated in my discussion of *Cheslatta*, declaratory relief is discretionary, and whether or not it should be granted is ordinarily a matter for the trial judge. I doubt that the trial judge's high-level approach to the infringement in this case should be the norm in future. I do think, however, that there was good reason for him to adopt that approach in this case, and I would not interfere with his decision.

[308] As was noted at para. 39 of *Lax Kw'alaams*, the Supreme Court of Canada has developed the law of Aboriginal rights in a series of regulatory prosecutions: *Sparrow; Van der Peet*; *Gladstone*; *N.T.C. Smokehouse*; and *Marshall; Bernard*. Such cases facilitated the infringement analysis, because they focused on particular regulatory provisions, or on limited sets of provisions comprising a regulatory scheme.

[309] The Supreme Court of Canada has recognized, however, that the procedural limitations of regulatory prosecutions make such prosecutions awkward vehicles for

the determination of Aboriginal rights. Civil actions seeking declarations are to be preferred, because they allow for the assembly of a comprehensive evidentiary record (see *Lax Kw'alaams* at para. 11). While regulatory prosecutions examine Aboriginal rights in the context of a narrow factual inquiry, civil actions for declarations are able to examine the bigger picture. They eliminate the need for a piecemeal analysis of rights that is dictated by regulatory prosecutions.

[310] Nonetheless, actions for declarations present their own challenges. They are expensive and can be unwieldy. They can take years to be resolved.

[311] The granting of injunctive relief early in this litigation, and the vast changes in forestry regulation and practices and in the economics of forestry over the long period during which the case has been before the courts has made concentration on specific details of infringement of little import.

[312] This was very much a test case. In addition to being an effort to resolve particular issues for the Tsilhqot'in and Xeni Gwet'in, it was an attempt to clarify the law of Aboriginal title and Aboriginal rights in British Columbia. The trial judge's declaration is a recognition of this fact. The unique circumstances of this case justified the judge's exercise of discretion in favour of granting a declaration that may not have immediate, specific, and concrete application on the ground.

[313] In terms of the judge's analysis, I am not persuaded that he erred in finding a *prima facie* infringement. As the plaintiff points out, extensive and substantial clear-cut harvesting through the Claim Area was an inevitable result of the various tenures and permits that were granted and the administration of forestry in the area. The judge had ample evidence for his conclusion that extensive habitat damage was the inevitable result of the province's administration of the forest in Tachelach'ed and the Trapline Territory. For example, the plaintiff points to evidence that 90% of the Brittany Triangle Special Resource Development Zone lies within the Claim Area, and that 86% of the productive area of the Zone would have to be cut in order to meet targets. While British Columbia points out that the cutting would occur over the

course of many years, the fact remains that, on the judge's findings, such cutting would have had a serious detrimental effect on wildlife population and diversity.

[314] The judge found that the diminution in wildlife population and diversity would affect the hunting rights of the Tsilhqot'in. British Columbia is critical of his analysis because it failed to quantitatively relate the projected diminution to the actual hunting activities of the Tsilhqot'in. It says that the judge failed to find any specific detrimental impact on hunting.

[315] In view of the judge's findings with respect to habitat destruction and its effects on wildlife, it was open to him to make the general finding that these hunting rights would be detrimentally affected. Indeed, given the fairly high level of planning that had taken place, it would not have been possible to make definitive findings about specific locations or specific species. It was enough, in my view, for the judge to come to a finding that detrimental effects on hunting rights would inevitably result from the forestry activities authorized and planned by British Columbia.

[316] In saying this, I recognize that very little logging actually took place in the Claim Area. As a result of the litigation, most activities were stopped. I do not think this fact precludes a finding that the Aboriginal rights of the Tsilhqot'in were infringed. The plaintiff did not have to wait until the traditional territory of the Tsilhqot'in was negatively impacted before seeking a declaration. The very acts of planning and authorizing logging infringed the Aboriginal rights of the Tsilhqot'in, since the planning and authorization were incompatible with those rights.

[317] I have already noted that this case was, in many respects, a test case, and that the trial judge's high-level approach to the issue of infringement is unlikely to be an appropriate template for analysis in future cases. Outside of the test case scenario, I would think that courts will be reticent to grant declarations of the sort issued here; it is more likely that Aboriginal rights declarations will be granted when there is a practical aspect to them, either in vindicating specific Aboriginal practices, or in invalidating particular exercises of governmental authority.

[318] I note, as well, that the judge's declaration in this case was founded on a comprehensive evidentiary record that allowed him to consider high-level effects of forest practices on the rights of the Tsilhqot'in. The case should not be seen as authority for the proposition that any industrial activity that affects the diversity of species or abundance of wildlife will necessarily be inimical to an Aboriginal right to hunt or trap. Each case must be analyzed in terms of the nature and scope of the Aboriginal right and of the conduct that allegedly infringes it.

[319] One final issue that should be mentioned is British Columbia's contention that the judge wrongly placed upon it the burden of proving that its actions would not infringe Aboriginal rights. British Columbia points to the following statement by the trial judge:

> [1103] What is clear from the evidence of Dr. [Hamish] Kimmins [a professional forester and expert in forest ecology called as a witness for British Columbia] is that "sustainability is multifaceted, involving a complex of physical, biological, social, economic, institutional and cultural dimensions: Kimmins report at p. 41. Given the findings of Tsilhqot'in Aboriginal rights resulting from these proceedings, there will be a need for British Columbia to develop a new model of sustainability in the Claim Area. The burden is on British Columbia to prove that any future harvesting of timber will not infringe Tsilhqot'in Aboriginal rights. That burden will require close consultation with Tsilhqot'in people, taking into account all of the factors that bear on their Aboriginal rights, as well as the interests of the broader British Columbia community.

[320] I do not read para. 1103 as reversing the onus. The judge clearly articulated the correct approach to Aboriginal rights earlier in his judgment:

> [1058] A person claiming an Aboriginal right bears the onus of establishing that the government's conduct amounts to a *prima facie* infringement or denial of that right. Once this onus is discharged, the burden then shifts to the Crown to demonstrate that its conduct was justified. Proof of infringement of an Aboriginal right protected by s. 35(1) triggers the Crown's burden to justify its conduct.

[321] In my view, the judge, in using the word "infringe" in para. 1103 was referring to an "unjustified infringement" rather than to a "*prima facie* infringement". His concern was with the justification analysis rather than the *prima facie* infringement analysis.

[322] In summary, the judge understood and applied the *Sparrow* test for *prima facie* infringement of Aboriginal rights. The test is satisfied when government action interferes with a proven Aboriginal right in more than a trivial way. Here, government policy and high-level planning, combined with the specific forest tenures, permits and licences granted by British Columbia, led the trial judge to the conclusion that there would be an inevitable detrimental effect on habitat and wildlife populations in the Claim Area. He further found that this detrimental effect would interfere with proven Tsilhqot'in Aboriginal rights to hunt and trap. These findings were open to the trial judge, and this Court cannot interfere with them. Further, the declaration granted by the trial judge, while broad and of limited immediate practical utility, was justifiable given the unique nature of the case before him.

## E. Justification

[323] The final issue to be addressed is whether the judge erred in finding that the *prima facie* infringement of Aboriginal rights was not justified by British Columbia.

[324] The test for justification was enunciated in *Sparrow*. A convenient summary of the test was provided in *Gladstone*:

> [54] In *Sparrow*, Dickson C.J. and La Forest J. articulated a two-part test for determining whether government actions infringing aboriginal rights can be justified. First, the government must demonstrate that it was acting pursuant to a valid legislative objective ….
>
> Second, the government must demonstrate that its actions are consistent with the fiduciary duty of the government towards aboriginal peoples….
>
> [55] Dickson C.J. and La Forest J. also held at p. 1119 that the Crown's fiduciary duty to aboriginal peoples would require the Court to ask, at the justification stage, such further questions as:
>
> > … whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented….
> >
> > We would not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.

[325] The trial judge in this case recognized that economic activities, including forestry, could, in appropriate circumstances, constitute valid legislative objectives:

> [1085] There is a range of legislative objectives that may justify infringement of Aboriginal title. These objectives arise from the need to reconcile the fact that Aboriginal societies exist within and are part of a broader social, political and economic community: *Delgamuukw* (S.C.C.), at para. 161; *Gladstone*, at para. 73. The development of agriculture, forestry, mining and hydro-electric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support these aims, are the kinds of objectives that may justify the infringement of Aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives is ultimately a question of fact that must be examined on a case-by-case basis: *Delgamuukw* (S.C.C.), at para. 165.

[326] While the quoted passage was part of the judge's analysis of justification for infringement of Aboriginal title rather than Aboriginal hunting and trapping rights, the same considerations were, on my reading of his judgment, incorporated into his later analysis in relation to those rights.

[327] The judge continued, indicating that the justification analysis should be carried out not on a general basis, but on an examination of the specific infringements under consideration:

> [1089] There can be no doubt that forestry falls within the range of government activities that might justify infringement of Aboriginal title. Generally speaking, the development of forest resources, and the protection of the environment and wildlife are all valid government objectives that may justify infringement of Aboriginal title and other Aboriginal rights.
>
> [1090] However, the analysis cannot end there. In this case I am concerned not with the general, but the specific. Can the Province justify its forestry activities in the Claim Area where such activities infringe Tsilhqot'in Aboriginal title? British Columbia must prove that it has a compelling and substantial legislative objective for the forestry practices, not just generally in British Columbia, but in the Claim Area in particular.

[328] British Columbia takes issue with the judge's approach, arguing that "[t]he question is not whether each and every infringing action meets the compelling and substantial test, but whether the objective of the legislative scheme that authorizes the action is compelling and substantial".

[329] I agree with the approach taken by the trial judge, and not that advocated for by British Columbia. The justification analysis must, in my view, depend on the nature of the infringement alleged.

[330] Where it is alleged that a legislative provision infringes Aboriginal rights, the subject of justification must be the legislative provision. In such cases, the first part of the *Sparrow* test for justification is concerned with whether there is a "valid legislative objective". That was the issue in cases like *Sparrow*, *Van der Peet*, and *Gladstone.* Where the alleged infringement is governmental conduct other than legislation, however, the question becomes one of whether the *governmental* objective underlying the infringement is a justifiable one.

[331] In this case, the judge found that there was no valid governmental objective for logging in the Claim Area. The judge identified the objectives postulated as justifying the authorization of logging as follows:

> [1101] British Columbia appears to argue that the compelling and substantial objectives behind the alleged infringements include the economic benefits that can be realized from logging in the Claim Area, and a need to salvage forests affected by mountain pine beetle for sound silviculture reasons.

[332] He found that neither of these objectives was made out in respect of forestry activities in the Claim Area:

> [1107] I conclude that British Columbia has failed to establish that it has a compelling and substantial legislative objective for forestry activities in the Claim Area for two reasons. First, as was the case with sports fishing in *Adams*, there is no evidence that logging in the Claim Area is economically viable. The Claim Area has been excluded from the timber harvesting land base for an extended period of time. Even the Chief Forester acknowledged its more recent inclusion was questionable. The impact of forestry activities on the plaintiff's Aboriginal title is disproportionate to the economic benefits that would accrue to British Columbia or Canadian society generally.
>
> [1108] Second, I conclude there is no compelling evidence that it is or was necessary to log the Claim Area to deter the spread of the 1980's mountain pine beetle infestation. Rather, the evidence shows that none of the proposed harvesting is directed at stopping or limiting the mountain pine beetle outbreak.

[333] On this appeal, British Columbia denies that battling the pine beetle or salvaging pine beetle ravaged forests was put forward as a justification in this case. If British Columbia is correct in that regard, then the judge's rejection of that basis of justification was unnecessary, but would not disclose an error in his analysis.

[334] The judge's analysis of the economic viability of forestry in the Claim Area would seem to be dispositive of any justification argument. British Columbia argues that the judge's conclusions with respect to economic viability are unreasonable, because the Crown only authorized private companies to undertake logging. It says that "[i]f logging within the Claim Area is not economically viable then there is no reason to fear that any logging will occur".

[335] I am not sure it is true that logging that is not economically viable will not be undertaken. Some provisions of provincial forest legislation and tenures require specific levels of logging to be undertaken in order for a tenure holder to retain its rights. Quite apart from this, however, it seems to me that the judge's determination did not depend on logging actually being unprofitable. Rather, his conclusion was based on the economic value of logging compared to the detrimental effects that it would have on Tsilhqot'in Aboriginal rights. The judge's comments at paras. 1290 and 1291 of the judgment underline the nature of his assessment:

> [1290] I have already noted that a legislative scheme that manages solely for timber with all other values as a constraint on that objective can be expected to raise severe challenges when called upon to strike a balance between Aboriginal rights and the economic interests of the larger society.
>
> [1291] Recognizing Aboriginal rights to hunt and trap over an area means wildlife and habitat must be managed to ensure a continuation of those rights. Section 35(1) of the *Constitution Act, 1982* demands that the protection of those rights is a paramount objective. The declaration of Aboriginal rights is not intended to be hollow or short lived. Tsilhqot'in Aboriginal rights grew out of the pre-contact society of Tsilhqot'in people. This historical right is intended to survive for the benefit of future generations of Tsilhqot'in people.

[336] I am not persuaded that the judge erred in his analysis of the importance of the governmental objective in this case. Accordingly, the judge's finding that the infringement of Tsilhqot'in hunting and trapping rights was not justified must stand.

[337] It is not, in the circumstances, necessary to engage in any detailed analysis of whether the impugned governmental conduct was consistent with fiduciary obligations or with the honour of the Crown. Given the potential for certain statements in the trial judgment to be misconstrued, however, I will address the issue of consultation briefly.

[338] The judge concluded his discussion of justification as follows:

> [1294] … As I mentioned earlier, the Province did engage in consultation with the Tsilhqot'in people. However, this consultation did not acknowledge Tsilhqot'in Aboriginal rights. Therefore, it could not and did not justify the infringements of those rights.

[339] British Columbia argues that the trial judge was in error in suggesting that the Crown must acknowledge unproven Aboriginal rights as a prerequisite to meaningful consultation.

[340] It is clear that the Crown need not accept the validity of asserted, but unproven, claims to Aboriginal rights as a prerequisite to meaningful consultation. Indeed, it is the uncertainty surrounding such rights that forms the basis for the duty to consult that was established in *Haida Nation*. Read in context, however, I do not think that the judge meant that the Crown is required to accept the validity of unproven rights claims as a condition precedent to meaningful consultation. Rather, as the plaintiff argues, all that is required is that the Crown treat the claim seriously by making a preliminary evaluation of its strength, and entering into consultations commensurate with that evaluation.

[341] The judge's criticism in this case was not that the government failed to accept the validity of Tsilhqot'in claims prior to consultation, but rather that it failed to gather important information before choosing its course of conduct.

[342] Given the judge's finding that the governmental objective in this case did not justify the Crown's authorization of forestry development in the Claim Area, it is not necessary to evaluate the judge's conclusion that the government's position in consultations was inconsistent with the honour of the Crown. There is little to be

gained from such an analysis, given that the law and practice surrounding consultation has advanced significantly since the consultations undertaken in this case.

[343] The judge determined that there was no governmental objective that was sufficiently weighty to justify the infringement of Tsilhqot'in Aboriginal rights. I would not interfere with that determination.

## XII. Conclusion

[344] In the result, I would come to the following conclusions with respect to the various issues brought forward in these appeals:

1. The plaintiff is correct in his assertion that the claim for Aboriginal title was not an "all or nothing claim" to the Claim Area.

2. The plaintiff's claim was a "territorial" one rather than a claim to a definite tract of land that was actually occupied by the Tsilhqot'in at the time of assertion of sovereignty.

3. The "territorial" basis for the claim did not form a viable foundation for a title claim. Accordingly, the claim for title was not made out.

4. This case was not about Aboriginal title to definite tracts of land within the Claim Area. Given the state of the law and the nature of this test case, the plaintiff cannot be faulted for failing to include site-specific claims in this litigation. Accordingly, the dismissal of the Aboriginal title claim cannot prejudice future claims by the Tsilhqot'in to title to specific areas within the Claim Area on the basis that they constitute definite tracts of land which were actually occupied by the Tsilhqot'in at the time Crown sovereignty was asserted.

5. The judge made no error in allowing the plaintiff to claim Aboriginal rights on behalf of the Tsilhqot'in rather than on behalf of the Xeni Gwet'in.

6. The judge made no error in finding that Aboriginal rights resided with the Tsilhqot'in Nation rather than the Xeni Gwet'in First Nations Government.

7. The judge made no error in finding a Tsilhqot'in right to capture and use wild horses in the Claim Area.

8. The judge made no error in allowing the plaintiff to assert that Tsilhqot'in hunting and trapping rights extended to the earning of a moderate livelihood, nor did he err in finding those rights to have been proven.

9. The judge did not hold that the Tsilhqot'in have a right to a harvestable surplus of all wildlife species in the Claim Area. Rather, he found that they have hunting and trapping rights in the Claim Area, and that the Crown had, in its management of forestry in the Claim Area, infringed those rights.

10. The judge, in considering whether there had been a *prima facie* infringement of the Aboriginal rights of the Tsilhqot'in, properly placed the burden of proof on the plaintiff. He did not, as alleged by British Columbia, "reverse the burden of proof".

11. The judge did not hold that the Crown must accept Aboriginal rights claims as valid in order to properly engage in consultation. Rather, his reasons should be interpreted as requiring such claims to be treated seriously in accordance with the Supreme Court of Canada's ruling in *Haida Nation*.

[345] In the result, while I would analyze certain aspects of this case differently than did the trial judge, I would uphold his order in its entirety, and would dismiss all three appeals.

[346] This has been a very complex appeal, and I would like to express my thanks to all of the counsel who participated in it, including counsel for the various intervenors. They succeeded in presenting a very complex case in a comprehensible and comprehensive fashion.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Mr. Justice Tysoe"